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Social Rights in Times of Crisis in the Eurozone: The
Role of Fundamental Rights' Challenges

Edited by Claire Kilpatrick and Bruno De Witte

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EDITORS' INTRODUCTION

Claire Kilpatrick and Bruno De Witte

EUI Law Department

Although often neglected by legal and policy analysis of the Eurozone crisis, an increasingly central dimension of that crisis and its management is important, sometimes dramatic, changes to social rights and entitlements. These include rights relating to work as well as rights relating to a wide range of welfare entitlements such as housing, health, education and social assistance. At the same time, fundamental rights, including fundamental social rights, from different sources can be a means to contest the crisis-imposed changes to social rights.

The aim of this project is accordingly three-fold. It analyses, firstly, what has happened to social rights in a number of the Eurozone Member States most affected by the crisis. Secondly, it explicitly links two sometimes rather disconnected discussions of 'social rights' by looking at both labour (and employment) rights and a broader range of social rights. Thirdly, it looks at the content, location and background of any fundamental rights' challenges made to crisis-imposed changes to work and welfare rights. It is worth spending a little time explaining each of these choices more fully.

We chose a subset of EU Member States, only Eurozone states but not only Eurozone states in bailouts. Our decision to focus only on those bailout countries in the Eurozone meant leaving out of the picture the three non-eurozone countries which received loan assistance from the EU at various periods from 2008 onwards (Romania, Latvia and Hungary) although these also raise important and linked questions to those raised by the Eurozone bailouts. We focus on those Eurozone countries which have required financial assistance in the form of bilateral loans or loans from the European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility (EFSF): Greece, Ireland and Portugal. In May 2010 Greece obtained the first Eurozone sovereign debt assistance: €80 billion on the basis of bilateral agreements with other Eurozone states alongside €30 billion from the IMF. Immediately following this, the EU Member States set up the EFSM (under EU law) and the EFSF (as an international agreement between Eurozone states) to provide future loans. The bulk of Ireland's support scheme, €85 billion (November 2010-December 2013),¹ and Portugal's €78 billion (May 2011-May 2014),² came from the EFSM and EFSF. Greece's second 'eurozone' support programme was exclusively EFSF-based: in March 2012 a €130 billion loan was agreed.³ In 2012, a

¹ In fact Ireland contributed €17.5 billion to this total financial assistance pot making it actually €67.5 billion of which €22.5 came from the EFSM, €17.7 from the EFSF, €4.8 from bilateral loans (from non-eurozone states such as the UK) and €22.5 from the IMF.

² Portugal received the same loan amount from the IMF, the EFSM and the EFSF (€26 billion).

³ The Greek bailouts are the most difficult to unravel, mainly because the second bailout was required before the first one had run its course and additionally because other non-Greek Eurozone bailouts occurred. Greece I was planned to run from May 2010 until 2014 with a Eurozone contribution of €80 billion. However, first, three Eurozone countries withdrew their assistance: Slovakia from the outset and Ireland and Portugal when they too required bailouts reducing the Eurozone pot for Greece I by €2.7 billion. Cyprus subsequently withdrew as an EFSF guarantor from 29 April 2013. Second, in March 2012, the second Greek bailout was agreed of just under €110 billion (plus €34.6 billion relating to the private sector involvement deal - the Greek 'haircuts') while the non-utilised portion of Greece I was cancelled. This loan runs until 31 December 2014 (para 2(c) Schedule 1: Loan Facility: Facility Specific Terms of the Master Financial Assistance Facility Agreement between EFSF and Hellenic Republic).

new financial assistance vehicle replacing the EFSM and EFSF, the European Stability Mechanism, came into force.⁴

We wish to comparatively map the changes required to work and welfare rights in the bailouts. A central source in tracking bailout demands are the Memoranda of Understanding (MoU) agreed by national governments with the EU institutions in the troika (Commission, ECB) and setting out the conditions for loan disbursements. How did those MoUs evolve over time in relation to social rights and entitlements? Was the troika or the national government in the driving-seat and how much discretion did the latter effectively enjoy in the implementation phase? Were the social partners, or other relevant civil society organisations, given or did they assume any role in managing or shaping the changes to social rights in the Member State (for example, for public sector workers, the Croke Park Agreement in Ireland, discussed by Anthony Kerr)?

Although the legal sources underpinning bailouts raise complex legal doubts, both as to their EU or international law pedigree and as to the legal obligations they produce, our goal here is rather to see how these sources were perceived and acted upon in bailout states.

We also decided to include two countries, Spain and Italy, which are struggling in the crisis and receiving important EU instructions with a social focus but which have not entered full loan assistance mode (although Spain has a more restricted loan assistance programme applying to its financial sector).⁵ These Eurozone non-bailout states have been subject, since the crisis, to reinforced budgetary rules, reinforced Excessive Deficit Procedures and a new Macro-Economic Imbalance Procedure. In addition, as the analyses of María Luz Rodríguez and Antonio Lo Faro explore, the atypical source of secret letters from the European Central Bank to Italy and Spain in August 2011 also played an important role in public and political discussions of labour law reform. Accordingly, setting bailout and non-bailout Eurozone states alongside one another allows one to consider in what ways the social instructions contained in the various norms differ: in their content, in their intensity or in their compliance pull.

A second important feature of our research design is the adoption of a broad definition of ‘social’ to encompass both work and a broader range of ‘social or welfare’ rights to housing, health, education, income. The crisis measures seem to demand such a broad definition. Crisis changes to work-related rights include changes to the substantive level of protection offered (such as cuts to minimum wages, public sector salaries and pensions, public sector dismissals, reduced dismissal protection and reduced young worker protection) but also, and a central element to changes to work rights in the crisis, are changes in how those substantive protections are set, most centrally the setting of wages through collective bargaining. Changes in welfare rights include across-the-board reductions in financial benefits or benefits in kind, as well as the exclusion of categories of persons from certain social benefits (e.g. irregular migrants) and sharp reductions in funding of welfare services have led to indirect interferences with social rights. Examples include the closing of hospitals in remote areas, making urgent medical help unavailable; and the downsizing of scholarships schemes that allow access to higher education.

To facilitate linked comparisons within the broad category of social rights, we have two analyses from each State, one on welfare rights, one on work rights. For two States, an additional analysis raise questions and directions for further research looking at both work and welfare. This is the case for

⁴ ESM Treaty agreed on 2 February 2012. Requiring ratification by its 17 eurozone signatories, it came into effect on September 27 2012. For details of its lending to date see www.esm.europa.eu. We did not include Cyprus which has received loan assistance under the European Stability Mechanism in May 2013 in part because it was too recent.

⁵ The Spanish financial assistance under the ESM of December 2012 of up to €100 billion (until 31 December 2013), directed at bank recapitalisation, was preceded by and linked to previously agreed EFSF assistance of July 2012 for the same purpose. The same MoU of July 2012 has been carried across from the EFSF to the ESM.

Portugal in the analysis contributed by Roberto Cisotta and Daniele Gallo. For Spain, Leticia Díez-Sánchez argues that emergency wrongly underpinned an unfair and undemocratic distribution of the burdens of re-adjustment.

Having mapped out the changes to social rights, broadly defined, and their links to bailout and EU macro-economic governance sources, the third aim of this project is to consider what role, if any, fundamental rights' challenges have played. On what fundamental rights' grounds were challenges made to these changes to social rights, using which sources and before which courts or other institutions monitoring compliance with Fundamental Rights ('fundamental rights bodies')?

One goal of the expanded social definition is to explore whether fundamental rights' challenges, and those taking them, vary according to whether the rights were welfare rights or work rights. Many of the case-studies show an important focus on constitutional or fundamental rights' challenges to pay and pension cuts, the latter in particular straddling the work-welfare boundary.

At national level, this primarily concerned constitutional challenges. A key finding is that many of these challenges do not hinge on the fundamental social rights in the constitutional text but rely instead on other more general provisions such as equality. The constitutional basis for challenging public sector pay-cuts can even be based on the right to a fair trial: judicial independence as a component of the right to a fair trial was the successful basis for challenging judicial pay-cuts before the Italian Constitutional Court. Nonetheless, there are also challenges based on fundamental social rights, such as the series of Greek Collective Complaints before the European Committee of Social Rights and some of the labour law reform constitutional challenges in Portugal outlined by Júlio Gomes.

Our expanded social rights' focus brings a wide range of international human rights sources and bodies into play: the many relevant ILO conventions and supervisory bodies as well as the much broader range of UN instruments and institutions protecting work and welfare rights in the crisis such as the UN Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women and their respective Committees. Regionally, both central Council of Europe sources (the European Convention of Human Rights and European Social Charter) and their interpreters, the European Court of Human Rights and the European Committee of Social Rights, have produced significant decisions on crisis measures in bailout states. There are important contrasts between the approaches of different international fundamental rights' bodies to the crisis measures. The authors consider when these international sources and bodies were turned to in the crisis by national actors. The Court of Justice of the European Union is another route to challenging the social rights' content of crisis measures. Portuguese courts have made a series of references, only one of which has been ruled upon, to the Court of Justice on the compatibility of a range of social crisis measures with the EU Charter of Fundamental Rights. The main Greek trade union failed in a direct challenge before the General Court to annul a series of excessive deficit decisions addressed to Greece. The CJEU played a more indirect but important role in Spain, as is highlighted by Maribel González. In its *Aziz* judgment, it empowered Spanish courts to stop repossession claims if based on unfair terms in mortgage contracts, and thereby allowed a better protection of the right to housing although that right (which is not separately mentioned in the EU Charter of Rights) did not appear in the European Court's reasoning.

The panorama of fundamental rights' challenges and decisions raises many interesting questions including questions of mobilisation choices, how the economic crisis shaped reasoning and argumentation on fundamental rights' application and the impact of findings of fundamental rights' bodies. The papers also give a strong sense of a set of stories which are not yet finished: of pending challenges and ongoing reflection.

Regarding mobilisation choices, the papers look at the actors behind fundamental rights' challenges and the specific avenues they took (eg Council of Europe rather than Court of Justice; national rather than international sources; ombudsmen rather than courts; political representatives rather than unions or civil society) to pursue their challenges? Greek unions and pensioner associations, explored by

Matina Yannakourou and Evangelia Psychogiopoulou, have adopted the most active and multi-pronged approach to fundamental rights' challenges. At the other end of the legal mobilisation spectrum, with very limited fundamental rights' challenges so far, the institutional and social factors which might explain this are explored in the Irish analyses by Anthony Kerr and Aoife Nolan.

On fundamental rights reasoning in times of economic crisis, the decisions and conclusions of these fundamental rights bodies and courts can usefully be compared to see how they differently construct the relationship between fundamental rights protection and highly challenging economic circumstances. This relates to how the 'crisis', or the need to comply with troika demands, was used by national governments (or by EU institutions) to justify their actions before fundamental rights' bodies. In a country such as Italy, where the constitutional court had an established doctrine on the justiciability of social rights, that doctrine was reconsidered but not abandoned, as Diletta Tega shows, in the new 'emergency environment' created by the euro crisis.

Finally, we wished to investigate when claims or findings of fundamental rights violations led to changes in social rights in Member States. This could be because national courts apply the findings of international fundamental rights' bodies. The position of national courts and constitutions with regard to the effects of these sources in national legal orders is investigated. It could be because governments respond to findings of breach of international obligations. Or such claims or findings could play a more diffuse role in broader social mobilisations against the crisis (strikes, demonstrations). Overall these analyses provide a sense both of a hierarchy of fundamental rights' bodies – with courts having more impact than expert or supervisory bodies – and a limited political resonance of most successful challenges to crisis measures. This may be connected to the fact that successful challenges have often been before expert or supervisory bodies and not before courts. This makes the strong political response, even backlash, to successful constitutional challenges to social crisis measures before the Portuguese Constitutional Court, discussed in particular by Nogueira de Brito, especially interesting.

These papers are lightly edited versions of papers presented and discussed at a workshop held at the EUI Law Department in December 2013. More fully revised versions will be published in a more conventional format later this year. We are grateful not only to all the authors but also to many others who contributed to making the workshop such a warm and interesting occasion. Roberto Cisotta, Stephen Coutts, Leticia Díez-Sánchez, Stefano Giubboni and Aristeia Koukiadaki provided stimulating prepared comments on the papers. Bob Hepple and Silvana Sciarra not only supplied numerous insights throughout the workshop but gave the participants much food for thought in their inspiring concluding remarks. We are also grateful to the many EUI doctoral and post-doctoral researchers who participated for their enthusiasm and thoughtful contributions throughout the workshop. Holding an international workshop requires funds and we should like to thank the Law Department and the Robert Schuman Centre at the EUI for their generous financial support. Last but certainly not least, we wish to thank Hanna Eklund for research assistance and Alberto Pallecchi for administrative assistance with the workshop and production of this Working Paper.

Florence, March 2014

WELFARE RIGHTS IN CRISIS IN GREECE: THE ROLE OF FUNDAMENTAL RIGHTS CHALLENGES

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1. Changes in welfare rights

1.1 Adjustment policies in the fields of pensions and health care

The Memorandum of Economic and Financial Policies (MEFP) accompanying the Economic Adjustment Programme (EAP) for Greece of May 2010 laid down provisions for fiscal, financial and structural policies. Concerning fiscal adjustment, which was agreed to be the cornerstone of the EAP, the government committed itself to measures aimed at lowering the debt-GDP ratio from 2013 onwards, and at reducing the deficit below 3% of GDP by 2014. Other measures concerned the financial sector and structural reforms aimed at modernising the public sector, rendering product and labour markets more efficient and flexible, creating a favourable environment for domestic and foreign investment and reducing the state's direct participation in domestic industries. Progress should be monitored through quantitative performance criteria, structural benchmarks and indicative policy targets contained in the MEFP and the Memorandum of Understanding on Specific Economic Policy Conditionality (MUSEPC) on a quarterly basis.

Income and social security policies were considered essential to buttress the state's fiscal adjustment effort. With respect to social security policies, in particular, it was decided that the social security system should be 'strengthened' to confront structural imbalances resulting from the ageing of the population, given that an increase in entitlement costs in Greece was projected to be among the highest in the EU and the social security funds accounted for the largest annual overruns in the budget.¹ Thus, besides a first set of measures adopted in 2010, in line with the EU excessive deficit procedure,² with a view to lowering the state's wage bill and reducing/eliminating seasonal pension bonuses (e.g. Christmas, Easter and holiday benefits),³ the MEFP made provision for another set of measures devised to cut public expenditure by around 7% of GDP through 2013, covering pension outlays, wage costs and other items of government spending. Relevant measures should be supplemented by efforts to increase public revenues by around 4% of GDP through 2013, mainly through taxation. Concerning pensions, agreement was reached on reducing the number of existing pension funds through mergers, reinforcing the link between contributions and benefits, increasing the normal retirement age, restricting early retirement and introducing a means-tested pension as a safety net. The reform should be designed in close consultation with the EC, the IMF and the ECB.

¹ Memorandum of Economic and Financial Policies, 3 May 2010, para. 7.

² See Arts. 126 and 136 TFEU.

³ Pursuant to Law 3845/2010, these bonuses should henceforth be granted to pensioners of main pension funds who had reached the age of 60, on condition that their pension amount (including the amounts of bonuses, as redefined) did not exceed €2.500 per month.

In response to the MEFP, two pension bills were enacted in July 2010 for the private and public sectors.⁴ Key elements of the changes brought to the Greek pension system included the introduction of a new basic pension of €360 per month to be paid from January 2015 onwards; uniform, yet reduced, accrual rates depending on the length of the pensioners' career; an increase in the statutory retirement age to 65 and in the minimum retirement age to 60 with an increased contributory period of 40 years; an automatic adjustment mechanism linking retirement age to increases in life expectancy from 2020; a pension reduction of 6% in the case of early retirement between the ages of 60 and 65 (with less than 40 years of contribution); a solidarity deduction imposed on higher pensions; a means-tested minimum guaranteed pension for individuals above 65 years subject to a 15 year residence requirement in Greece; and a sustainability clause on the modification of the pension system, should long-term projections indicate a rise in public pension expenditure between 2009 and 2060 over 2.5 percentage points of GDP. Attention was also given to fighting fraud in the field of disability pensions,⁵ with the aim of limiting the share of disability pensions in total pensions to 10%. Subsequent steps involved the introduction of new, and the tightening of existing, pension deductions,⁶ as well as a number of pension cuts, including a 40% reduction in monthly main pensions exceeding €1000 for pensioners who have not attained the age of 55; a 20% reduction in monthly main pensions exceeding €1200 for pensioners aged 55 and above; and a 12% reduction in main pensions which after previous cuts still exceeded €1300.⁷

The MEFP also provided for structural reforms in the field of health, which is characterised by considerable expenditure overruns. As explained, the government's action was to improve the cost efficiency of the health care system in order to keep public health expenditure at or below 6% of GDP while 'maintaining universal access and improving the quality of care delivery'.⁸ The measures foreseen varied, ranging from cuts of public expenditure on pharmaceuticals and the introduction of e-prescribing and prescribing by substance in order to increase the use of generics and to reduce over-prescription, to the publication of a reference price list for medicines and a 'negative' list of medicines not reimbursed by social security funds, increased cost-sharing for patients, decreased pharmacies' and wholesales' profit margins, and hospital computerisation, among others.

The state's action initially took the form of an increase in co-payments for outpatient visits to facilities of the National Health System⁹ and strengthened monitoring of health care activity, particularly in terms of consultations, hospital admissions, prescription of medicines, referral to other physicians, and stocks and flows of medical supplies and medicines. The adoption of Law 3918/2011 entailed structural changes, merging the four largest Greek health insurance schemes (IKA, OAEE, OGA, OPAD) into one national organisation for the provision of health services (EOPYY) - an important step 'towards pooling funding and health risks, more uniform contributions and services package, and increasing equity of financing and access to care'.¹⁰ Law 3918/2011 also laid down provisions for the centralised procurement of medical goods and services and a progressive rebate system for pharmacies and pharmaceutical companies. However, delays were observed in relation to the other measures

⁴ Laws 3863/2010 and 3865/2010.

⁵ See Law 3863/2010.

⁶ See in particular Laws 3986/2011 and 4002/2011.

⁷ See in particular Laws 4024/2011 and 4051/2012.

⁸ The Economic Adjustment Programme for Greece, Second review – autumn 2010, Occasional papers 72, December 2010, para. 32.

⁹ Joint Ministerial Decision Y4a/oik.165114; Ministry of Health and Social Solidarity, Circulars Y4a/oik. 1329/4.1.2011; Y4a/oik. 4456/14.1.2011.

¹⁰ The Economic Adjustment Programme for Greece, Second review – spring 2011, Occasional papers 82, July 2011, 4th review, para. 37.

foreseen. For the state's international lenders, efforts for a comprehensive reform of the health system should be reinforced. Also, they should be expanded in order to equalise EOPYY contribution rates (entailing increased contribution rates for specific health insurance schemes), reduce the number of administrative staff and physicians contracted with EOPYY, and re-organise the Greek hospital network more widely. A number of related policy proposals were made by a Taskforce of Independent Healthcare Experts, created at the end of 2010 with a view to identifying, in consultation with the EC, the IMF and the ECB, areas for policy improvement.

Under the second EAP, a revised MEFP and MUSEPC, agreed in December 2012, outlined the economic and financial policies that Greece should implement during the remainder of 2012 and in the period 2013-2016 in order to address persisting challenges accentuated by a recession that was deeper and longer than initially expected, namely restoring growth, ensuring fiscal sustainability and securing the financial sector. Policies were adapted, for reinvigorating structural reforms, improving the business environment, and reforming the labour market. Structural fiscal reforms, in particular, focused on the objective of reaching a primary surplus of 4.5% of GDP in 2014, and involved important reductions in public expenditure and a revised tax system founded on a broadened tax base and strengthened tax collection. For 2013, the measures envisaged amounted to €9.2 billion of savings, the bulk of which (€6 billion) should originate in reductions in the wage bill, pensions and social transfers.

Concerning pensions, the government committed itself to a number of measures, with effect as of 1 January 2013: a reduction in lump-sum benefits for different categories of public employees; progressive cuts in overall monthly pension income above €1000; the elimination of all seasonal bonuses (except for the severely disabled); an increase in the statutory retirement age from 65 to 67 years; and other rationalisation measures.¹¹ Relevant measures, introduced through Law 4093/2012, were complemented by Law 4052/2012 on the reform of the supplementary/auxiliary pension funds, which created a new single supplementary pension fund and provided for an actuarially neutral calculation of pension benefits, among other issues.

Cuts in social spending were also agreed in relation to the health sector. The government committed itself to reduce public pharmaceutical spending towards 1% of GDP by activating the mechanism of rebates to be paid by the pharmaceutical industry on a quarterly basis; increasing co-payments and limiting the number of medicines exempted from co-payments; restricting entry of non-generic drugs into the positive list of reimbursed medicines; reducing the price of generic drugs; diminishing hospitals' operating costs; and revising EOPYY's benefit package by delisting selected health services and reducing reimbursement prices. Other agreed measures concerned updating the positive list of reimbursed medicines by moving medicines to the negative list of non-reimbursed medicines; limiting brand name prescription to 15% of overall prescriptions per doctor; ensuring that pharmacies substitute prescribed brand medicines by the lowest-priced medicine of the same substance; and carrying out regular monitoring of doctors' prescription behaviour, particularly through compulsory e-prescription.

Following the adoption of Law 4052/2012, Law 4093/2012 and several ministerial decrees, the Greek state's donors noted progress in several areas. Besides savings achieved in the field of pharmaceuticals, various measures were taken to control EOPYY costs, which accommodated all remaining health insurance schemes: a decrease in administrative and medical staff expenses through reductions in the number of EOPYY employees and contracted doctors, limits to the number of reimbursed consultations/tests and reduced EOPYY fees to private providers of health services with an increase in related patient fees. The troika also expressed support for the action taken to reform the

¹¹ E.g. the elimination of special pension benefits for trade unionists, a decrease in the pensions of elected staff, the introduction of means-testing for the pensions of specific categories of beneficiaries, cross-checks to remove ineligible pension benefits and the establishment of a national pension registry.

hospital sector through hospital mergers/closures and preparations for the introduction of analytical hospital accounting. It invited domestic authorities to secure the implementation of the measures enacted and also to fine-tune policies, particularly in the area of pharmaceuticals and with respect to the rationalisation of the hospital network, and EOPYY's management and operation.

1.2 Social implications and other social benefits

The 2010 MEFP underlined *fairness* in the distribution of the adjustment burden, claiming that the government's 'resolve to protect the most vulnerable in society from the effects of the economic downturn' had been taken fully into account in the design of the various adjustment policies.¹² More cognisant of the social implications of the adjustment process, the second EAP stated that although 'correcting large and unsustainable external and fiscal imbalances in the space of a few years [did] impose a reduction in living standards',¹³ social considerations had formed a central component of the measures agreed with the Greek state. With respect to pensions, in particular, it was claimed that cuts, though extensive, had been designed with a view to protecting the lowest income pensioners, with the largest reductions being made of the highest pensions. In the field of healthcare, in turn, where reform measures had focused on reducing public expenditure on medicines, and on the promotion of cheaper medicines and measures devised more generally to fight waste, a relative increase in costs borne by patients had occurred. Nevertheless, this was aimed 'at reducing unnecessary demand for healthcare services', and in any case 'amounted to a small fraction of the overall reduction in costs'.¹⁴

Despite the assurances provided concerning the 'social sensitivity' of the adjustment process, contrary to the first EAP, the second EAP made explicit provision for a better targeting of the Greek social programmes. Underlining that for a long time the Greek state had lacked comprehensive social policies, resulting in a social system that was disproportionately expensive for the benefits it effectively provided and often unsuccessful in alleviating poverty and hardship, the second EAP laid stress on the need to protect the most vulnerable. However, arguments about social fairness went hand in hand with calls to generate additional savings by removing benefits allocated to groups of society that were not considered to be 'subject to acute social hardship'.¹⁵ On the basis of technical assistance advice, provided mainly by the OECD, the Greek state was required to replace existing family benefits with a targeted means-tested benefit and eliminate family income tax allowances; reduce unemployment benefits targeted to specific geographical areas; abolish benefits for workers in industries with seasonal employment patterns and workers made redundant on account of mergers; and increase the age eligibility and income-testing of social solidarity supplements to low pensions. The government also committed itself to the introduction of two new social programmes, aimed at cushioning the impact of growing unemployment and contraction in disposable income on the population. Further, a programme on housing should be established, alongside the introduction of a new property tax, which should replace the real estate tax collected through electricity bills and the wealth tax on property, and generate €2.7-2.9 billion per year from 2014 onwards by broadening the tax base.¹⁶

The measures sought to channel financial support to those households subject to pronounced poverty risks, while at the same time rendering requirements for the receipt of social assistance stricter. Support to the unemployed was considered a priority given the sharp increase in unemployment and

¹² Memorandum of Economic and Financial Policies, 3 May 2010, para. 8.

¹³ The Second Economic Adjustment Programme for Greece, Occasional papers 94, March 2012, p. 8.

¹⁴ Ibid.

¹⁵ Ibid., para. 38.

¹⁶ The Second Economic Adjustment Programme for Greece, Third review, Occasional papers 159, July 2013, para. 33.

the increasing share of long-term unemployed (defined as those unemployed for more than 12 months¹⁷). Law 4093/2012 hence abolished a wide range of selective unemployment benefits and established a means-tested new benefit equal to €200 per month, payable for up to 12 months to long-term unemployed who exhaust the full length of unemployment benefits (which amounts to 12 months). In addition, the law instituted a means-tested single allowance child support scheme for families, in the form of a benefit of €40 per month for each dependent child, and made provision for a minimum income guarantee scheme, launched on a pilot basis, for individuals and families facing extreme poverty. Concurrently, as part of the formulation of active labour market policies, the Greek authorities committed to improve the effectiveness of training and job-matching programmes and to devise an action plan to support those deprived from access to primary health care on account of long-term unemployment (since the provision of public health care services is linked to employment status, with the exception of emergency care and care for chronic disease).¹⁸

2. Fundamental rights challenges to changes in welfare rights

2.1 Domestic and European courts

Domestic courts have so far demonstrated an ambivalent attitude towards the cutbacks of welfare rights and the broader structural reforms carried out as part of the state's adjustment effort. In a first wave of cases dealing with restrictive measures adopted prior to the second EAP, the Council of State (CS), the supreme administrative court of Greece, upheld the disputed measures as constitutional, and also confirmed their compatibility with the European Convention on Human Rights (ECHR). More recently, the Court of Auditors (CA), which is entrusted with the task of delivering (non-binding) opinions on draft pension bills,¹⁹ has questioned the compatibility of draft legislation prepared under the second EAP with fundamental rights guarantees.

The first of those judgments is case 668/2012 concerning reductions in public wages, pensions and other benefits, in which the CS examined, among others, the compatibility of the abolition of seasonal pension bonuses for pensioners below 60 years and their reduction for pensioners above 60 years through Law 3845/2010 with Article 1 of Protocol 1 to the ECHR on the right to property and Article 17 of the Greek Constitution enshrining the same right.²⁰ The dispute was brought before the CS by the Athens Lawyers Bar, the Public Service Trade Union Confederation (ADEDY), the Panhellenic Federation of Public Service Pensioners, the journalists' union ESIEA, the Technical Chamber of Greece, and the academic personnel of the Faculty of Social Sciences of the University of Crete, together with other associations and individual complainants.

Drawing on the jurisprudence of the European Court of Human Rights (ECtHR), the CS held that although pecuniary rights and proprietary interests, including entitlements to pension benefits, fell under the scope of the right to property,²¹ Article 1 of Protocol 1 to the ECHR did not secure a right to

¹⁷ *Ibid.*, para. 74

¹⁸ The Second Economic Adjustment Programme for Greece, Third review, Occasional papers 159, July 2013, para. 58.

¹⁹ See Article 73(2) Const.

²⁰ Council of State, Case 668/2012, 23 February 2012.

²¹ See ECtHR, *Hasani v. Croatia* (appl. no. 20844/09), 30 September 2010; *Andrejeva v. Latvia* (appl. no. 55707/00), 18 February 2009; *Stec and Others v. the United Kingdom* (appl. no. 65731/01 and 65900/01), 12 April 2006; *Jankovic v. Croatia* (appl. no. 43440/98), 12 October 2000; *Kjartan Asmundsson v. Iceland* (appl. no. 60669/00), 12 October 2004; *Domalewski v. Poland* (appl. no. 34610/97), 15 June 1999.

a pension of a particular amount.²² Domestic authorities could thus decide on the amount of the allocated pension benefits in line with prevailing economic or other conditions. However, any interference with the right to peaceful enjoyment of possessions (with respect to recognised pension entitlements) should be properly justified, in addition to being laid down in law. More specifically, the interference should pursue a legitimate aim in the public interest, which, in the court's view, could accommodate considerations of economic or social policy (for instance, in relation to fiscal adjustment or the sustainability of the social security system), and it should also be necessary and proportional to the aim pursued. Crucially, the CS noted, the ECtHR allowed domestic authorities a wide margin of appreciation; the role of the ECtHR was limited to verifying that the legislator's choice was not 'manifestly without reasonable foundation'.²³

Noting that the disputed pension cuts formed part of a broader programme aimed at tackling the state's pressing economic needs and at strengthening its financial stability in the long-term, the CS held that the measures were justified by a legitimate aim in the public interest, that is, the state of necessity facing the Greek economy and the need to improve the state's economic and financial situation in the future. Moreover, the measures reflected the 'common' interest of the Member States of the Eurozone to ensure, in line with EU requirements, fiscal discipline and the stability of the euro area. After finding that the pension changes contributed to immediate cuts in public spending and that therefore they were necessary to attain the objective pursued, the court rejected the argument put forward by the complainants that the legislator should have considered alternative, less burdensome measures to cope with the fiscal and economic challenges facing the country. Besides the pension reductions at issue, broader efforts for fiscal adjustment and economic consolidation were made through a range of fiscal, financial and structural measures. Similarly, the CS did not accept the claim that the disputed measures were disproportionate on account of the fact that they were not purely provisional: the aim they pursued was not merely to remedy the immediate acute budgetary problems of the country but also to strengthen its finances in the long term. Further, a fair balance had been struck between the demands of the general interest and the requirement to protect pensioners' fundamental rights. The pension cuts had not entailed a total deprivation of pensioners' entitlements, resulting in the impairment of the essence of their rights, and they had been designed with due attention given to the needs of vulnerable groups. Against this background, the CS concluded that no infringement of Article 1 of Protocol 1 to the ECHR and Article 17 Const. had occurred. Observing that the pension reductions had not compromised pensioners' decent living, the CS also found no breach of Article 2 Const. on the protection of human dignity.

In another set of cases dealing with the same type of pension cuts, the CS confirmed the compatibility of the measures enacted also with Articles 4(1), 4(5), and 22(5) Const. on equality, the obligation of Greek citizens to contribute without distinction to public charges in accordance with their means, and the state's obligation to provide for a social security system.²⁴ Taking note of the fact that the disputed provisions eliminated seasonal bonuses for pensioners below 60 years and maintained reduced seasonal bonuses for pensioners above 60 years, the CS held that the criterion of age was not an arbitrary criterion leading to discriminatory treatment. On the contrary, it was an objective criterion, justified first, by the need to protect older pensioners and second, by the fact that a broader pension

²² See ECtHR, *Kanakis and Others v. Greece* (appl. no. 59142/00), 20 September 2001; *Juhani Saarinen v. Finland* (appl. no. 69136/01), 28 January 2003, *Vilho Eskelinen and Others v. Finland* (appl. no. 63235/00), 19 April 2007; *Andrejeva v. Latvia*, above.

²³ ECtHR, *James and Others v. the United Kingdom* (appl. no. 8793/79), 21 December 1986; *Pressos Compania Naviera S.A. and Others v. Belgium* (appl. no. 17849/91), 20 November 1995; *Juhani Saarinen v. Finland*, above; *Klifaas and Others v. Greece* (appl. no. 66810/01), 8 July 2004; *Andrejeva v. Latvia*, above.

²⁴ Council of State, Cases no. 1285/2012, 2 April 2012; and 1286/2012, 2 April 2012. See also Council of State, Case no. 1283/2012, 2 April 2012; and 1284/2012, 2 April 2012.

reform increasing existing age limits for retirement was under preparation.²⁵ The CS further rejected the argument that pursuant to Article 22(5) Const., domestic authorities should have conducted a detailed actuarial study validating the necessity of the measures reviewed for the sustainability of the social security system. For the court, this was not a prerequisite for the adoption of horizontal pension cuts in the frame of a wider set of economic policy measures aimed at fiscal adjustment. Interestingly, the CS also rebutted the claim that the disputed measures were in breach of Articles 12 (the right to social security), 30 (derogations in time of war or public emergency) and 31 (restrictions) of the European Social Charter (ESC), and Articles 2 (obligations of parties), 9 (the right to social security), 11(1) (the right to an adequate standard of living) of the International Covenant on Economic, Social and Cultural Rights (ICESR) for being insufficiently precise. In addition, it did not accept allegations about infringement of Article 34 (social security and social assistance) of the Charter of Fundamental Rights (CFS) of the European Union. According to the CS, the CFS was binding on the EU Member States only when these acted within the scope of EU law and not in the case of purely domestic measures, as was considered to be the case at hand.

A few months after the issuance of the CS's 668/2012 decision, ADEDY, together with one of the individual applicants before the CS, filed the case with the European Court of Human Rights (ECtHR).²⁶ In reviewing the case, the ECtHR observed in accordance with its settled case law that any interference by a public authority in the peaceful enjoyment of possessions should be lawful, pursue a legitimate aim 'in the public interest' and be proportional to the aim sought. The margin of appreciation domestic authorities enjoyed in implementing social policies and finding a balance between public spending and public revenues was a wide one, since a number of political, economic and social considerations had to be taken into account. The ECtHR thus noted that domestic authorities were in principle better placed than an international court to decide what was 'in the public interest' and that their decision should be respected unless it was manifestly unreasonable.

According to the ECtHR, the restrictions introduced by the disputed measures in the form of reductions in pension bonuses (and public wage cuts) constituted an interference with the right to the enjoyment of possessions. Nonetheless, they were justified by the exceptional crisis of the Greek state, which was unprecedented in its recent history. They therefore pursued an aim in the general interest and also, as the domestic court had stated, they were in the interest of the Member States of the Eurozone, whose obligation was to observe budgetary discipline and preserve the stability of the euro area. Verifying then compliance with the principle of proportionality, the ECtHR took note of the fact that the CS had rejected a number of arguments in this regard, and held specifically on the issue of pension cuts, that according to domestic legislation, these had been offset by a one-off bonus. The ECtHR thus concluded that the Greek legislator had not overstepped the limits of its margin of appreciation and rejected the application as manifestly ill founded.

In a complementary effort, cuts in pension benefits, alongside cuts in labour costs, were contested before the General Court (GC) of the European Union.²⁷ ADEDY and two of its members brought an action for annulment of *Council Decision 2010/320/EU*²⁸ and *Council Decision 2010/486/EU*,²⁹ which with a view to remedying the excessive Greek deficit had required the Greek state to abolish seasonal

²⁵ Law 3863/2010, adopted following the disputed pension cuts, had indeed carried out such a reform, providing for a gradual increase of the retirement age to 60 years (with 40 years of insurance) or 65 years.

²⁶ ECtHR, *Koufaki and Adedy v Greece* (appl. no. 57665/12 and 57657/12), 7 May 2013.

²⁷ General Court, Order in case T-541/10, *Adedy, Papaspyros and Iliopoulos v. Council*, 27 November 2012.

²⁸ Council 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, OJ L 145, 11/6/2010, p. 6.

²⁹ Council Decision of 7 September 2010 amending Council Decision 2010/320/EU

pension bonuses and ensure the medium and long-term sustainability of the Greek pension system. However, the GC dismissed the action, asserting that the Council's decisions were not of *direct* concern to the applicants, and therefore did not meet the requirements of Article 263 TFEU on *locus standi*.

Crucially, all the above mentioned decisions dealt with the first attempts of the Greek state to curb public expenditure through reductions in pensions and related benefits. In its opinion of 30 October 2012 on the draft law 'Public sector pension issues',³⁰ prepared on top of various bills adopted since 2010 to reduce social spending, the Court of Auditors marked a significant disjuncture from the judicial stance thus far. The CA ascertained that the ECHR and the Greek Constitution did not safeguard a right to a pension of a particular amount and accepted that under severe economic conditions, the legislator could adopt restrictive measures to decrease public spending. In doing so, however, due respect for the requirements of Articles 2 and 4(5) Const. should be ensured, so as to preserve adequate living conditions, especially for vulnerable groups, and guarantee a fair distribution of the ensuing economic burden on citizens. According to the CA, in a relatively limited period of time, the Greek legislator had adopted numerous acts to reduce pension and related benefits.³¹ This, in conjunction with repeated legislative action to reduce public wages, amounted to pensioners' and public employees' discriminatory treatment, in breach of Articles 2 and 4 Const, as well as Article 25(1) Const. on the principle of proportionality and Article 25(4) Const. on the state's right to claim fulfillment of a duty to social and national solidarity by *all* citizens. Further, the draft law raised serious concerns with respect to its compatibility with Article 22(4) Const. on the state's duty to provide for a social security system. A similar line of reasoning was followed by the CA in delivering an opinion on yet another pension-related bill in 2013.³²

2.2 The European Committee on Social Rights (ECSR)

The reporting procedure established by the ESC and strengthened by the 1991 Turin Protocol has not yet offered the ECSR the opportunity to rule on the conformity of the changes brought to welfare rights in Greece.³³ The collective complaints mechanism, however, instituted to expose breaches of the ESC, has already paved the way to the finding of ESC violations.

Pursuant to the *1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, five complaints were filed with the ECSR on 2 January 2012 by the Federation of Employed Pensioners of Greece, the Panhellenic Federation of Public Service Pensioners, the Pensioners' Union of the Athens-Piraeus Electric Railways, the Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) and the Pensioner's Union of the Agricultural Bank of Greece (ATE),³⁴ all alleging infringement of the ESC by a number of Greek regulations modifying

³⁰ Court of Auditors, Proceedings of the 3rd and 4th special sessions of the plenary, 30 October 2012.

³¹ Notably Laws 3845/2020, 3865/2010, 3986/2011, 4002/2011, 4024/2011 and 4051/2012.

³² Court of Auditors, Proceedings of the 2nd special session of the plenary, 27 February 2013.

³³ The Greek state informed on the implementation of the right to health, the right to social security, the right to social and medical assistance, the right to benefit from social welfare services and the right of elderly persons to social protection (Articles 11, 12, 13, 14 of the ESC and Article 4 of the 1988 Additional Protocol) early January 2013, addressing the period 1/1/2008-31/12/2011 and thus most of the measures adopted under the first EAP. Domestic authorities attributed many of the measures enacted to the economic crisis and the state's international obligations towards the troika. The ECSR's conclusions are expected to be issued in December 2013.

³⁴ Collective complaints no. 76/2012, *Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece*, 7 December 2012; no. 77/2012, *Panhellenic Federation of Public Service Pensioners v. Greece*, 7 December 2012; no. 78/2012, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, 7 December 2012; no.

the public and private pension schemes from May 2010 onwards.³⁵ The trade unions argued, in particular, that recurrent legislative intervention, entailing substantive cuts in pensions, amounted to a violation of Article 12(3) of the ESC, which requires contracting states to ‘endeavour to raise progressively the system of social security to a higher level’. For the complainants, the measures introduced were not necessary and suitable for the recovery of public funds; they were not proportional to the aim they purported to pursue; and taken together, they were likely to affect the ability of many categories of pensioners to lead a decent life.

The Greek government counter-argued that the contested acts, motivated by the state’s economic and social situation, were necessary to ensure the macroeconomic sustainability of the social security system in Greece. They resulted from the state’s international obligations deriving from the financial support mechanism agreed with the EC, the IMF and the ECB; and they had been designed in a way supportive of the most vulnerable groups in society, thus showing that every effort had been made to ensure compliance with the ESC.

The ECSR contended that the fact that the contested laws sought to fulfil the requirements of the Greek state’s international obligations under the loan arrangements made with the EU institutions and the IMF did not remove those laws from the ambit of the ESC. In fact, when agreeing on binding measures relating to matters coming within the scope of the ESC, states parties to the ESC should take full account of their ESC commitments, both when formulating their international obligations and when implementing them into national law. Concerning the repercussions of the economic crisis on social rights more generally, the ECSR underlined that ‘the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter’: governments were under the obligation ‘to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most’.³⁶

This being said, the ECSR noted that some of the pension reductions criticised by the trade unions did not amount to a violation of the ESC. This was particularly the case for the restrictions introduced in respect of seasonal bonuses, and the restrictions on pension rights in cases where the level of pensions was sufficiently high or where people were of such a low age that it was legitimate for the state to conclude that it was in the public interest to encourage them to keep forming part of the work force. Nevertheless, the *cumulative* effect of the various restrictions introduced since 2010 was ‘bound to bring a significant degradation of the standard of living and the living conditions of many of the pensioners concerned’.³⁷ True, the Greek government had been required to take decisions in a relevant short period of time. However, insufficient research and analysis had been carried out into the impact of the measures envisaged on vulnerable groups and the identification of measures likely to limit the cumulative burdensome effect of the pension reform. Also, domestic authorities had refrained from debating relevant matters with various international and national organisations that had expressed concern about the measures under preparation. On this basis, the ECSR concluded that the Greek state had taken inadequate steps to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, in breach of Article 12(3) of the ESC.

(Contd.) _____

79/2012, *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece*, 7 December 2012; no. 80/2012, *Pensioner’s Union of the Agricultural Bank of Greece (ATE) v. Greece*, 7 December 2012.

³⁵ Complainants referred in particular to Laws 3845/2010, 3847/2010, 3863/2010, 3865/2010, 3896/2011 and 4024/2011. They criticised reductions in primary and auxiliary pensions, cuts in seasonal bonuses, the levy of a social solidarity contribution from pensions, the suspension/reduction of pensions for individuals who take up an occupation on the side of their pension and the reduction of private sector pensioners’ social solidarity benefit.

³⁶ See indicatively collective complaints no. 76/2012, above, para. 75.

³⁷ *Ibid.*, para. 78.

Drawing attention to the jurisprudence of the ECtHR, the ECSR also held that any decisions in respect of pension entitlements should in general respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals might have in relation to the stability of the rules applicable to social security benefits. In the ECSR's view, the various restrictive measures introduced had failed to respect the legitimate expectation of pensioners that adjustments to their social security entitlements would be implemented with due account taken of their vulnerability, settled financial expectations and ultimately, their right to enjoy effective access to social protection and social security. The ECSR observed, however, that other mechanisms of fundamental rights protection were better suited for the voicing of complaints on the effects of the legislation on individual pensioners' rights. Courts, in particular, could play a significant role in this regard.

2.3 Pressures from other sources

The austerity measures introduced as part of the state's fiscal adjustment effort have triggered heated debate in European and international organisations. Domestic human rights bodies and organisations have similarly expressed strong criticism of the austerity policies conducted. The Greek National Commission for Human Rights (NCHR), an advisory body to the government in matters of human rights protection, has persistently sought to place fundamental rights, including social and welfare rights, at the centre of the state's adjustment policies, pointing to the state's obligations in this regard deriving from the Constitution and various international and European sources of fundamental rights protection.³⁸ In a recommendation issued on 8 December 2011, entitled *The imperative need to reverse the sharp decline in civil liberties and social rights*, the NCHR condemned 'ongoing drastic reductions in even the lower salaries and pensions' and the 'drastic reduction or withdrawal of vital social benefits', stating that 'the rapid deterioration of living standards, the concurrent deconstruction of the welfare state and the adoption of measures that do not conform to social justice undermine social cohesion and democracy' in the country.³⁹ The NCHR thus invited the government and the Greek legislator to assess the implications of any new fiscal policy measure on social protection and social security, and to collaborate with the other EU Member States and the EU Parliament in order to ensure that any measure of 'economic governance' duly respects fundamental rights.

In its 2012 resolution *Austerity measures - a danger for democracy and social rights*,⁴⁰ the Parliamentary Assembly (PA) of the Council of Europe argued for a profound reorientation of austerity programmes in order to prevent the undermining of existing democratic standards and end the quasi-exclusive focus on expenditure cuts in social areas such as pensions, health services and family support, with a view to protecting the European social model and its various national expressions. Noting that the implementation of austerity measures linked to bodies such as the troika raised questions of democratic control and legitimisation, the PA called for preserving maximum possible discretion of national governments and parliaments. It also recommended the adoption of measures aimed at increasing public revenues by raising taxes on wealthier income groups and large corporate profits, fighting tax evasion and fraud, and boosting quality employment opportunities while ensuring equal access to employment and support for the youth.

The institutions of the United Nations (UN) have also been particularly active in debating changes to the social system in Greece on the basis of information compiled through fact-finding visits, the

³⁸ On this, see National Commission for Human Rights, Decision on the need for continuous respect for fundamental rights in the implementation of the strategy for the exit of the economy and society from the crisis of external debt, 10 June 2010.

³⁹ National Commission for Human Rights, *The imperative need to reverse the sharp decline in civil liberties and social rights*, 8 December 2011.

⁴⁰ Parliamentary Assembly of the Council of Europe, Resolution 1884(2012) of 26 June 2012, 'Austerity measures – A danger for democracy and social rights', <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18916&Language=EN>, date accessed 28/11/2013.

reporting mechanism underlying various UN Conventions and comments received. The ILO, in particular, has provided advice and technical assistance for actuarial analysis in the field of pensions and has also engaged in the evaluation of many of the pension measures adopted. Following the comments transmitted by the Greek Confederation of Trade Unions to ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR)⁴¹ on the impact of the austerity measures on the application of a number of ILO Conventions, a high-level mission visited Greece from 19 to 23 September 2011. The report, which was subsequently issued,⁴² observed governance weaknesses and a general loss of confidence in the capacity and effectiveness of the state as a regulator and provider of social security services. Also, it documented widespread concern about the lack of social justice considerations, and of an equitable and fair sharing of the adjustment burden, in handling the crisis, and regretted that the impact of the ongoing pension reform on poverty levels and on the sustainability of the social security system, given parallel wage cuts and insufficient policies supportive of employment, had not been properly addressed in discussions of the Greek government with the troika.

In its 2013 report examining the application of ILO Conventions and Recommendations by ILO state parties, the CEACR severely questioned the 'social austerity' measures adopted following the 2010 pension reform, mainly through Laws 4024/2011, 4051/2012 and 4093/2012.⁴³ Although the 2010 pension changes had been an important step towards strengthening the viability of the Greek social security system, in line with the minimum standards guaranteed by the Social Security Convention, 1952 (no. 102), subsequent intervention in the field of pensions had undermined the ability of the pension system to withstand the continuing contraction of the economy, employment and public finances. As the CEACR put it, the state's measures 'formed part of the austerity package and reform strategy imposed on Greece by its international creditors as a condition to unlock successive tranches of bailout funds necessary to prevent the bankruptcy of the country threatening to provoke a chain reaction throughout the European financial system. Being a member of the Eurozone, Greece did not have the option of devaluation to adjust its relevant prices and wages and, to service its debts, it was therefore compelled to devalue the standards of living of its people'.⁴⁴

The CEACR harshly criticised the spread of poverty in Greece, expressing doubt as to whether existing poverty indicators linked to the median income reflected the real state of deprivation of the population. Since 'wages [were] in freefall, so [was] the median income',⁴⁵ which implied that the related poverty threshold could fall below the level of physical subsistence of an individual. In considering it an urgent duty for the government to assess past and future social austerity measures in relation to the prevention of poverty – a core objective of the Convention - the CEACR invited this to be placed promptly on the troika's agenda, and also required the government to inform it on whether any specific subsistence level had been established for different age groups. Further, the CEACR denounced the absence of social solidarity, justice and equity in coping with the crisis. The troika's demands to improve Greece's competitiveness by reducing non-wage labour costs and by allowing wages costs to adjust downwards had been met by the Greek state through direct cuts in wages and pensions, thus placing a disproportionately large share of the country's adjustment effort on the ordinary people. The CEACR thus considered it incumbent upon the government to provide succinct information on the exact minimum amounts of the benefits still guaranteed by the national legislation and on the ways through which more fortunate segments of the Greek society and economy (e.g.

⁴¹ See Art. 23 of the ILO Constitution.

⁴² ILO, Report on the high-level mission to Greece, Athens, 19-23 September 2011.

⁴³ Committee of Experts on the Application of Conventions and Recommendations, III Report, International labour conference, 102nd session, 2013.

⁴⁴ *Ibid.*, p. 764.

⁴⁵ *Ibid.*, p. 765.

banks, companies, industries, civil and religious organisations, individuals, etc) contributed to the welfare system, especially through taxes and earmarked contributions. Domestic authorities were also invited to indicate, in light of the concerns expressed by the NCHR and the CA, the number of cases opposing pension cuts in courts and related court decisions, and to engage in ‘reverse engineering of austerity’: with the help of the National Actuarial Authority, they should analyse the redistributive effects of benefit cuts; assess the overall impact of austerity policies on the sustainability of the social security system; and explore possible scenarios for returning disproportionately low pension benefits to the socially acceptable level. Similar requests towards the Greek government were made by the Committee of Ministers of the Council of Europe, in its role of monitoring compliance with the European Code of Social Security.⁴⁶

In its 2012 concluding observations on the implementation of the UN Convention on the Rights of the Child, the Committee on the Rights of the Child (CRC) discussed the effects of the financial and economic crisis on public spending affecting in particular services provided to children and on subsistence costs incurred by families for basic needs such as food, fuel and housing, including increasing demands on payments for public health care services.⁴⁷ Cautioning that ‘in time of fiscal constraint, efforts must be made to sustain and expand social investment and social protection of those in the most vulnerable situations and to employ an equitable approach’,⁴⁸ the CRC urged the Greek government to increase budgetary allocations for the implementation of child rights, paying particular attention to investments in the protection of children in situations of vulnerability (e.g. children with disabilities, unaccompanied, migrant and asylum-seeking children, children belonging to minority groups, etc.) and to formulate policies aimed at countering increasing child poverty through action in different areas (particularly the economy, health care, housing, social policy and education).

Substantive pressure to adopt a human rights-based approach for the design and implementation of the fiscal consolidation and reform policies in Greece also came from the UN independent expert on foreign debt and human rights. In a statement following his fact-finding visit in Greece from 22 to 26 April 2013,⁴⁹ the independent expert deplored the massive cuts of pensions and other welfare benefits, alongside significant wage cuts, the absence of comprehensive social assistance and housing schemes, the limited funding devoted to extending unemployment benefits and the increasing inaccessibility of the public health care system on account of increased fees and co-payments, the closure of hospitals and health centres and the loss of public health insurance due to prolonged unemployment. He advised on reducing unemployment, alleviating poverty and closing the gaps in the welfare system’s safety net to be henceforth included as measurable targets in the Greek adjustment programme and be closely monitored.

3. The actors and their choices regarding fundamental rights challenges and the resonance of fundamental rights challenges at national level

The preceding analysis shows that domestic actors have followed a multi-forum strategy to contest changes in welfare rights. Major trade unions and pensioners’ associations in the country, together

⁴⁶ Committee of Ministers of the Council of Europe, Resolution CM/ResCSS(2013)21 on the application of the European Code of Social Security by Greece, 16 October 2013 (assessing the application of the Code for the period 1/7/2011-30/6/2012).

⁴⁷ Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention on the Rights of the Child, Concluding observations: Greece CRC/C/GRC/CO/2-3, 13 August 2012.

⁴⁸ *Ibid.*, para. 6.

⁴⁹ United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mr. Cephias Lumina Mission to Greece, 22-26 April 2013, End of mission statement Athens, 26 April 2013.

with individual litigants and other advocacy associations, have brought cases before domestic courts and have also resorted to the ECtHR and the GC of the EU to question the social austerity measures adopted. Rather than seeking to contest individual hardship, litigation in courts sought to countervail the adverse effects of fiscal consolidation on social welfare standards and reverse the understanding that fiscal adjustment must principally rest on drastic cuts in social spending. Recourse to other fora of fundamental rights' protection, such as the ECSR and the ILO organs, has also taken place with a clear focus on policy reform.

The cases reviewed by domestic courts have mainly focused on cuts in pensions rather than cuts in public spending in the fields of health care, housing, family support and support for particularly vulnerable groups (e.g. persons with disabilities, migrants, the long-term unemployed, etc.). This might be partly explained by the fact that civil society in Greece, with the exception of labour-related associations, is not particularly developed, active or influential. Alongside constitutional provisions, litigants have invoked key sources of internationally agreed fundamental rights standards, such as the ECHR, the ESC, the CFR and the ICESCR. Their claims, however, did not meet the courts' approval. In upholding the fundamental rights compatibility of the state's action, the Greek supreme administrative court ruled that the measures caused by the crisis pursued a legitimate aim in the public interest, namely to address the country's dire economic situation and strengthen its financial stability, with due respect for the principle of proportionality. The domestic courts' stance increased the attractiveness of the European courts for the exposure of the social predicament of the country. The same applicants that had filed cases with the CS addressed the ECtHR and the GC. However, litigation in both judicial arenas proved unsuccessful. Whereas the ECtHR confirmed the Greek state's wide margin of appreciation in balancing individual rights with overall public interests in the frame of formulating and implementing economic and social policies, *locus standi* constraints for private applicants under Article 263 TFEU prevented a GC ruling on the merits.

The diversification of forums for challenging the ongoing deregulation of the Greek welfare system bore some results, though. Collective complaints to the ECSR led to the finding of violations of the ESC and reporting to a number of international fundamental rights bodies, particularly the ILO organs, progressively resulted in a harsh critique of the economic adjustment programme, the demands of the troika and the state's resolve to keep on applying exclusively financial solutions to deal with the crisis, gradually dismantling its welfare regime. Domestic calls for social justice and equity also became more pronounced. The NCHR and the CA became particularly vocal about the need to ensure that fiscal and financial consolidation does not undermine the fulfilment of fundamental rights. Whereas the CA openly challenged the constitutionality of a number of draft legal provisions imposing additional cuts on pensions and social benefits, the NCHR took steps to raise awareness of the social hurdles accompanying the implementation of the adjustment programme and of the concern these had raised in a number of international organisations.⁵⁰

Increasing pressure from domestic fundamental rights bodies and international organisations for a review of the state's austerity policies has not yet translated in policy change. So far there have been no comprehensive attempts to assess the effects of the measures adopted on social welfare and take remedial action with a view to restoring the enjoyment of welfare rights. However, what the various challenges - both successful and unsuccessful - have done is to raise awareness about the fact that the state's formulation and implementation of social policies is subject to scrutiny and that there are limits to the state's wide margin of appreciation in this regard.

The ECtHR has held on several occasions, including when reviewing the Greek measures on pension cuts, that a 'fair balance' must be struck between the demands of the general interest of the community

⁵⁰ On this see in particular, National Commission for Human Rights, The recommendation of the NCHR and the position of international bodies on the compatibility of austerity measures with international standards for the protection of human rights, 27 June 2013.

and the protection of individual rights in the peaceful enjoyment of possessions. Such a ‘fair balance’ will not be reached when individual rights to welfare benefits are infringed in a manner that affects their essence. The failure of early litigation in domestic courts as well as in the ECtHR can be primarily attributed to the fact that the disputed measures, forming part of the state’s first attempts to reduce public spending, were held not to have deprived pensioners from essential means of subsistence to such an extent as to nullify their individual rights. By contrast, in reviewing the collective complaints brought before it, which had put emphasis on the ‘cumulative’ effect of the various measures taken in terms of degrading living conditions, the ECSR found a violation of the ESC. In a similar vein, the CA held various draft provisions on pension cuts to be unconstitutional mainly because these added to a number of earlier cuts in pensions and other social benefits. Should domestic courts and the ECtHR be called upon to review the fundamental rights compatibility of what have proved to be recurrent cuts in social spending since 2010, there are good grounds to believe that different conclusions would be reached from those reached thus far. Notably, litigation before domestic courts could also involve the EU courts more meaningfully. In domestic disputes pertaining to specific austerity measures, litigants could claim the invalidity of EU acts imposing austerity policies on fundamental rights grounds, and ask for a preliminary reference to be made to the European Court of Justice in order to adjudicate on the compliance of the EU measures concerned with the CFR and the ECHR.

In discussing implementation risks in the first review of the second EAP in November 2012, the EC awkwardly noted that ‘important budgetary measures are likely to be challenged in courts, which could lead to the need to fill a fiscal gap emerging as a consequence’. Although this statement indicates that the EC might be more interested in the fiscal repercussions of litigation in courts than in the fundamental rights compatibility of the measures agreed and adopted, it also suggests that a large number of court cases might be in the pipeline. By clarifying the limits on the state’s margin of appreciation in developing social austerity policies, challenges to social rights changes thus far might have acted as a catalyst for litigation and for a broader mobilisation of fundamental rights sources to contest the deficiencies of the Greek welfare system. Rather than leading to the adoption of corrective measures, the result of litigation in courts and mounting pressure from the fundamental rights policy community for a rectification of the situation might indeed be increased reliance on fundamental rights sources to document social injustice and advocate changes in the Greek fiscal adjustment policies.

CHALLENGING AUSTERITY MEASURES AFFECTING WORK RIGHTS AT DOMESTIC AND INTERNATIONAL LEVEL. THE CASE OF GREECE

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1. The economic and political background

Between 2000 and 2008 Greece enjoyed a period of fast growth (about 4% on average) based on strong consumer demand, cheap bank credit and high construction activity (Matsaganis 2011). Unhappily this period of 'false' prosperity was not combined with productive investment and the strengthening of the Greek economy's low competitiveness (Meghir, Vayanos and Vettas 2010).

In October 2009 the new socialist government announced that various fiscal and economic data had been misreported. Their revision raised dramatically public debt and external deficit and the financial market's reaction was to increase spreads on Greek bonds and to lower credit ratings. In March 2010 Greece lost access to international financial markets and faced sharply the perspective of a solvency crisis. In May 2010 a €110 billion rescue package was agreed by the Greek government with the European Commission, the European Central Bank and the International Monetary Fund (the so called 'Troika') as a loan agreement. In return the country signed on 6 May a Memorandum of Economic and Financial Policies (MEFP) and a Memorandum of Understanding of Specific Economic Policy Conditionality (MoU -called the first Memorandum) containing a 3-year program of fiscal, structural and income reforms that had to be undertaken by Greece in order to reduce the country's public deficit below 3% of GDP by 2014.

During this first period significant institutional and legal interventions were adopted towards the establishment of a flexible labour market environment (Hellenic Republic Ministry of Finance 2012), which amounted to a radical adjustment of labour legislation to financial policies (Yannakourou and Tsimpoukis 2013). Although the austerity measures were scheduled to change the architecture and paradigm of domestic labour law, the government never tried to convince society about their rationality and thus failed to build a social consensus around the reforms. The Memorandum was appended to, and implemented by, an ordinary piece of law (Law 3845/2010). There was neither public consultation over the extended reforms nor activation of social dialogue procedures, so the first cases challenging austerity measures of the first Memorandum on fundamental rights grounds were brought before domestic courts and international fundamental rights bodies by the trade unions.

Following the deterioration of public finances, a second loan agreement of €130 billion was agreed in June 2011, conditional on the implementation of another austerity package (2012-2014). This time the Greek government was urged by the Troika to open discussions with the social partners to conclude a national tripartite agreement to address all factors having a direct or indirect impact on labour costs, mainly minimum wages set by the mechanism of National General Collective Agreements (hereafter 'NGCA') and non-wage labour costs such as social contributions (Koukiadaki and Kretsos 2012). During the consultation, the employers' associations suggested a 3-year freeze in wage and maturity increases and the reduction of social insurance costs but were opposed to the reduction of minimum wages set by the NGCA. The employee's confederation (GSEE) insisted that negotiations should be limited to non-wage costs. In February 2012 the parties came to an agreement which opted for the preservation of the 13th and 14th months of salary and the minimum wages levels in the private sector, as stipulated by the NGCA. A statutory reduction of social insurance contributions was also envisaged.

Given that the consultation failed to deliver a far-reaching consensus on the freeze in wage increases for the years 2012 and 2013, the social dialogue was dismissed as a pure failure.

Consequently, a revised MEPF and MoU were agreed on 9 February 2012 and the government was forced to take measures to accelerate the rapid adjustment of labour costs to fight unemployment, restore cost-competitiveness and make labour conditions more flexible. Reiterating the experience of the first Memorandum as to the procedure to be adopted, the second Memorandum was appended to Law 4046/2012 and implemented by the Board of Ministers' Act No 6/28.2.2012.

2. The impact of austerity measures on work rights

Based on the premise that labour market regulation in Greece constituted a significant barrier to growth, labour law reforms shaped in the successive Memoranda and specified in more than 15 different legislative Acts affected almost all individual and collective labour rights in both the public and private sectors. The reforms promoted to implement the MoUs were targeted towards (Katrougalos and Achtsioglou 2012, Pikoulas 2012, Yannakourou and Tsimpoukis 2013):

- Reforming the wage-setting system and adjusting the wage cost to the control of public deficit, by enhancing the role of the State and reducing trade union bargaining power (statutory realignment of the minimum wage previously stipulated by the NGCAs, freeze in wage maturity increases)
- Introducing discriminatory measures (mainly sub-minimum wages) for the young employees up to 25 years old;
- Decentralising collective bargaining system from sectoral to company level and allowing for firm-level collective agreements to derogate *in pejus* to restore cost-competitiveness;
- Reinforcing managerial prerogative in defining the working conditions (unilaterally imposed rotation work, increase of the maximum duration of fixed-term contracts and agency work contracts without being converted to open-ended contracts, removing of administrative burdens from overtime work regime, reduction in the overtime cost);
- Facilitating dismissals (increase in the probation period from 2 to 12 months, reduction in the severance payments, increase in the threshold of collective dismissals).

As far as wage bargaining is concerned, the changes were quite dramatic and marked the decline of fundamental labour law principles such as freedom of association and collective autonomy (Kazakos 2012, Travlos-Tzanetatos 2012). The collective bargaining system in force in 2010, when Greece asked for an international financial assistance, had been established by statutory law in 1990 (Law 1876/1990), with a view to promoting free collective bargaining without State interference. The National General Collective Agreements (NGCAs) set the minimum wage at national level and sectoral, occupational and enterprise level agreements provided for additional remuneration in line with the favourability principle, which means that if different level collective agreements are competing, those provisions most favourable to workers apply. In line with the Troika's recommendations, significant changes in this area emerged immediately after the support mechanism was enshrined in law (see Law 3845/2010 to which the first Memorandum was appended), anticipating radical reversal of collective bargaining's precedence over statutory law in regulating terms of employment relationships, especially minimum wage levels.

The reforms varied according to whether they were introduced in the first loan agreement of May 2010 or in the second one of February 2012. There was a significant shift of paradigm between the two Memoranda, confirmed in the most recent legislative reform of November 2012 (Law 4093/2012).¹

¹ This last Act was set as prior condition for disbursement of a long delayed 31, 5 billion Euros loan instalment.

In May 2010 it was agreed to observe the minimum standards set by the national general collective agreement and to pursue the adjustment of wages through collective bargaining. This option was reflected in the legislative acts implementing the first Memorandum, particularly Laws 3899/2010 and 4024/2011. Law 4024/2011 recognized to all firms regardless of numbers employed, the legal capacity to sign company level collective agreements with a collective representation called ‘association of employees’, representing at least 3/5 of the company staff. Company collective agreements were allowed to deviate *in pejus* from sectoral collective agreements, provided that they kept in line with national general collective agreements’ clauses. Finally, the administrative procedure of ‘extension’, that is the statutory possibility of the Minister of Labour to extend, by ministerial decision, the binding effects of sectoral collective agreements to non signatory companies of a certain branch or sector, and thus proclaim them generally binding for all employees of a certain branch, was suspended until 2015 (Law 4024/2011).

The objective of these Acts was to create a flexible collective bargaining system and to transfer wage setting closer to company level, without contesting the primary role of national general collective agreements in setting minimum wages and working conditions. Initially the alternative option of immediate pay-cuts (direct labour cost) seemed to have been left aside. However the second loan agreement of February 2012 changed this by integrating this option into the guidelines of the additional regulatory measures requested in view of a rapid adjustment of labour costs. The government was urged to adopt a legal package of labour market measures in the urgent public interest, and to intervene in collective autonomy of social partners, given that the attempt to adopt the same or equivalent measures by social dialogue fell short of expectations (see above).

Law 4046/2012 and the subsequent Board of Ministers’ Decision No 6/28.2.2012 implemented this totally different policy direction, by imposing an immediate realignment of the minimum wage level through statutory law. Such an immediate realignment of the minimum wage level determined by the National Level Collective Agreement by 22 percent at all levels, based on seniority, marital status and daily/monthly wages, was accompanied by its freezing until the end of the financial adjustment program period (2015). The legislator imposed a further 10 % cut (32% in total) for youth, which will apply generally without any restrictive conditions under the age of 25. In this way a single worker with no previous work experience, who until 2012 received €751 gross, will henceforth earn €586 gross, that is €487,45 net. An unskilled worker aged 24 will henceforth earn €400 net (€510,94 gross). Besides, unilateral recourse to arbitration has been eliminated, allowing requests for arbitration only if both parties –trade union and employers’ organisations and/or single employer- consent. Arbitrators are also prohibited from introducing any provisions on bonuses, allowances, or other benefits, and thus may rule only on the basic wage; and economic and financial considerations must now be taken into account alongside legal considerations.

These measures were aimed at aligning Greek minimum wage levels with its peers (Portugal, Central and South-East Europe). They were also expected to help address high youth unemployment, the employment of individuals on the margins of the labour market and to encourage a shift from the informal to the formal labour sector.

These provisions were of immediate effect and abolished wage provisions of the National General Collective Agreement in force since 15 July 2011, in the name of public interest and state of emergency. In addition, Law 4093/2012 permanently substituted statutory law for collective bargaining in minimum-wage setting.

3. Challenges before ‘Fundamental Rights Bodies’

Judicial scrutiny of the austerity measures contained in the various acts implementing the Memoranda was conducted by the Council of State² at domestic level (A) the European Court of Human Rights (B), the ILO Committee on Freedom of Association (C) and European Committee of Social Rights at international level (D).

A. The Greek Council of State (Plenary Session) Decision 668/2012 (issued on 20 February 2012)

An appeal was lodged before the Council of State by the Athens Bar Association, the Technical Chamber of Greece, the Trade Union Confederation of Civil Servants (ADEDY) and others against the Ministers of Finance and Labour, contesting the validity of several administrative acts implementing the first Memorandum, on the basis of the law it has been annexed to (Law 3845/2010). The Council of State issued Decision 668/2012, which examined whether wages and pension cuts in the public sector were in breach i) of the protection of property under art. 1 of the First Additional Protocol to the European Convention of Human Rights (ECHR) and ii) of Article 25(1) (principle of proportionality) and 17 (right to property) of the Greek Constitution.

The Court concluded that no constitutional provisions were infringed and that the measures complied with Article 1 of the First Additional Protocol to the ECHR. The judicial reasoning is based on the state of emergency doctrine in the one hand and on the overarching nature of public interest on the other (Pikrammenos 2012). According to the Court the measures adopted were of an emergency character in view of the urgent and difficult economic situation of the country. The austerity measures were considered part of a broader financial adjustment program promoting structural reforms which aimed to fulfil immediate financial needs of the country and to improve its public economic order and its future financial and economic situation. These aims serve public interest. Under these special circumstances ‘*the measures under scrutiny are not in principle manifestly inappropriate for the achievement of the goals pursued by them, neither can they be considered as not necessary*’. The Court concluded that all the measures were proportionate.

The Court also mentioned that in case of

‘protracted economic crisis, the [...] legislator, to reduce expenses, is entitled to take measures entailing the financial burden on large sections of the population; however this discretion of the legislator finds its limits in the principle of equal participation to the public charges in proportion with each one’s possibilities, established by Art. 4 par. 5 of the Constitution’.

Accordingly the Court decided that none of the measures breached constitutional principles (Drossos 2013).

However the Court emphasized that Parliament’s power to further reduce pensions and wages of public employees was limited, since the measures should not focus on only one category of citizens (pensioners and public employees) and should respect human dignity (Art. 2(1) Greek Constitution). The Council of State decided that *neither the Greek Constitution nor any other international text* (such as Article 1 of the First Additional Protocol to the ECHR) *enshrines a right to a certain level of remuneration*. In such a way diversification depending on particular circumstances cannot be excluded, unless the right to a decent living guaranteed by Article 2(1) of the Greek Constitution is jeopardised. Whether this happens or not has to be examined on a case-by-case basis depending on the nature and the extent of various measures adopted.

² In Greece there is no Constitutional Court assigned exclusively with the control of constitutionality of ordinary laws. Each court at every instance is competent to proceed to such a control, nevertheless it is mainly the Council of State, as High Administrative Court, and the Supreme Court (Areios Pagos), which ensure the control of constitutionality.

The Council of State was in line with its previous case-law according to which when the State faces a state of necessity it can allow protection of public interest to prevail temporarily over constitutional rights (Katrougalos 2012). However the Court does not probe the provisional or temporary nature of the challenged measures. But the real novelty is that for the first time the Council of State integrated immediate cash needs of the country within the concept of public interest. In this way the Council of State has shaped the legal concept of ‘financial public interest’ as a new instrument legitimising the legislator’s forced choices (Pavlopoulos 2013). The limits to this approach are set by the protection of human dignity, the right to a decent living as enshrined in Art. 2(1) of the Greek Constitution. Unfortunately the Council of State does not consider how this decent standard of living is to be measured. It refrained from analysing this issue since the applicants did not bring specific claims relating to the risk of not having a decent standard of living because of the contested reductions.

Undoubtedly the question remains open for the pending Council of State’s ruling, which will deal with the labour law reforms on minimum wage, discriminatory provisions against young persons under 25 years old, collective bargaining and labour arbitration procedure, contained in the second Memorandum, as appended to Law 4046/2012, as well as its implementing act (Board of Ministers’ Act 6/28.2.2012). These measures, focused on the private sector, were challenged by the General Confederation of Greek Labour (GSEE) and other trade unions before the Council of State’s Plenary Session³. The unions claim these measures are not in compliance with several constitutional provisions (Art. 2: right to a decent living; Art. 4: right of equality; Art. 5: free development of personality; Art. 22: principle of collective autonomy⁴; Art. 23: right to freedom of association and Art. 25: protection and exercise of fundamental rights), the first Additional Protocol to ECHR safeguarding the protection of property, ILO Conventions Nos 98, 111 and 122, as well as EU anti- discrimination law. At the time of writing no ruling has been issued.

B. The interrelation between Council of State Decision 668/2012 and the ECHR’s decision in Koufaki and ADEDY v. Greece⁵

Ms Koufaki, senior investigator at the Greek Ombudsman, and ADEDY (the Trade Union Confederation of Civil Servants), both petitioners before the Council of State in the previous case, complained that Greece, by issuing Decision 668/2012 had failed to comply with Art. 1 of the First Protocol to the ECHR alongside other articles. The Strasbourg Court rejected the case as ‘*manifestly unfounded*’. The ECtHR repeated in detail every single argument of the Decision 668/2012. It recalled that Member States of the Council of Europe enjoy a large margin of appreciation with regard to their social policy. While salary and social benefits enter within the scope of Art. 1 of the First Protocol and are considered as property rights, this provision ‘*cannot be interpreted as securing a right to a pension of a determined amount*’ [para. 33]. Restrictions introduced by the laws implementing the Memorandum were not a privation of property, but rather a legally permissible interference in the peaceful enjoyment of possessions under the terms of Art. 1(1) of the First Protocol to the ECHR [para. 34]. The Court adopted the reasoning of Decision 668/2012 and the reasoning of the Introductory Report to Act 3833/2010 presented by the Government to the Parliament, referring to ‘*the biggest crisis of the public finances of the last decades*’ and ‘*the historic responsibility and the national duty*’ of Greece to ‘*achieve the fiscal consolidation with objectives following a precise*

³ ‘The Memorandum II before the Council of State’s Plenary Session’, *EErgD* 2012, p. 1632.

⁴ Before the loan agreements and the austerity measures, the Greek Council of State, in a constant case law, had stated that reasons of general social interest, related with the functioning of national economy, justify the regulation of wages by the legislator, provided that the state intervention in this field was exceptional and provisional and that the measures adopted are proportionate to the extraordinary economic situation. For a detailed analysis see Koukiadis (2011), *Collective labour relations*, Athens- Thessaloniki: Sakkoulas, 2011.

⁵ Cases 57665/12 and 57657/12, Decision of 7th May 2013.

timetable' [para. 37]. The Court also referred to the goals served by the measures on salary and pension cuts, which aim at serving the public interest. These aims converge with similar aims of other Member States within the Eurozone, taking into account budgetary discipline and the preservation of stability within the Eurozone established by EU legislation. Given their nature *these measures contribute to the immediate reduction of public expenses* and thus may be qualified as serving the public interest. The national legislator has a large power to shape its economic and social policy and the Court respects the way each State perceives the requirements of the public interest.

The Court particularly mentioned that the salary reduction of Ms Koufaki – the first plaintiff - from €2.435,83 to €1.885,79 - was not of a 'level that risks to put the plaintiff in front of difficulties incompatible with Art. 1 of the First Protocol [para 46]. As to the measures affecting ADEDY they were deemed not to be disproportionate because the cut of the 13th and the 14th salary months was compensated for persons entitled to less than €2.500 per month with the creation of a unique allowance of €800 per year.

C. The 365th Report of the ILO Committee on Freedom of Association (Case no 2820)

The General Confederation of Greek Workers (GSEE) filed complaints between 2010 and 2012 for non-observance of Convention Nos 87, 98 151 and 154. The Civil Servants' Confederation (ADEDY), the Greek Federation of Private Employees (OIYE) and the General Federation of the National Electric Power Corporation (GENOP-DEI) associated themselves with the complaint in March 2011, as did the International Confederation of Trade Unions (ITUC) in October 2010. The Committee issued a Report on November 2012⁶.

The GSEE alleged that the austerity measures imposed in the context of the loan mechanism affected workers' fundamental rights to free collective bargaining as well as the right to uniformly binding minimum standards of decent work through National General Collective Agreements.

The Committee observed that the repeated and extensive intervention in collective bargaining could destabilise the overall framework for labour relations in Greece. The immediate realignment of the minimum wage level through statutory law (from €751 to €586 for white-collar workers over 25 years old) and the abolishment of wage provisions of the NGCAs in force since 2011, in the name of public interest and state of emergency, constituted a violation of *the principle of free and voluntary collective bargaining established in Article 4 of Convention No 98 (para 995)*.

If the government wished to bring collective bargaining in line with economic policy it had to persuade the parties and not impose on them renegotiation of the collective agreements in force. Measures adopted to face exceptional circumstances must be provisional in nature '*having regard to the severe negative consequences on workers' terms and conditions of employment and their particular impact on vulnerable workers*' (para 995).

The Committee underlined that the elaboration of procedures systematically favouring decentralised bargaining (including prioritising terms that are less favourable than the higher-level provisions) could lead to a global destabilization of the collective bargaining machinery and constituted in this respect a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98.

In respect of the legal capacity of associations of employees to conclude binding firm level agreements when there is no trade union in the company (Law 4024/2011), the Committee considered that collective bargaining with representatives of non-unionized workers should only be possible when there are no trade unions at the respective level. Taking into account the Workers' Representatives

⁶ 365th Report of the Committee on Freedom of Association, paras 784 -1003, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_193260.pdf

Convention (No 135) and the Collective Bargaining Convention (No 154), which contain explicit provisions guaranteeing that when both union and elected representatives exist in the same undertaking, appropriate measures must be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned. The Committee was concerned that the '*granting of collective bargaining rights to such associations may seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process*'.

Similarly, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in its observations published in the 102nd Session ILC Session (2013), recalled its *concern* that, given the prevalence of small enterprises in the Greek labour market (approximately 90 per cent of the workforce), the facilitation of association of persons combined with the abolition of the favourability principle set out first in Law No. 3845/2010 and given concrete application in Law No. 4024/2011 would have a severely detrimental impact upon the entire foundation of collective bargaining in Greece. The Committee requested the Government to ensure that trade union sections can be formed in small enterprises in order to guarantee the possibility of collective bargaining through trade union organizations.

Finally as regards the legal amendments which now permit recourse to binding arbitration only when both parties agree, the Committee recognized that this measure was taken in order to align the law and practice with its principles relating to compulsory arbitration and did not consider this measure to be in violation of freedom of association principles.

D. Challenges before the European Committee of Social Rights (Collective Complaints no 65/2011 and 66/2011)

Two complaints were lodged by the General Federation of the National Electric Power Corporation (GENOP-DEI) and the Trade Union Confederation of Civil Servants (ADEDY) against Greece before the European Committee of Social Rights (ECSR). The complaints⁷ concerned:

- extension of the probation period, during which a labour contract of indefinite duration may be terminated without notice and with no severance pay, from two (2) months to twelve (12) months (Law 3899/2010).
- One year special apprenticeship contracts for young persons aged 15 to 18 years to acquire the necessary skills and experience to enable labour market integration (Art. 74(9) of Law 3863/2010). The apprentices may receive 70% of the minimum wage stipulated by the NGCA. They are excluded from the provisions of labour law, save those concerning health and safety at work. Furthermore, they get insurance coverage merely in kind and are covered against accidents at work at a rate of only 1%.
- Sub-minimum wage for young persons under 25. According to the second Memorandum, appended to Act 4046/2012, an immediate realignment of the minimum wage level, stipulated by the NGCA, by 22 % at all levels based on seniority, marital status and daily/monthly and by

⁷ Complaint 65/2011 *General Federation of Employees of the national electric power corporation & Confederation of Greek Civil Servants Trade Unions v Greece*, Decision of May 23 2012; Complaint 66/2011 *General Federation of Employees of the national electric power corporation & Confederation of Greek Civil Servants Trade Unions v Greece*, Decision of 23 June 2012. The text of the collective complaints, the additional allegations of the parties, and the decisions of the European Committee of Social Rights on the merits of complaints can be found in: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/complaints_EN.asp. For the other Greek Collective Complaints concerning pensions see E. Psychogiopoulou, this Working Paper.

32% for those under 25.⁸ From 14 February 2012 onwards the minimum gross monthly wage for a white-collar employee under 25 who is single and has no previous service amounts to €510,95, while the minimum gross daily wage for a blue-collar employee (worker) under 25 who is single and has no previous service amounts to €22,83. It was explicitly stipulated that the 32% decline of minimum wage introduced by the Board of Ministers' Decision 6/28.2.2012 will apply to special apprenticeship contracts as well⁹.

The Committee's conclusions were (Yannakourou and Tsimpoukis 2013):

a. Extension of Probation period. This provision was considered to be in breach of Article 4(4) of the 1961 European Social Charter which guarantees the right of all employees to a reasonable period of notice for the termination of employment.¹⁰

b. Special apprenticeship contracts. The Committee found that:

- By exempting minors between 15 and 18 years of age, among other labour provisions, from the right to paid annual leave, violates Article 7(7) of the Charter, which guarantees those under 18 years of age paid annual leave of at least three weeks.
- The special apprenticeship contracts, although aiming to provide the young with professional skills and work experience, do not constitute a genuine vocational programme, despite the government's claims, because they are more similar to employment contracts. In that respect, they violate Article 10(2) ESC which guarantees the right of the young to vocational training.
- The fact that minors who are engaged in a *special apprenticeship contract* enjoy social security coverage only in kind and are covered from the risk of accident at a rate of merely 1%, constitutes a violation of Article 12(3) of the Charter, by virtue of which each employee is entitled to a right to social security.

c. Sub-minimum wage for young employees. The European Committee of Social Rights examined the issues of *fair remuneration* and *age discrimination* separately:

- The Committee stated that, although in certain circumstances young persons, could be paid less than the minimum wage, their wage must not fall below the poverty level of the country concerned. As already stated, the minimum wage reduction of 32% for those under 25, stipulated by Board of Ministers' Decision 6/28.2.2012, amounts to a minimum gross wage of €510,95 per month. Given that the 2011 poverty level in Greece in 2011 was set at around €580 per month,¹¹ the Committee concluded that the minimum monthly wage for under 25s fell below the poverty level.

⁸ Article 1 para. 2 of the Board of Ministers' Decision 6/28.2.2012 on 'Regulation of issues concerning the application of article 1 para. 6 of Law 4046/2012', Government Gazette A' 38/28.2.2012, which implemented and specified Article 1(6) of Law 4046/2012.

⁹ Before that, their wage was 30% lower than the minimum national wage. Therefore, under the Board of Ministers' Decision 6/28.2.2012 their wage was further decreased by 2%.

¹⁰ In paragraph 25 of Decision 65/2012 the European Committee of Social Rights reminds us that the employer's obligation to notify the employee of the termination of his employment contract stands even during a period which is *genuinely* probationary.

¹¹ According to the Report on the High Level Mission to Greece (Athens, 19-23 September 2011) of the International Labour Organization (ILO) (see paragraph 61 of ESCR Decision 66/2012). However, according to the results of the latest survey (2011) carried out by the Greek Statistical Agency (ELSTAT) on income and living conditions with reference income period the year 2010, the poverty threshold for an one-person household is set at €479,80 per month (net income). This inconsistency in the statistical data mentioned by ILO and ELSTAT is of no importance, since, irrespective of the figure taken into consideration, the minimum wage of young persons under 25 will fall below the poverty line (Yannakourou and Tsimpoukis 2013).

- Furthermore, the Committee stated that the less favourable pay for under 25s constituted age discrimination which was not proportionate to the otherwise legitimate aim of the employment policy pursued by the Government. Consequently, the Committee concluded this pay discrimination constituted a violation of Article 4(1) of the Charter, which establishes the right to fair remuneration, in light of the non-discrimination clause included in the Preamble to the 1961 Charter.

4. Conclusions

The Council of State at domestic level and the ECHR at European level have ruled only on the constitutionality and legality of salary and pension cuts of civil servants enacted in 2010, in compliance with the first MoU. The Council of State's ruling on labour law reforms of the second MoU is still pending: on minimum wage, discriminatory provisions for under 25s, collective bargaining and labour arbitration procedure, enacted in 2011 and 2012. Hence the Council of State has not scrutinised austerity measures affecting central labour law rights for potential violation of constitutional social rights (for example, the right to work, freedom of association, the right to collective bargaining – Arts 22 and 23 of the Greek Constitution). Since many critical areas of labour law (e.g. dismissal, collective bargaining, level of minimum wage, sub-minimum wage for young) were affected by the second Memorandum and no ruling has yet been issued, we cannot predict if the Council of State will uphold these measures as constitutional, accepting that they are justified by a state of necessity faced by the Greek economy. To date, the Council of State has based its reasoning on general constitutional principles such as the principle of equality of public burdens, the principle of proportionality and the overriding principle of public interest, which was broadened to include the concept of immediate cash needs. We still need to wait for the Council of State to develop its case law on the right to a decent standard of living and to state whether reforms on minimum wage reduction and sub-minimum wages for the young are compatible with the respect of this right.

From the point of view of strategic litigation, we should point out that the trade unions and other professional bodies (e.g the Athens Bar Association) adopted an approach that limited their chances for a successful outcome before either the Council of State or the ECHR. They neither selected the right case to bring before the ECtHR nor did they bring claims that could help the Council of State refine its reasoning and conclude that the pay cuts were of such a level that they failed to respect the decent standard of living and the property rights guaranteed by the European Convention of Human Rights.

With regard to the ILO Committee on the Freedom of Association, its conclusions have had no impact on recent reforms deregulating labour law. Either it found no direct violation of specific ILO Conventions and expressed its concerns about a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98 or it pointed to the risk of a potential violation in case certain practices or procedures become the rule or become abusive (e.g. the recognition of association of persons as bargaining actors). Even when a violation of the principle of free and voluntary collective bargaining in Article 4 of Convention No 98 was established (the immediate realignment of the minimum wage level through statutory law and the abolishment of NGCA wage provisions), the ILO Committees' conclusions and recommendations have no binding effect and their enforceability depends on the governments' political will to proceed to changes. In Greece the government is unwilling to review measures enacted to implement the Memoranda.

By contrast, the European Committee of Social Rights (ECSR), after examination of the Collective Complaints made by Greek trade unions, found many specific violations of ESC provisions. Its Decision 66/2012 might be of major relevance for the Greek legal order; following this decision the Greek courts should refrain from applying the current legislation concerning the employment and remuneration of under 25s, given that the ESC, as interpreted by the ECSR, constitutes an international convention sanctioned by statute of the Greek legislature that has become an integral part

of domestic law and prevails over any contrary provision of ordinary Acts adopted by the Greek Parliament¹² (Gavalas 2012; Yannakourou and Tsimpoukis 2013). Moreover in 2010 the Council of State¹³ recognised for the first time an ESC provision (Article 1(2) on the right of free choice of employment) as self-executing and annulled an administrative act as contrary to the said provision. It was the first time that a Greek Court attributed this effect to the ESC (Gavalas 2011). Based on this case-law an individual can appeal before the national courts and claim various labour law provisions enacted to implement the Memoranda to be pronounced inoperative as contrary to justiciable subjective rights deriving from the Charter provisions that are sufficiently clear, precise and unconditional. For this reason the ESC is of great value for challenging austerity measures before the Greek courts.

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WELFARE RIGHTS IN CRISIS IN THE EUROZONE: IRELAND

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Introduction

The Eurozone crisis and the austerity measures introduced in response to it have resulted in significant changes in terms of economic and social rights (ESR/welfare rights) in Ireland.² However, the overall reaction of Irish society has been less of a bang than a whimper (albeit an audible and protracted one). This is despite the existence of legal provision for ESR at the constitutional level, historic societal concern in relation to ESR-related issues, and an active and rights-aware civil society sector.

The full version of this paper will argue that part of the reason that the crisis and the response thereto were able to impact on economic and social rights to the degree that they did was due to a lack of an ‘ESR culture’ in Ireland. By an ‘ESR culture’, I mean a societal awareness and absorption of rights as concepts that should direct and constrain state action, and that may ultimately operate as the bases of claims against the state in the case. I will assert that this lack of ‘ESR culture’ has resulted in a failure on the part of Irish society generally to conceptualise the impact of the crisis and the responses thereto in terms of rights – whether legal or moral.³ In turn this has affected political, legal and societal responses to post-crisis changes to ESR, including the strategies employed to challenge such. The Irish response public and political response to crisis-induced austerity contrasts with that in other Eurozone countries. In considering the reasons for this, I will explore whether a stronger cultural perception of the role of the state as provider in other Eurozone member states due to, amongst other things, a history of constitutionally enforceable ESR and, perhaps more importantly, the ‘sozialstaat principle’,⁴ has contributed to a comparatively more assertive criticism of erosion of the welfare state framework resulting from austerity measures. The final article will engage with notions of ‘rights culture’, the role of rights in relation to social resistance and, ultimately, social resilience in the post-crisis context.

This working paper contribution, however, will focus on the issues highlighted in the working paper’s outline. It begins with a discussion of the position vis-à-vis ESR prior to the crisis. Having established the state of affairs that pertained prior to the crisis, I will turn to the impact of the crisis – and specific aspects of the responses thereto – on legal protection of ESR in Ireland. The next section focuses on fundamental rights’ challenges to post-crisis changes to ESR (or lack thereof). It highlights the historic

¹ Email: aoife.nolan@nottingham.ac.uk. The author would like to thank Gerry Whyte (TCD), Liam Thornton (UCD) and Gareth Noble (KOD Lyons) for their very helpful suggestions in relation to this paper.

² The terminology of ‘economic and social rights’ is taken from international human rights law. While international ESR do include work rights, these will not be discussed in this paper.

³ While the relationship between legal and moral rights is complex and has been the subject of extensive academic commentary, here I want to make it clear that societal understandings of rights may extend beyond those that are enforceable in law.

⁴ This description of the ‘sozialstaat principle’ is included in C. O’Cinneide, ‘Austerity and the Faded Dream of a “Social Europe”’ in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: CUP, forthcoming 2014). That chapter provides a useful overview of the operation of the principle in a range of European countries in the context of the recent financial and economic crises.

and contemporary factors that have affected the kinds of fundamental rights challenges taken and the success (or not) of such. I conclude with a number of observations about ESR in the post-crisis context in Ireland.

On the Side-lines: An Overview of ESR Before the Crisis

The Irish Constitution of 1937 contains a number of economic and social rights,⁵ both express and unenumerated (implied), as well as a number of explicitly non-justiciable directive principles of social policy that have clear implications for the enjoyment of socio-economic rights.⁶ Despite the existence of a constitutional framework that is prima facie predisposed to according protection to ESR, concerns about the implications of adjudication of socio-economic rights for the separation of powers and the involvement of the courts in what are deemed issues of ‘distributive justice’⁷ has, in more recent times, resulted in a general reluctance on the part of courts to recognise and give proper effect to such rights.⁸ The Supreme Court has proved particularly unwilling to grant positive (eg mandatory) orders against the state where it has found violations of ESR. As such, even before the crisis the courts were extremely reluctant to become involved in issues relating to ‘the distribution of public resources’.⁹

More broadly, the Irish constitutional framework certainly offered scope for the judicial development of a variant of the *Sozialstaat* principle, in terms of which the State would have the constitutional obligation to assume interventionist functions in the economic and social sphere and to guarantee fundamental social rights to all citizens.¹⁰ This has not occurred, however.

In addition to judicial discomfort with ESR, there has been broader reluctance to expand the remit of constitutional protection of ESR. In 1996, the Constitution Review Group rejected the explicit inclusion of ESR in the Irish Constitution.¹¹ More recently, concern about the further constitutional entrenchment of ESR was evidenced by the fact that various government proposals in relation to the content of the constitutional amendment on the rights of the child (ultimately approved by referendum in November 2012) consistently avoided extending recognition to children’s economic and social rights.¹²

⁵ The only ESR expressly set out in the Constitution is the right to education under Article 42. Unenumerated ESR derive from Article 40.3.1° of the Constitution, which provides that: ‘[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen’ [emphasis added]. It is clear that this Article imposes a duty on the State to take positive action in appropriate circumstances. In *Ryan v The Attorney General* [1965] IR 294, Justice Kenny in the High Court held that the ‘personal rights’ mentioned in Article 40.3.1° are not exhausted by the rights to ‘life, person, good name and property rights’ expressly enumerated in the following section 40.3.2, a position confirmed by the Supreme Court in the same case.

⁶ Article 45. For more on the constitutional protection of economic and social rights, see A. Nolan, ‘Ireland: The Separation of Powers Doctrine vs Human Rights’ in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge: Cambridge University Press, 2008) 295.

⁷ *Per Costello J in O’Reilly v Limerick Corporation* [1989] I.L.R.M. 181

⁸ The two key cases on this point are *Sinnott v Minister for Education* [2001] 2 IR 545 and *TD v Minister for Education* [2001] 4 IR 259.

⁹ *O’Reilly*, 194.

¹⁰ G. Katrougalos & P. O’Connell, ‘Fundamental Social Rights’ in M. Tushnet et al (eds), *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2013) 375, 378.

¹¹ See Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996).

¹² For a discussion of these various proposals, see U. Kilkelly & C. O’Mahony; (2007) ‘The Proposed Children’s Rights Amendment: Running to Stand Still?’ (2007) 2 *Irish Journal of Family Law* 19. This reluctance was ultimately reflected in the final wording of the amendment put to the electorate in 2012 which made no reference to economic and social

There are other vehicles by which ESR could be afforded legal protection in terms of Irish law. One potential avenue for the indirect protection of ESR is civil and political rights,¹³ whether constitutional or legislative.¹⁴ There are several civil and political rights-related provisions of the constitution that could be used as a basis for indirect protection of socio-economic rights.¹⁵ In practice, however, constitutional civil and political rights have historically only been of limited use for those seeking to advance ESR claims.¹⁶ While property rights have served to ground social security rights claims in other jurisdictions, that has not been the case in Ireland;¹⁷ the Supreme Court has held that the right to receive benefit or retain benefit wrongly paid derives from statute and does not partake of the nature of a constitutional property right.¹⁸ Rather, social security issues have been dealt with primarily through social welfare legislation.

Similarly, although legislative human rights protections – specifically, the European Convention on Human Rights Act - have resulted in protection being afforded to elements of the right to adequate housing for instance,¹⁹ they have had limited impact on the protection of the full scope of obligations imposed by ESR²⁰ - and have played no significant role in the post-crisis context. This is true both in relation to reported judgments and in terms of litigation brought.²¹ More broadly, there has been a historic reluctance on the part of government to render key ESR concerns expressly ‘rights-based’, further reducing the potential for rights-based challenges to ESR-related issues.²²

But what of Ireland’s non-domestic ESR obligations? Ireland has ratified a range of international human rights instruments making provision for ESR, including the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and the Convention on the Rights

(Contd.) _____

rights. Although approved by the electorate, this amendment has not yet come into force due to ongoing litigation about the constitutionality of the referendum process.

¹³ By ‘indirect protection’ I mean where other non-ESR are applied or interpreted by the courts so as to protect ESR-related interests.

¹⁴ The key legislative human rights instrument in Ireland is the European Convention on Human Rights Act.

¹⁵ For instance, an expansive interpretation of the right to life protected by Article 40.3.2 of the Constitution could give rise to socio-economic rights being protected by means of that right. Indeed, in rejecting calls for the explicit inclusion in the Irish Constitution of guarantees of socio-economic rights, the Constitution Review Group concluded that, where anyone falls below a minimum level of subsistence, the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity. Constitution Review Group, above n11, 236. Other civil and political rights that might be employed by the courts to give protection to ESR-related interests, include the unenumerated right to bodily integrity under Article 40.3.1 and the constitutional guarantee to equality (Article 40.1).

¹⁶ For more on this, see A. Nolan, ‘Ireland: The Separation of Powers Doctrine vs Human Rights’ in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge: Cambridge University Press, 2008) 295.

¹⁷ This is true both in relation to the right to property under Article 40.3.2 of the Irish Constitution and under Article 1, Protocol 1 ECHR via the ECHR Act 2003.

¹⁸ *Minister for Social, Community and Family Affairs v Scanlon* [2001] IESC 1, at 17.

¹⁹ For more on this point, see L. Thornton, ‘Human Rights in the Republic of Ireland’ in J. Allain & S. Mullally (eds), *Irish Yearbook of International Law 2008* (Oxford: Hart Publishing, 2009) 159 at 168-171.

²⁰ For more on this point, see G. Whyte, ‘Public Interest Litigation in Ireland and the European Convention on Human Rights Act 2003’ (paper on file with author).

²¹ This is based on non-scientific anecdotal evidence from practitioners working in the human rights and public interest areas. It will need further support.

²² See, e.g., the experience in relation to the Disability Act 2005 discussed in J. De Wispelaere & J. Walsh, ‘Disability Rights in Ireland: Chronicle of a Missed Opportunity’ (2007) 22(4) *Irish Political Studies* 517.

of the Child. However, in contrast to civil and political rights under the ECHR, these rights have had little or no domestic impact. Ireland's dualist system requires that its international obligations be expressly incorporated into domestic law in order for them to be enforceable before the national courts.²³ This has not occurred in relation to any of the UN human rights instruments that Ireland has ratified and, hence, their provisions (ESR or otherwise) are not directly enforceable by the national courts. The Supreme Court has stated that, in the absence of such incorporation, the principles of international treaty law do not prevail over domestic legislation.²⁴ Furthermore, the Supreme Court has held that, under Article 29 of the Constitution, international law confers no rights capable of being invoked by individuals.²⁵ This finding does not augur well for those seeking to place reliance on international instruments in an attempt to secure ESR being denied under the domestic legal order.²⁶

A final point should be noted in terms of the state of play with regard to legal protection of ESR prior to the crisis. Even before the crisis hit Ireland, there was evidence of state discomfort with regard to human rights accountability. It is notable that among the first cuts made by the Government at the start of the economic crisis were those to the Irish Human Rights Commission and the Equality Authority, whose budgets were cut by 32% and 43% respectively.²⁷ Further cuts followed. These cuts to the Irish human rights and equality infrastructure would directly impact on the scope for challenges to crisis-induced changes to ESR through the resultant reduction of cases that could be heard, taken and supported by those respective bodies.²⁸

The Changes Caused by the Crisis – and Responses Thereto – to ESR in Ireland

Ireland was the first of the countries affected by the Eurozone crisis to enter recession. It was the second, after Greece, to be subject to an IMF/ECB/EU 'bailout' and troika involvement. On 21 November 2010 Ireland officially requested financial assistance from the EU, the euro area Member States and the International Monetary Fund (IMF). This followed the collapse of the property market, the construction industry and banking sectors and the socialisation of debt through the Government's guarantee of all banking debt.

A week after Ireland's request, a joint mission with members from the European Commission, the IMF and the European Central Bank on 28 November reached agreement with the Irish authorities on a comprehensive policy package for the period 2010-2013.²⁹ Over the next three years, the troika and the Irish authorities would agree 12 separate memoranda of understanding and the troika would carry out 12 Review Missions to Ireland. The memoranda included undertakings on the part of the Irish Government that it and the Central Bank would give effect to it in terms of economic and financial

²³ Article 29(6) of the Constitution states that: 'No international agreement shall be part of the domestic law of the State save as may be determined by Parliament.'

²⁴ See *Sumers Jennings v Furlong* [1966] IR 183.

²⁵ See *Kavanagh v Governor of Mountjoy Prison* [2002] 3 I.R. 97, 126.

²⁶ G. Biehler, 'International Law Procedures' in G. Biehler, (ed.), *International Law in Practice: An Irish Perspective* (Dublin: Thompson Roundhall, 2005), pp. 184-240, at 197-8.

²⁷ Irish Human Rights Commission, 'Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland' (March 2011), http://www.ihrc.ie/download/pdf/ihrc_report_to_un_universal_periodic_review_march_2011.pdf.

²⁸ For more details, see <http://pila.ie/bulletin/october-2013/9-october-2013/irish-equality-human-rights-bodies-tackling-less-cases-ahead-of-merger/>.

²⁹ European Commission, 'Economic Adjustment Programme for Ireland', http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm.

policies.³⁰ Key measures from an ESR perspective included social protection expenditure reductions, the reduction of public service employment numbers, the reduction of existing public service pensions, reductions in expenditure including on goods and services, reduction in public capital expenditure and reduction of the minimum wage.³¹

Government efforts to give effect to these undertakings resulted in a range of measures that were retrogressive in terms of ESR enjoyment, including a series of ‘austerity’ budgets introducing severe cuts in income, pensions and public services.³² ESR affected included the right to an adequate standard of living, the right to social security, the right to education and the right to the highest attainable standard of health.³³

It is important to note that the troika certainly cannot be regarded as the sole villain in the piece when considering post-crisis changes to ESR in Ireland. Before the crisis, the Irish Government had proven distinctly lukewarm with regard to the state-centred model of provision of ESR-related goods and service provision. Low taxes,³⁴ the reliance on non-state actors to deliver ESR-related goods and services, and the adoption of a market-based model to healthcare, including heavy reliance on private health insurance were key features of Celtic Tiger Ireland (and beyond).³⁵ Furthermore, it is notable that the government’s response to the crisis came under tacit criticism from the troika: in the troika’s October 2012 statement on its Review Mission to Ireland it emphasised that ‘the measures adopted in Budget 2013 should be durable, as growth-friendly as possible, and minimise the burden of adjustment on the most vulnerable’.³⁶ More broadly, the Government’s resistance to rights language and concepts in the context of economic and financial decision-making is evidenced by its deliberate use of the rhetoric of ‘fairness’ and ‘progressiveness’, rather than ‘equality’ or ‘rights’.³⁷

Fundamental Rights (and Other) Challenges to Changes in ESR

The Irish experience and the scope for challenges is necessarily affected by the issues faced by other EU countries, such as growing ‘executive dominance’ within EU governance and the nature and location of such executive power in relation to policy fields such as national budgets and macro-economic decisions.³⁸ The limited accountability and lack of transparency that surrounds key EU

³⁰ For an initial overview, see the ‘EU/IMF Programme of Support for Ireland’, 16 December 2010, <http://www.finance.gov.ie/documents/publications/reports/2011/euimfrevise.pdf>

³¹ For information on the implementation of these undertakings, see the Memoranda of Economic and Financial Policies that formed part of the Memoranda of Understanding published for each troika review, <http://www.finance.gov.ie/viewdoc.asp?DocID=6856>.

³² For a highly critical analysis of the 2011-2014 budgets, see <http://www.socialjustice.ie/content/budget>.

³³ For an example of a human (specifically child) rights-based analysis of the 2008-2014 budgets, see the Children’s Rights Alliance’s analyses of annual state budgets, www.childrensrighs.ie.

³⁴ For more, see section 5 below.

³⁵ A. Nolan & D. Nolan, ‘Ireland’s Health Care System: Some Issues and Challenges’, (Dublin: ESRI, 2004)

³⁶ See <http://www.imf.org/external/np/sec/pr/2013/pr13432.htm>

³⁷ See, e.g., the information issued by the Government in relation to Budget 2014, which included a ‘Fairness Infographic’: <http://budget.gov.ie/Budgets/2014/2014.aspx>.

³⁸ See, e.g., D. Curtin, ‘Challenging Executive Dominance in European Democracy’, (2013) 77(1) *Modern Law Review* 1. For more on these concerns and their implications for the stability of the EU project as a whole, see M. Dawson & F. De Witte, ‘Constitutional Balance in the EU after the Euro-Crisis’ (2013) 76(5) *Modern Law Review* 817.

decision-making in relation to macroeconomic policy is a considerable obstacle to those seeking to challenge the impact of such policy on ESR in Ireland.³⁹

However, transparency and accountability-related obstacles are certainly not limited to the European level. Growing concern has been expressed in Ireland about the role played by the Economic Management Council, which makes all key economic decisions. In July 2013, the Minister for Social Protection argued that the Council, whose membership is confined to the Prime Minister, the Deputy Prime Minister, the Minister for Finance and the Minister of Public Expenditure & Reform, was not seeing the ‘big picture’ of the Irish economy ‘because of its exclusive nature and the influence of non-elected officials from only four departments’.⁴⁰

Challenges to changes to ESR have also been hampered by the limitations in Ireland’s existing freedom of information legislation – particularly the exclusion of key domestic financial policy decision-making bodies from the Freedom of Information Act, including the Financial Regulator, the Central Bank and the National Treasury Management Agency.⁴¹ The draft Freedom of Information Act 2013 has recently been subject to extensive criticism on the basis of, amongst other things, the proposed introduction of up-front fees for FOI applications.⁴²

More positively, efforts were made throughout the crisis by both national and international civil society to challenge changes to ESR using a variety of human rights advocacy strategies, including lobbying international human rights actors such as the Council of Europe Commissioner for Human Rights,⁴³ carrying out ESR-based budget work,⁴⁴ using rights language to analyse and criticise aspects of fiscal and economic policy,⁴⁵ and to campaign for greater protection of ESR at the domestic level.⁴⁶ The scope for such challenges were strengthened by the existence of a very active, experienced and skilled civil society sector,⁴⁷ (albeit that the ability of civil society actors to engage with post-crisis impacts on ESR was negatively affected by funding cuts to the not-for-profit sector resulting from the global financial crisis).⁴⁸ In contrast to other countries affected by the Eurozone crisis, civil society

³⁹ Ultimately, this section will include a discussion of issues surrounding the role of the IMF and other International Financial Institutions in relation to ESR, including the historic neglect of such rights in those actors’ work, as well as the lack of binding ESR obligations imposed on them.

⁴⁰ ‘Taoiseach and Tánaiste council is too exclusive – Burton’, *Irish Times*, 29 July 2013.

⁴¹ See Section 31 of the Freedom of Information Acts 1997 and 2003 on ‘Financial and Economic Interests of the State and of Public Bodies’.

⁴² See, e.g., http://transparency.ie/news_events/commitments-open-government-ring-hollow-says-transparency-international-ireland.

⁴³ Lobbying has also been directed towards the UN human rights treaty-monitoring bodies but Ireland has yet to report on the crisis/post-crisis period to any such body with an ESR mandate.

⁴⁴ See, e.g., Center for Economic and Social Rights, ‘Mauled by the Celtic Tiger: Human Rights in Ireland’s Economic Downturn’ (Madrid, CESR, 2012).

⁴⁵ See, e.g., the Children’s Rights Alliance analyses of annual state budgets from a children’s rights perspective, www.childrensrights.ie.

⁴⁶ See, e.g., the work of the Irish Section of Amnesty International seeking to ensure greater legislative and constitutional protection of ESR, as well as ratification by Ireland of Optional Protocol to ICESCR.

⁴⁷ [Sources on Irish advocacy movement and historic role of non-state actors in advocating for – and providing – ESR-related goods and services].

⁴⁸ See, e.g., B. Harvey, *Downsizing the Community Sector 2008-2012* (Dublin: ICTU, 2012), <http://www.ictu.ie/download/pdf/downsizingcommunitysector.pdf>

tactics did not make extensive use of mass mobilisation.⁴⁹ Indeed, overall public protest and strike action were limited following the crisis, and ‘large-scale public protests and riots remain unlikely’⁵⁰. ESR language was not a significant feature of any such action. Due to space constraints, the remainder of this section will focus on the use of the law to challenge changes to ESR following the crisis.

The Role of the Law

Given the existence of a functional and relatively easily accessible legal system, as well as the role of law in concretising austerity, it would seem logical for ESR advocates to seek protection of such rights against crisis-induced changes through the courts. Ireland has not, however, seen extensive litigation being brought to challenge changes to ESR. In contrast to contemporary and historic post-crisis experiences in other jurisdictions, Ireland has seen relatively few actions seeking to declare post-crisis adjustment measures to be violations of constitutional ESR or property rights, for instance.⁵¹ Nor is there evidence of any significant effort by rights-holders/lawyers to use the Constitution to challenge measures and policies affecting ESR on an individual basis.⁵² Indeed, the Irish courts have engaged with the impact of austerity measures on individual rights to a lesser extent than those in the UK – despite the fact that the Irish framework expressly provides for a greater range of such rights.

There has been at least one post-crisis instance in which ESR have been enforced indirectly through the judicial interpretation of social welfare legislation. *CP v Chief Appeals Officer & Ors*⁵³ the High Court considered the proper construction of the statutory framework pertaining to a decision of an appeals officer of the Social Welfare Appeals Office refusing a domiciliary care allowance to a mother with a child with special educational needs. In finding for the plaintiff, the Court demonstrated its awareness of ‘the Department’s anxieties to ensure the smooth working of the appeal system and to husband scarce resources at a critical time when the State is struggling to ensure that the public finances are brought back to equilibrium’.⁵⁴ However, the Court emphasised that this did not serve as a justification for actions that had no basis in law.

There have been a number of cases challenging changes to ESR that resulted directly from the crisis.

In *McKenzie v Minister for Defence & Ors*,⁵⁵ the Permanent Defence Force’s union argued (unsuccessfully) that they should have been allowed to make representations about cuts in allowances to members of the Force.⁵⁶ The cuts resulted from the Government’s decision ‘arising out of the recent severe economic down-turn’ to reduce ‘across the board for all public servants the rates payable to them by way of expense allowances for motor travel and subsistence’ by means of a circular issued in March 2009.⁵⁷ In its ruling, the Court emphasised that it was ‘part of the constitutional mandate of the

⁴⁹ [Sources on significant protests between 2007 and 2014].

⁵⁰ T. Reidy, ‘After Six Years of Austerity, Ireland’s Coalition Government Has Little Room to Manoeuvre’, *LSE EUROPP Blog*, 8 May 2013, <http://blogs.lse.ac.uk/europpblog/2013/05/08/ireland-coalition-austerity/>.

⁵¹ For more on comparative experiences in relation to such post-crisis litigation, see A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: CUP, forthcoming 2014).

⁵² While anecdotal evidence is that a number of cases have been settled by the state, there is no evidence of a consistent effort to employ litigation strategy to enforce ESR.

⁵³ [2013] IEHC 512, 14 November 2013. While the decision in question focused on one plaintiff, the Court noted four other similar judicial review applications were awaiting the outcome of this case. *Ibid*, para 9.

⁵⁴ *Ibid* para 23.

⁵⁵ [2010] IEHC 461, 30 November 2010.

⁵⁶ In this instance, the plaintiffs had initially sought to claim that the measures complained of were in breach of the constitutional rights and entitlements of the plaintiffs (as individuals and members of the armed forces trade union). This ground was ultimately dropped, however.

⁵⁷ *Ibid*, para 2.16.

Government that it should be able to act swiftly, and if necessary unilaterally, in urgent protection of the national interest. It is a matter of very wide public knowledge, and this court has no hesitation in taking judicial notice of it on that basis, that in late September of 2008 our country entered the most serious economic crisis in its history and that that crisis has been deepening by the week ever since'.⁵⁸ According to the Court, the Government decision in question was 'made not just in the public interest ... but rather it was also one that was made in the urgent national interest'.⁵⁹ In its judgment, the Court emphasised that 'when it requires to act urgently [*sic.*] the Government cannot be at the mercy of, or be expected to obtain the approval of, or to have to invite representations from, every single interest group. Rather, its duty is to the country as a whole and it has, under Article 28 of the Constitution, a very wide freedom of action pursuant its mandate to discharge the executive power of the State in the area of budgetary control in the public interest or in the interests of the common good.'⁶⁰ The Court also expressly rejected the plaintiffs' suggestion that a state of emergency had to be declared before the Government could act in that way.⁶¹

In contrast to the *McKenzie* litigation, constitutional and legislative human rights played a significant role in a challenge brought by pharmacists to reductions in the fees paid by the State to them.⁶² These changes were brought about pursuant to the *Financial Emergency Measures in the Public Interest Act 2009*, which included a provision for the reduction of payments to health professionals.⁶³ They alleged that the new fee structure imposed on them would result in at least a 24% reduction in their income under the schemes and that such a reduction would make them insolvent. The plaintiffs challenged the constitutionality of both the 2009 Act and the Regulations made in respect of pharmacists on the basis that, amongst other things, the relevant measures failed to vindicate their fundamental rights with regard to property and to equal treatment (which are protected both under the Constitution and/or under the European Convention on Human Rights). The Court held, however, that there was no constitutional property right at issue in this case as the right asserted was one founded on contract. Furthermore, even if the Court had been prepared to find that such a constitutional property right did exist, the encroachment complained of could not be considered unconstitutionally 'unjust' in any event. The Court also rejected the claim of unconstitutional discrimination or unequal treatment.

A number of cases have been taken to challenge various aspects of government policy in responding to the financial crisis. In *Hall v Minister for Finance*, the High Court dismissed a challenge by a private citizen to procedures adopted by the Minister for Finance to support financial institutions.⁶⁴ The plaintiff in this case claimed that the Minister did not have the power to issue promissory notes, in a total sum of €30.6 billion, as consideration for the capital provided by the State to the former Anglo Irish Bank and Irish Nationwide Building Society. Specifically, the plaintiff argued that the provision of financial support by the Minister pursuant to Section 6 of the *Credit Institutions (Financial Support) Act 2008* constituted an appropriation of revenue or other public monies within the meaning of Article 17 of the Constitution, which was unlawful in the absence of a resolution of the Irish Parliament. He did so on the basis of two key claims. First, if construed constitutionally, Section 6 must be taken as meaning that the Minister must first get Oireachtas approval by way of an appropriation for a specific sum subject to a temporal limitation. Thus, the plaintiff alleged, the Minister's provision or making in 2010 of promissory notes was *ultra vires* in terms of the Act. In the

⁵⁸ Ibid, para 5.2.

⁵⁹ Ibid, para 5.3.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *J. & J. Haire & Co. Ltd v Minister for Health*, HC, 17 December 2009.

⁶³ Section 9.

⁶⁴ [2013] IEHC 39, 31 January 2013.

alternative, the plaintiff claimed that Section 6 was itself unconstitutional as an impermissible assumption of power by, or delegation of power to, the Minister. The application was dismissed by the High Court on the grounds of *locus standi*; in the Court's view, such a challenge should have been brought by a Member of Parliament. It did not rule on the validity of the challenge either to the lawfulness of the Minister's acts or the constitutionality of the statutory provision on which the plaintiff relied.⁶⁵

Many of these issues raised in the *Hall* case were addressed in the subsequent High Court decision in *Collins v Minister for Finance & Ors*.⁶⁶ In this case, the plaintiff was a Member of Parliament. The High Court rejected both the challenge to the validity of the two promissory notes issued by the Minister for Finance in June and December 2010 and the challenge to the constitutionality of Section 6 of the 2008 Act. According to the Court, Section 6 'gave the Minister power to issue financial support to the banks under certain defined circumstances without the necessity for any further parliamentary vote and that is not inconsistent with the Constitution'.⁶⁷ The Court's judgment made clear its concerns about the effect that an acceptance of the plaintiffs' arguments might have in terms of 'either sapping the ability of the State to borrow money on international capital markets or, at least, introducing a new risk premium which would have to be reflected in more elevated bond yields in respect of Irish sovereign debt'.⁶⁸

Neither ESR (nor, indeed, any form of constitutional rights) were raised or addressed by the Courts in either of the *Hall* or the *Collins* cases.

In the most significant Irish post-crisis constitutional law decision to date, the plaintiff in *Thomas Pringle v The Government of Ireland, Ireland and the Attorney General* challenged the compatibility of the ESM Treaty with both the Constitution and EU law.⁶⁹ From a constitutional perspective, Pringle did not rely on constitutional ESR. Rather, he argued that the ESM Treaty constituted such a degree of delegation of sovereignty that it was incompatible with the Constitution; as a consequence a referendum to amend the Constitution was necessary pursuant to Article 43 of the Constitution to permit ratification of, and Ireland's participation in, the ESM Treaty. Both the High Court and the Supreme Court found against Mr Pringle on the constitutional points raised.

Ultimately, the *Pringle* litigation also demonstrated the limited prospects of success of efforts to use EU law-based ESR protections efforts to challenge changes to ESR under the ESM. The judgment of the European Court of Justice in the *Pringle* case,⁷⁰ pursuant to questions submitted to that Court for clarification, held that the European Stability Mechanism (ESM) was not subject to the Charter's provisions – a finding that would, amongst other things, appear to sharply limit the scope for using EU

⁶⁵ For more on the litigation, see also *Hall v Minister for Finance & Ors* [2013] IESC 10, 19 October 2013.

⁶⁶ [2013] IEHC 530, 26 November 2013.

⁶⁷ *Ibid*, para 130. The Court stated further that 'that the objects and effects of the appropriation requirements in Article 11 and Article 17 when coupled with the principles and policies test in Article 15.2.1 is to preserve the budgetary autonomy of Dáil Éireann; to safeguard the proper operation of the budget process as required by the Constitution and to ensure that the discretion thereby vested by law in the Government and individual Ministers to spend public moneys can be controlled and measured by reference to identifiable standards prescribed by law. Measured by these standards we hold that s. 6 of the 2008 Act satisfies these tests' (paras 128-129).

⁶⁸ *Ibid*, para 122.

⁶⁹ [2012] IESC 47.

⁷⁰ Case C-370/12, *Pringle v. Ireland*, 27 November 2012). For an overview of the *Pringle* decision, see B. de Witte and T. Beukers, 'The European Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle' (2013) 50 *Common Market Law Review* 805. For a consideration of the decision from the perspective of EU financial and monetary policy, see P. Van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) 14 (1) *German Law Journal* 141.

law to challenge the emergency fund programmes conducted by the ESM.⁷¹ Post-*Pringle*, Darren O'Donovan has highlighted the importance of determining whether European institutions such as the Commission, the Council and the ECB are bound by the Charter when acting under non-EU intergovernmental Treaties; what are the Commission's responsibilities in terms of the Charter when deliberating regarding fiscal adjustments, for example?⁷²

In terms of other regional judicial and quasi-judicial bodies, the European Court of Human Rights has yet to directly address any cases brought in relation to the post-crisis changes to ESR in Ireland. Indeed, its existing 'austerity' case-law offers little to attract or support those seeking to ameliorate the impact of post-crisis adjustments in Ireland.⁷³ While the European Committee on Social Rights has adopted an assertive approach to austerity measures that impact on ESR,⁷⁴ there is currently no collective complaint before that body dealing with crisis-induced changes to ESR in Ireland. Furthermore, given the Irish Government's dismissive response to the previous decision of that body against it on a non-ESR topic, one is forced to query whether a positive decision on the part of the Committee would be given effect to anyway.⁷⁵

In sum, therefore, efforts to employ the law – whether national or international - to challenge changes to ESR have been neither numerous nor successful.

The Post-crisis Prospects of ESR in Ireland

Ireland is due to exit the IMF-EU bailout on 15 December 2013. However, crisis-related impacts are far from over. The full, long-term impacts of cuts to healthcare, education and other services, particularly on the young and the socially vulnerable are not yet clear but are likely to be significant. Responses to the crisis have effectively targeted low income households, lone parents and created new inequalities in public sector – with women being affected disproportionately on each front.⁷⁶ The impact of emigration – particularly youth emigration – and the associated 'brain drain' is likely to have long-term implications for the resources (human and financial) that will be available to Ireland to meet the ESR-related needs of those in its jurisdiction in future.⁷⁷ Income inequality between the

⁷¹ R. O'Gorman, '*Pringle v Ireland*', 28 November 2012, www.humanrights.ie. Tomkin argues that 'the creation of a permanent stability mechanism that is liable to have a direct impact on the lives of Union citizens and yet lies outside and beyond the reach of the Union legal order, and is subject neither to general principles nor the rights enshrined in the Charter of fundamental rights, may be regarded as undermining of the principle of effective judicial protection and democratic accountability'. J. Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14(1) *German Law Journal* 169, 189.

⁷² D. O'Donovan, 'The Insulation of Austerity: The Charter of Fundamental Rights and European Union Institutions', 16 May 2013, www.humanrights.ie.

⁷³ For evidence of the European Court of Human Rights' reluctance to engage with austerity measures, see *Da Conceição Mateus and Santos Januário v Portugal*, application nos. 62235/12 and 57725/12, 8 October 2013; *Koufaki and Adedy v Greece*, application nos. 57665/12 and 57657/12, 7 May 2013.

⁷⁴ See, e.g., *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, 23 May 2011; *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, Complaint No. 76/2012, 77/2012, 78/2012, 79/2012 and 80/2012, 7 December 2012.

⁷⁵ The Irish government's response to a 2005 finding of the Committee that its failure to prohibit all forms of physical punishment against children violated the European Social Charter was to keep the issue 'under review'.

⁷⁶ U. Barry & P. Conroy, 'Ireland in Crisis 2008-2012: Women, austerity and inequality' (October 2012) http://www.nwci.ie/download/pdf/nwцитасc_seminar_ursula_barry_and_pauline_conroy.pdf

⁷⁷ Research published by University College Cork in September 2013 highlighted that the vast majority, over 70%, of emigrants are aged in their twenties when they depart from Ireland, while 62 per cent of emigrants aged 25 to 34 have a

richest and poorest has risen over the period of the crisis and the cumulative effect of the post-crisis budgets has been regressive in terms of ESR enjoyment.⁷⁸ TASC notes that ‘huge inter-generational inequality has been created, with the legacy banking costs and the debt repayments passed on to the younger generations, who are already struggling with excessive personal and business debt from the boom period’.⁷⁹ These after-effects of the crisis will have ongoing impacts on ESR in Ireland.

In addition, long-term governmental resistance to tax increases (whether through the introduction of a wealth tax, the removal of regressive tax breaks or the raising of corporation tax rates) has, if anything, been copper-fastened by the crisis.⁸⁰ Indeed, the crisis and the troika-prescribed responses thereto appear to have effectively entrenched a neo-liberal economic model in Ireland that takes limited account of ESR, while having serious implications for the protection and enjoyment of such.⁸¹

On a more positive note in terms of ESR, it is to be hoped that as Ireland passes out of recession, discretionary fiscal consolidation will be eased and employment will increase. Furthermore, the crisis appears to have raised the profile of ESR language and concepts amongst social justice and poverty advocates in Ireland. Perhaps the most important positive impact of the crisis in terms of ESR has been the galvanising of support for the inclusion of economic and social rights within the mandate of the ongoing Constitutional Convention. Established in 2012 by a Resolution of both houses of parliament, the Constitutional Convention is a forum of 100 people, representative of Irish society and parliamentarians from the island of Ireland, with an independent Chairman. Its task has been to consider and make recommendations on certain topics set by the Government as possible future amendments⁸². When first established, senior government officials made it clear that the Convention would not address the constitutional protection of ESR. However, there was been a sustained campaign led by Amnesty Ireland to get the Convention to consider ESR as part of their future work.⁸³ While it is not yet clear whether this will happen, there is no doubt that the possibility of ESR being addressed by the Convention would never have arisen had the crisis – and the changes that it has wrought in terms of ESR - not occurred.

(Contd.)

third-level qualification, compared to 47 per cent of Irish people in that age group overall. UCC Émigré, ‘Irish Emigration in a Time of Austerity’ (2013) https://www.dropbox.com/s/2e7qg1jeuuxujdl/Emigration%20in%20an%20Age%20of%20Austerity_02%2010.pdf.

⁷⁸ See, Social Justice, ‘Who Really Took the Hits during Ireland’s Bailout?’ (November 2013), <http://www.socialjustice.ie/sites/default/files/file/Policy%20Issues/Poverty%20and%20Income%20Distribution/2013-12-02-%20Who%20really%20took%20the%20hits%20during%20Irelands%20Bailout.pdf>.

⁷⁹ TASC, ‘Budget 2014: Choosing an Equitable Route to Recovery’ (2014), 2.

⁸⁰ For an overview of Irish revenue decisions from a human rights perspective, see Center for Economic and Social Rights, ‘Mauled by the Celtic Tiger: Human Rights in Ireland’s Economic Downturn’ (Madrid, CESR, 2012) 14-16. For a discussion of wealth tax in an Irish context, see T. McDonnell, ‘Wealth Tax: Options for its Implementation in the Republic of Ireland’, TASC Working Paper Series, NERI WP 2013/No 6 (2013), http://www.neriinstitute.net/download/pdf/neri_wp_no_6_2013_mcdonnell_wealth_tax.pdf.

⁸¹ For a discussion and critique neo-liberal economic of neo-classical economic theories from an ESR perspective, see D. Elson et al, ‘Public Finance, Maximum Available Resources and Human Rights’ in A. Nolan et al (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart Publishing 2013) 13.

⁸² For more on the Convention’s work, see <https://www.constitution.ie/>.

⁸³ For more information, including details of the submissions made to the Convention, see <http://www.amnesty.ie/news/constitutional-convention-open-it>

SOCIAL RIGHTS IN CRISIS IN THE EUROZONE. WORK RIGHTS IN IRELAND

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The Evolution of Employment Rights in Ireland

Labour relations in Ireland have historically been characterised by a commitment to legal abstention, sometimes referred to as ‘voluntarism’. The system is a voluntary one in the sense that the parties to the labour relations process (employers and trade unions) are free both to agree or not to agree on the substantive principles (if any) which are to govern their mutual rights and obligations and to regulate their behaviour without the intervention of the State. The State’s role was one of facilitating the relationship between employers and trade unions by providing both the legislative framework within which trade unions might operate and machinery to assist the parties to resolve industrial disputes that could arise.

Central to this ‘voluntarist’ ethos is the lack of any general legal obligation on employers to bargain collectively with, or recognise, trade unions representing their workers. Where collective bargaining does take place, the resultant collective agreement is usually not legally enforceable. Indeed, Ireland is one of those few Member States where there is "no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace".

State intervention in the individual employment relationship began in the 1930s with the enactment of the Conditions of Employment Act 1936 and the Shops (Conditions of Employment) Act 1938 which sought to regulate the working hours of those engaged in industrial employment and in retail distribution respectively. This legislation also provided for paid annual leave, an entitlement which was gradually extended by legislation in 1939, 1961 and 1973. The 1970s saw the enactment of legislation conferring valuable rights in the areas of equal pay, unfair dismissal and employment equality. Other rights followed in subsequent decades largely dictated by the requirements of European Directives such as those on the Organisation of Working Time and Part-Time and Fixed-Term Work.

The domestic legislation tends to adopt a minimalist transposition leaving it open to individual employers and employees to enter into arrangements that are more favourable to the employee. This has led to the OECD in 2008 ranking Ireland’s labour market as ‘among the least rigid’ and having one of the ‘least stringent employment protection systems’ when it came to protection against dismissal and regulation of temporary forms of employment.

A significant enactment which was not required by virtue of Ireland’s EU obligations was the National Minimum Wage Act 2000 (the Act of 2000) which provided for a national minimum hourly rate of pay of £4.40 (€5.59), around 52% of median earnings at the time of its introduction on the 1st April 2000. Projections by the Economic and Social Research Institute suggested that this rate would benefit 13.5% of the workforce (some 163,000 workers) and add 1.6% to the national wage bill. That hourly rate was increased in July 2001, October 2002, February 2004, May 2005 and January 2007, and then again in July 2007 to €8.65. According to the Central Statistics Office’s *National Employment Survey 2007*, only 4.9% of workers were then at the national minimum wage or below. The survey found that most of these were aged under 25, were female and tended to be nationals of the then ten Accession States.

At the time of the enactment of the Act of 2000, there were in operation two types of sectoral wage determination mechanisms, both of which had been established by the Industrial Relations Act 1946 (the 1946 Act). The first was the Joint Labour Committee system and the other was the Registered Employment Agreement system. The origins of the former can be traced back to the United Kingdom's Trade Board Act 1909 and those of the latter to the Irish Free State's Conditions of Employment Act 1936.

Part IV of the 1946 Act provided for the establishment of Joint Labour Committees empowered to make proposals to the Labour Court fixing minimum rates of remuneration to be paid to all workers covered by the particular committee and regulating other terms and conditions of employment. Once the Labour Court made an Employment Regulation Order on foot of these proposals, the rate of remuneration and other conditions of employment became legally enforceable throughout the relevant sector on pain of criminal sanction. In February 2009, there were ten such committees covering sectors such as agriculture, catering, contract cleaning, hairdressing, hotels, retail grocery and security. Minimum rates of pay in these sectors were slightly in excess of that prescribed by the Act of 2000 (on average 9%).

Part III of the 1946 Act empowered the Labour Court to 'register' a collective agreement, subject to its being satisfied of certain matters such as the inclusion of a provision that, if a trade dispute were to occur, a strike or lockout would not take place until the dispute had been submitted for settlement by negotiation. The effect of registering the agreement was that its terms became legally applicable (again on pain of criminal sanction) to every worker of the class, type or group to which it was expressed to apply, and his or her employer, notwithstanding that such worker or employer was not a party to the agreement. As of February 2012, there were 75 agreements on the register, the most significant being those for the construction and electrical contracting sectors. Minimum rates of pay in those sectors were significantly in excess of that prescribed by the Act of 2000.

Aside from the various statutory rights conferred on private sector workers, civil and public service workers enjoy a range of benefits, such as paid sick pay, paid maternity and other leave and pension schemes, not generally enjoyed by workers in the private sector.

The Initial Response to the Economic Crisis

The period between 1987 and 2008 was marked by 'social partnership'. In 1987, a three year *Programme for National Recovery* was negotiated between the government, the trade unions, the employers and the farming organisations which, on its expiry, was followed by *Programmes for Economic and Social Progress*, *Competiveness at Work* and *Prosperity and Fairness* and other partnership agreements. All provided for a range of social and economic issues including staged pay increases, with the pay terms of the last agreement - *Towards 2016* - which was negotiated in 2005 providing for increases totalling 10% over 27 months. It might be noted that, in 1996, the Irish Government invited a group of non-profit organisations to join the social partnership talks alongside the employers, the trade unions and the farming organisations as the so-called 'fourth pillar'.

In September 2008, a new national pay agreement was agreed and was formally ratified by the social partners - the Irish Congress of Trade Unions (Congress) and the Irish Business and Employers Confederation (IBEC) - on the 17th November 2008. The agreement provided for pay rises in the public and private sectors of 6% over 21 months but with a pay pause of three months in the private sector and eleven months in the public sector.

By the end of September 2008, however, it had become obvious that Ireland was facing a severe monetary crisis and the then government decided to guarantee the Irish banking system, covering both customer deposits and the banks' own borrowings, to an estimated total of €440 billion. Inevitably the pay terms of the agreement came under pressure to be revisited, because of the severe deterioration of the Irish economy, and a number of significant employers announced that they could not afford to pay

the agreed increases. Congress and IBEC failed to reach agreement on a revision of the pay terms of the agreement, despite six months of social partnership discussion, and IBEC ultimately indicated that it was withdrawing from the private sector national pay agreement. Simultaneously, the trade unions and the government failed to agree a consensus approach to securing a €1 billion reduction in the public sector pay bill. The trade unions were formally opposed to any cuts to basic wage rates in the public sector and had put forward a variety of alternative proposals, including one that would see public sector workers take 12 days additional unpaid leave. On the 4th December 2009, however, the then government announced that the proposal did not provide 'an acceptable alternative to pay cuts'.

Within days of the collapse of social partnership, the then government enacted the Financial Emergency Measures in the Public Interest (No 2) Act 2009 providing for a reduction in public service salaries of between 5% and 15% with effect from the 1st January 2010.

In March 2010, effectively under threat of further emergency legislation, the public sector trade unions agreed a four year Public Service Agreement (the so called Croke Park Agreement) under which public sector pay levels would be protected in exchange for a reduction in employment numbers and a commitment to substantial organisational reform.

The Arrival of the Troika

On the 28th November 2010, the then government accepted the terms of an IMF/EU *Programme of Financial Support*. The first Memorandum of Understanding is dated the 1st December 2010 and was focussed principally on measures relating to fiscal consolidation and financial sector reforms (such as legal costs). It did contain, however, various measures concerning 'structural reforms' relating to the Irish labour market.

It sought in particular a commitment to a reduction in the national minimum wage of 11.7% and the establishment of an independent review of the Joint Labour Committee and Registered Employment Agreement systems with terms of reference and follow-up actions to be agreed with the European Commission. The concern was expressed by the Troika that there were distortions of wage conditions across certain sectors associated with the presence of sectoral minimum wages in addition to the national minimum wage. Other than that, no demands were made to impose general reductions in employment statutory employment rights, reflecting no doubt the lack of any rigidity in the Irish labour market caused thereby. The IMF/EU, however, re-asserted the then Government's 2010 budget commitment that there would be a revised pension scheme for new public servants which would be based on 'career average' earnings rather than final salary. The programme also included a review of 'accelerated retirement' of certain categories of public servants.

The programme also sought to strengthen competition law enforcement and avoid sectoral exemptions. Consequently the Memorandum of Association required the Irish authorities to ensure that no further exemptions to 'the competition law framework' would be granted unless they were 'entirely consistent' with the goals of the *Programme of Financial Support* and the needs of the economy. Consequently, the commitment given by the previous Government to amend the Competition Act 2002 to allow 'voice over actors' and 'freelance journalists' to exercise their right to engage in collective bargaining was vetoed by the Troika on the basis that, according to 'settled EU case law', self-employed individuals were 'undertakings'. It is difficult to understand how the needs of the Irish economy could be damaged by allowing such economically dependent workers to exercise their right to collective bargaining through their trade union.

The reduction in the national minimum hourly rate of pay to €7.65 was mandated by section 13 of the Financial Emergency Measures in the Public Interest Act 2010, with effect being given from the 1st February 2011. The independent review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms was conducted by the Chairman of the Labour Court, Kevin Duffy, and a University College Dublin labour economist, Dr Frank Walsh.

Their report was published in April 2011 and recommended reform of both systems; not abolition. The authors noted that the principal industries covered by the Registered Employment Agreement system (construction and electrical contracting) were

‘characterised by a large number of employers of various size, and a highly mobile workforce. They are also sectors which have had a relatively high level of trade union density. Both sectors are labour intensive and labour costs account for a high proportion of overall costs. Given the diversity of the industries, it would be difficult if not impossible for normal collective bargaining to take place at the level of each enterprise.’

The authors also noted that employers benefited from the stability of the dispute resolution mechanism, which is required to be contained in the agreement for it to be registrable, and further noted:

‘All employers in these sectors compete with each other for available contracts which are normally awarded by competitive tendering. In tendering for work, employers need to know, with a high degree of certainty, what their labour costs will be over the currency of the contract. Moreover, since all employers normally have the same employment costs, competition is focussed on cost efficiency, including efficiency in the utilisation of labour, rather than on the actual wages and conditions of employment to which individual contractors are committed. Thus, if the wages and conditions of employment of workers were fixed by collective agreements with some contractors but not all, those covered by agreements would be placed at a competitive disadvantage relative to those who are not.’

The review carefully examined all of the suggested disadvantages of the two systems and found none of them to be substantial. The authors found that it was not accurate to suggest that the body of primary employment rights legislation in force adequately covered matters dealt with by Registered Employment Agreements and Employment Regulation Orders. The authors found no evidence that such agreements or orders resulted in inflated or uncompetitive wage rates. Indeed, there was some evidence that labour costs were higher in firms implementing individual bargaining relative to firms adopting the national wage agreement or industry level agreements. Nor did the evidence indicate any substantial difference in the degree of wage rigidity across the different groups.

The authors acknowledged, however, that both systems of sectoral/industry wage determination needed to be reformed to render them fit for purpose. Their conclusions were supportive of those reached in a general review of industrial relations in the electrical contracting industry carried out in 2009 under section 38(2) of the Industrial Relations Act 1990 by the former General Secretary of the Irish Congress of Trade Unions, Peter Cassells, and a former Chairman of the Labour Court, Finbar Flood.

Following a general election in early 2011, a new Fine Gael/Labour coalition government came to power and one of the first steps taken was to reverse the reduction in the national minimum hourly rate of pay. Section 22 of the Social Welfare and Pensions Act 2011 required the restoration of the rate to €8.65 which was achieved, following some discussion with the Troika, with effect from the 1st July 2011.

Before any action could be taken to give effect to the Duffy/Walsh recommendations on reforming the industry/sectoral wage determination mechanisms, there was a dramatic intervention by the courts.

The Involvement of the Courts

On the 12th May 2008, the Labour Court, acting on proposals from the Catering Joint Labour Committee, made an Employment Regulation Order increasing the statutory minimum remuneration of workers employed in catering establishments covered by the committee with effect from the 2nd June 2008. On the 12th December 2008, a fast food outlet in Cork, one of its directors and a body known as the Quick Service Food Alliance issued a plenary summons in which they sought a declaration that three sections of the Industrial Relations Act 1946 and one section of the Industrial

Relations Act 1990 were invalid having regard to the provisions of the Constitution of Ireland and a declaration that the Catering Employment Regulation Order constituted an unlawful and disproportionate interference with the plaintiffs' constitutionally guaranteed property rights.

The case was heard in the High Court on the 16th, 22nd and 23rd March 2011 and judgment was delivered on the 7th July 2011: *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277; [2011] 3 I.R. 211. Feeney J. granted the declarations sought on the basis that the 1946 and 1990 Acts failed to set out anything that could properly be described as policies or principles directing or informing Joint Labour Committees and the Labour Court as to the matters to be taken into account in carrying out the task of fixing wage rates and conditions of employment and thus the powers delegated to those bodies were excessive and amounted to an impermissible transfer of power from the Oireachtas (the Irish Parliament) contrary to Article 15.2.1^o of the Constitution.

In its Summer 2011 review of the Economic Adjustment and Programme for Ireland, the European Commission's Director-general for economic and monetary affairs said that this finding 'redoubles the urgency of reform in this area'. The Commission welcomed the government's commitment to introduce legislation going beyond what was recommended by the Duffy/Walsh report 'as eliminating any impediments to job creation/reallocation, while safeguarding basic workers' rights, is essential to ensure that the emerging recovery benefits all'.

In response to the High Court judgment, the Oireachtas passed the Industrial Relations (Amendment) Act 2012 (the 2012 Act) which came into effect on the 1st August 2012. The amendments effected by this Act require Joint Labour Committees, when formulating their proposals, to take into account a variety of factors, such as the legitimate commercial interests of employers and levels of employment and wages in comparable sectors both in Ireland and within the European Union. The Act also provides that employers might seek temporary exemptions from Employment Regulation Orders from the Labour Court. This last mentioned matter was specifically referenced in the Memoranda of Understanding of February and May 2012.

The 2012 Act also made changes to the Registered Employment Agreement system as a result of which the registration of collective agreements was to be subject to much more elaborate principles and policies and provision for review and consideration by the Minister for Jobs, Enterprise and Innovation and the Oireachtas.

Yet again, the actions of the government in enacting the 2012 Act were overtaken by another dramatic intervention by the courts.

On the 22nd May 2008, an application had been made to the Labour Court to cancel the Registered Employment Agreement for the electrical contracting industry. After some initial legal skirmishes, the Labour Court embarked upon an eleven day hearing and, on the 26th February 2009, issued a determination refusing the application for a cancellation of the agreement. The Labour Court also refused, it should be noted, an application by the Technical, Engineering and Electrical Union to vary the agreement by increasing the minimum rate of remuneration.

A judicial review application in respect of this determination was dismissed by the High Court on the 30th June 2010 on the basis that the application had been brought outside the prescribed time limits and that it was undesirable that any constitutional challenge to the validity of the Registered Employment Agreement system should proceed in judicial review proceedings.

Some of the applicants appealed to the Supreme Court and, in a judgment delivered on the 9th May 2013, that Court granted a declaration that the entirety of Part III of the Industrial Relations Act 1946 was invalid having regard to the provisions of Article 15.2.1^o of the Irish Constitution: *McGowan v Labour Court* [2013] IESC 21; [2013] 2 I.L.R.M. 276.

O'Donnell J., delivering the judgment of the Court, said that these provisions of the 1946 Act involved a delegation of the law-making power of a most fundamental and far-reaching kind. There was a

wholesale grant, indeed abdication, of law-making power to private persons unidentified and unidentifiable at the time of grant to make law in respect of a broad and important area of human activity. Once an agreement purported to become binding on non-parties, it passed into the field of legislation which, by Article 15 of the Constitution, was the sole and exclusive preserve of the Oireachtas.

The immediate consequence of the *McGowan* decision was to invalidate all agreements registered under Part III of the 1946 Act, even those involving single employers, and to render meaningless the amendments effected by the 2012 Act.

Influence of the Troika on the provisions of the Industrial Relations (Amendment) Act 2012

The Memorandum of Understanding of November 2011 stated that the Irish authorities would present legislation to modernise Employment Regulation Orders with a view to reducing the possible negative impact on job creation and competitiveness and obliged those authorities to engage with the staff of the Commission, the IMF and the ECB on the basis of draft legislation in advance of publication. The specific Troika requirements, as set out in the Memoranda of Understanding of February and May 2012, were that:

1. An employer might apply to the Labour Court, where there is a substantial risk that a significant number of workers would be laid off or made redundant or where the sustainability of the employer's business would be significantly adversely affected, for a derogation down to the level of the national minimum wage for one or more recurring periods up to a maximum of two years.
2. There be a requirement that Joint Labour Committees be reviewed every five years.
3. There be a requirement for the committee, and the Labour Court, to take into account, where enterprises in the sector in question are in competition with enterprises in other Member States, the general level of wages in the enterprises in that other Member State.
4. (iv) The extent of any Employment Regulation Order be restricted.

In May 2012, the European Commission reported that the Bill was 'broadly in line with the programme objectives' in that it made the wage-setting systems more flexible and more responsive to economic conditions. The Commission expected that revised Employment Regulation Orders emerging from the reformed system would be 'leaner and more employment-friendly'. The Act accordingly limits such an order to providing for a minimum hourly rate of remuneration and not more than two higher hourly rates of remuneration based on length of service or attainment of recognised standards or skills. Other matters such as providing for a rate for Sunday working, pay in lieu of notice, redundancy *etc* are specifically excluded.

The first review of the system has now taken place and recommends the abolition of two committees, those for Law Clerks and for hotels in the Dublin/Dun Laoghaire areas. The largest committee - that for retail grocery - should be amended to exclude small independent grocery shops but to include any shop trading either as a multiple supermarket or within a symbol group franchise. The rationale behind this recommendation is to ensure that retailers with a similar level of pricing advantages through bulk purchases are competing on a level playing field while not affecting truly independent grocers.

The Trade Unions' response

It might be considered surprising that no legal challenge was made by employees or their trade unions to the austerity measures introduced in late 2009. In part, this may be due to the unhappy experience of those trade unions who sought to challenge the imposition of the 7% pensions levy by the Financial Emergency Measures in the Public Interest Act 2009. The purpose of this levy, which was imposed

with effect from the 1st March 2009, was to stabilise the public service pension arrangements. Both the Garda Representative Association and the trade union UNITE initiated judicial review proceedings seeking to challenge the Minister for Finance's decision not to exempt their members, or some of them, from the pension levy.

Both applications were unsuccessful with the President of the High Court, Kearns P., ruling in the UNITE application that, even if the deductions required by the Act amounted to an interference with the union's members' property rights, such interference could not be said to be disproportionate 'having regard to the dire financial circumstances' in which the Act was passed. The judge estimated that a person on the average industrial wage (then €32,000) would be required to pay approximately €1,950 and continued:

'While this is a considerable amount of money in the current economic climate for a person earning the average industrial wage, I do not think it amounts to a disproportionate additional contribution to require a person with the benefit of a public sector type pension to pay in light of the current economic circumstances affecting the public finances.'

Nor was Kearns P. satisfied that the interference with the union's members' contractual entitlements was such as to amount to an 'unjust attack'. That phrase, as used in Article 40.3.2° of the Irish Constitution, had to be read in light of the 'unusual economic crisis' that necessitated the introduction of the Act. See *Garda Representative Association v Minister of Finance* [2010] IEHC 78 and *UNITE v Minister for Finance* [2010] IEHC 354.

Although not falling within the time period covered by this paper, a further decision of the Supreme Court is appropriately mentioned at this juncture.

Legislation enacted in 2001 - the Industrial Relations (Amendment) Act 2001 - conferred new powers on the Labour Court to determine terms and conditions of employment in cases where collective bargaining arrangements were not in place with the employer with whom a dispute arose. The provisions of the Act made it clear that it was not intended to provide for trade union recognition and that it could not be used to force employers to engage in collective bargaining. The Act, however, does provide 'a measure of protection to employees in employments where pay and conditions are not freely determined by collective bargaining'.

The Act, even as amended by the Industrial Relations (Miscellaneous Provisions) Act 2004, did not provide a definition of 'collective bargaining' and, in *Ashford Castle Ltd v SIPTU* [2003] E.L.R. 214, the Labour Court said that the term should be assigned 'the meaning which it would normally bear in an industrial relations context'. The Labour Court followed this approach in *IMPACT v Ryanair Ltd* [2005] E.L.R. 99 but on appeal, the Supreme Court ruled that this approach was incorrect and quashed the decision of the Labour Court: see *Ryanair Ltd v Labour Court* [2007] 4 I.R. 199.

Following this decision, the Irish Congress of Trade Unions, and the trade union IMPACT, lodged a complaint on the 4th May 2010 with the Expert Committee on Freedom of Association of the International Labour Organisation (ILO) over the lack of legal protection afforded to the practice of collective bargaining in Ireland. The Committee's report, which issued in March 2012, recommended that the Irish government should review the existing legal framework and consider any appropriate legislative measures so as to ensure respect for freedom of association and collective bargaining principles. The current government has committed itself to reforming the law on employees' rights to engage in collective bargaining particularly so as to secure compliance with recent decisions of the European Court of Human Rights and has so informed the ILO.

In addition, the Irish Congress of Trade Unions filed a submission on the 21st March 2011 with the 12th session of the Universal Periodic Review (UPR) Working Group of the Human Rights Council of the United Nations. The submission alleged that Ireland was failing to secure proper observance not only of the right to join trade unions and the right to collective bargaining but also of the right to effective remedies. Speaking to a special session of the UN Human Rights Council on the 15th March

2012, Ireland's ambassador to the UN confirmed that the government's commitment on collective bargaining rights would be honoured.

Following the decision of the Supreme Court in *McGowan*, the Irish Congress of Trade Unions and the Technical, Engineering and Electrical Union have filed an application with the European Court of Human Rights under Article 34 of the European Convention on Human Rights against Ireland alleging that the result of the *McGowan* judgment is that the workers, whom the unions affiliated to Congress represent, are now denied the effective right to collective bargaining which is an essential element of Article 11 of the Convention.

The Applicants submit that the Supreme Court, in coming to its judgment, had no regard to its obligation to construe legislation to comply, so far as possible, with Ireland's international commitments and in particular Article 11 of the European Convention on Human Rights. The Court's approach is condemned, in the Applicants' written submissions, for fundamentally misunderstanding 'the role of collective bargaining in enhancing both the legitimacy and the efficacy of legal provisions'.

The Applicants have submitted in summary:

1. It is clear that the right to collective bargaining is one of the essential elements of trade union freedom protected by Article 11.
2. Accordingly, Ireland has a positive obligation under Article 11 to provide mechanisms which enable trade unions and their members to engage in real and effective collective bargaining in all sectors of work and industry.
3. The ability under Part III of the 1946 Act to give sector-wide legal effect to agreements concluded through voluntary collective bargaining by representative bodies in sectors such as construction and electrical contracting constitute an essential means to promote and secure the interests of workers in those sectors.
4. The effect of the *McGowan* decision is to remove that mechanism and leave the trade unions and their members without any mechanism whatsoever through which to engage in effective collective bargaining in those sectors.
5. There was no pressing social need, nor were there any compelling or convincing reasons why it was or is necessary to dismantle the registered employment agreement system, particularly as the Troika mandated independent review supported the retention of the system, albeit reformed.

Conclusion

Four days before the then Irish government accepted the terms of the 'bailout', it published a *National Recovery Plan 2011-2014*. The plan announced a range of structural reforms to the labour market aimed at 'removing barriers to employment creation and disincentives to work'. Among the proposed measures was a €1 reduction in the national hourly minimum rate of pay and a commitment to review the framework of sectoral wage setting mechanisms within a three month period. Similarly, the then government had already announced that there would be a new public sector pension scheme for new entrants.

Consequently, the main effect of the re-assertion of these commitments in the IMF/EU *Programme of Financial Support* and the December 2010 Memorandum of Understanding was to tie the hands of any future government. What no-one anticipated at the time was that the sectoral wage setting mechanisms would be dismantled by the courts.

Until such time as the Registered Employment Agreement system is re-established, sectors such as construction, electrical contracting and security remain open to firms from lower wage countries paying their home country wages on contracts in Ireland. This may well reduce costs for clients but at

the expense of indigenous contracting firms and their employees. Some trade unions have speculated that greater competition from other EU Member States was what was really behind the European Commission taking a position on this topic.

WELFARE RIGHTS IN ITALY

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1. Introduction

This paper aims to answer the three main questions posed by the workshop's coordinators: What led to the changes in social welfare rights? To what extent did EU fiscal requirements shape those changes? What are the main challenges to fundamental rights arising from these changes?

One thing must be made clear from the outset: the amount of the public debt and deficit is a long-standing problem of the Italian economy; e.g., an excessive deficit procedure (EDP) was opened in 2005 and closed in 2008, before the EDP of the crisis years (2009-2013). The enormous debt (currently 133,3% of the GDP), the ensuing difficulties in finding credit on financial markets and the fiscal discipline constraints established in EU treaties and regulations have been important issues in the political debate – and also a cause for pressure on welfare services, entitlements and rights – well before the 2011 overhauling of EU economic and fiscal governance and the in-depth reviews (IDRs) of macroeconomic imbalances. The new economic governance system (as well as other unusual interventions: see below) made the pressure for fiscal discipline greater and more systematic: but the impulse in this direction already existed.

2. What led to the changes in social welfare rights and to what extent did EU fiscal requirements shape those changes?

A) The macro-economic imbalance procedure

As of 2013, two IDRs of macroeconomic imbalances have been issued in Italy.

The July 2012 IDR highlighted serious, if not yet excessive, imbalances: first and foremost, the high government debt; moreover, a declining competitiveness, due to stagnant productivity growth and an unfavourable export structure. The policy measures recommended (“Policy challenges”) are mostly focused on fiscal consolidation and economic growth. None of these recommendations directly and specifically impact on welfare rights; indeed, a major reform of an important and costly welfare sector – pensions – had already been enacted at the end of 2011, with the aim of limiting the burden on public expenditure also in the long term. Nevertheless, the IDR recommendation may have had indirect effects, by putting further emphasis on fiscal discipline and, consequently, on the reduction of public expenses: the impulse in this direction currently being represented by the financial, economic and political difficulties faced by Italy, also with regard to the guarantee of welfare rights. Moreover, the recommended shift in taxation – from labour and capital onto consumption and property – might have some impact on the constitutional duties of social solidarity, although not directly on welfare rights and services as such.

The April 2013 IDR, as well as the country specific findings issued by the Commission in COM(2013) 199 final, are consistent with the 2012 analysis, although the importance of economic growth, and of the policy measures supporting it, gains greater prominence. Labour rights remain at stake, and the on-going spending review in the public sector is encouraged as a possible way to improve the efficiency and effectiveness of government spending; no recommendation, however, deals directly with welfare rights, with the notable exception of education – highlighted as a key for economic growth.

B) EU fiscal requirements

Indeed, when the effects of the global crisis were perceived, and even before the new Stability and Growth Pact entered into force, the political leadership in Italy felt the urge to present the country, to both the European partners and the market, as reliably committed to financial stability, and as ready to cut down social expenses, if needed, to meet balance requirements. For example, the urgent fiscal manoeuvre enacted with Decree-Law 31 May 2010, no. 78 (converted into Law 30 July 2010, no. 122) was presented to the public opinion as a response to the effects of the global financial crisis, and also as a package of measures required to comply with the European coordination of economic policies. Several provisions of this Decree-Law were later challenged before the Constitutional Court (see below). Later, in August 2011, the Government unilaterally announced that Italy would achieve a balanced budget by the end of 2013, and not by the end of 2014 as previously envisaged. This commitment was later confirmed several times: in October 2011, in a lengthy letter to the Presidents of the European Council and Commission; in the budget documents adopted at the end of that year; and, later, also in the Constitution.

Indeed, in fulfilment of the Europlus Pact (adopted by the European Council on 24-25 March 2011) and of the Fiscal Compact, the principle of a balanced budget – according to European requirements – was entrenched in Article 81 of the Italian Constitution. The Parliament passed the constitutional reform (Constitutional Law 20 April 2012, no. 1) quickly, in about six months, well before the entry into force of the Fiscal Compact (January 2013).

Despite this effort to display such a dedicated zeal for fiscal discipline, in November 2013, the European Commission delivered an opinion, based on a Fall 2013 forecast, expressing concern that the Draft Budgetary Plan for 2014 would not ensure compliance with the SGP rules. In particular, the Commission Forecast points out the risk that the Draft Budgetary Plan would not allow a reduction of the debt-to-GDP ratio in line with the debt reduction benchmark. The Commission is also of the opinion that Italy has made limited progress with regard to the structural part of the fiscal recommendations issued by the Council in the context of the European Semester. The Commission therefore invites the authorities to take the necessary measures within the national budgetary process to ensure that the 2014 budget will be fully compliant with the SGP and, notably, that it will address the risks identified by the Commission in its assessment. Furthermore, it invites the authorities to accelerate progress towards implementation of the fiscal recommendations under the European Semester. For Italy there is a risk that based on current plans the debt reduction rule could be breached in 2014.

The Budget Plan 2014 (Law no. 147) was passed by the Italian Parliament on 27th December 2013. It entered into force on the 1st of January 2014 and it consists of one single article with 749 paragraphs. From a preliminary analysis it does not seem to contain any significant provisions on welfare apart from the refinancing of the ‘social card’ allocating 400 euros to families with economic difficulties.

C) Other sources of pressure: the letter from the ECB

Nevertheless, during the crisis years new – and somewhat extraordinary – sources of pressure were also applied to Italy by EU institutions. The most notable example is arguably the 5 August 2011 letter signed by Mario Draghi (at the time, Governor of the Italian central bank and incoming President of the ECB) and Jean-Claude Trichet (at the time, President of the ECB).

This unusual letter expressed concern about the state of Italy’s government bond markets, as well as about the standing of Italy’s sovereign signature: indeed, during the summer of 2011 the spread between Italian and German government bonds had widened, raising concerns about Italy’s capacity to find the financial resources necessary to keep the administration running. The letter consequently recommended a very detailed and precise reform agenda, that was deemed necessary and could not be postponed any longer, in order to meet the EU criteria and to “balance the books”. It required vast and

far-reaching interventions, including expenditure cuts, interventions in the pension system and a systematic review of performances in critical welfare sectors (health, education). The letter went so far as to suggest not only the timetable, but also the preferred instrument (decree law); and also called for the introduction of automatic deficit-reducing clauses. Compliance with these requests was implicitly presented as a condition for ECB financial support, namely through massive purchase of Italian government bonds on the secondary market. The letter was meant to remain confidential (the ECB refused to divulge it), but was immediately leaked to the press; and this gave greater momentum to the austerity policies later enforced, including the pension reform.

However, the press raised the suspicion (correct in my opinion) that the contents of the letter might have been suggested to the ECB, and later leaked to the press, by the Italian Government then in charge, with the aim of using requests from the ECB as a tool for pressure on the Government's own majority in Parliament¹. Undoubtedly, the document was written by someone with a high degree of familiarity and knowledge of the situation in Italy, and with a very clear policy agenda in mind.

3. What are the main challenges to fundamental rights arising from these changes?

In Italy, the economic crisis brought about striking institutional and constitutional events, but did not breach constitutional legality: neither with regard to democratic processes and the political system, nor with regard to the guarantee of welfare rights – even if these rights had to be balanced, to some extent, against the urgent need for expenditure cuts. In order to present the relevant problems, the analysis must follow simultaneously two different paths, since they are, from a constitutional law standpoint, tightly related to each other (Morrone 2014).

A) The political background

In Italy – analogously, to some extent, to Greece and Portugal – the economic crisis has gone hand in hand with a political crisis: the executive branch seemed to receive its legitimacy more from necessity and emergency, than from normal democratic processes.

Consider the two most recent Italian governments, both strongly supported by the President of the Republic. The “technocrat government”, led by Mario Monti (16 November 2011 – 27 April 2013), was sworn into office after the collapse of the fourth Berlusconi administration. Mario Monti was seen as the high-profile personality able to replace Silvio Berlusconi and to lead a new unitary government in Italy with a view to implement reforms and austerity measures.

The outcome of the elections in February 2013 led to a political deadlock and to the re-election of Giorgio Napolitano as President of the Republic by the Italian Parliament. After Pierluigi Bersani,

¹ It is interesting to mention that the Conclusions of the European Council 19/20 December 2013 consider the so called contractual arrangements that seem, in substance, to pursue a not very different path from the one of the letter. In particular, the Conclusions state that «Mutually agreed contractual arrangements will be a "home-grown" commitment which constitutes a partnership between the Member States, the Commission and the Council. The National Reform Programme submitted by each Member State in the context of the European Semester will be the basis for the mutually agreed contractual arrangements, also taking into account the Country Specific Recommendations. Mutually agreed contractual arrangements will be tailored to the needs of each individual Member State and will focus on a limited number of key levers for sustainable growth, competitiveness and job creation. The economic policy objectives and measures included in the mutually agreed contractual arrangements should be designed by the Member States, in accordance with their institutional and constitutional arrangements, and should ensure full national ownership through appropriate involvement of national parliaments, social partners, and other relevant stakeholders. They should be discussed and mutually agreed with the Commission, before being submitted to the Council for approval. The Commission will be responsible for keeping track of the agreed implementation of the mutually agreed contractual arrangements on the basis of jointly agreed timelines».

leader of the relative majority party (Democratic Party, PD), failed to form a government, Enrico Letta (vice-secretary of the same party) and his cabinet were sworn in on 28 April. This was a coalition government, under the aegis of President Napolitano, and was supported by the two main political parties – PD (centre-left) and Berlusconi's People of Freedom (centre-right) – together with a third, smaller centre-right party, to which Mario Monti belonged.

As regards the Italian political system, it is possible to observe that: a) these two governments are the product of the political system and of the weakness of parties and political leaderships, rather than the result of external pressures or a "diktat" of the economic crisis; b) the political agenda has been set following, at least in part, the EU's and international institutions' requests.

Even the introduction of the balanced budget principle, through the aforementioned reform of Article 81 of the Constitution², was conducted in full respect for the autonomy of politics (and the democratic decision mechanisms) and for fundamental rights.

The reform was mainly criticized by the Italian doctrine both for its excessive speed and for the small amount of time that Parliament devoted to its debate (see Luciani 2012, arguing that the ECB letter contained a suggestion, not a firm request of constitutional reform; see also about the constitutional consequences of the financial crisis Groppi 2013 and 2012; Giupponi 2014); and for the margin of flexibility that it provides. Other scholars, conversely, expressed different positions: on the one hand, a less negative opinion, recalling the *Bundesverfassungsgericht* decision of 12 September 2012, affirmed that a balanced budget is a value that, instead of being inimical to democracy, aims to preserve it (Morrone 2014); on the other hand, it was stressed that the reform was not very relevant, because the duty of the balanced budget was already included in EU legislation and, for this reason, already prevailed over national law (Tosato, 2013).

B) The 'most aggressive face' of the economic crisis and the role of the Constitutional Court

There is no doubt that the economic crisis and 'austerity' policies represent a terrible mix that, by strongly contracting the resources devoted to social policy activities, affect the distribution and the effectiveness of the social services and social rights.

Legislation adopted in these very last years, particularly under the Monti government, has been characterized as enacting urgent and immediate interventions. Because of this, most of it took the form of decree laws (as suggested by the ECB letter), in order to receive a prompt application, and was christened with evocative names, such as the 'Save Italy' Decree (Decree Law 6 December 2011, no. 201). Many of these decrees included both permanent reforms and temporary measures: e.g. the 'Save Italy' Decree included the pensions' reform and a two-year stop to inflation-adaptation for most pensions.

² In the translation available on the website of the President of the Republic, the new Article 81, entered into force on the 1st January 2014, reads as follows: «The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle. / No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle or, subject to authorisation by the two Houses approved by an absolute majority vote of their Members, in exceptional circumstances. / Any law involving new or increased expenditure shall provide for the resources to cover such expenditure. / Each year the Houses shall pass a law approving the budget and the accounts submitted by the Government. / Provisional implementation of the budget shall not be allowed except by an Act of Parliament and only for periods not exceeding four months in total. / The content of the budget law, the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by an Act of Parliament approved by an absolute majority of the Members of each House in compliance with the principles established with a constitutional law.» Constitutional Law no. 1/2012 also changed Articles 97, 117 and 119 of the Constitution, in the light of the balanced budget principle. The same Law (Article 5) also contained other, substantive, provisions corresponding to what is mentioned in the sixth paragraph of the new Article 81.

It is worth recalling that the decree laws adopted by the Berlusconi and Monti Governments in 2011 (nos. 98, 138 and 201) and converted (with many adjustments) into law by the Parliament, totalled an overall net adjustment in general government spending of EURO 48.9 billion for 2012, of 75.7 billion for 2013, and of 81.3 billion for 2014 (respectively, 3%, 4.6% and 4.8% of the GDP).

This legislation may imply for the Constitutional Court the need to re-calibrate its balancing test, as the pressure of financial emergency has caused a compression of social rights. Besides, it generated a tendency towards the expansion of the role of the State in legislative spheres traditionally and constitutionally belonging to the Regions: and this led to a new interpretation of the constitutional division of competencies between State and Regions. The jurisprudence of the Constitutional Court blatantly shows that, in an era of sluggish economic development, the territorial allocation of public resources calls for a reorganisation, with a stronger role played by the central State (Morrone 2014).

In order to “save” this kind of legislation, the Constitutional Court started to use, perhaps excessively, the constitutional clause assigning to the State the powers for the “coordination of public finance”: e.g., through crisis legislation, these powers have been called into action also to deal with century-old problems of administrative organization, such as the alleged inefficiency of some local government bodies (provinces, small municipalities). The Constitutional Court has so far given such a broad construction to the concept of “coordination of public finance”, that this has almost worked as a clause “*bonne à tout faire*”.

The crisis legislation has been massively challenged before the Court both by Regions and by ordinary courts. Anticipating a conclusion of our analysis, the Court’s general view is that the legislative choices enacted in Italy during the economic crisis, even if they provide severe cuts of public expenses, still seem to fit within a welfare model compatible with the one designed by the Italian Constitution³.

To provide a clear picture of this, it is important to turn to the jurisprudence of the Constitutional Court⁴. But, before considering some of its latest and most telling decisions, it is necessary to recall the traditional attitude of the Court towards the implementation of social rights.

Regarding the relationship between social rights and available resources, the Constitutional Court has always used the so-called “balancing test” (*bilanciamento*), preserving legislative discretion on the distribution of public resources (Dec. no. 455/1990). The Court ruled against legislative measures (finding them unconstitutional) when the “essential core” of a constitutional entitlement had been infringed (e.g. Dec. no. 304/1994 concerning health; Decisions nos. 99 and 390/1995, concerning social security, where the Court justified a restrictive regulation in the name of financial difficulties and of the enactment of a system of protection able to offer certainty to present and future retired workers).

Even the long-standing problem of the so called “vested rights” has to be put in perspective, particularly when it concerns social security benefits to be enjoyed for a long period of time: the legitimacy of restrictive measures is justified in the name of economic necessities to prevent differences in treatment among categories of workers (Decision no. 349/1985, see Morrone 2013, 5). More recently, in Decision no. 248 of 2011, the Court indicated that “the right to medical assistance is financially conditioned because the need of ensuring universality and completeness of the assistance system in our country clashes with the shortage of the financial resources that can be devolved annually to the health sector” (see Salazar 2013, 10).

³ The guarantee of the social rights enshrined in the Constitution is conditioned by the financial resources made available by ordinary legislation (Baldassarre 1989).

⁴ The decisions of the Italian Constitutional Court are available at www.cortecostituzionale.it. Each year, the most important cases are translated in English.

It is true that, in an earlier period, the Court invented a kind of decisions, the so called *additive di principio* (rulings adding a new principle to a body of law) in order to guarantee the justiciability of social rights ‘forgotten’ by the legislator⁵. But it is also true that, since the 1990’s, the Court has reduced the tightness of its control on legislation implying spending reductions. Following that path, the Court’s case law has consented to relevant reductions of welfare spending, on condition that the essential core of constitutionally protected⁶ rights is respected (from Decision no. 304/1994 onwards), or that the *modus operandi* of the spending cuts do not amount to a manifest violation of reasonableness criteria (see among others Salazar 2000; 2013; Pezzini 2001; Benvenuti 2012). Lately, expressions like “conditioned rights” (the leading case is Decision no. 455/1990), “gradual nature of onerous reforms”, “shortage of available resources”, “the value of the financial equilibrium” have become keywords in the jurisprudence of the Court.

Turning to the latest decisions taken by the Court, I will recall just a few examples related to social rights.

In Decision no. 236/2012, the Court ruled on the constitutionality of article 8 of Regional Law (*Regione Puglia*) no.4/2010 (*Urgent health and social services measures*). Article 8 prevented local health agencies from stipulating agreements with private entities, established outside the Region, to supply home physical therapy to disabled patients resident within the Region. This article was argued to be in violation of the right to health enshrined in the Constitution (Arts. 32 and 117, third clause) and of the principle of equality (Art. 3 of the Constitution). The Court declared that this measure of reduction of expenditure (in the recent past, the Region had approved such agreements, incurring in relevant expenses) was unconstitutional, because the restrictive effects of the provision affected the needy, in particular the disabled, who need home assistance. The freedom of choosing among treatments, and treatment providers, is an element of the right to health, especially for patients who were already being treated by bodies situated outside the Region.

In other decisions on crisis legislation, the Court recalled its past case law on the suspension of wage rises for public employees during the 1992 financial crisis. In order to assess this kind of measures, at the time, several rulings held that, at critical junctures in the economic and financial life of the country, when there is an urgent need to restore a balance in the budget, sacrifices – even significant ones – may be imposed; and they are compatible with the equality and reasonableness principles, provided they are exceptional, temporary, not arbitrary (i.e. not unreasonably allocated among different categories) and consistent with the stated aims.

⁵ This typology of decisions was adopted by the Court as an attempt to create a sort of alliance between the Court and the judges of lower courts. In its decision, the Court states a broad principle, that other judges are entitled to use in pending cases, even before the legislator intervenes to fill the gap and establish a new set of rules complying with the principle. This is particularly important because there is no guarantee that the legislator will act promptly. However, recently the Court has almost abandoned these decisions, mainly because of the lack of intervention by the legislator and of the difficulty in applying a principle often too abstract to solve any single case.

Very briefly it has to be recalled that in Italy, when for the first time, in the mid ‘70s, budget problems required reductions of public expenditure, a cultural battle to reduce the welfare state arose. It was the time of the controversy about ‘costs of welfare state’ and the relationship between citizens’ rights and duties (see for all Luciani 2013). In this cultural atmosphere, part of the Italian doctrine asserted the different structure of social rights, inferring that these rights, unlike civil rights, ‘have a cost’, and for this reason have to be considered ‘conditioned’ upon the availability of economic resources. The problem of the so called ‘financial coverage for rights’ brought legal scholarship to speculate whether the constitutional duty of establishing an adequate coverage for public expenses also concerns the ‘costly’ decisions through which the Constitutional Court recognizes social rights.

⁶ The theory of the essential core was elaborated mostly with regard to the right to health (Rovagnati 2012, Minni Morrone 2013): not only because this right has been the target of many laws aiming to reduce the expenses for the relevant health care services, but also because the Court repeatedly stated that the essential core of the right to health entails the right to urgent and not-deferrable medical treatment for everyone, including irregular migrants.

In Decision no. 223/2012, these principles were used to subject to a very strict scrutiny, and therefore to declare unconstitutional, a provision of Decree Law no. 78/2010 (the first decree openly addressing the on-going financial crisis: see above) blocking wage rises for magistrates. The Court highlighted that the provision took away benefits already allowed, with formal acts of the Government, to the magistrates; and that its effects, time wise, went beyond the short term, and also beyond the financial planning horizon of the decree. It was also noted that, due to the specialty of their role, magistrates deserve special guarantees, also with regard to economic entitlements. Moreover, in another part of Decision no. 223/2012 (dealing with a different provision, establishing a 5% reduction of public employment gross salaries over 90,000 EUR) and later in Decision no. 116/2013 (concerning a 5%-15% “equalization contribution” on pensions over 90,000 EUR) the Court held that the equality principle does not allow special taxes, however formulated, to be imposed only on certain categories (e.g. magistrates, public employees, pensioners): also in times of financial crisis, income taxation should be as uniform as possible.

In the objectionable Decision no. 310/2013, concerning financial emergency measures which block wage rises and neutralize service seniority for university lecturers and professors, the aforementioned principles were again at stake, but the Court decided in the opposite way compared with its Decision no. 223/2012, reverting to its case law on the suspension of wage rises for public employees during the 1992 financial crisis. In this last decision, the judicial review of reasonableness was strongly conditioned by the specific features of the single issue at stake; and, this time, the Court recognized more importance to the scope of the questioned measures⁷.

With regard to State-Regions litigation in the crisis years (see above), it is worth recalling that the issues at stake often impact on welfare rights, since areas like health care and social services mostly come within the responsibility of regional and local government.

For example, Decision no. 104/2013 deals with the financial support allowed by a Region to oncological patients needing treatment in regional facilities: this support has been challenged by the Government, and struck down by the Court as an additional level of service, not provided for in the agreement between the State and the Region in question for the reduction of the financial imbalance in the health care budget of the latter. Many Regions have the same problem and the agreements between them and the State are very detailed and restrictive with regard to the reorganization and rationalization of health care services. A strict enforcement of these agreements, due to financial constraints, impacts both on regional autonomy and welfare rights.

However, in other decisions the Italian Court also felt the necessity to state that measures taken by the State – in particular those combining spending cuts and invasions of competences constitutionally allocated to the Regions – cannot be justified solely in the name of the *salus rei publicae* in time of financial emergencies (Decisions nos. 148 and 151/2012); and that transitional limitations to the financial autonomy of Regions, even when they are constitutionally allowed in a time of crisis, should never become permanent restrictions (Decision no. 193/2012).

⁷ In the decision the Court stated that it had identified “the exceptional, transitory and non arbitrary character of the requested sacrifices, related to the specific and temporary aim of containing public spending and therefore it excluded the unreasonableness of the measures that had been taken [...] The containment and rationalisation of public spending, through which a balanced budget may be obtained, imply severe sacrifices, such as those under scrutiny, that are justified by the economic crisis. In particular, due to the multi-annual perspective of budgeting, these sacrifices must inevitably last for periods, albeit defined, that are longer than those taken into consideration in the Constitutional Court’s case law related to the 1992 budget law. The provisions under review pass the reasonableness test given that they are aimed, in a perspective of solidarity, at reducing expenditure in the entire sector of the public administration within– albeit with differences deriving from the different professional categories – for a limited time period that takes into account multi-annual budgeting.”

Since this “crisis-related” legislation was adopted mainly by the Government, it was of great significance when the Court held that, if enacted through decree law, legislation addressing the crisis should focus on clearly defined interventions, with precise and immediate financial effects, abstaining from complex general reforms, which should rather be passed at the end of a full parliamentary debate, through ordinary law (for this reason, Decision no. 220/2013 held that a general reform of provinces – a local government body, located at an intermediate level between regions and municipalities – cannot be adopted through a decree law).

4. Preliminary Conclusions

In the opinion of the majority of Italian authors, the crisis, its effects on the Italian economy and public finance and the measures enacted to react to these effects, are calling into question at least part of the foundations of the constitutional State. Even in Italy it is true to say that the financial crisis challenged both the categories of democracy and justice that are at the core of the constitutional State.

Yet, the economic and financial crisis is so aggressive because it affects the already fragile body of the constitutional State, made even weaker by different but convergent forces that, in particular because of globalization, aim to strike at its very heart (see Morrone 2013).

The Italian Court has not (yet) been involved in scrutinizing severe manoeuvres like the ones enacted in Portugal that brought the Portuguese Constitutional Tribunal to reaffirm the guarantee of the essential core of fundamental rights against austerity policies (I refer to the decision taken on the 5th of July 2012 on the three years’ suspension for public servants of both summer bonus and end-of-year bonus).

But it is true that when called to rule on the financial crisis measures, in 2012 and 2013, the Constitutional Court has taken (forcedly, I add) a very cautious, and sometime ambiguous stance: while reaffirming that constitutional principles must be preserved, and that values such as equality, solidarity, autonomy of local government cannot simply yield before economic concerns and must be reasonably balanced with them, the Court – just as it did in previous times of crisis – keeps these concerns in high consideration and scrutinizes each austerity measure on a case by case basis, taking into account its specific features and effects.

On this issue, according to the Constitutional Court’s case law, the principles of efficiency and economy do not always prevail on the others: a judgment has to be made case by case. The economic crisis cannot be the only factor taken into account: ruling on the closing down of tribunals located in smaller towns (Dec. no. 237/2013), the Court held that, also in this kind of organizational reform, “it is necessary to assess the reasonableness and proportionality of the balancing among the several constitutional interests possibly involved”, and that this “is particularly true when complaints concern the prevalence of efficiency and economy on solidarity”.

One could say that social rights are put too much into the hands of the legislator and that the review carried out by the Constitutional Court has revealed itself to be too mild. But the response to this observation is the fact that the duty of the Constitutional Court is not to legislate. Are social rights taken seriously by the Court? I think that nowadays not only the Italian Constitutional Court but more in general European constitutional courts do not have an alternative, since they do not have case law to refer to when dealing with social rights in the crisis. Courts, for this reason, are not predictable. However I hazard a guess: in the current jurisprudence of the Italian Court one may see the glimpse of a latent, implicit and random use of the ‘state of emergency’.

It appears quite striking that the implementation of social rights at national level is referred to in a context in which the legislator decides to make cuts in an over-rapid, conflicting and confused way, and the Court is requested in a few months’ time to decide those cases, thus playing a role that the legislator was not able to play.

Nevertheless, together with the consequences of an abnormal level of public debt, the financial crisis affected the guarantee of social rights in Italy, in ways that might become intolerable if protracted for a longer time. In closing this paper, it is worth showing some data (see Salazar 2013) that already are affecting daily life of Italians, concerning the national funds which should be distributed to the Regions in order to supplement their welfare policies and services: the fund for welfare policies amounted to 656,4 million in 2008 and was reduced to 518,2 in 2009, to 380,2 in 2010, to 178,85 in 2011 and to 10,8 in 2012; the fund for equal opportunities was reduced from 64,4 million in 2008 to 11 million in 2012; the fund for family was cut down from 346,4 million in 2008 to 31,9 million in 2012; the national health fund experienced reductions of 900 million in 2011, 1,8 billion in 2012, 2 billion in 2013 and 2,1 billion from 2015.

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FUNDAMENTAL RIGHTS CHALLENGES TO ITALIAN LABOUR LAW DEVELOPMENTS IN THE TIME OF ECONOMIC CRISIS: AN OVERVIEW

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Introduction

Though significantly affected by the economic crisis, Italy never applied to the European Stability Facility (and later Mechanism) with a view to obtain financial aid. Consequently - and differently from Greece, Portugal and Ireland - no Memorandum of Understanding has ever been addressed to Italy by the Troika.

Yet if one looks at the developments of Italian labour legislation over the past few years, the difference with Greece and Portugal becomes less evident. Let me be clear: this definitely does not mean that Italian labour law developments in the last few years have reached the severe harshness of Greek and Portuguese legislation. However, the substantive issues which have been reformed in Italy since the explosion of the economic crisis are quite similar to the ones which have been dealt with within the countries most dramatically affected by the crisis.

The measures of the Italian crisis legislation are quite variegated; however, if read in the light of this research project's main aims, they could be grouped into four chapters, which will probably raise no surprise to an audience already accustomed to the 'economic crisis and labour law' issue: the first refers to the freezing of Public sector salaries (§.1); the second concerns Fixed term work (§. 2); the third Derogatory collective bargaining (§. 3), and the last Individual Dismissals (§. 4).

I will briefly deal with the four issues I just mentioned by referring to both the legislative changes and the fundamental rights' challenges affecting each of them.

1. Public sector wage freezing

A short introduction is needed in order to better understand the much questioned and puzzled history of public sector wage freezing in Italy. Italian public employers are divided into two broad categories: those whose wages are determined by collective agreements; and those whose wages are determined by a variety of legislative and statutory instruments.

In 2010 a Decree Law was adopted (n. 78/2010, later converted into Law n. 122/2010) introducing, among others, the following measures: *a)* a proviso preventing any wage increase until 2013, later extended to 2014, has been adopted regarding both categories of public employers above mentioned;

b) a so-called 'solidarity contribution' was introduced affecting higher public salaries beyond €90.000.

a) The different ways of determining public employees' wages explains why the constitutional review of the measures affecting them has been a process of bits and pieces which at the moment leave no space for a unitary, coherent and comprehensive judicial response to the public wage freezing issue.

At this moment in time, the Constitutional Court has handed down a series of judgments scattered over the period October 2012 to December 2013 (Cases n. 223/2012, 304/2013, 310/2010) – each of them dealing with one particular category of workers and each of them based on quite contradictory legal arguments.

An inductive appraisal of this constitutional jurisprudence would lead to a twofold assessment. On the one side, it must be emphasized that - differently from what has happened with constitutional complaints lodged by Greek or Portuguese public employees - the Italian scenario offers a quite rare - if not unique - example of successful litigation: in one specific circumstance, indeed, the claimants won the case and the restrictive legislation was repealed.

On the other side, however, the bulk of the Constitutional Court jurisprudence on public sector wage freezing is on the whole rather disappointing. First, because it has given rise to an irrational inequality among public employees, some of them having been 'saved' from the pay cuts and some of them not. Second, because in the very same judgment proclaiming the unconstitutionality of the wage cuts the Court relied much more on the specific nature of the job performed by public employees at stake in that particular case, rather than on what I would call the general principles of the economic constitution seen in a fundamental social rights perspective.

The real 'matter of principle' - i.e.: how fundamental social rights might affect socially restrictive national measures induced by the economic crisis - has not been tackled openly by the Court because, for a series of procedural reasons not worth recounting here, among the many lawsuits coming from many different public employees, the only successful claim related to one particular category of public employees: i.e.: the judiciary. In Case n. 223/2012, the Court essentially stated that cutting the salaries of magistrates is contrary to the constitution because it is to be intended as a challenge to their independence, which is both a domestic constitutional value, and a principle stated in Art. 6 of the European Convention of Human rights: the independence of the judge is indeed part of the right to a fair trial. And a judge is truly independent - the Court stated - also to the extent that his wage is not affected by any cut and/or freezing.

Is that a reasonable and convincing statement, able to justify the fact that Italian magistrates did not and will not suffer any wage detriment when - as it will be said below - most other public employees will do so? Probably not; the judgment is neither reasonable nor convincing. However, it might help to draw a quite unexpected conclusion as far as the main theme of this research project is concerned: curious as it might appear to be, the international fundamental right avoiding national restrictive social policies in time of economic crisis, has not been a fundamental social right, but rather the right to a fair trial. Quite surprising, indeed.

b) The second part of the same "Judiciary" judgment (Case n. 223/2012) was devoted to assessing the constitutional acceptability of the second measure adopted within the frame of the EU austerity-driven national wage policies; i.e., the above mentioned 'solidarity contribution' to be paid by public employees earning more than €90.000 per year.

This second kind of wage reduction too has been considered by the Court as unconstitutional, and it has therefore been repealed, for the satisfaction of the 'richest' public employees. But, again, has this happened following a fundamental social rights logic? Not really, actually. The legal argument used by the Court - which I will describe in a while - was indeed another *escamotage* used by the Court not to tackle overtly the real point of the matter: that is, the constitutional legality of reducing public wages as a response to the budget restrictions imposed by the EU austerity policies. As a matter of fact, this was precisely the arena in which the whole matter was supposed to be played. In its statement of defense, the State defended the legislator's choice claiming that wage cuts had to be necessarily introduced due to the 'suggestions' coming from the notorious European Central Bank letter.¹ However, the Court refused to play on this ground; it declined the difficult task to take a position for or against the constitutional acceptability of EU austerity policies implemented through such atypical

¹ In August 2011, the ECB sent an informal letter to the Italian government, "asking" it to introduce a series of "structural reforms", including 'a significant reduction of the cost of public employees, by strengthening turnover rules and, if necessary, by reducing wages'.

instruments such as central bank letters, and it choose to deal with the case by applying different and less problematic tools.

In brief, the Court stated that rather than a mere wage reduction - which would have been admissible as such - the solidarity contribution must be considered as a tax, which on the contrary is not admissible, because a tax imposed only on public employers is contrary to the principle of equality. Here comes, for the first time in the Court's reasoning, a 'fundamental rights challenge' to the austerity policies: the principle of equality is evoked, even if in the specific and limited form according to which each one should pay taxes according to his/her economic capacity and irrespective of his/her employment status.

When all is said and done, by relying upon the independence of the judiciary, and by 'transforming' wage cuts into taxes, the Court cleverly decided the case without entering into the dangerous minefield of the relationship between economic crisis, EU austerity policies, balanced budget requirements and socially restrictive national legislation.

However, at the margins of the Court's deliberative process, there are some fragments where the Court seems to talk more to future legislators rather than to the actual parties of the case. And in doing so it finally enters into the core of the matter, by pointing out some general principles, among which there are some related to the very notion of financial emergency.

To begin with, the Court recalled some of its previous decisions of the nineties in which it had admitted similar cuts of public wages on the basis that they were limited to one year duration. And although when dealing with matters of principles the 'time factor' could be considered a trivial one, the Court relied very much on that. Sacrifices are admissible - the Court stated - only insofar as they are not unreasonably extended in time.

Furthermore, the Court did not discharge wholeheartedly the idea that austerity measures can be selective and not universal. However, such selectivity must be rational and justified: 'The uniqueness of the economic situation allows the legislator to make use of unique instruments', it said. 'However, it is the duty of the State to ensure the respect of the constitutional order, which is not indifferent to the economic and financial reality, but which cannot allow exceptions to the principle of equality'.

In subsequent judgments, however, the Court did not stick to its own statements. When called to decide about the constitutionality of other measures shrinking wages of other categories of public employers (Case 304/2013 concerning diplomats, and Case 310/2013 concerning university professors and lecturers), the Court did not live up either to the 'time factor' argument, or to the principle of 'rational selectivity' it had featured only some months before. Contrary to what it had decided for the judiciary, the Court considered that the wage cuts affecting diplomats and university teaching staff were to be considered as fully justified even if their extent in time is lengthier than the one provided for magistrates (four years instead of three), and albeit they affect workers whose salary is generally lower than €90.000 per year.

All in all, what is left after the completion of this first round (others will probably follow) of constitutional judgments on austerity-induced wage restrictions, is a fluttering impression of a "random rationality" whereby the same legal arguments lead to different legal outcomes. And whereby, at the end of the day, the only ones who have been 'saved' by the Court are probably those who needed it least.

2. Fixed term work

The Italian legislation on fixed-term work is probably the most frequently amended legislation in the world. Only to mention the reforms which have been implemented since the beginning of the economic crisis, it is possible to enumerate no less than seven or eight reforms.

This is neither the time nor the place to get into details. Suffice it to say that the obsessive fascination of the Italian legislator toward fixed term work is linked to its firm belief that it is crucial to any successful employment policy: *a)* to make it easier to hire on a fixed term basis on the one side, and *b)* to reduce the costs of the relative remedies on the other side.

a) Just to mention but some of the recent legislative developments capable of raising a significant number of ‘fundamental rights challenges’ within and across the national borders: *i)* the 2012 labour market reform has introduced the so-called ‘free fixed-term contracts’, providing that whereas for the conclusion of a fixed-term contract an objective reason is generally required, no reason whatsoever is required for the conclusion of the first contract, provided that it does not exceed one year; *ii)* a 2013 amendment has changed the so called stop-and-go regulation, that is the period of time which must separate the previous fixed-term contract from the subsequent, with a view to limit the employer attitude to cover stable job positions with a series of continuous fixed-term contracts; *iii)* in order to limit the amount of a huge fixed-term litigation in the education sector, where teaching and non-teaching staff are hired on what I would call a ‘permanent fixed-term basis’, legislation has been passed providing that all the rules limiting the abuse of fixed-term contracts according to Clause 5 of the 1999/70/EC² Directive do not apply to school staff.

b) Still more important are the remedial reforms. Since the beginning of the crisis, several pieces of legislation have been passed with a view to limit the economic consequences of the litigation related to unlawful fixed-term contracts. Let me briefly describe this point.

Until 2010, workers hired through unlawful fixed-term contracts could count on two quite effective kinds of remedy: they could claim the unlawfulness of the contract without any time limit; in case of a successful claim, they could obtain both the conversion of the fixed-term contract into an open-ended contract, and full compensation of the damages suffered, consisting of the lost wages from the expiry of the unlawful contract to the actual recovery of the employment relationship following the judicial declaration. In 2010, legislation has been passed (Law n. 183/2010) to set quite a short time-limit for claiming the unlawfulness of a fixed-term contract; and providing that a damage limitation clause applies to such claims.

Seen in the light of the judicial challenges to such restrictive measures, a twofold fundamental rights challenge has actually arisen:

As concerns the measures above listed under *a)*, the exclusion of school staff from fixed term legislation limitations – already stated in 1999 and later confirmed in 2011 (Law n. 106/2011) – has been challenged by the Italian Constitutional Court in what is to be considered a truly historical step. For the first time in its history, indeed, the Italian constitutional court has referred a preliminary ruling to the ECJ. In July 2013, it has asked the Luxembourg court whether ‘Clause 5(1) of the 1999/70/EC Directive [must] be interpreted as precluding the application of a domestic provision which laying down rules on the allocation of the teaching posts [...] goes on to provide that this is to be done by allocating annual replacements pending the completion of competition procedures for the recruitment of permanent members of the teaching staff, thus permitting fixed-term contracts to be used without a definite period being fixed for completing the competition’ (Case C-418/13, pending).

² Providing that ‘To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships’.

As concerns the measures above listed under *b*) – i.e. the shortening of the limitation periods to claim the unlawfulness of fixed-term contracts, and the damage limitation clause - the fundamental aspect linked to the fiscal policy rationale of such legislative changes is constituted by the fact that the legislator has changed the rules of play while play was continuing. It must be recalled here that most of the lawsuits concerning fixed-term work had been brought to court by workers employed by the public administration and publicly owned enterprises: namely, the education sector and postal services.

Now, given the extension of such litigation, and fearing the cost of its consequences for the public budget, the national legislator passed ‘retroactive rules’ capable of changing significantly the final outcome of a huge litigation which at the time of their adoption still was in the course of its development. And indeed, the ‘budgetary difference’ between the previous and the new (retroactive) rules is quite evident: it is one thing for a - say - postal worker to be able to claim in court for years after the expiration of an allegedly unlawful fixed-term contract, and to be able claim full compensation covering all the lost wages from the expiry of the contract to the re-starting of the job (which could mean, considering the notorious slowness of the Italian labour trials, obtaining compensations amounting to five or more years of salary). Another thing is being obliged to claim within sixty days, and being entitled to obtain a compensation not exceeding twelve months of salary, as Law. 183/2010 provides.

A retroactive rule acting on the remedy side of the legal discipline was therefore the ‘Italian way’ to amend fixed-term legislation with a view to limit the public budget consequences flowing from it. There is enough to imagine that - once again, after what has happened for wage freezing (see *supra* §. 1) - the fundamental right evoked in order to challenge the constitutional legality of the new socially restrictive measures was the right to a fair trial under Art. 6 ECHR. And indeed, it is exactly the compatibility with Art. 6 ECHR of retroactive legislation limiting labour-related rights which was the object of a Judgment of the Constitutional Court in 2011. It affirmed – referring to the Strasbourg court jurisprudence - that retroactive legislation is perfectly admissible provided that there is a public interest reason for that (Constitutional Court, judgment n. 303/2011). In its judgment, the Constitutional Court identified the public interest in the ‘need for certainty in legal relations between all parties involved in the production process, in order to overcome the inevitable differences application which had resulted from the previous system’. It would not be arbitrary to infer - however - that the ‘real’ public interest issue pursued by the retroactive legislation in question had little to do with legal certainty and much more to do with budgetary considerations.

This is a field, however, in which a conflict between the Constitutional Court and the Strasbourg Court actually occurred, precisely regarding fixed term contracts of non-teaching school staff. Judging on a national rule excluding some benefits for fixed term school staff then hired on a permanent basis, the European Court of Human Rights has indeed affirmed that retrospective rules are admissible to the extent that there is a public interest reason, but that the notion of public interest has to be used reasonably; something that did not happen in that particular case, given that retrospective legislation excluding benefits for fixed term workers was justified by financial interests (*Agrati et alii*. Case 43549/08 ECtHR, Decision of 7 June 2011).

And what is more interesting to note is that the above described conflict between the two courts will be soon enriched by the intrusion of a third court, i.e. the Court of Justice to which the labour court of Naples has recently referred the following preliminary question, again concerned with the case of a postal fixed-term worker who – due to the supervening retroactive legislation had been denied full compensation of the damage suffered. Again, the fundamental right evoked as a barrier to this sort of ‘emergency’ legislation is the right to a fair trial. The Naples court asked indeed: Do the general principles of legal certainty, equality of arms in proceedings, effective judicial protection, and the right to an independent and impartial tribunal and, more generally, to a fair hearing, guaranteed by Article 6(2) of the EU Treaty read in conjunction with Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, preclude the adoption of a provision which alters the consequences of

ongoing proceedings to the detriment of the employee and to the advantage of the employer? (Case C-89/13, submitted to the Court of Justice on 22 February 2013).³

3. Derogatory collective agreements

It is well known that in all the Memoranda of Understanding addressed by the Troika to the sovereign debt loan states, as well as in the Excessive Deficit Procedures, and in the Country specific Recommendations, the reform of collective bargaining is a sort of common denominator of EU policies, going in the double direction of a decentralization to company level, and of a possibility to derogate at that level higher-level collective agreements.

As concerns Italy, the suggestion to reform collective bargaining was indeed part of the famous letter of the European Central Bank, which is dated August 2011.

Just a few weeks before, in June 2011, a nation-wide intersectoral agreement – considered by many as an event of epochal importance in the domestic industrial relations system - had admitted for the first time in Italy the possibility for company level agreements to derogate national industry agreements. However, such a possibility was conditional to the presence of an explicit exit clause in the national agreements, authorizing the derogation and circumscribing its substantial extent.

The chronological succession of events has a role here. The above mentioned intersectoral agreement was signed on 28 June 2011; the ECB letter is dated 5 August 2011. And on the 13th of August 2011 new ‘urgent’ rules were adopted – *via* a Decree Law (n. 138/2011) - providing that not only higher level agreements, but also legislative rules can be derogated *in pejus* by company level agreements.

As anyone could easily imagine, huge academic and political debates have been developed following such groundbreaking legislation (called by some authors the ‘August Revolution’); still, no actual judicial reaction can be at the moment detected. However, a great part of the doctrinal criticisms are indeed concerned with an alleged contradiction of such new rules with fundamental rights.

Namely, the possibility for company level agreements to derogate the law, is deemed to violate trade union freedom, or - to say it with the Italian conceptual categories - the principle of collective autonomy. The issue might not be so obvious: why should the principle of collective autonomy be jeopardized by legislation conferring collective agreements the power to derogate the law? One could rather say the contrary, indeed: far from being an attack on collective autonomy, what the new rules have implemented is instead a prerogative reinforcing collective bargaining, to the extent that it enhances its regulatory functions, up to the point of giving collective bargaining a priority over legislation.

As a matter of fact, the opinions maintaining that a violation of fundamental rights exists have some degree of foundation only if one deciphers the full meaning of ‘trade union freedom’ (or collective autonomy). An essential component of trade union freedom is the union’s organizational autonomy, i.e. its freedom to choose the level at which trade union action is to be better developed. Once this is ascertained and accepted, giving only to a specific kind of collective agreements (namely: plant level agreements) such big regulatory powers ends up ruling out any role for other layer of agreements that unions would prefer to practice according to their own strategic options (namely: national level agreements).

To tell the truth, I would not bet on the Constitutional Court accepting such an argument; and less so the Strasbourg court or, still less, the Luxembourg Court. It is presumable - also in the light of what

³ The same question had been previously submitted in another episode of the postal fixed-term workers saga by another Neapolitan judge in case C-361/12. However, in its judgment of 12 December 2013, the ECJ decided to follow the questionable Conclusions of AG Nils Wahl by declaring that such question was ‘unnecessary to answer’.

has happened with regard to the Greek legislation - that others international human rights agencies, such as the International Labour Organization or the Council of Europe could have a word on this. However, differently from what has happened with regard to the Spanish and Greek new rules on trade union activity, no complaint has been addressed to date to the ILO Committee on Freedom of Association or to the Council of Europe's Committee of Social Rights.

Should this happen, it is likely that positive outcomes could be expected: not so much because the ILO and/or the European Committee of Social Rights's statements could be credited with a sufficient decree of effectiveness, but rather because this could prompt some national judge to 'make use' in his/her decision of the ILO or Council of Europe social committees' pronouncements. However, things could also go into a different direction: it is hardly contested that judges tend to dialogue with their peers, not with experts in committee; and this is why the European Convention of Human Rights has by this stage abundantly entered into the decisions of Italian courts, and the European Social Charter has not. The European Convention on Human Rights does have a court to dialogue with; the Social Charter does not.

4. Individual dismissals

Finally, probably no domestic measure has been attributed to the pressure of EU austerity policies as much as the reform of individual dismissals. And indeed, in the rather legendary ECB letter, it is possible to read the bold statement affirming that 'A thorough review of the rules regulating the hiring and dismissal of employees should be adopted.'

What has been implemented through Law n. 92/2012 indeed, is not a thorough review of the rules regulating dismissals, as the ECB would probably have wished, but rather a more limited legislative intervention on the remedies available in case of unlawful dismissal. In particular, the scope of the reinstatement remedy has been reduced and limited only to some particular cases.

Due to an extremely long and controversial decisional process, the end result is quite puzzling, to say the least. Probably it could not be affirmed that the Italian dismissal reform infringes fundamental social rights, unless one understands fundamental rights as a peculiar element of legislative rationality. In this perspective, indeed, the dismissals' reform might have some feature of irrationality, insofar as it ends up disciplining the remedial profile of dismissals in a somewhat unreasonable way: to indicate but one example, procedural violations - for instance the missed indication of the dismissal's reason - are punished more severely in small enterprises than in big ones. If legislative rationality is part of a fundamental rights analysis, then, the new Italian rules on dismissals might be considered as a violation of fundamental rights.

5. Conclusion

To conclude, what the Italian scenario of post-crisis labour legislation reveals is a situation in which some fundamental rights challenges to austerity-driven legislation are indeed visible. However, the set of fundamental rights and principles which have been mobilized are probably different from those one might expect: what has been evoked up until now, in fact, was not the typical fundamental social rights, but rather other expressions of fundamental rights: the independence of the judges (see §. 1), the right to a fair trial (see §. 3), the legislator's rationality (§. 4). Whether this is a weakness or rather a virtue of a fundamental rights strategy, remains to be ascertained.

PUTTING SOCIAL RIGHTS IN BRACKETS? THE PORTUGUESE EXPERIENCE WITH WELFARE CHALLENGES IN TIMES OF CRISIS¹

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1. Introduction

This contribution discusses the status of social welfare rights in Portugal in the period subsequent to the country's entering into the Economic and Financial Assistance Programme, in 2011.

As is well known, in May 2011, Portugal requested financial assistance from the European Commission (EC), the European Central Bank (ECB), and the International Monetary Fund (IMF), in order to overcome the structural challenges faced by the Portuguese economy, the threat of contagion from the sovereign debt crisis and the adverse conditions faced by the Portuguese banking sector.

The agreement on the Programme was formally adopted on 17 May 2011. The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) and the Loan Agreement were signed thereafter. They include a joint financing package of €78 billion, covering the period 2011 to mid-2014. To this date, the programme has been submitted to nine updates, each acknowledging the recession is deeper than expected and hoping for the economy returning to growth in a (not so) near future.

It appears that Portugal's situation remains less dramatic than Greece's, but not much less. It was presented as follows, in a usefully synthetic way:

“On top of a 1.5% drop in GDP last year, a further fall of 3.9% occurred in 2012 with only two other member states, Greece and Cyprus, faring worse. Unemployment, at 13%, is well below the Greek or Spanish rate, but newest budget cuts, which include another 1.2 billion euros in public pension payments, point to a worsening of all major economic indicators. Portugal's public debt, which stood at 107% of GDP last May, is expected to reach 118% by the end of this year, even as the budget deficit has been reduced from 9.1% of GDP to 5.6%. Further shrinkage is likely, as the Portuguese Prime Minister has pledged to cut the deficit still further, to 4.5% this year, which is more likely than not to accelerate the economy's downward spiral. Though the IMF predicts that the Portuguese economy will eventually grow enough to reduce the debt burden, few people in Portugal believe this.”²

The programme has led to dramatic changes to a wide range of welfare entitlements such as rights to housing, health, education, food, and social assistance. Such changes include reductions in financial benefits or benefits in kind, the exclusion of categories of persons from certain social benefits (most notably in the case of the Social Insertion Income, referred to below), as well as the State's general withdrawal from its activities relating to the accomplishment of constitutional entrenched social rights.

In order to assess the extent of the above mentioned changes, I focus first on the requirements of the Memorandum of Understanding (MoU) agreed by the Portuguese government and the troika, and its evolution over time. Then, I address the role of the “crisis” in justifying austerity measures in the

¹ The title adapts the wording used, although in a somewhat different context, by Gomes Canotilho, “‘Bypass’ social e o núcleo essencial das prestações sociais, in *Estudos sobre Direitos Fundamentais*, 2.^a ed., Coimbra Editora, 2008, p. 244.

² See Charles Krakoff, *PIGS to the Slaughter: After Greece, Portugal*, posted February 15, 2012, in www.emergingmarketsoutlook.com.

reasoning of the Portuguese Constitutional Court. Finally, I analyse the scope of judicial challenges to social rights changes due to the austerity programme.

2. The MoU's content regarding social rights and its evolution over time

2.1 Measures foreseen in the MoU

Regarding social rights, the main targets of the first version of the MoU, from 11 May 2011³, were health care, education and social security.

The measures concerning these rights, to be carried out beginning with the 2012 Budget Law, were the following:

- Reduction of costs in the area of education, with the aim of saving EUR 195 million by rationalizing the school network by creating school clusters; the lowering of staff needs; centralization of procurement; and reduction and rationalization of transfers to private schools in association agreements. (1.8.)
- Control of costs in health sector on the basis of detailed measures mentioned below, achieving savings worth EUR 550 million. (1.10)
- Reduction of pensions above EUR 1,500 according to the progressive rates applied to the wages of the public sector as of January 2011, with the aim of yielding savings of at least EUR 445 million. (1.11)

However, it was in the specific domain of the right to health care that the Memorandum contained more concrete and precise measures. The objectives were to “improve efficiency and effectiveness in the health care system, inducing a more rational use of services and control of expenditures; generate additional savings in the area of pharmaceuticals to reduce the public spending on pharmaceuticals to 1.25 per cent of GDP by end 2012 and to about 1 per cent of GDP in 2013 (in line with EU average); generate additional savings in hospital operating costs”.

In order to pursue these objectives, the original Memorandum foresees an extended set of concrete measures, including, among the most relevant, the following ones:

- To review and increase overall National Health System moderating fees (*taxas moderadoras*) (3.50).
- To cut substantially (by two thirds overall) tax allowances for healthcare, including private insurance (3.51).
- To achieve a self sustainable model for health-benefits schemes for civil servants, the overall budgetary cost of existing schemes – ADSE (civil servants), ADM (Armed Forces) and SAD (Police Services) - will be reduced by 30% in 2012 and a further 20% in 2013, at all levels of general government. Further reductions at a similar pace will follow in the subsequent years towards having them self-financed by 2016. The budgetary costs of these schemes will be reduced by lowering the employer's contribution and adjusting the scope of health benefits (3.52).
- To continue with the reorganization and rationalization of the hospital network through specialization and concentration of hospital and emergency services and joint management (building on the Decree-Law 30/2011) joint operation of hospitals (3.77).
- To reduce costs for patient transportation by one third (3.83).

³ Available at http://www.portugal.gov.pt/media/371369/mou_20110517.pdf, last visited on January 9 2014. I include in brackets the numbers of the MoU's clauses specifically alluded to in the text.

2.2 The roles of the troika and the Portuguese government on shaping the content of the MoU in relation to social rights

It is said in Portugal that the real authorship of the MoU is a very well-kept secret. Be that as it may, the leader of the Social Democratic Party (PSD) and future Prime Minister Pedro Passos Coelho, commenting on his electoral programme on May 9 2011, just before the present centre-right coalition government was elected, said the following: “This programme goes much beyond the troika’s memorandum”. The following year, during the parliamentary discussion of the 2013 budget, the Prime Minister said that only a reform of the social state could avoid a second bailout⁴.

These statements give an idea of how the Portuguese Government has reacted to the content of the MoU in relation to social rights. Even if that content has been primarily decided by the troika it certainly has been supported by the Government⁵.

The austerity programme conducted by the Government, in addition to the reduction of public wages⁶, includes the freezing of public reforms⁷, an increase in the age of retirement (from 65 to 66 years, according to Law-Decree n. 167-E/2013, December 31), a reduction in the duration of unemployment benefits (according to Law-Decree n. 64/2012, May 15), as well as the introduction of caps on health, education and housing allowances.

The rules of the Social Insertion Income were also revised (Law-Decree n. 13/2013, January 25). The amount of the social insertion income is currently €178,15. Furthermore, as a result of the new rules, nearly fourteen thousand people lost their Social Insertion Income (RSI – *Rendimento Social de Inserção*) between September and November 2013. There were in November 2013, 234.929 beneficiaries, according to data from the Social Security Institute; the data from the Social Security Institute relating to November 2012 give evidence of 281.415 beneficiaries⁸.

2.3 The MoU’s evolution over time in relation to social rights

All the measures concerning social rights above mentioned have been upheld and even developed in subsequent updates of the MoU.

The second update, from December 9, 2011, for example, states the following: “Implement measures aimed at achieving a reduction of at least EUR 200 million in the operational costs of hospitals in 2012 (EUR 100 million in 2012 in addition to savings of over EUR 100 million already in 2011). This is to be achieved through the reduction in the number of management staff, concentration and rationalization in state hospitals and health centers with a view to reducing capacity.” (3.74)⁹. These last words are certainly revealing of the dramatic changes that are taking place in Portugal in the domain of social rights.

⁴ See newspaper *Económico*, November 31, 2012.

⁵ This support is essential especially for those who consider that the “Memoranda are programmatic guidelines of a political rather than legal character”: see George Katrougalos, *The Greek Austerity Measures: Violations of Socio-Economic Rights*, Int’l J. Const. L. Blog, January 29, 2013, available at: <http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights>; admitting the legal force of the memoranda, see Eduardo Correia Baptista, “Natureza Jurídica dos Memorandos com o FMI e com a União Europeia”, in *Revista da Ordem dos Advogados*, Ano 71, II, abril-junho 2011, pp. 477-488.

⁶ See articles 19, 20, and 21 of Law n. 55-A/2010, December 31; articles 21 and 25 of Law n. 64-B/2011, December 30; articles 27 and 29 of Law n. 66-B/2012, December 31; article 33 of Law n. 83-C/2012, December 31. These statutes contain the budgetary laws for the years 2011 to 2014.

⁷ See, for example, article 114 of Law n. 83-C/2013, of December 31.

⁸ Data available at <http://www4.seg-social.pt/estatisticas>, last visited on January 9, 2014.

⁹ Available at http://www.portugal.gov.pt/media/371411/2r_mou_20111220.pdf, last visited on January 9, 2014.

In general terms the structure of the MoU concerning social rights has remained the same throughout the successive updates it has been subjected to: in a first moment the MoU indicates the savings to be obtained with reductions in the costs of the National Healthcare Service, education and social security allowances; and then, in a second moment, it details the content of some of the measures which are to be undertaken in order to obtain those savings, especially in what concerns the health care system.

Above, I have mentioned the measures concerning these rights to be carried out according to the original version of the MoU. These measures were replicated, and even aggravated in the successive updates of the MoU. The second update of the MoU, from December 9, 2011, includes the following measures concerning social rights to health care, education and social security:

- Reduce pension expenditure in gross terms in 2012 by at least EUR 1,260 million (EUR 950 million taking into account the losses of government revenues at the level of income taxes): by (i) suspending the 13th and 14th monthly payments for those pensioners with monthly pension benefits of EUR 1000 or more, (ii) suspending on average and in a progressive way the equivalent of one of those monthly benefits for those with monthly pension benefits between EUR 485 and EUR 1000. The pensions of those receiving benefits below EUR 485 will be frozen and the lowest pensions will be marginally increased. In case a pensioner receives more than one pension, the consolidated pension income will be considered for the application of the thresholds defined here. These rules will also apply to subventions or subsidies paid by the government that take the nature of pensions even if designed otherwise (1.9).
- Control costs in the health sector on the basis of detailed measures listed below under 'Health-care system', achieving savings worth some EUR 1000 million (1.10).
- Reduce costs in the area of education, with the aim of saving EUR 380 million by rationalizing the school network including by creating school clusters; lowering staff needs; centralizing procurement; and reducing and rationalising transfers to private schools in association agreements and making a more intensive use of EU funds to finance activities in the area of education (1.12).
- Reduce cash social transfers (other than pensions) by at least EUR 180 million by tightening eligibility criteria and decreasing average benefits in selected cases (1.14).

As already mentioned these measures were in general repeated in the next updates, with adjustments in the amount of the savings to be made.

Notwithstanding, from the seventh to the eighth and ninth updates, carried out in October 2013, a change in the nature of the measures concerning cutbacks in social allowances is perceptible. In fact, in the Memorandum of Economic and Financial Policies of June 12, 2013¹⁰, produced in the context of the seventh update of the programme, a new item on “Legal safeguards” was added.

The new item’s text is as follows:

“9. Legal safeguards. We will take a number of steps aimed at mitigating legal risks from future potential Constitutional Court rulings. First, expenditure reforms will be designed with the principle of public/private sector and intergenerational equity in mind as well as the need to address the sustainability of social security systems. Second, legislation underpinning the expenditure reforms will be duly justified on compliance with the fiscal sustainability rules in the recently-ratified European Fiscal Compact which now ranks higher than ordinary legislation. Third, the government will rely as much as possible on general laws—rather than on one-year budget laws—consistent with the structural nature of the reforms. This also opens the possibility of prior constitutional review of said laws, thus allowing early reaction on the part of the government in case these reforms raise constitutional issues.”

¹⁰ Available at http://www.portugal.gov.pt/media/1112953/7R_MEFP_20130612.pdf, last visited on January 9, 2014.

This is a reaction to the rulings of the Portuguese Constitutional Court concerning the 2012 and 2013 budgets, as well as the Court's decision from August 2013 on the imposition of dismissals and redeployments on the public sector. In those decisions the Court has struck down the measures included in the State Budget Laws for 2012 and 2013 that enabled the Government to temporarily implement pension and wage cuts in the public sector.

Below I explain better the grounds of the Court's landmark decisions on austerity measures. In any way the reason why the Government feels the necessity of taking the above mentioned "legal safeguards" is because it fears adverse rulings by the Constitutional Court on the measures it deems necessary in order to meet the requirements of the austerity programme.

On the other hand, the coming to an end of the aid programme also implies that permanent and structural measures are adopted so that the savings already obtained are not lost after the troika is gone.

Considering these two points, the Government has recently advanced its most ambitious austerity measure, concerning the reform of the pension system.

In the last update of the programme¹¹, the Government presents this measure as follows:

"PER—pension reform. A pension reform is expected to generate 0.6 billion of net savings. It is based on equity principles with preservation of minimum socially-acceptable income levels, thus protecting those who earn the lowest pensions. Specifically, the reform takes into consideration the need to reduce the current differences between the civil servants' regime and the general social security regime, aiming at enhancing the fairness of the overall pension system. Moreover, while reforms implemented over the past two decades have contributed to long-term sustainability, the amount of pension benefit payments for which the government is currently liable makes the system excessively costly under the current circumstances reassessing the need to take into account demographic developments. Accordingly, the reform is based on three main elements: (i) an effective increase by one-year in the statutory retirement age to 66 years—implemented by adjusting the demographic sustainability factor (*prior action*); (ii) aligning the rules and benefits of the public sector pension funds, CGA, to the general pension regime by changing one of the replacement rate parameters from about 90 to about 80 percent for all applicable beneficiaries, while avoiding double penalization of CGA beneficiaries, with a pension below €5,030, with the CES contribution (*structural benchmark*), and (iii) means testing survivors' pensions of both CGA and the general pension regime, in cases where these accumulate with other pensions. Each of these reforms is implemented through modifications to the relevant laws. The necessary legislative proposals have been submitted to Parliament."

In fact this abstract does not give a completely accurate overview of the main points of the pensions system's reform. The reform involves the reduction in 10% of all monthly pension benefits of EUR 600 and more. Furthermore, this reduction applies to current beneficiaries, only excluding the beneficiaries above 75 years of age.

The legislative proposal concerning the reform of public servants pensions (Proposal of Law n. 171/XII) has already been approved in Parliament and sent to the President of the Republic who submitted the project of law to prior constitutional review by the Constitutional Court. The Court struck down the public pensions system's reform as per Judgment 862/2013 for violation of the principle of protection of legitimate expectations.

As remarked by a noted constitutional scholar, and former justice in the Constitutional Court, the Government's proposal of law has confronted the Court with a dilemma: "If the Court applies the 'principle of protection of legitimate expectations' with the absolute character with which this principle was understood in the case of job security in the public sector, the Court should declare the

¹¹ See Memorandum of Economic and Financial Policies, from October 24, 2013, available at http://www.portugal.gov.pt/media/1239041/8_9R_MEFP_20131113.pdf, last visited on January 9, 2014.

law unconstitutional, as the reduction of pensions covers the current pensioners. But doing this the Court not only maintains a blatant unequal treatment among pensioners of the public sector and the private sector (since other things being equal pensions of the former pensioners are higher), but it also creates a second inequality, now among pensioners of the public sector (since, other things being equal, the new pensioners will have lower pensions than current pensioners)¹². Commenting on Judgment 862/2013, the same scholar has remarked: “Conferring once more absolute value to the principle of protection of legitimate expectations (without parallel in comparative constitutional jurisprudence), the Constitutional Court reiterated its view, this time regarding the convergence of pensions from the public and private sectors, that public benefits conferred by law become constitutionally untouchable, even if this translates into a manifest inequality, not only between pensioners from the public sector and the private sector, other things being equal, but also between current and future pensioners of the public sector”¹³.

Finally, it should be noted that all above mentioned austerity measures are exclusively based on the MoUs and the Government’s implementation of their content. In fact, Portugal, being a “Programme country”, like Greece and Ireland, was excluded from the assessment undertaken under the Macroeconomic Imbalance Procedure, as it already was under economic surveillance linked to the financial assistance it receives¹⁴.

2.4 Participation of social partners and other relevant civil society organisations in the managing and shaping of social rights changes

In Portugal no agreement such as the Croke Park Agreement was concluded between the Government and the representative unions of the public employees. As is well known, in the terms of the Croke Park Agreement, and in return for the public employees’ cooperation with wide scale reforms of the public sector aimed at increasing efficiency, flexibility and redeployment and at reducing cost and the number of people working in the public service, the Irish Government committed itself not to further reduce civil servants’ pay rates, beyond the reductions decided in 2009 and 2010¹⁵.

Surely, in Portugal the relevant civil society organizations were given the opportunity to express their views concerning the changes concerning social rights. But this occurred by means of legally foreseen mechanisms and not on the basis of a kind of social contract explicitly entered into for the purpose of reaching an agreement with all social partners in face of the adverse conditions imposed by the austerity programme.

Among the aforementioned mechanisms one must mention first of all the agreements reached within the Economic and Social Council (Conselho Económico e Social) which is the body with responsibility for consultation and conciliation in the economic and social policy domain. The Economic and Social Council includes representatives of the Government, the organizations that represent workers, business activities and families, the autonomous regions and local authorities, as foreseen in article 92 of the Portuguese Constitution.

¹² See Vital Moreira, Dilema Constitucional, posted November 18, 2013, in <http://causa-nossa.blogspot.pt/2013/11/dilema-constitucional.html>. The translation is mine.

¹³ See Vital Moreira, *Quando a Segurança Absoluta Convive Mal com a Equidade*, posted December 19, 2013, in <http://causa-nossa.blogspot.pt/>. The translation is mine.

¹⁴ The Macroeconomic Imbalance Procedure was applied the first time with the publication of the Alert Mechanism Report in February 2012. Based on the analysis in the report, the European Commission carried out in-depth reviews for twelve EU member states. The countries included were: Belgium, Bulgaria, Denmark, Finland, France, Italy, Hungary, Slovenia, Spain, Sweden and the United Kingdom.

¹⁵ See more details at <http://per.gov.ie/croke-park-agreement/>, last visited on January 9, 2014.

The Economic and Social Council aims at promoting social dialogue and negotiation between the Government and the social partners - trade unions and employers' associations – by means of tripartite negotiations between representatives of these entities, during which legislative projects concerning labor and social matters are assessed and social conciliation agreements (Acordos de Concertação Social) are concluded.

In this context, the Government and the social partners concluded in January 2012 the Tripartite Agreement on Commitment towards Growth, Competitiveness and Employment¹⁶. This agreement addresses matters of labour policy and work rights, but not specifically social and welfare rights.

In any way, and as explained later, the Constitutional Court's rulings on the austerity measures can perhaps be envisaged as a kind of *ersatz* of a social contract between the Government and public sector employees.

3. The role of the 'crisis' in justifying austerity measures

The economic and financial crisis has been a fundamental justification deployed by the Government in defence of its measures before the Constitutional Court. The Government developed this justification in the reports of the Ministry of Finance (*Exposição de Motivos*) on the State Budget's proposals for 2012, 2013 and 2014, which were submitted to Parliament.

The same justificatory technique has been used in the legislative proposal concerning the reform of the civil servants pensions' system. In fact, the report on the Proposal of Law n. 171/XII, submitted to Parliament in late September, is probably the most extended report ever to be included in a proposal of law and surely the one in which a justificatory reasoning based on the economic and financial situation of the country is most explicitly assumed¹⁷.

Notwithstanding, the Constitutional Court has adopted in several of its rulings an activist stance in striking down the pay and pension cuts for public employees. But the Court did not prohibit those pension and wage cuts on the basis of the right to work and other social rights, although these are abundantly provided for in the Portuguese Constitution. Instead, the reasoning of the Court turns around general principles of constitutional law, like the principle of equality and the principle of the protection of legitimate expectations.

In Judgment 353/12 the Constitutional Court declared unconstitutional the suspension, foreseen in the 2012 budget, of the holiday and Christmas payments to workers of the public sector, considering that this suspension would result in a decrease in the annual income of the affected persons in violation of proportional equality. According to the Court the difference in treatment of workers in the public sector and the private sector – which was not affected by this suspension – was so pronounced that it could not be justified.

The unbearable nature of the difference of treatment between workers of the public and private sectors becomes evident, in the reasoning of the Court, through the comparison between the salary reductions that took place in 2011 and in 2012.

¹⁶Available at http://www.ces.pt/download/1022/Compromisso_Assinaturas_versao_final_18Jan2012.pdf.

¹⁷ See Proposal of Law n. 171/XII, 2nd Legislative Session, which “Establishes mechanisms for the convergence of social protection regime of the public servants with the general system of social security, proceeding to the fourth amendment to the Law n. 60/2005 of December 29, the third amendment to the Decree-Law n. 503/ 99 of November 20, the amending of Decree-Law n. 498/72 of December 9, which approves the Retirement Statute, and the repealing of rules which establish accrued years of service for retirement purposes under Caixa Geral de Aposentações” (available at www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=37904).

In its Judgment 396/11 the Court held, with regard to the salary reductions that occurred in the year 2011, that the temporary character and the percentage of the reductions made to the income of civil servants, which were between 3.5% and 10% of their annual income, were still within the limits of the additional sacrifice required from public servants.

However, according to the Court, a new reduction of 14.3% of the annual income, as foreseen in the Budget Law for 2012, which more than triples, on average, the amount of the initial reductions, attains such a high level that it now becomes evident that those limits have been exceeded.

The same reasoning was repeated by the Court in its Judgment 187/2013. In this decision, the court reviewed a number of austerity measures contained in the 2013 State Budget, in particular the suspension of one of the holiday and Christmas payments to workers and pensioners of the public sector. The Court held that such a measure, in spite of the fact that it suspended not the two (as foreseen in the Budget Law for 2012) but only one of the monthly payments concerning holiday and Christmas, continued to demand an additional effort from workers in the public sector that was not required from workers with a similar income in the private sector.

The general conclusion of the Court, in line with what was decided in Judgment 353/2012, was that the difficult economic and financial situation of Portugal should be addressed by policies of a general nature and not by measures which affect exclusively public sector employees.

However, the Court did not consider that the Constitution had been violated by the introduction in the State Budget for 2013 of an “Extraordinary Solidarity Contribution” (CES – *Contribuição Extraordinária de Solidariedade*), whose rates could rise to more than 50% of all pensions, paid by public or private entities, that amounted to more than EUR 3.750. According to the Court, this is so because affecting pensions of relatively high amounts does not correspond to an illegitimate restriction of the beneficiaries’ rights, but constitutes a transitional measure justified by financial and economic emergency, and cannot be qualified as having a confiscatory nature.

In Judgment 474/2013, the Constitutional Court further declared unconstitutional, on the grounds of proportionality and the constitutional principle of the protection of legitimate expectations, legislative measures which made it easier for the Government to dismiss civil servants, notwithstanding the fact that similar measures already exist for a long time regarding workers in the private sector.

A provisional balance of the constitutional jurisprudence on the crisis measures can be drawn along the following lines. In a first moment, the Court accepted, in its Judgment 396/2011, the first wave of cuts in salaries of the civil servants with the argument that persons “who get paid by public funds are not in a position of equality with the other citizens, so the additional sacrifice that is required for that category of persons – which is bound, it is timely to remind, by the pursuit of the public interest – does not embody a unjustifiably unequal treatment”¹⁸. It must be recalled that this first wave of austerity measures, contained in the 2011 budget, consisted in the reduction from 3,5% to 10% of public employees salaries’ that exceeded €1500¹⁹.

In a second moment, the further reductions foreseen in the 2012 budget, in addition to the ones included in the 2011 budget which were maintained, consisted in the suspension of both the holiday and Christmas payments regarding public employees, as already said. This time the Constitutional Court considered, as per Judgment 353/2012, that the new measures exceeded the limits of permissible differentiation between workers of the public and the private sectors. The same reasoning was

¹⁸ In the original: “quem recebe por verbas públicas não está em posição de igualdade com os restantes cidadãos, pelo que o sacrifício adicional que é exigido a essa categoria de pessoas – vinculada que ela está, é oportuno lembrá-lo, à prossecução do interesse público – não consubstancia um tratamento injustificadamente desigual”.

¹⁹ Article 33 of the Budget Law for 2014, contained in Law n. 83-C/2013, of December 31, substitutes a new reduction from 2,5% to 12% of public employees salaries’ that exceed €675.

repeated by the Court in its Judgment 187/2013, as explained above. Furthermore, in Judgment 862/2013, as also mentioned above, the Court struck down the public pensions system's reform, which attempted to introduce a more equal treatment between pensioners from the public sector and the private sector, on the basis of the principle of protection of legitimate expectations.

The main conclusion is that the Court does not question the necessity of an austerity programme, but only its fair application, as between public and private workers and pensioners. All workers and pensioners must endure the burdens of austerity in roughly equal shares, even if only the fairness of the share of public sector's workers and pensioners was asserted by the Court. This line of reasoning allows the Court to recognize that "we are in a very serious economic and financial situation, in which it is important to achieve the public deficit objectives set out in the memorandum of understanding in order to ensure the financial subsistence of the State"²⁰, and, at the same time, to consider unconstitutional the provisions of the State budget that the Government deemed necessary to pursue those objectives²¹.

In view of the above it is possible to argue that the Court is engaged in a judicial activism path, to the point of recommending to the Government the adoption of taxes as the normal mechanism to distribute the fiscal burdens of austerity policy²². This path has little to do with the enforcement of social or work rights but is specially aimed at the protection of public sector's employees. This is why I have considered above the hypothesis that the Court's jurisprudence amounts to a kind of *ersatz* of a social contract between the Government and public sector employees – even if this contract is unilaterally imposed on the former by the Court, acting as a proxy for the latter – by setting the limits of wages and pensions reductions at the rates introduced in the Budget Law for 2011.

The only apparent exception to this crisis jurisprudence is the striking down, as per Judgment 187/2013, of article 117 of Law n. 66-B/2012, of December 31, which subjected the amounts of social benefits granted in the events of illness or unemployment to a "contribution" of, respectively, 5% and 6%. The Court considered that this measure was not in violation of the workers' rights to "material assistance", as foreseen in article 59 of the Constitution, and the citizens' rights to protection in case of illness, as foreseen in article 63. In the Court's opinion, the Constitution does not protect a concrete amount of social protection in the cases of illness and unemployment. Furthermore, according to the Court, "compliance with the constitutional protection programme of citizens in a state of illness and unemployment depends, in each historical moment, on financial and material factors, and it is the task of the legislator to define the situations that require protection and the content of the corresponding social right".

But on the other hand, continues the Court, "while the reversibility of concrete rights and subjectively grounded expectations is not to be put in doubt, one cannot fail to recognize that there will always be a limit, even in a state of economic emergency, namely the essential core of an existential minimum already brought into effect by the general legislation disciplining the entitlement to social benefits in the contingencies of illness or unemployment, so the constitutional parameter of a decent existence may be affected". The Court also considered in this connection a violation of the proportionality principle.

²⁰ See Judgement 353/12 of the Constitutional Court.

²¹ This aspect is sometimes forgotten by commentators: see, for example, Christina M. Akrivopoulou, "Striking Down Austerity Measures: Crisis jurisprudence in Europe," *Int'l J. Const. L. Blog*, June 26, 2013, available at: <http://www.iconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-Europe/>. The Portuguese Constitutional Court didn't in fact stroke down the austerity measures qua austerity measures, but only on the ground of their alleged violation of the principle of equality.

²² According to Judgment 187/2013, "the legislator, in the choice of the political decision, could not have failed to confer an autonomous relevance to the principle of equality before public burdens, which in principle is brought to effect through the tax system" (see § 44).

This is not the place to criticize this opinion, but it surely confirms the Court's resistance to review the austerity measures on the basis of the constitutionally entrenched social rights²³. In fact, the right to a minimum of existence is construed by the Court, following previous decisions (most notably Judgment 509/2002), as directly based on the principle of human dignity and not in connection with constitutional social rights²⁴.

4. The scope of judicial challenges to social and welfare rights changes and their role in broader social mobilisations against the crisis

In Portugal, the judicial challenges to the welfare reforms have thus mainly involved the Constitutional Court. Those challenges have also mainly been pursued by the political actors²⁵. In fact, all major Constitutional Court's decisions that challenged the austerity measures were made in the context of what the Portuguese Constitution labels "abstract procedures of constitutional review". These procedures can only be initiated by the President of the Republic, the Prime Minister, the Ombudsman, the General Prosecutor and a certain number of members of Parliament (article 278 and 281 of the Portuguese Constitution).

This is somewhat curious in view of the fact that the Portuguese Constitution contains, as mentioned, an extended catalogue of economic, social and cultural rights. Specifically foreseen as social rights are the right to social security (article 63), the right to health care (article 64), the right to a decent housing (article 65), the right to a safe environment (article 66), the right to the protection of the family (article

²³ For a different view, see the interesting study by Roberto Cisotta and Daniele Gallo, "Il Tribunale Costituzionale portoghese, i risvolti sociale delle misure di austerità ed il rispetto dei vincoli internazionali ed europei", in *Diritti Umani e Diritto Internazionale*, vol. 7, 2013, n.º 2, pp. 465 ff. The authors express the opinion that Judgment n. 187/2013 amounts to the reaffirmation of the Portuguese "social sovereignty" by means of the law's judge and not the law's author (see *op. cit.*, p. 480). This certainly reverses the usual terms of the debate on the democratic legitimacy of the judicial review. For a completely opposed view, see Gonçalo Almeida Ribeiro, *Judicial Activism Against Austerity in Portugal*, Int'l J. Const. L. Blog, Dec. 3, 2013, available at: <http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/>.

²⁴ According to Gomes Canotilho, "By-pass' social e o núcleo essencial das prestações sociais, in *Estudos sobre Direitos Fundamentais*, cit., p. 244, the Constitutional Court's jurisprudence on the right to a social minimum amounts to putting social rights in brackets.

²⁵ One relevant exception is a judgment from July 2013 of the Administrative Court of Lisbon (Tribunal Administrativo de Círculo de Lisboa) that suspended the Government's decision to close the principal maternity hospital of Lisbon, the *Maternidade Alfredo da Costa*. This judicial decision, based inter alia on the violation of the social right to health care laid down in article 64 of the Constitution, was adopted in an interim action and is now under appeal to the Central Administrative Court. Considering the fact that prior decisions of the administrative courts have already decided that a Government's decision to close a hospital is not justiciable (see, for example, the decision of the Supreme Administrative Court of March 6, 2007, Rec. 1143/06) it is probable that the decision from the Administrative Court of Lisbon will be overruled. It is also worth mentioning that the European Court of Human Rights adopted on October 8, 2013 its decision in the combined cases of *Da Conceição Mateus v. Portugal* and *Santos Januário v. Portugal*. In these cases, the Applicants, Antonio Augusto da Conceição Mateus and Lino Jesus Santos Januário, were two Portuguese nationals who had seen a reduction in their pension payments. The applicants' state pensions were divided in 14 equal instalments, as usual in Portugal: one per month, plus additional holiday and Christmas payments in July and December. From January 2012, and for the duration of the Economic and Financial Assistance Programme, the applicants' holiday and Christmas subsidies were reduced by approximately 50%. The pension cut was only to affect the holiday and Christmas payments, while their monthly pension remained the same, and this was scheduled to last from 2012 to 2014. The cumulative losses amounted to approximately 10% of the applicants' total annual pension income. According to the ECHR, and in direct contrast with the Portuguese Constitutional Court, "In the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and the temporary effect of the reduction of their holiday and Christmas subsidies, the Court considers that the applicants did not bear a disproportionate and excessive burden."

67), the right to parenthood (article 68), the rights of children (article 69), the rights of young people (article 70), the rights of disabled citizens (article 71), and the rights of the elderly (article 72).

On the other hand it can be said that the legitimacy of the State is linked to the provision of social rights²⁶.

However, these two facts, i.e. an extensive list of social rights in the Constitution and the perception that the legitimacy of the State is linked to the provision of social rights, have not been able to generate a culture of judicial challenges of the violation of such rights. In fact, Portugal's constitutional commitment to social rights has not given rise to a culture of judicial enforcement of social rights nor to a reduction of socioeconomic inequality²⁷. One possible explanation is a 'clientelist' model of social policy-making, with a significant diversion of social benefits from the most needed²⁸. Perhaps this also explains why the Portuguese people initially accepted the austerity measures without taking to the streets.

However, there are signs of a growing and generalized discontent: four general strikes, out of a total of ten since the Portuguese revolution of 1974, have taken place since the beginning of the austerity programme (November 24, 2011; March 22 and November 14, 2012; and June 27, 2013).

An illustrative episode of this growing discontent is the attempted reduction of the TSU (*Taxa Social Única*) – the business contribution to Social Security – by 5.75 per cent, down to 18 per cent, which was announced by the Prime Minister in September 7, 2012. On the same occasion, the Government also announced its intention to increase the contribution of workers to the Social Security to 18 percent, i.e. an increase of seven percentage points. The measure should have been applied both to private and public sector employees. Despite the arguments of the Prime Minister, who justified the reduction of TSU with the need to improve the financial situation of private companies and to "fight the growth of unemployment," the measure soon generated strong opposition, not only among the opposition and trade unions, but even among the parties within the government coalition. As a result, two major demonstrations took place in Lisbon on September 15 and 21 2012 and the Government decided to abandon this measure²⁹.

Specific claims or findings related to social rights did, however, play no role whatsoever during the above mentioned general strikes and demonstrations, even if the general perception of social rights retrenchment was underlying all of them.

²⁶ See Pedro Ramos Pinto, "Housing and Citizenship: Building Social Rights in Twentieth-Century Portugal", in *Contemporary European History*, Volume 18, Issue 2, May 2009, pp. 199-215.

²⁷ In fact, among OECD countries only Turkey and Mexico register higher income disparities: cf. *Growing Unequal: Income Distribution and Poverty in OECD Countries*, OECD, 2008.

²⁸ Cf. Leonor Vasconcelos Ferreira, *Social Protection and Chronic Poverty: Portugal and the Southern Welfare Regime*, FEP Working Papers, n.º 168, March 2005, pp. 12, 18.

²⁹ See *Diário de Notícias*, de 6 de setembro de 2013.

SOCIAL RIGHTS IN CRISIS IN THE EUROZONE. WORK RIGHTS IN PORTUGAL

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1. The Troika's view of Portuguese labour reforms

The Memorandum of Understanding foresaw a number of measures concerning labour and social security law that ought to be implemented by the government after consultation of social partners and 'taking into account possible constitutional implications, and in respect of EU directives and Core Labour Standards'. Those measures should 'foster job creation' and 'tackle labour market segmentation' amongst other purposes and should, or so was expected increase the competitiveness of the Portuguese economy.

In practice those measures consisted mainly, in what concerns labour law, in, on the one hand revision of dismissal causes and procedures, the reduction of severance payments, and on the other hand in changing the law in order to allow more flexible working time arrangements. In addition a substantial reduction in labour costs was envisaged: a reduction in overtime payments, but also, in practice, a reduction of the overall salaries. The Portuguese government undertook the obligation of refraining from any increase in the minimum wage unless agreed with its creditors and only if justified by economic and labour market developments.

It must be recognised that the analysis of the Portuguese labour law system was sophisticated and so much so that the document clearly pointed out some of the political deficiencies of our collective bargaining system. In Portugal, as a rule, there are no legal criteria to assess the representativeness of trade unions. As collective agreements may be extended to employers and employees that are not represented and affiliated respectively by employers' organizations or trade unions through administrative procedures, the government has a discretionary power to extend the personal scope of collective agreements even when the signatories of that collective agreement may be insignificant, having only a very small number of members. These extensions of collective agreements to third parties may be particularly dangerous if the employers' organizations represent a minority of big or very big enterprises who then attempt to extend their agreement to small or medium size competitors. And that is why the Memorandum established that the Portuguese government should define clear criteria to be followed for the extension of agreements and commit to them and 'the representativeness of negotiating organizations and the implications of the extension for the competitive position of non-affiliated firms will have to be among these criteria'. Unfortunately the Portuguese government introduced some criteria of representativeness for the employers' organizations, but significantly and for obvious political reasons failed to do so *vis-a-vis* trade unions. Another foreseen measure was to promote the inclusion in sectoral collective agreements of conditions under which work councils could conclude firm-level agreements without the delegation of unions. Such a measure however was never introduced: collective agreements remain in Portugal the monopoly of trade unions and the workers council can only intervene if the trade union chooses to delegate that power. As a matter of fact – and differently from what occurred recently in Spain – the general collective agreement may establish that certain matters, such as salary or job functions may be reserved to the collective agreement that prevails in that case, over the enterprise agreement. Portugal did not follow the path of other countries, also seriously struck by the economic crisis, of establishing that the prevailing level of collective bargaining is the enterprise.

In practice most of the measures taken by the government to fulfil its contractual obligations and the duties set by the Memorandum amounted to a reduction of costs associated with labour (salaries, severance payments and unemployment benefits) and an increase in working time flexibility, in the possibility of hiring fixed-term workers.

2. Social partners' views on the MoU

At the beginning of this governmental policy those measures had a significant level of support by the main body of national social dialogue. The *Conselho Económico e Social* and particularly one of its organs, the *Comissão Permanente de Concertação Social*, a body where the main trade unions and employers' associations are represented, endorsed the policies as a 'lesser evil' although with the opposition of one of the most important trade unions' federation, the CGTP-IN. In this sense it might be stated, as the European Commission, the ECB, and the IMF, recently did, that 'Portugal's culture of political and social dialogue remains an important asset to the programme'¹.

However, it must be stressed that the social dialogue body, the *Conselho Económico e Social* has increased its criticism of the governmental measures. In a recently published Opinion it pointed out that the measures had the effect of increasing unemployment from 12.7% of the active population in 2011 to an estimated value of 17.4% in 2013, a number which is not significantly higher due to an important increase in migration abroad. As a matter of fact the document also pointed out that a significant number of young workers, frequently highly qualified, chose to emigrate, a factor that represents a waste of the investment in education, raises doubts in our competitiveness in the long run and worsens the demographic pyramid of the Portuguese population that is already rather old on average. The document also denounces the reduction of expenses in health and healthcare in general at a moment when there are more and more older people – in public education and in public safety. It emphasizes that sharp reduction of salaries and pensions (a reduction of 25.9% between 2010 and 2014) has resulted in a substantial reduction of private and public expenditure and internal consumption, with the consequent shut-down of many enterprises. The Opinion also states that the government has underestimated the crisis, and has failed in the task of reforming the state, opting for the politically more convenient route of increasing taxes and reducing public expenditure in a 'blind' way.

3. Legal challenges to crisis measures

The legal reaction of those Portuguese citizens who suffered substantial hardship as a result of a reduction in salaries, particularly in the public sector, pensions and, as we shall see, as a result of an interference of the law both in collective bargaining and in the individual labour contract has been mainly channelled through the national courts, raising issues of possible constitutional violations.

The Portuguese Constitutional Court has been called, either in a preventive or in successive control proceedings, to repeatedly decide on these issues. In some cases the Constitutional Court has considered the measures taken by the government to represent a breach of the constitution, although in many other cases it has taken the opposite stance, stating that there may be a serious sacrifice but one that is required by the economic plight of the country. Despite of the fact that in most instances the Constitutional Court has been rather flexible, the European Commission recently stated that 'over the summer, sovereign yields reversed earlier gains amid market concerns about the predictability of

¹ Statement by the European Commission, ECB and IMF on the eighth and ninth review mission to Portugal, 3rd October 2013, Press releases database.

policy making following short-lived political turbulence and Constitutional Court rulings that blocked key policy measures'.²

By comparison the recourse to international and European institutions seems rather modest. To our knowledge, there was a preliminary reference request presented by the Labour Court of Oporto on the 8th March of 2012 (C-128/12) followed by a similar one by the same court on the 29th of May of 2012 (C-264/12). The Court of Justice of the European Union declined the first preliminary reference which mainly concerned breaches of the equality principle and of the EU Charter of Fundamental Rights. The Portuguese Court asked the European Court whether a legal reduction of salary almost exclusively in the public sector was a breach of the equality principle or of the right to dignified working conditions. But the Court of Justice considered that the request by the Portuguese Court 'did not contain any concrete element allowing to infer that the Portuguese law was aiming to apply Union law.' The second reference, C-264/12, is still pending.

Recently – on the 23th September 2013 – the CGTP-IN filled a claim³ with the ILO stating that Portugal was breaching ILO Convention Nos 98, 151, 87 and 131, all previously ratified by the Portuguese State. The complaint made by the CGTP-IN raised a number of issues that may represent infringements of ILO Conventions. Just to give some examples, the Portuguese Labour Code allows non-affiliated workers to choose which of the collective agreements effective in their enterprise will be applied to them, while affiliated workers are bound by the collective agreement entered into by their trade union or by the lack of it. As such a legal rule allows non-affiliated employees a choice that is denied to affiliated employees it may be seen as a way to promote non-affiliation. Another complaint concerns the fact that the law does not allow clauses in collective agreement permitting agreements to remain in force until replaced by another one. The CGTP-IN also invoked legal rules – that meantime have been declared unconstitutional by the Constitutional Court – that suspended certain contractual clauses and considered subsequently void other contractual clauses (namely those regarding compensatory rest for extra work in a day which is not a mandatory weekly resting day).

4. The Portuguese Constitutional Court and the crisis measures

We are now going to describe the most important decisions of the Constitutional Court concerning the governmental measures to reduce the public expenditure.

In Acórdão nº396/2011 the Court was faced with a request by a group of members of Parliament to declare the unconstitutionality of some of the rules of the state budget Law for 2011 (Lei nº55-A/2010 of the 21st December). Those rules reduced, among other things, the value of the salaries paid to public servants. The reduction, effective from the 1st January onwards, concerned only salaries above €1.500 per month and the reduction varied from 3.5% to 10%, depending on the value of the salary. It applied to almost all public servants as well as employees in state owned enterprises. It was claimed that such a reduction was unconstitutional for a number of reasons: firstly, it was not clear whether the reduction was permanent or transitory but in any case it would amount to a breach of trust. The citizens, it was stated, relied on the state and its conduct and in view of the past conduct of the state, there was no reasonable expectation of this kind of conduct by the state. It was also tantamount to a violation of the equality principle since the reduction of salaries was only legally imposed on public servants or employees of the public sector. A fundamental right to non-reduction of salaries was also invoked.

The majority of the court declined the request and decided that the reduction of salaries was not unconstitutional. In order to justify the decision, the Court first stressed that the reduction in salary had

² Statement by the European Commission, ECB and IMF on the eighth and ninth review mission to Portugal, 3rd October 2013, Press releases database.

³ Reclamação relativa à violação das Convenções da OIT n.º 98, 151, 87 e 131 pelo Estado Português, 23 de Setembro de 2013.

to be temporary – differently from what happened to some subsidies – since it was included in a budget law that, by its very nature, is annual. The Court emphasized that it was important to take into account the temporary nature of the reduction. The Court denied the existence of a fundamental right to non-reduction of salaries and expressed that although the legitimate expectations of the citizens were obviously important, it was imperative to assess the reasons behind the governmental measures and consider they were adequate and proportionate to their objective. The Court emphasized that the purpose of governmental measures was to comply with agreements with the European Commission and the IMF in order to reduce the budgetary deficit to a value within the limits set by the European Union. In so doing the Court also pointed out that the reductions were of a value that was below those introduced in other European countries with the same predicament, were not imposed on employees with a monthly income of less than €1.500 and the reduction varied according to the amount of the salary.

The most difficult problem, however, was the principle of equality: was it constitutionally acceptable that the reduction of salaries was legally imposed only on public servants and employees of public enterprises? The Court discussed briefly whether there was a principle of equality among all citizens concerning public burdens but finally decided that public servants, or better, those who are paid thanks to taxes, are not on an equal standing or footing to other citizens because their activity in itself has the purpose of the common good. As a result, in the opinion of the Court, those people may be asked to make an additional sacrifice. It must be stressed that there were, nevertheless, several dissenting votes (the decision was obtained by a majority of 9 against 3 of the Judges). The three dissenting votes stressed the need to protect legitimate expectations and trust (CARLOS PAMPLONA DE OLIVEIRA and JOÃO CURA MARIANO) and the equality of all citizens (J. CUNHA BARBOSA).

To some extent the Constitutional Count changed direction in a subsequent decision, Acórdão 353/2012. Once again a number of members of Parliament raised the issue of constitutionality of some rules of the budget Law of 2012 (Lei n.º 64-B/2011 of 13th December). It may come as a surprise that, once again, the members of Parliament complain about salary reductions when the Court had previously stated that some sacrifices, even serious sacrifices, might be asked of citizens in order to fulfil the obligations of the country. But it must be stressed that these were more stringent measures that were added to the previous ones: the law established that some subsidies (of holidays and Christmas – in Portugal the salary is paid traditionally in 14 instalments) were not to be paid to public servants (whenever the monthly salary was above €1.100 and were reduced whenever the monthly salary was between €600 and €1.100). The Law also established that it was imperative and it prevailed over any other law or contract, including collective agreements. There was also a reduction in pensions and additional reductions to salaries that could go from 3.5% to 10% (the reduction in pensions could go up to 50%).

This time the majority of the Court decided that these measures were excessive. It recognized that they were probably more effective and speedy than other possible measures to reduce public expenditure. But they came at a time when citizens were heavily taxed and the new reductions were considered excessive precisely because ‘as the sacrifice or hardship imposed to the citizens in order to achieve public interests grows, so must grow equally the demands of equity and fairness in sharing those sacrifices’. The Court also treated as irrelevant arguments made by the government that public servants, on average, earn more than private sector workers and enjoy stronger protection against dismissal. The Court stated that the comparison should not be made on average but should take into account job descriptions and responsibilities. On the other hand, increased dismissal protection was not, according to the reasoning of the Court, sufficient ground to impose an additional burden on public servants and employees of state owned enterprises. The decision has however a caveat in its effects: contrarily to what is normal, the legal rules were declared unconstitutional but not with retroactive effect, avoiding the restitution by the state of some of the non-paid salaries. Once again the decision was taken by a majority of 9 against 3 Judges, although this time some of the Judges in the majority criticized part of the ruling, considering that the decision should be retroactive. The minority

stated that the rules should be considered constitutional due to the dire economic situation of the country (VITOR GOMES); perhaps the most sophisticated dissenting vote was by MARIA LÚCIA AMARAL who stressed the need for fairness between generations and stated that it was unacceptable for the present generation to postpone burdens and costs that were, therefore, imposed on the future generations.

Recently, the Portuguese Constitutional Court in an important ruling (Acórdão n.º 602/2013, Processo n.º 531/2012) had to answer a significant number of issues regarding recent changes in labour law that derived from the need to comply with the Memorandum signed with the creditors (jointly known as the ‘Troika’). The Portuguese government had taken a number of legislative steps whose conformity with the Constitution was at stake. Among these measures – at least among the most important measures – was the suspension, by law, of a number of contractual clauses, both in collective agreements and individual labour contracts, as well as the legal stipulation that after a period of suspension, when those clauses would again be effective, the amounts contractually foreseen (for instance for payment of extra work) would be reduced to half unless there was a subsequent agreement by the parties confirming the original amounts. Hence the legislator not only suspended contractual clauses but directly intervened in the content of the contracts. In addition some clauses of both collective agreements and individual labour contracts that were valid at the moment of contracting were declared invalid (a sort of supervening invalidity).

Another set of problems concerned the possibility of introducing changes in working time without the individual agreement of the employee. Changes in working hours were already possible with the individual agreement of the employee and the law considers that certain proposals of the employer are deemed to be accepted if the employee does not decline the offer in writing. But the law now goes one or two steps further: on the one hand if the proposal to increase the weekly number of working hours – in some cases the average of the working hours will respect the limit of 40 hours in a reference period, but in other cases the extra work may be compensated simply by money or other means such as additional holidays – is addressed to a working team or section and if the employer obtains the agreement (by silence) of 75% of the workers, such a measure can be applied to all of them, even those who declined the offer by writing. If there is a trade union in which 60% of the workers of a certain section or working team are affiliated or if a collective agreement signed by a trade union can be applied to 60% of the working team or section, the non-affiliated workers are bound by that agreement. The workers who are not bound by the agreement are only the workers affiliated in another trade union who expressed an opposition to the extension of the collective agreement.

Questions were also raised concerning a number of measures aiming to facilitate the dismissal of workers. On the one hand there were measures concerning dismissal as a result of extinction of the working post – a cause of dismissal akin to collective dismissal. The law allowed the employer to choose the criteria he/she was going to follow in order to decide which workers would be the target of dismissal. Another controversial measure was the elimination of the duty of the employer to check if there was another available working post to avoid dismissal of the worker. Yet another change concerned the possibility to dismiss an employee as a result of a reduction in productivity. Traditionally it has been difficult to dismiss workers in Portugal simply because their productivity has declined. Disciplinary dismissal as any other disciplinary sanction requires evidence of faulty behaviour. In cases where the employee is not to blame for the declining of his/her productivity, dismissal was only possible, as a rule, when the employee showed signs of being unable to adjust to a new technology. Only in some marginal cases of workers who performed directive functions was it possible to dismiss simply for the failure to attain certain previously agreed objectives. The new changes in the law allow the Portuguese employer to dismiss employees whose productivity has declined in a relevant measure and in such a way that one may expect the reduction to be permanent. On the other hand the law also ended the duty of the employer to check the possibility of changing the worker to a different available working post.

Before scrutinizing in greater detail the decision of the Court it must be stressed that, from a number of issues, not a single one was decided unanimously. All the judges in the bench had dissenting votes and all of them were in the minority on at least one of the issues at stake.

The decision states that the Court will only discuss the relationship between the law and collective agreements. The possibility of the law interfering so drastically in the individual labour contract or, in other words, whether the individual labour contract as such must be respected as private autonomy and private freedom are also, to some extent, enshrined in the Portuguese Constitution was not discussed since the Court considered that the request made by 24 members of the Portuguese Parliament did not mention the individual labour contract. As a result the analysis of the Court focused only on the relationship between law and collective bargaining.

A number of legal rules were considered unconstitutional, namely those that had suspended and considered void clauses of contractual agreements that had been entered into by the parties and were valid and effective when the new legal rules were enacted.

The Portuguese lawmaker had taken several measures to increase the flexibility of working time. One of the first measures was the so-called ‘adaptability’ which refers to temporal flexibility. As a rule the limit of weekly working hours is 40, but this limit can be raised by collective agreement, concerning some kinds of activities. But the Portuguese law also allows for a certain modulation or flexibility: in such a system the 40 hours per week limit turns to be solely an average limit and working hours may reach 60 or 50 working hours per week depending on the arrangement. This flexible time limit may be introduced by collective agreement. But there are other possible ways of creating such a flexible scheme: on the one hand it is possible to make an individual agreement with the concerned employee and the law even states that the employee’s silence has the meaning of consent. But another way of establishing such a flexible time limit is a collective one although not by a collective agreement. If such a proposal by the employer is presented to a working team or section and accepted either by a trade union that represents 60% of the workers of that section or group or by 75% of the workers themselves the mechanism will apply to all workers irrespective of the fact that some of them may have refused in writing the proposal. Again with one exception: workers affiliated in a trade union which has opposed such a working period. In any case this device will not apply to certain categories of workers such as pregnant woman, workers with at charge and workers with chronic illness. However this mechanism has been criticized – although without success in the Constitutional Court – for a number of reasons, mainly because it violates the so-called freedom of the workers not to be affiliated in a trade union.

A much more drastic mechanism, however, that was introduced and subsequently enlarged by the law maker is the so-called working hours’ pool. It must be emphasized that this mechanism allows the employer to require additional working hours that are not extra hours and that do not necessarily require extra payment, but on the other do not have to be compensated with rest. What that means is simply that the agreement may either contemplate an extra payment, additional vacation days or a deduction in working time equal to the additional hours performed by the worker. As a result this arrangement may have as a consequence an additional number of working hours that may amount to 200 working hours per year. Again this arrangement may be introduced in the same ways that were described above concerning the flexible limits to the weekly working hours. The Constitutional Court, although by the smallest possible majority, ruled that these changes were not unconstitutional.

One of the novelties of Law 23/2012 was that in dismissals for extinction of the working post as well as in dismissals resulting from worker inadequacy it was no longer necessary for the employer to give evidence supporting the conclusion that in the enterprise there was no other available working post suited to the remaining working capacity of the employee. This was considered a serious violation of the Constitutional provision forbidding dismissal without just cause (Article 53.º of the Portuguese Constitution). According to our Constitution dismissals of workers, disciplinary or non-disciplinary, must be a last resort, an *ultima ratio*. In addition, the labour contract must be performed in good faith

and the employer who dismisses an employee without previously checking that there was no other working post infringes the good faith requirement.

Law 23/2012 also allowed the employer to choose the criteria for determining which employees would be selected for dismissal. In other words the employer was free to select criteria, such as economic priorities, as long as they were not abusive or discriminatory. The Constitutional Court considered that this provision was too vague and did not ensure sufficient protection for employees. As a result the old rule was reintroduced and the employer is yet again bound to respect the legally established criteria, protecting mainly the more senior employees.

At the same time the Constitutional Court accepted the possibility of dismissing inadequate workers even in cases where there was no introduction of new technology. As a result, this new cause of dismissal, that requires no worker misconduct, is really a dismissal for lack or reduction of productivity. The procedure is somewhat cumbersome since it requires a written opinion by the employer stating that the employee had shown signs of inadequacy (a significant reduction in productivity or an increase in the number of malfunctions in equipment or a significant increase in the level of danger associated with the work).

In Acórdão n.º 794/2013 the request made by some members of the parliament concerned the increase in working hours of the public servants (without a proportional increase in salary) as well as a number of rules that established that such an increase was mandatory, prevailing over collective agreements. A majority of the Court decided that the public servants could not invoke the reliance principle as they ought to be aware of the governments' intention to gradually converge the laws concerning private and public employment. On the other hand, as the Court stated, there is no fundamental right insuring against salary reductions. The Court discussed the possible existence of a general clause against the reduction of rights but considered that such a clause was unacceptable since it would infringe upon the legislative function or power and it would 'almost totally destroy the legislator's freedom to act'. The increase of the working hours of the public servants (from the limit of 35 hours per week to 40 hours per week) was considered a foreseeable event and a decision that a freely elected lawmaker could take. The decision was taken by a very small majority (the smallest possible: seven against six) and the dissenting votes expressed doubts concerning a possible excessive interference with collective agreements and collective bargaining (MARIA JOSÉ RANGEL DE MESQUITA) and stated that changing the content, by law of a collective agreement or extinguishing it by law was a serious violation of the fundamental right of collective bargaining (JOÃO CURA MARIANO and JOAQUIM DE SOUSA RIBEIRO).

This last decision seems much more cautious than the previous one, perhaps as a result of the strong criticism that was aimed at the Constitutional Court that was accused, as already stated, by the European Commission of 'blocking key political changes'.

A final remark: it appears clear from the above that the Portuguese citizens have chosen mainly to challenge the legal changes in the Portuguese Courts, particularly in the Constitutional Courts.

THE PORTUGUESE CONSTITUTIONAL COURT CASE LAW ON AUSTERITY MEASURES: A REAPPRAISAL*

Roberto Cisotta^o and Daniele Gallo[•]

Introduction

In various cases during these last years, the Portuguese Constitutional Tribunal (PCT) reviewed the legality of some of the austerity measures agreed with (but effectively imposed by) the *Troika* – the European Commission (Commission), the European Central Bank (ECB) and the International Monetary Fund (IMF) – as conditions for the release of the loan package granted to Portugal in May 2011. As is well-known, some of those austerity measures have been declared unconstitutional¹. This paper tries to shed some light on a number of questions, both theoretical and practical, to which those judgments give rise. It is structured as follows: in the second paragraph, the legal nature of the obligations to implement such austerity measures are analyzed; in the third paragraph, some criticisms, expressed by a part of the legal doctrine and concerning the legal reasoning of the PCT, will be presented and scrutinized. Finally, in the third paragraph, the case-law of the PCT will be analyzed in a broader perspective, taking into account its implications regarding the legal framework governing the relationships between the internal legal order and European and international law, as well as its meaning in the light of the protection of national social sovereignty.

The legal nature of the obligations contracted by Portugal and the (implicit) attempt to avoid any conflict with the European legal order

The decision regarding the financial aid for Portugal was adopted by the ECOFIN Council on 16-17 May 2011 and the related *Memorandum of Understanding on Specific Policy Conditionality* (MoU) was signed immediately afterwards². The rescue package was provided by the *European Financial*

* This article develops our earlier essay: *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità e il rispetto dei vincoli internazionali ed europei*, in *Diritti Umani e Diritto Internazionale*, vol. 7, n. 2, 2013, 465-480. Roberto Cisotta has drafted paras 1-3, while Daniele Gallo has drafted par. 4.

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¹ See the other contributions to this Working Paper by Júlio Gomes and Miguel Nogueira de Brito.

² Memorandum of Understanding on Specific Economic Policy Conditionality, 18 May 2011, which incorporates the precedent Memorandum of Economic and Financial Policies (MEFP), www.ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf. The Portuguese crisis has to be understood in the more general framework of the responses provided by the EU and its Member States to the sovereign debt crisis: see A. Viterbo and R. Cisotta, 'La crisi del debito sovrano e gli interventi dell'UE: dai primi strumenti finanziari al Fiscal compact', *Il diritto dell'Unione europea*, 2012, p. 323 ss., especially p. 329. For an analysis from the economic point of view of the deterioration of Portugal's financial situation, see: D. Gros, 'Greece and Portugal: Similar Fundamentals but Different Outcomes?', *CEPS Commentary*, 17 February 2011, www.ceps.eu/book/greece-and-portugal-similar-fundamentals-different-outcomes; European Commission, 'The Economic Adjustment Programme for

Stabilisation Mechanism (EFSM) – the only fund established within the EU legal order³ -, by the *European Financial Stability Facility* (EFSF)⁴ and by the International Monetary Fund (IMF), through the *Extended Fund Facility*⁵. Each of the three funds has provided 26 billion euro.

The Economic Adjustment Programme (*Programa de Ajustamento Económico e Financeiro*, hereinafter PAEF) is based on the following documents: a letter of intent from the Portuguese government and the *Banco de Portugal* and addressed to the President of the Eurogroup, the President of the ECOFIN Council, the Commissioner for economic and monetary affairs, the President of the ECB (the *Managing Director* of the IMF was in copy); the already mentioned MEFP and MoU; the *Technical Memorandum of Understanding* (TMU), containing, in particular, the indexes for the verification of the achievement of the objectives⁶.

As the EU committed itself to providing 26 billion euro under the EFSM, the Council adopted an implementing decision⁷ in which it is clarified that '[t]he first instalment shall be released subject to

(Contd.) _____

Portugal', *Occasional Paper* 79, June 2011, http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp79_en.pdf, especially pp. 5-13; F. Carballo-Cruz, 'La crisis económica y financiera en Portugal: orígenes, ajuste y situación un año después', *Revista de Estudios Europeos* 2012, pp. 9-31.

³ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism *OJ L* 118, 12.5.2010, p. 1–4.

⁴ The EFSF has been created by the Euro Area Member States as a *société anonyme* incorporated in Luxembourg and it can provide financial aid to Euro Area Member States. On the features of the EFSM and of the EFSF and on their origins in the aftermath of the Greek crisis, see A. Viterbo, R. Cisotta, 'La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea', *Il Diritto dell'Unione europea*, 2010, p. 961 ss., especially pp. 980-988. Afterwards, the EFSF has been replaced by a permanent mechanism, the European Stability Mechanism (ESM): see the Treaty Establishing the European Stability Mechanism, <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>. The possibility to establish such a mechanism has been explicitly stated at primary law level thanks to an amendment of Article 136 TFEU: see European Council Decision No 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *OJ L* 91, 6.4.2011, p. 1–2.

The Court of Justice has recently confirmed the validity of this decision in its judgment in case C-370/12, *Pringle* [2012], nyr. The judgment is quite complex and it addresses the compatibility of the whole legal solution with EU law. See B. De Witte and T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*', *Common Market Law Review* 2013, p. 805 ff.; P. Craig, '"Pringle": Legal Reasoning, Text, Purpose and Teleology', *Maastricht Journal of European and Comparative law*, 1/2013, p. 3 ff.; D. Thym and M. Wendel, 'Préserver le respect du droit dans la crise; la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt *Pringle*)', *Cahiers de droit européen*, 3/2012, p. 733 ff.

⁵ This Facility has been created in 1974 to provide aid to countries experiencing difficulties in their balance of payments.

⁶ On MEFP and MoU see fn 2-4. All the documents on which the PAEF is based are attached to '*The Economic Adjustment Programme for Portugal*', *Occasional Paper* 79, cit., p. 37 ff. A separate letter of intent has been addressed to the *Managing Director* of the IMF: see *infra*, fn 12.

⁷ Council Implementing Decision No 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal, *OJ L* 159, 17.6.2011, p. 88–92, as amended by the following Council implementing decisions: 2012/224/EU, of 29 March 2012, *OJ L* 115 27.4.2012; 2012/409/EU of 10 July 2012, *OJ L* 192 20.7.2012; 2012/658/EU of 9 October 2012, *OJ L* 295 del 25.10.2012; 2013/64/EU of 20 December 2012, *OJ L* 26 26.1.2013; 2013/323/EU of 21 June 2013, *OJ L* 175, 27.6.2013; 2013/703/EU of 19 November 2013, *OJ L* 322, 3.12.2013. In recital (6) of this decision, it is recalled that the financial assistance is provided within the framework of the PAEF.

One may wonder whether the implementing decision is aimed at implementing one of the international instruments (of the PAEF) within the EU legal order, or Regulation 407/2010, cit. establishing the EFSM. In this context, it seems more natural to prefer the first alternative, as the EU has committed itself – although not being formally part of the relevant international instruments – to granting a part of the loan and there should be an act implementing this obligation within

the entry into force of the Loan Facility Agreement and the Memorandum of Understanding⁸; furthermore, '[a]ny subsequent loan releases shall be conditional upon a favourable review by the Commission, in consultation with the ECB, of Portugal's compliance with the general economic policy conditions as defined by this Decision and the Memorandum of Understanding' (Article 1(4)).

As to the subjects entrusted with the task of monitoring Portugal's compliance with the decision itself and therefore also with the MoU, the Council implementing decision makes reference only to the Commission and the ECB and not to the IMF, since only the loan granted under the EFSM – an EU law instrument – is at stake in this context. Nevertheless, conditionality terms have been set with reference to the whole lending operation – involving the EFSM, the EFSF and the IMF –, therefore the three members of the *Troika* actually work together and the IMF is involved in the monitoring activity on the same footing as the two EU Institutions.

The *Troika*⁹ intervenes as a monitoring body, but it had also conducted the negotiations to finalize the various instruments of the PAEF. Once more, Portugal had to negotiate with it after the Constitutional Tribunal struck down provisions implementing obligations stemming from the PAEF.

The complex architecture set up to provide financial aid to Portugal – and the conclusion would not be *substantially* different for the other rescued States – is *avant tout* based on instruments, which, as to their legal nature, are to be qualified as international agreements (including a private contracting party, where the loans are granted by the EFSF). As just said, even the part of the loan granted under the EFSM – that is to say an EU law instrument – has to be understood as a segment of the machinery based on the PAEF and the conditionality terms are those established by the MoU and the other instruments mentioned. Therefore, the move of the Euro Area Member States aimed at rescuing Portugal is principally framed outside the EU legal order, even if links with that legal order

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the EU legal order. Nonetheless, even the other alternative would not undermine the fact that, as it will be argued in the text, Portugal has essentially undertaken international obligations and that formally speaking EU law is merely playing an ancillary role.

⁸ By the *Loan Facility Agreement*, signed on 27 May 2011, the loan has been effectively granted; see now the *Master Financial Assistance Facility Agreement* of 24-25 May 2012, www.efsf.europa.eu/attachments/efsf_portugal_ffa.pdf.

⁹ In principle, the Commission and the ECB, as institutions of the EU, should act on its behalf and it is the Union, not its institutions, that is endowed with international legal personality (see for instance: A. Tizzano, 'La personalità jurídica dell'Unione europea', in *Il Trattato di Amsterdam*, Milano, 1999, p. 123 ff., espec. p. 149; other authors do not share this view and affirm that the ECB is an autonomous legal person under international law: see C. Zilioli, M. Selmayr, 'The External Relations of the Euro Area: Legal Aspects', *Common Market Law Review* 1999, p. 273 ff. espec. p. 282). In this context, one may wonder whether the two EU institutions, in particular given the involvement of the EFSM – an EU instrument, as we have seen – are effectively acting as *agents of the Union*. Nevertheless, despite the decision regarding the involvement of the EFSM has to be clearly adopted within the EU legal framework and according to its relevant rules, it seems more appropriate to affirm that it is not the EU that is acting within the *Troika* (through its institutions and alongside the IMF), but the Member States of the Euro Area, and that the Commission and the ECB are actually acting on their behalf (or on behalf of the EFSF and, in the future, on behalf of the ESM: both mechanisms can be considered independent legal subjects, however it has to be recalled that they have been established by those States and the EU once more is not formally involved). In fact, the EU has not directly concluded with Portugal any of the relevant instruments: the procedures existing under EU law to conclude international agreements have not been used and formal obstacles do exist in EU law that could not be overcome (see *infra*, fn 13). The only foothold of the EU is the EFSM, which is not a legal subject under international law and therefore cannot *per se* subscribe any of those instruments. It has been (apart the IMF) the EFSF, which has directly entered into formal agreements with Portugal: see in particular *Master Financial Assistance Facility Agreement*, cit.

What is relevant for the EU legal order here is that the Commission, in line with its general tasks, as enshrined in Article 17 TEU, should ensure the compatibility of the instruments which are negotiated and adopted in this context with EU law (this has been affirmed by the Court of Justice with reference to the activity of the ESM and should be considered true, *mutatis mutandis*, for the EFSF: see *Pringle*, cit., paras 160-165, espec. 164).

nevertheless exist¹⁰. As a consequence, the obligations undertaken by Portugal respectively under international and under EU law cannot be easily separated and an action in breach of the latter – fully dependent on, and functionally linked to, the PAEF – would turn out to be, in its substance, a breach of the former.

a. In particular: the MoU

This conclusion cannot be called into question by the doubts raised in the legal doctrine on the binding character of the MoU¹¹. It is true that the MoU seems to be presented as a *gentlemen's agreement*, however the legal mechanism set up to provide financial aid to Portugal has to be understood in its entirety. Two considerations can be made. First, even if it looks as though it is a kind of *addendum* to the (legally binding) instruments¹², it actually sets the terms under which the various *tranches* of the loan can be released and this has to be considered a *core point* in the whole legal mechanism.

Second, one may make reference to Article 2(1) (a) of the Vienna Convention on the Law of Treaties, whereby a treaty is ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’. Even if this definition is aimed at clarifying the use of terms for the purpose of the Convention, it can be accepted as a general definition which can shed some light on the understanding of the MoU. The expression ‘two or more related instruments’ is, first of all, to be intended as a reference to the exchange of letters, a form under which treaties are often concluded in diplomatic practice. But other cases of ‘related instruments’ are also possible. Thus, our situation could be interpreted as follows: the MoU has to be inserted in a wider legal mechanism and all the related instruments are to be considered as the ‘treaty’. The MoU could appear as a non-binding instrument, but it is functionally linked to other instruments, so that the terms laid down in it *play a clearly legal role*, as Portugal is obliged to respect them (to obtain the next release of the loan).

Whatever one's position on the legal value of the MoU, the essentially international nature of the obligations stemming from the whole mechanism and its *absorbing character* with regard to EU law obligations clearly emerges from the analysis above¹³.

¹⁰ Such links are not sufficient to attract the instruments in question to the EU legal order, since the obstacle of their international legal nature cannot be overcome. This has been the choice of the Euro Area Member States and this circumstance cannot be called into question.

¹¹ For an analysis of this problem in the Portuguese literature, see: E. Correia Baptista, ‘Natureza jurídica dos memorandos com o FMI e com a União Europeia’, *Revista da Ordem dos Advogados*, 2011, p. 477 ff.

¹² In particular, the MoU is attached to the mentioned letter of intent and to the other one addressed to the *Managing Director* of the IMF. See *supra*, fn 2-4 and 6. The letter of intent sent to the *Managing Director* of the IMF and the annexed documents are published on the website of the IMF: <https://www.imf.org/external/np/loi/2011/prt/051711.pdf>.

The form (and formal presentation) of the MoU, and of the whole PAEF, simply makes amendments easier. To date there have been nine updates, see the contribution by Miguel Nogueira de Brito to this Working Paper.

¹³ This ‘escape from EU law’ is due to the lack of instruments of EU law to provide financial assistance to Member States whose currency is the Euro experiencing financial troubles. This is due to two factors. First, there is an explicit prohibition, enshrined in Article 125 TFEU (*no bail-out* clause) for the Union and for Member States to assume the financial commitments of (another) Member State. This rule is rigidly applied only to Member States whose currency is the Euro with a view to preserving the financial stability of the Euro Area: in fact the TFEU itself (Article 143) does provide the possibility of provide financial aid to Member States with a derogation (i.e. whose currency is not the Euro). Nonetheless, after the first rescue package for Greece in May 2010, Article 125 has been (re-)interpreted, also on the basis of solid textual arguments, as a non-absolute prohibition limited only to direct commitments. Second, the Union enjoys only weak competences in the field of ‘economic policy’ (Chapter 1, Title VIII of the Third Part of the TFEU),

This explains why the *Tribunal constitucional* has raised no argument related to EU law¹⁴. Nevertheless, it might be wondered whether this absence of references to EU law was precisely intended to avoid any direct conflict with the EU and, moreover, to avoid dealing with a clash between potentially conflicting (international and EU) obligations.

The Court of Justice of the EU seems to have confirmed this solution, by refusing to respond to a preliminary reference by the *Tribunal do trabalho do Porto* concerning the budget law 2011 (*Lei do Orçamento de Estado para 2011 – LOE2011*), on the ground that no argument had been made as to whether that law was implementing EU law; as a consequence, the Court did not scrutinize the conformity of the budget law with the Charter of Fundamental Rights of the EU¹⁵.

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while it has an exclusive competence as regards monetary policy for Member States whose currency is the Euro (Article 3(1) (c) TFEU). As results from Article 2 TFEU, the EU's economic policy competence only allows a coordination of national policies at the EU level and cannot be classified within anyone of the main categories of competences (exclusive, shared or competences to support, coordinate or supplement Member States' actions): see M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', in *Common Market Law Review*, 3/2008, p. 617 ss., espec. pp. 655-6. Furthermore, according to Article 5(1) TFEU (which, like Articles 2 and 3, just mentioned, is inserted in Title I of the First Part of the TFEU, whose title is: 'Categories and Areas of Union Competences'), '[s]pecific provisions shall apply to those Member States whose currency is the euro': many of the innovations introduced in the context of the sovereign debt crisis can be probably associated to the 'specificities' of the situation of Member States of the Euro Area. On these issues, and on the problems emerging from the setting up of a mechanism like the EFSM, see: A. Viterbo, R. Cisotta, 'La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea', cit., espec. pp. 964-974. The Court of Justice of the EU has dealt with the interpretation of Article 125 TFEU in the *Pringle* case, cit. (see paras 64, 108-114, 130-137) (see *supra*, fn 4) and it has in substance endorsed the restrictive interpretation of the prohibition laid down in Article 125 TFEU, just recalled, on which the EU institutions and Member States (in particular those of the Euro Area) have relied upon in the context of the crisis. This judgment regards (indirectly) the institution of the ESM (which, according to a widespread opinion, can be regarded as the financial stability mechanism for Euro Area Member States which was missing in the original design of the founding Treaties): the weakness of the competences of the EU in the economic policy field has led the Court, amongst other arguments, to derive from the system of the Treaties the existence of a competence of the Member States of the Euro Area to establish a system like the ESM.

¹⁴ On the absence of any reference to 'counter-limits' and to Article 8.4 of the Portuguese Constitution, see *infra*, par. 4.

¹⁵ See Order in case C-128/12, *Sindicato dos Bancários do Norte et al. v. BPN – Banco Português de Negócios SA* [2013], nyr (see in particular paras 10-12). The referring court raised some doubts as to the conformity of the budget law with the principles of human rights protection under EU law and the Charter; however, according to Article 51, par. 1 of the Charter itself, it has to be respected by Member States only when implementing EU law (the same is true for general principles on the protection of fundamental rights). Moreover, the Court stresses that, according to Article 6 TEU, the Charter has the same legal value as the Treaties, but it does not create new competences for the Union: by recalling this statement, the Court seems to stress once more that the EU does not enjoy any kind of competences in this area. Even if this was the real underlying intention of the Luxembourg judges, it is not clear whether it has been the referring court to fail to provide evidence of application of EU law (thus giving the European judges a chance to abstain from giving an answer), or whether the Court of Justice itself failed to note the involvement of the EFSM (and therefore of Regulation 407/2010, cit. and of the Council implementing decision No 2011/344, cit.). It seems nevertheless quite clear that the Court of Justice is willing to preserve the essentially international nature of the rescue package, probably at the same time keeping the EU legal order uninvolved in the delicate issue of the contrast between austerity measures and fundamental rights. However, the question arises as to whether the application of the Charter of fundamental rights of the EU can be (so easily?) avoided, given that it cannot be denied that instruments of EU law are applied in this context (even if, as explained in the text, such instruments of EU law play only an ancillary role in the context of the provision of financial aid to Portugal). The Court might have the chance to better explain its views in some pending cases: Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial - Companhia de Seguros, SA* (once more from the *Tribunal do trabalho do Porto*, concerning this time budget law 2012); Case C-566/13, *Jorge Ítalo Assis dos Santos v. Banco de Portugal*; and Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins* (from the *Tribunal do Trabalho de Lisboa*).

Criticism of the case-law of the Portuguese Constitutional Court on Austerity Measures

The case-law of the PCT has been subjected to more specific criticism as well. In substance, there are two main critical points. The first one regards the way the equality principle has been applied: it has been argued that the Tribunal has used it as an *excessively flexible tool*, in order to achieve some pre-determined objectives. By so doing, the Portuguese Constitutional judges would have chosen their objectives and then found the legal reasoning suitable to achieve them *a posteriori*. Thus, they would have acted as a legislator.

In particular, some authors¹⁶ have found the way the Tribunal has justified the choice of applying austerity measures only to public workers not convincing and, all in all, incorrect. For instance, with regard to the cut of the fourteenth-month salary bonus, the Tribunal first considers the situations of private and public employees as, in general, comparable¹⁷ and it opposes the cut of the bonus only for public employees. The legal reasoning through which it achieves this result can be summarized as follows. First, the measure has not been considered arbitrary by the Tribunal, as it is functional to the pursuit of a public good. According to the authors who have criticized the Tribunal, it should have stopped here. On the contrary, the Tribunal considers that the difference in treatment of the two categories (public and private workers) has to be evaluated in the light of the ‘proportional equality’ principle. According to the Tribunal, the guiding parameter is the aptitude of the measure to achieve the objectives laid down in the PAEF, but this is not related to intrinsic elements of the two categories and cannot justify a greater sacrifice for public workers. On top of that, what is decisive for the PCT is the combined effect resulting from the continuous imposition of austerity measures upon public employees.

As far as the reduction for extra-time work is concerned, the Tribunal considers the two situations as not comparable, as private workers normally work for more hours. Apart from the alleged weakness of this consideration *per se*, the authors in question argue that the Tribunal – here as in almost all the other cases – is not clearly distinguishing between the preliminary question of the comparable nature of the two situations, and the justification of a different treatment.

The second critical point¹⁸ is not only related to the results achieved by applying the *equality principle test*, but involves the more general approach of the Tribunal: namely, its intrusion in an allegedly exclusive competence of the national legislator. As the legislator should be granted a particularly wide margin of discretion in economic policy choices, this approach would be inadmissible *a fortiori* as regards budget laws. Moreover, one may wonder whether, as the considered budget laws implemented international obligations, the margin of intervention to be recognized the Constitutional judges had to be even narrower. By declaring some provisions unconstitutional, the Tribunal has *canceled* some measures agreed by the Portuguese government and the *Troika* to put public expenditure under control and to make Portugal able to finance its debt regularly through the markets. Therefore, the government has been forced to find new ways to make ends meet. Thus, the *dictum* of the Tribunal influenced the outcome of delicate political negotiations and it might be wondered whether this should be considered beyond the reach of a Constitutional Court.

¹⁶ See G. Coelho, P. Caro De Sousa, “La morte dei mille tagli”. Nota sulla decisione della Corte costituzionale portoghese in merito alla legittimità del bilancio annuale 2013’, *Giornale di diritto del lavoro e di relazioni industriali*, 3/2013, 527 – 544. The two authors make reference in particular to judgment No. 187/2013.

¹⁷ The greater the difference between the two groups, the wider the discretion enjoyed by the public authorities in establishing differential treatment: this is the way the Tribunal itself interprets the comparison. However, according to the reported authors, the lack of sufficient legal justification for considering the two groups to be comparable – and the omission of important circumstances, like the different benefits and guarantees in case of unemployment, as well as the differences in treatment between the two groups envisaged by the Portuguese Constitution itself – constitutes the first flaw in the legal reasoning of the Tribunal.

¹⁸ *Ibid.*, 540 ff. For similar criticisms see also *infra*, fn 33, 34 and corresponding text.

It can nevertheless be noted that it is quite *natural* for a Constitutional Court to evaluate the reasonableness – in terms of proportionality, as well as of their suitability to achieve the pre-fixed goals – of measures adopted by a government, also if previously agreed on the international plane. Some more detailed thoughts will be presented on this issue in the following paragraph, bearing in mind that a more general question has to be answered: *to whom is the PCT speaking?* When pieces of national legislation are struck down, the national legislator is naturally seen as *under accusation*, but taking into account that those provisions were negotiated with (or imposed by) the *Troika*, the latter might be considered as the *second addressee* of the PCT decisions. Therefore, such decisions can be *paradoxically* regarded as aimed at protecting the national legislator, by giving back to it the power to re-decide on some critical issues, albeit under the guidance of the PCT as regards the respect of fundamental rights under the national Constitution.

4. Constitutional courts and economic crisis, between pseudo counter-limits and social sovereignty

As observed by Júlio Gomes and Miguel Nogueira de Brito in their contributions to this Working Paper, the PCT, in its jurisprudence on austerity measures and (*lato sensu*) social rights, has declared unconstitutional several provisions of LOE2012 and LOE2013 on the basis of the principle of equality, laid down in Art. 13 Const., whose corollaries – the principles of proportionality and legitimate expectation, both implied in Art. 2 Const. – were also found to be breached. The jurisprudence examined by Gomes and Nogueira de Brito is of great importance in order to provide new answers to the questions raised by the role of constitutional courts in protecting fundamental rights and assessing the legitimacy of national legislation implementing international and EU constraints¹⁹. At stake is the quest for a fair balance between the financial and economic objectives of the reduction of public spending required by international and European institutions, on the one hand, and the application of national constitutional principles concerning the protection of fundamental social rights, on the other. From this point of view, the PCT jurisprudence provides a concrete dimension to these principles, rather than one merely based on theoretical speculations on the relationship between external obligations contracted by the country at international and European level and fundamental rights recognized and safeguarded by the national legal order.

The main argument used in judgments nos. 253/2012, 187/2013, 474/2013 and 602/2013 is that the constitution is breached by stringent measures and special burdens on public servants and employees of state owned enterprises like those laid down in LOE2012 and LOE2013 since they would create unjustifiable disparities and differences in treatment between workers in the public and private sectors. However, the Tribunal does not say that no sacrifices may be asked of the former category in order to fulfil international obligations contracted by the country aimed at reducing public expenditure and securing efficiency, namely the *Troika*'s package described *supra*, par. 2. The principle of equality, in fact, must be read in light of the principle of proportionality: when the latter is respected, there is no violation of the Constitution. This has been clearly stated in judgments 396/2011 and 794/2013 where the PCT did not find any violation of the Constitution in relation, respectively, to LOE2011 and LOE2013, but also in the other judgments mentioned above with regard to a number of provisions contained in LOE2012 and LOE2013 that were not found unconstitutional by the PCT.

This circumstance shows that the PCT jurisprudence on the social implications of the austerity measures required by the *Troika* and implemented by the Portuguese Parliament (under the pressure of the Executive) does not represent a genuine revolution, that is to say, a radical modification of the overall framework of the contested state budget laws. The PCT does not call into question the prerogatives of the Legislature which decided to pass the state budget laws that have been challenged before it. This point may be clarified by examining a passage from judgment no. 187/2003. Based also

¹⁹ On the topic see *supra*, par. 2.

on its previous case law²⁰, the PCT started by considering that the right to pension, although not explicitly enshrined in the Constitution, can be derived from the right to property and the right to social security, which are recognized, respectively, in Articles 62 and 63 Const. It then observed that, since the right to pension is a social right, the task of deciding whether to impose restrictions on that right falls within the wide discretion of the legislator, who must ensure that a fair balance is struck between the pensioners' interests in receiving the amount originally established and the public interest represented by the '*sustentabilidade do sistema de pensões*'²¹. The Tribunal had no intention to claim for itself the power to determine the minimum content of positive benefits that the State must ensure to its citizens, i.e. the core of those rights whose protection is certainly more dependent on state resources than civil and political rights²². As stressed by the PCT, this determination falls within "*uma maior margem de livre conformação, por parte do legislador, do que a generalidade dos direitos, liberdades e garantias, uma vez que a sua aplicabilidade direta (não estando excluída), é necessariamente mais limitada*"²³. The reason why the Tribunal found a violation of the Constitution does not lie in the fact that a reduction of the pension would be *per se* in conflict with the right to social security under Art. 63 Const., since the Tribunal was not entitled to a declaration to that effect. Rather, the unconstitutionality of Art. 77 of LOE2013 lies in the fact that the measure therein provided for is meant to apply to a wide, undifferentiated 'audience' of citizens; in this sense, it results from the application of the principle of equality²⁴, in the field of fiscal policy, that is, the '*subprincípio densificador*'²⁵ of a progressive income tax system²⁶.

From what has been said above, as well as from the considerations made by Gomes and Nogueira de Brito, it may be inferred that lying at the core of the Tribunal's overall approach on the social side effects of the economic crisis is the issue of the relationship between the legislature and the judiciary, with regard to the legitimacy of measures which are the result of redistributive policy decisions democratically taken by the Parliament. In this respect, the Portuguese jurisprudence represents a judicial response to austerity measures, a response which is comparable to the legislative reaction of the Cypriot Parliament to the decisions made by the Government of that country. In both cases, the main problem revolves around the scope, extent and limits of democratic legitimacy, as well as the relationship with the principles, values and rights enshrined in national constitutions, with the crucial

²⁰ See judgments 72/2002, of 20 February 2002 and 3/2010, of 6 January 2010.

²¹ According to the Tribunal, "[è] ao legislador que incumbe fazer as necessárias ponderações que garantam a sustentabilidade do sistema e a justiça na afetação de recursos" (judgment 187/2013, para. 57, p. 2376); see also para. 58, p. 2377 of judgment 187/2013.

²² On this point, see the still-relevant observations by M. S. GIANNINI, *Stato Sociale: una nozione inutile*, in *Aspetti e tendenze del diritto costituzionale. Scritti in onore di C. Mortati*, vol. I, Milano, 1977, p. 141 ff.; see also R. Plant, *Modern Political Thought*, London, 1991, p. 269, according to whom "[p]ositive rights, as rights to resources, are always claimed against a background of scarcity and therefore there are limitations on satisfying them" and S. Holmes, C. R. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes*, New York-London, 1999. From a different perspective, on the similarities between social rights and civil/political rights see M. Luciani, *Sui diritti sociali*, in *Democrazia e diritto*, 1995, p. 545 ff.

²³ See judgment 187/2013, para. 57, p. 2376.

²⁴ See judgment 187/2013, paras 54 and 59, p. 2375 and p. 2377.

²⁵ This expression, in the plural, has been employed by the Tribunal to clarify that the principle of equality is a sub-principle, like others, of the principle of "*Estado de direito democrático*" recognized in Art. 2 Const.; see para. 54 of judgment 187/2103, para. 54, p. 2375.

²⁶ See judgment 187/2013, para. 54, p. 2375.

difference that in Portugal social sovereignty²⁷ has been reaffirmed, rather than by its natural agent, by the Tribunal²⁸. In this way, the PCT, relying on the principle of equality (and on its corollaries), seems to have urged the legislator to better exercise the competences and powers it seems to have given up in favour of international and European constraints.

The approach taken by the Tribunal seems destined to exceed national boundaries and become a tool of confrontation and fertilization amongst constitutional courts in the wake of the growing phenomenon of horizontal dialogues between national judges²⁹. One of the issues that will have to be assessed in the future is to what extent the Portuguese jurisprudence may be read in the sense of constitutionalizing the principles – and the rights that derive from them³⁰ – which have been given primacy over international constraints and, thus, have acquired universal status – principles and rights that, as a consequence, cannot be derogated from by international law and which may apply to all EU legal systems. Therefore, we have to wait for future developments in the jurisprudence of national constitutional courts.

A closely connected issue is that of the so-called counter-limits, to be understood as national principles which must be necessarily protected and which limit the effectiveness of EU law within the national legal system. Now, it is clear, first of all, that the obligations at the core of the PCT jurisprudence do not only, and mainly, derive from EU law – as has been already highlighted *supra*, par. 2 – but also from international law and, secondly, that they operate with respect to provisions that, even though adopted because of external constraints, are formally internal sources of law, as is the case of LOE2012 and LOE2013. The *vis expansiva* of EU law, through the principle of primacy, cannot be therefore automatically transposed to the dialectical relationship between international legal order and national law. This is also the reason why the PCT did not ground its reasoning on Art. 8.4 Const., according to which

“As disposições dos tratados que regem a União Europeia e as normas emanadas das suas instituições, no exercício das respectivas competências, são aplicáveis na ordem interna, nos termos definidos pelo direito da União, com respeito pelos princípios fundamentais do Estado de direito democrático”³¹.

²⁷ On the notion of “social sovereignty” see R. Latham, ‘Social Sovereignty’, *Theory, Culture and Society*, 2000, p. 1 ff.; see also M. Ferrera, *The Boundaries of Welfare. European Integration and the Spatial Politics of Social Protection*, Oxford 2005, and S. Sciarra, *L’Europa e il lavoro – Solidarietà e conflitto in tempi di crisi*, Roma-Bari, 2013.

²⁸ On the relationship between constitutional courts and politics see G. Zagrebelsky, *Principi e voti. La Corte costituzionale e la politica*, Torino, 2005.

²⁹ On the concepts of legal pluralism as well as on the constitutionalisation of international law and internationalisation of constitutional law see, *inter alia*, G. de Búrca, O. Gerstenberg, ‘The Denationalization of Constitutional Law’, *Harvard International Law Journal*, 2006, p. 243 ff.; N. Walker, ‘Beyond boundary disputes and basic grids: Mapping the global disorder of normative disorders’, *International Journal of Constitutional Law*, 2008, p. 373 ff.; A. von Bogdandy, ‘Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law’, *ivi*, p. 397 ff.; M. Poiares Maduro, ‘Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism’, in J. L. Dunoff, J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International law, and Global Governance*, Cambridge, 2009, p. 356 ff.; A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford, 2010; C. Focarelli, *International Law as Social Construct. The Struggle for Global Justice*, Oxford, 2012, pp. 316-349; D. Tega, *I diritti in crisi. Tra Corti nazionali e Corte europea di Strasburgo*, Milano, 2012, pp. 23-44.

³⁰ On rules and principles see, among others, R. Dworkin, *Taking Rights Seriously*, London, 1978, Ch. 2.

³¹ The fact that the main *sedes materiae* is international law rather than EU law entails that the EU Charter of fundamental rights is not applicable; on this point see F. Costamagna, ‘Saving Europe Under Strict Conditionality’: A Threat for EU Social Dimension?’, *Working Paper-LPF*, 2012, n. 7.

In conclusion, the jurisprudence of the PCT raises crucial issues which the constitutional courts of EU Member States will certainly need to address in the future: what is the boundary between judicial activism and the judicial recognition of fundamental social rights as a remedy to the legislature's minimalism in ensuring the protection of those rights? When can legislative action, insofar as resulting from the democratic process, no longer be regarded as the best way to secure that the rights of citizens are safeguarded? To what extent can judges require the legislature to take social rights 'seriously'? In this regard, we believe that, even though judges obviously do not create the law³², they should be active – rather than *activist* or creative – agents of change³³ whenever constitutional rights are put at risk by national legislation – whether or not the latter is the result of an international obligation or constraint – in order to act as guardians of last resort for citizens' fundamental rights³⁴.

³² In these terms J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford, 2009, p. 127.

³³ *Contra*, with regard to the PCT jurisprudence see G. de Almeida Ribeiro, Judicial Activism Against Austerity in Portugal, *International Journal of Constitutional Law Blog*, Dec. 3, 2013, available at: http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/_who, in his harsh criticism of the PCT's approach, refers to the risk that democracy would give way to "juristocracy".

³⁴ On the risks deriving from such 'creativity' see M. Cappelletti, *Giudici legislatori?*, Milano, 1984 and J. Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal*, 2006, p. 1346 ff. On judicial activism and *originalism* see J. Rubenfeld, *Freedom and Time – A Theory of Constitutional Self-Government*, 2001, p. 188.

WELFARE RIGHTS AND EURO CRISIS - THE SPANISH CASE

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The Euro crisis has a particularly strong impact on the Spanish society. The rise of the unemployment rate by 15.7 points¹ over the last five years, and the rise of the index of risk of poverty and/or social exclusion² are self-explanatory. In these circumstances, the effectiveness of welfare rights is particularly important. Yet, social expenditure is lower than before the crisis.

In this context, not only have the living conditions of most Spaniards been worsened but the constitutional and political system has also come under enormous pressure. Currently, Spanish citizens tend to distance themselves from the key actors of the representative democracy. The issues are clearly extremely complex, and I will limit myself, in this paper, to the relationship between the Euro crisis, the protection of welfare rights and democracy in Spain.

This analysis aims at exploring briefly the cut-backs in welfare rights in Spain during the euro crisis. In this regard, I will first expose the impact of the cut-backs on the main public policies. Secondly, I will study their implementation mechanisms. Thirdly, I will discuss the main judicial decisions in relation to this topic. Finally, I will touch upon the citizens' response to these issues.

This paper is limited to the brief analysis of the main measures adopted regarding the right to education, the right to health care and housing rights. I have not included the changes regarding, for instance, support and care to dependent persons. Moreover, I will not deal in detail with all those measures but only with their global impact in Spain. Actually, the seventeen Spanish Regions are entitled to shape and implement the core of social policies but a study of these seventeen systems would exceed the framework of this contribution. Therefore, I will only discuss those regional reforms that have been challenged before Courts.

Austerity Measures in Spain

The Commission initiated an excessive deficit procedure regarding Spain in April 2009, which is still ongoing, even though the deadline to reduce the public deficit has been extended until 2016. This decision had a first impact in 2010: the birth allowance was canceled (EUR 2500 per birth) and the funding of assistance to persons with dependency due to disability, age or illness was reduced³.

The economic crisis deepened and in 2011 the public deficit reached 8,5% of GDP. On 14 February 2012 the Commission, on the basis of EU Regulation 1176/2011, adopted the Alert Mechanism Report, in which it identified Spain as one of the Member States for which an in-depth review would be carried out. The review stated that Spain is affected by macro-economic imbalances. Therefore, Spain was required to take several measures, among them the reduction of the deficit and public debt.

¹ The unemployment has increased yearly: 11.3% in 2008; 18% in 2009; 20,1 % 2010; 25% 2012; 27% in 2013. Commission Staff Working Document. Brussels SWD 29.5.2012 (2013) 359 final

² Index of risk of poverty and/or social exclusion; 2008 22,9 ; 2009 23,4%, 2010 de 25,5%, 2011 del 27% . Commission Staff Working Document. Brussels 30.5.2012. SWD 2012 310 final

³ *Real Decreto Ley 8/2010*, 20.05.2010

In 2012, the Spanish economy deteriorated due to the banking crisis. On 7 May 2012 the Spanish government decided to nationalize Bankia, Spain's fourth biggest bank. Bankia's rescue, due to its low capital, amounted to 2,5% of GDP. Therefore, on 9 June 2012 Spain requested financial assistance for an amount of 100bn Euros. This aid was granted on the condition that Spain would comply with the obligations derived from the excessive deficit procedure and the recommendations to address the macroeconomic imbalances⁴.

The subsequent Commission reports still pointed to Spain as one of the countries with serious macroeconomic imbalances. Moreover, they explicitly stated that the excessive deficit procedure has not been triggered given the deep and ambitious national reform developed by Spain. Currently, the Commission keeps monitoring the Spanish reforms⁵.

Spain has taken several measures to fulfill the EU requirements. However, from the point of view of welfare rights, the real problem is the need to reduce public deficit and public debt. In fact, the EU only demands a better management of social expenditures to reduce the global deficit. Moreover, the EU Commission and the Council insist on the need to improve the Spanish educational system at all⁶ levels and to pay attention to the poverty rates⁷. In fact, the only explicitly required reduction is that of the public expenditure on pharmaceuticals⁸.

Nevertheless, the cut-backs have a special impact on social policy expenditure. In other words, the austerity measures recommended to Spain by the EU have led to a strong reduction of the expenditure in social policies. It could be argued that austerity measures could be developed without affecting social policies and, to a large extent, it is plausible to consider that it is up to Spain to decide how to reduce the deficit. However, the requirements are so demanding that it is quite complicated to fulfill them without major changes in social policies.

In this regard, the budget of the Spanish Regions is a good example. The EU explicitly required "strong fiscal measures" and "budgetary compliance" at the regional level⁹. It even recommended that, if necessary, the Spanish State had to impose budget stability on the Regions, without any consideration of the vast constitutional and political implications of such a decision.

However, Regions are in charge of the main social policies. In fact, social expenditures reach up to 70% of the regional budget. Moreover, their debt-related expenses are rapidly increasing. It is indeed really hard to imagine how one could reduce the regional deficits without decreasing the expenditure on social services.

To clarify this point, I have taken into account the data provided by the Spanish Finance Ministry regarding Regional Budgets, the maximum deficit required of Spain and the actual Spanish deficit. These data, in my view, are self-explanatory. Social policies plus public debt amount to 80% of the regional budget. Moreover, regions are entitled to provide public security and judicial administration, which implies a further 5% of their budget. Hence, it is not surprising that public health and education expenditures have decreased rapidly since 2010.

⁴ Memorandum of Understanding on Financial-Sector Conditionality. 9.07.2012.

⁵ Alert Mechanism Report 2014. Brussels 13.11.2013, COM /2013) 790 final

⁶ Brussels, 7.6.2011. SEC (2011) 718 final

⁷ Brussels, 10.5.2012, COM (2012) 310 final

⁸ Brussels, 29.5.2013, SWD (2013) 259 final

⁹ Brussels, 10.5.2012, COM(2012) 310 final.

	2010	2011	2012
Deficit required of Spain	9,3	6	6,3
Spanish actual deficit	9,2	8,5	7,0
Regions' rate for social policies	72%	73%	71%
Regions' rate for public debt	5%	7%	9%
Regions health spending	59.140.617.859	56.810.181.852	55.988.179.230
Regions education spending	40.602.389.962	38.396.987.667	37.723.732.009

An important share of cut-backs has been suffered by civil servants and public employees. However, there are also a number of measures able to affect the quality of education and health care. Actually, one of the decisions in this field has been to replace only one out of ten vacancies, in addition to raise working hours and, in the case of schooling, the number of pupils per classroom. Besides, hospitals have been privatized or partially closed down, educational fees have been raised, scholarships have decreased, medicinal prices have been raised, etc.

Furthermore, these measures have generally not taken into account their effect on vulnerable groups and have been particularly hard on minors, immigrants and ill people. In the case of immigrants illegally staying in Spain, they have been barred from access to public health care, except in cases of emergency assistance, pregnancy and minors. The granting of financial assistance in case of dependency has been delayed in time and the amount of the aid has been strongly reduced. Family allowances have been almost canceled; subsidies for school meals have been substantially cut as well as the support to minors with learning problems.

These measures have been easily taken by the central government thanks to the clear majority of the *Partido Popular* in the Spanish Parliament since the 20 November 2011 elections. The three main legal instruments have been the following: Budget Acts, Royal Decree Laws and "Sectorial Conferences".

A Royal Decree Law is adopted by government in exceptional circumstances and emergency, which include, following the Spanish Constitutional Court's case law, measures dealing with economic problems or even with EU requirements. A Royal Decree Law enters into force almost automatically once published. The Congress has to ratify the text as a whole, after a short parliamentary debate, within 30 days by a simple majority. Hence, a Government with parliamentary support in the Congress can easily approve a Royal Decree Law.

In Spain only governments can table Budget Acts. The power of Members of Parliament to make amendments is restricted and the time limits are unusually short. To sum up, the Parliament's participation in the adoption of Budget Acts and Royal Decree Laws is minimal, yet without breaching the constitution.

Regarding the "Sectorial Conferences", they are composed of members of the central Government and Regional Governments. They are a key instrument to enhance the cooperation between the State and Regions, but they suffer from a lack of transparency. Actually, only the agendas of the meetings are made public. They must not encroach upon parliamentary powers. Nonetheless, during the crisis "Sectorial Conferences" have adopted agreements regarding key issues and Regional Parliaments have ratified them without much parliamentary debate. Since the *Partido Popular* has a majority, all on its own, in the central Parliament and in 10 out of 17 Regional Parliaments, the application of agreements

concluded in the “Sectorial Conferences” has been very much facilitated, and the poor parliamentary participation has speeded up their adoption¹⁰.

Main Austerity Measures and Domestic Courts

Social groups and political minorities have been excluded from the shaping, development and implementation of social reforms. Therefore, it is not surprising that the main reforms have been challenged before the Constitutional Court or Administrative Courts. However, the Spanish legal system does not provide many opportunities for claiming welfare rights in court.

Regarding the Constitutional Court, the *recurso de amparo* (individual complaint for violation of fundamental rights) does not protect any welfare right, except the right to education. Furthermore, legislative acts cannot be the object of a *recurso de amparo*. Constitutional challenges can be initiated by the President of the Government, 50 Deputies, 50 Senators, Regional Governments, Regional Parliaments and the National Ombudsman.

The lion’s share of the challenges related to austerity measures has been initiated by regional governments and Socialist Party members of the Chamber of Deputies. However, the President of the Government has also challenged several regional acts which either widened or restricted the scope of austerity measures. Unfortunately, all the cases are still pending. Only on the latter, the Constitutional Court has already pronounced itself since the President of the Government is entitled to request the suspension of the application of the regional act. This suspension has to be confirmed by the Constitutional Court before five months.

Since citizens cannot directly challenge legislative acts before the Constitutional Court, they tend to rely on the Ombudsman. In fact, during 2012, more than 200.000 requests were registered asking the National Ombudsman to lodge a complaint before the Constitutional Court¹¹. Many of those requests concerned violations of welfare rights, presented both before the National and Regional Ombudsmen. The lack of effective remedies regarding welfare rights has probably enhanced the importance of these bodies. Paradoxically, one of the austerity measures proposed, and even adopted in one Region, has been to eliminate the Ombudsman.

Trade unions, associations and even city councils have challenged several measures before administrative courts. However, all the cases related to the cut-backs are still pending. There is only one interesting decision of the Superior Court of Castilla-La Mancha which suspends the partial shut-down of emergency health services, as well as three decisions of the Constitutional Court provisionally suspending the extra charge on medicines and the limitations of the access of irregular immigrants to public health care. Even though these decisions are not final, they denote the Court’s approach to welfare rights.

The Spanish Constitutional Court has pronounced itself on the question whether Regions may increase or reduce the prices of medicines¹². Cataluña and Madrid established one euro extra charge per medicine. These measures established certain criteria to exempt disadvantaged groups. The President of the Central Government required the suspension of these measures.

The main argument against the measures was that it would lead to a significant rise of the prices, because the State legislation had also raised them. Moreover, they would imply inequalities among

¹⁰ In fact, the Catalan government did not table the Budget Act for 2013 because it was afraid that Catalan Parliament would not approve further cut-backs. The regional government simply extended the former Budget Act without any parliamentary inquiry.

¹¹ 2011 the Ombudsman received 2.455 requirements. Annual Report Ombudsman 2012.

¹² Decisions 122/2013 (21.05.2013) and 142/2013(04.06.2013).

citizens of different Regions. The Regions, on the other hand, have defended their measures by stating the need to reduce the deficit and arguing that the economic capacity of the recipients had been taken into account.

The reasoning of the Constitutional Court relies on the need to reduce pharmaceutical expenditure particularly “in the current situation, characterized by the exigency of a reduction of public expenditure”. In their view, the real economical impact of these measures on the citizens cannot be quantified, whereas the savings implied by these measures can be. According to the Court, those savings “cannot be disregarded” by referring to a “hypothetical” harm to citizens’ health.

Nevertheless, the Constitutional Court considers that to reimburse the money to citizens would be very complicated in case that the final judgments declare the regional measures to be unconstitutional. This reimbursement could imply even more costs for the Regions than the savings they were hoping to make. This is the only reason for maintaining the suspension.

The Constitutional Court follows the same reasoning in a Basque case to a large extent¹³. The Basque Government intended to limit the state austerity measures in the field of public health by funding medicines and including irregular immigrants into the Basque health system in every case. Regarding the prices of medicines, the Constitutional Court maintains its approach: the real economical impact of these measures on the citizens cannot be quantified. In relation to the health care of illegal immigrants, the Constitutional Court links the right to health with the right to life, with express reference to the ECHR’s case law. The Court follows the Basque Government’s position, which quantified the damage due to restricted access to health care for persons suffering chronic diseases. Furthermore, according to the Region, from the point of view of collective health care it would be unwise to exclude them from the public services. In addition, the Constitutional Court questions whether these measures could lead to reduction of public expenditure, since immigrants can accede to emergency services anyway. Indeed, emergency services’ expenses have increased.

To sum up, the main criterion of the Constitutional Court is based on the quantification of advantages and disadvantages of the challenged measures. This reasoning implies two major inconsistencies. On the one hand, it will always be much more difficult to quantify the impact of the measure on the population at large than on the State or regional budgets. If one would follow this reasoning each and every complaint will have to be dismissed. On the other hand, the Court avoids a rights based reasoning beyond the economical requirements.

It is quite surprising that regarding the access to public health of irregular immigrants the Constitutional Court has failed to mention the prohibition of discrimination, even though it explicitly linked the right to health and the right to life, and the latter, as a human right, is to be recognized to every person. Nonetheless, looking on the bright side, the Constitutional Court will likely declare unconstitutional the State Law that excludes irregular immigrants from health care.

The Superior Court of Castilla-La Mancha has a different approach on the matter¹⁴. When deciding on the shutdown of emergency services in the countryside, the Court required from the Regional Government to quantify the damages to the population and not only the reduction of public expenses. Moreover, when the Region justified its decision invoking Article 135 Spanish Constitution, which contains the so called *golden rule* since the 2011 constitutional amendment, the Court asserted that this provision did not excuse the public power from providing a proper justification for the decision adopted.

According to the Court, the Region should have explained how health care would have been guaranteed if the emergency services were partially shutdown. The government decision lacked a full

¹³ Spanish Constitutional Court Decision 239/2012 (12.12.2012)

¹⁴ Superior Court of Castilla La Mancha Decision 50/2013 (20.10.2013)

report on the final impact of the measure on citizens as well as on the alternative measures in order to reduce the said impact. The Court pointed out that it was not requesting the Region to open a new health service but to refrain from closing down the existing ones.

Generally, Spanish Courts have been reluctant to guarantee welfare rights, since those have been traditionally conceived as a free decision of the democratic legislator. The Spanish Constitution broadly recognizes welfare rights but Article 53.3 Spanish Constitution states that most of them are guaranteed in accordance with the law¹⁵. Therefore, their justiciability is highly disputed. The Constitutional Court has normally even refused to link them with other rights.

The Constitutional Court will soon have to decide whether or not it keeps this approach. Moreover, it will have to define the meaning of Article 135 Spanish Constitution, frequently quoted by the State to justify the cut-backs. Article 135, paragraph two, of the Spanish Constitution, states that Spain cannot incur a structural deficit larger than that allowed by the European Union.

Therefore, the Constitutional Court has not delivered any judgment regarding the cut-back in social policies yet. Nevertheless, it has stressed the current need to decrease the public expenditure in the above mentioned decisions. This reasoning may reinforce its usual reluctance in defining the scope of welfare rights. In this regard, it is not surprising that social movements and ordinary courts are knocking on the European Courts' doors to protect the right to housing in Spain.

Austerity Measures and International Courts: the Right to Housing

Spain has not ratified the Additional Protocol to the European Social Charter providing for a system of collective complaints. Nevertheless, the Commissioner for Human Rights of the Council of Europe delivered a report following his visit to Spain in June 2013, which focuses on welfare rights protection. Moreover, the United Nations Committee on Economic, Social and Cultural Rights delivered the fifth report on Spain on 6th June 2012. Both reports insist on the situation of vulnerable groups. They criticize particularly the education reforms and the current situation of the housing market. They point out the rise of poverty and discards initiative of Spanish courts.

Besides those institutional reports, the right to housing has been backed up by decisions of both ECJ and ECtHR. Doubtlessly, one of Spain's major challenges is its housing market. Spain's economic growth was based on the housing bubble, characterized by an oversized construction sector, incentives to house purchases, excessive prices and a low interest rate. Generally houses were purchased with mortgages.

The increase of interests led to the doubling of mortgages rates. Simultaneously, unemployment and taxes rose while social allowances and salaries decreased. This led to mass evictions. Currently house prices are often lower than the mortgages debts. Even after the surrender of the home in settlement of the mortgage, part of the debt may remain. In fact, the Spanish legal system of private insolvency does not lead to a discharge of residual debt.

Unfortunately, there is a lack of public reports or data regarding the number of evictions and mortgage enforcement proceedings in Spain before 2012. The few existing data have not been disaggregated in order to assess the impact of the measures on marginalized individuals and groups. However, according to the data provided by the Statistical Service of the Judiciary, in 2012 there were around 37,279 mortgage enforcement proceedings and 14.165 evictions related to family homes¹⁶.

¹⁵The right to education is enshrined in article 27 Spanish Constitution. Therefore its efficacy should not depend on the law. Even more, the Constitutional Court has recognised that scholarships are a key element of the right to education. (Constitutional Court Judgment 188/2001. 20.9.2001) Education's reforms have been also challenged but all the cases are still pending.

¹⁶ Consejo General Poder Judicial Judiciary Data June 2013

The cases decided by the ECJ and the ECtHR are substantially different. The ECJ has discussed the compatibility of the mortgage enforcement procedure with EU consumer protection law, whereas the ECtHR questions the eviction of families from their home without providing them with a new place to live.

The ECJ's decision derived from a preliminary reference. The key question was whether a Spanish court was able to grant interim relief in the course of mortgage enforcement proceedings. According to Spanish Law, the assessment of the unfairness of a contractual term had to be assessed in proceedings separate from the mortgage proceedings. Thus, if a contractual term was considered abusive, compensation could be granted but, by then, the house had already changed property. Ordinary Courts raised this question before the Spanish Constitutional Court and the ECJ.

The Spanish Constitutional Court dealt with the compatibility of such a provision with the right to a fair trial and the right to housing. The Spanish Constitutional Court declared the question inadmissible. Even more, it stated that the ordinary court was trying to shape a hypothetical legal order whereas such an order can only be set out by the legislative power¹⁷.

The ECJ, from its side, dealt with the compatibility of such a provision with the Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts. On the one hand, the Spanish court asked whether the Spanish Code of Civil Procedure was an impediment to the consumer's exercise of right of action or judicial remedies. On the other hand, it was asked whether several clauses in mortgage contracts could imply a significant imbalance to the detriment of the consumer¹⁸.

On 24 March 2013, the ECJ stated that Directive 93/13 precluded any legislation which does not allow the court which has jurisdiction to assess whether a contractual term is unfair to grant interim relief¹⁹. Furthermore, the ECJ did not establish whether the terms which were at stake in the main proceeding should be considered unfair. However, it pointed out that Directive 93/13 was applicable to mortgage contracts. Thus, ordinary courts have jurisdiction to determine whether the terms are unfair, in accordance with EU law. Therefore, the ECJ empowered ordinary courts in a way that the national legislation and the Constitutional Court have failed to do, thanks to the application of EU consumer law to mortgage contracts. Currently, nine more preliminary rulings related to Spanish mortgage law are pending before the ECJ.²⁰

This judgment had a huge impact on the Spanish legal system. On the one hand, the Supreme Court declared void the contractual terms that established a minimum interest rate regardless of the Euribor, whenever such contractual terms lack transparency. Actually, it declared void contractual terms of mortgages contracts made by three major banks and established a series of parameters for further cases²¹.

On the other hand, the ECJ's judgment influenced the reform of the Mortgage Act passed on 14 May 2013. This reform was promoted by a popular legislative initiative. The main request was to force the banks to accept the houses in lieu of payments. A further request consisted in refraining from evicting persons who cannot pay the mortgage of their home and, instead, permitting them to rent their home.

¹⁷ Spanish Constitutional Court Decision 113/2011, (19.7.2011)

¹⁸ These clauses being: the so-called acceleration clauses, the setting of default interests not subject to legal limits and applicable to both the instalments already fallen and instalments due as a result of acceleration, the unilateral establishment by the lender of mechanisms for the calculation of both ordinary and default interest.

¹⁹ According to the ECJ that applies "more strongly where [...] the mortgage property is the family home" ECJ Judgment, *Aziz* case (C-415/11) 14.3.2013, para. 61.

²⁰ C-482/13 to 487/13, C-280/13, C-116/13 and C-537/12

²¹ Supreme Court Judgment 241/2013 (09.05.2013)

The new law does not provide for the surrender of the home in lieu of payments, but it does take the ECJ and Supreme Court' judgments into account. In this regard, ordinary courts may grant interim relief whenever they must decide on the unfairness of a term in a mortgage contract. The law establishes also a maximum default interest and softens the acceleration clause by requiring three defaults to trigger it.

It is still too early to assess the effect of this new law which stops evictions of vulnerable groups during a two year period. Among these vulnerable groups has to be highlighted the situation of minors²². In this sense, families with three or more children, families with a sole parent and two children and families with children under three years can be considered vulnerable groups.

This is an important provision since three cases are pending before the ECtHR against Spain for violation of Articles 8 and 3 ECHR in cases of evictions of families with under age children. In two cases, the eviction has been suspended²³ and in the third case the eviction has been allowed once the Spanish State provided for an alternative home for the families. Therefore, the ECtHR seems to adopt the view that an eviction can violate Articles 3 and 8 ECHR, especially when children are involved. In this way, it grants a protection which the Spanish legal system lacks and which has not been considered by domestic courts. At the same time, ECJ extends consumer protection to mortgage, widening the competences of ordinary courts. Actually, it is quite remarkable that before the ECJ and ECtHR decisions, mortgage enforcement could not be stopped against the creditor's will except in really extraordinary situations.

It must be pointed out that between January and March 2013 mortgage enforcements have decreased by 13.9% and evictions by 23.3%²⁴. It is not possible to determine to what extent these reductions are due to the decisions of the European courts. However, it is likely that this case law has a certain influence on this trend.

Civil Movements and Austerity Measures

On 15 May 2011, a demonstration took place in several Spanish cities following the call of the platform Actual Democracy AT ONCE. Such call was backed by other groups such as Anonymous and the Platform in defense of people affected by mortgage (PAH). Actual Democracy AT ONCE refuses any link to either political parties or trade unions, demands a redistribution of welfare, direct democracy, a proportional electoral system and transparency. Furthermore, it is especially harsh on political parties, financial institutions and large companies.

The demonstration was very successful and, afterwards and spontaneously, it was decided to camp on *Puerta del Sol* in Madrid. The tents remained over 28 days. Protesters also started camping in several Spanish towns. This was the beginning of the so called 15 M movement, which put pressure on the political system²⁵. The growing discontent among citizens becomes obvious when one considers the total number of 44.233 demonstrations in 2012, and 21.297 in 2011²⁶.

²² According to social civil organisations around 87% evictions are affecting to families with children. www.afectadosporlahipoteca.com

²³ ECtHR Decision *A. M. B and others v. Spain* (Application 77842/12. 6.12.2012) and *Raji and others v. Spain* (Application 3537/13. 15.01.2013)

²⁴ Consejo General Poder Judicial Judiciary Data October 2013

²⁵ Actually, the 15 M movement asked people not vote on local elections on 22nd May 2011. There have been several demonstrations in Spain against the main actors of the representative democracy such as the demonstrations on 22 September 2012 in Madrid ("Surround the Congress") and on 14 May 2012 in Barcelona, which aimed at blocking the Regional Parliament to avoid the debate over the Budget.

²⁶ National Policy 2012 Activities Report

In the framework of the 15 M movement, civil organizations were either consolidated or newly created for the protection of welfare rights. Three civil organizations are especially relevant: the White Tide, the Green Tide and the PAH. Both Tides emerged after May 15; they were founded by health care and educational professionals in order to protest against the cut-backs in these areas. Both have instigated many demonstrations and strikes. The Green Tide has united for the first time parents, teachers and students of all educational levels. The White Tide has been supported by all kinds of health professionals. Both have collected signatures against the main austerity measures in health care and education. The White Tide has been very active in Madrid. Actually, judicial complaints have suspended the privatization of six hospitals and eight health centres in Madrid²⁷. These complaints have been promoted by the founders of the White Tide.

The most successful civil movement is the PAH. It was enhanced after the 15 M and has a deep involvement in social and political activities. It has promoted many demonstrations and protests, some of them have come to great notoriety because they have either avoided several evictions or they have taken place close to certain politicians' home. Moreover, they legally represent persons who are about to lose their home. In fact, lawyers of the PAH represent several families that have complained against Spain before the ECtHR. These lawyers have also advised to ask for a preliminary ruling of the ECJ. Lastly they presented the above mentioned popular initiative legislative, supported by 1.400.000 signatures, which originated the mortgage law reform. Therefore, this movement has acted at all possible levels.

The crisis has also enhanced the use of direct democracy tools²⁸. In fact the Regional Parliament of Andalusia has reformed its Parliamentary Act in order to let citizens participate directly in law-making (the so-called 110 Seat). The crisis has also strengthened the criticism towards political parties. The rise of political movements that claim not to be a political party is remarkable. These movements are organized on the basis of local groups with autonomous and assembly-based structures. In this regard, the pro-independence movement, "CUP", has to be mentioned. It has linked the independence of Catalonia with the denial of austerity measures leading to ever growing support, including two seats in the 2012 Regional elections and further seats in several local Councils in Catalonia.

To sum up, austerity measures have diminished welfare rights in Spain. Domestic courts have not made any relevant decision in this regard yet, however they are generally quite reluctant to guarantee them. This tendency in the case law could be reinforced by the inclusion of the 'golden rule' in the constitution. European courts have been more active. Both the ECJ and the ECtHR have required a better protection of housing rights.

Looking on the bright side, the Spanish society has begun to participate directly through civil movements and democracy tools, most of them enshrined in the Spanish Constitution. Therefore, the Spanish society is setting aside its traditional distrust of any personal involvement in democracy. However, some of this new mobilization could lead to the rise of dangerous populist movements.

²⁷ Superior Court of Justice Madrid Decision 787/2013 (11.09.2013)

²⁸ In this regard, during the period 2008-2012, it had been presented before the Congress more than a third of the total popular initiative legislatives presented since the Spanish Constitution was enacted.

LABOUR RIGHTS IN CRISIS IN THE EUROZONE: THE SPANISH CASE

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1. A fleeting starting point: Keynesian measures

The Spanish Government did not publicly acknowledge the existence of the economic crisis until July 2008. At that time, the indicators were not yet warning about the huge loss of jobs which was about to take place, but in 2009 the Spanish economy collapsed. In a single year, more than 1.4 million jobs were lost, the number of unemployed people increased by more 1.5 million, and the unemployment rate rose by almost 7 points, up to almost 18%. Today, 5 years later, the effects of the economic crisis remain devastating: more than 3.5 million jobs have been lost, the number of unemployed people has increased by more than 3.3 million, and the unemployment rate is 25.98%¹.

To face this situation, the first measures taken by the Spanish Government were typically Keynesian. Among others, in November 2008 and October 2009 what were known as the *State Fund for Local Investment* and the *State Fund for Employment and Local Sustainability* were approved, which amounted to public investment of more than 13 billion euros (1.3% of the GDP), mainly to support the building industry and try to halt the huge loss of jobs which was taking place as a result of the burst of the housing bubble.

But in May 2010 the Spanish Government changed its strategy against the crisis and unemployment.

2. 12 May 2010: a U-turn in anti-crisis policies

After the ECOFIN meeting of 8 and 9 May 2010 and the announcement of Greece's bailout, the Spanish President appeared on 12 May in Parliament to announce the first measures to decrease public expenditure.

It is true that there had been indications that the anti-crisis measures were changing. On the basis of the *Stability and Growth Pact*, the European Union (EU) initiated investigations for excessive deficit against Spain in April 2009². In addition to reducing deficit, a first recommendation was made: carrying out a reform of the pension system³; later on, a second recommendation was added, namely the reform of the labour market⁴. Both were described as necessary structural reforms in the President's speech to Parliament to present the *Sustainable Economy Strategy*, on 2 December 2009⁵. Soon after, on 29 January 2010, the Vice-President announced that Spain was considering the

¹ These data were obtained from the comparison between the Active Population Survey (EPA) for the third quarter of 2008 (<http://www.ine.es/daco/daco42/daco4211/epa0308.pdf>) and that for the third quarter of 2013 (<http://www.ine.es/daco/daco42/daco4211/epa0313.pdf>) (*).

² http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-06_council/2009-04-27_es_104-6_council_en.pdf

³ http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-07_council/2009-04-27_es_104-7_council_en.pdf

⁴ http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-07_commission/2009-11-11_es_104-7_commission_en.pdf

⁵ http://www.congreso.es/public_oficiales/L9/CONG/DS/PL/PL_129.PDF

possibility of raising the legal age for retirement from 65 to 67. The change in strategy against the crisis started then, and was clearly due to EU pressures.

The next step was announced in the speech of 12 May 2010, and was taken with the approval of Royal Decree-Law 8/2010 of 20 May for the adoption of extraordinary measures for the reduction of public expenditure (Decree-Law 8/2010)⁶. The approval of Decree-laws with no previous parliamentary debate, on the basis of the extreme and urgent need to take anti-crisis measures would become, from then on, the *modus operandi* of the successive Governments. The reason for this regulatory technique is found once again in the EU requirements. At least, this is what is stated in the Preamble to this Decree-Law, when it attempts to explain the reasons why this way of acting was chosen: “*the speed, security, and determination in the action is part of the commitment assumed by the Euro Zone countries to strengthen trust in the single currency and the stability of the Euro Zone*”. This ultimately became one of the characteristics of the regulatory model during this entire time: the undermining of democracy through avoidance of Parliament.

Decree-Law 8/2010 establishes two of the measures which have given rise to the highest social and legal controversy. The first one is the non-revaluation of pensions in 2011, except for minimal and non-contributory pensions; the second one, a 5% reduction in the wage bill of Public Administration employees. There is no doubt that these measures were due – as stated in the Preamble to this piece of legislation – to ‘the Government’s commitment to speed up, in 2010 and 2011, the reduction in the deficit initially scheduled [given] the evolution of the economic situation, as well as the *commitments assumed by our country as part of the European Union to uphold the Monetary Union and the Euro Zone economies*’.

However, it has not been proven that these and not others were the measures that should have been taken to this end. What this means is that, once the EU imposed the fiscal consolidation policy, the Spanish Government decided where to apply the cuts required to carry it out. The non-revaluation of pensions and the reduction of public employees’ salaries were possibly due to reasons of speed and effectiveness: both measures led to immediate savings in public expenditure.

But acting in a different way would also have been possible. This brings us to a second characteristic of this time which I would like to point out: even though responsibility for the adoption of certain unpopular measures is usually attributed to the fiscal consolidation measures imposed by the EU, the fact is that the adoption of those measures, at least in the case of Spain, is usually due to a mix between EU pressures and decisions taken by the national Government, in such a way that responsibility for those measures is at the very least shared (Pisarello 2011, 183).

Immediately after the approval of Decree-Law 8/2010, three types of reaction against it arose. The first was a public administration general strike on 8 June 2010 (with rather low compliance levels). The second was a legal attack designed by trade unions which brought Decree/Law 8/2010 to the Constitutional Court (CC). The third was the filing of a Complaint with the ILO Committee on Freedom of Association by FSC-CCOO, claiming that the trade union freedom and collective bargaining rights of public administration employees, acknowledged in Convention Nos 87, 98, 151, and 154 of ILO, had been breached.⁷

It should be pointed out that the Spanish trade unions’ recourse to the ILO to denounce the breaches of fundamental labour rights had until then taken place on an exceptional basis only. However, as we shall see, during the crisis it has become a usual channel for trade unions to challenge Government measures. This is giving the social conflict in Spain an international dimension, and giving the ILO a relevance in labour relationships which it has previously not had. Both are positive effects, in my view. In particular, given that the appeal made by the Spanish trade unions (together with Greek and

⁶ <http://www.boe.es/boe/dias/2010/05/24/pdfs/BOE-A-2010-8228.pdf>

⁷ http://www.galicia.ccoo.es/comunes/recursos/11/1117040-Texto_da_queixa_%5BPDF%5D.pdf

Portuguese trade unions) may make it possible for the ILO to have a greater presence in the definition of international anti-crisis strategies.

3. First responses from the Constitutional Court and the ILO: no violation of fundamental rights

Given that in Spain trade unions do not have the procedural ability to file unconstitutionality appeals, the legal attack against Decree-Law 8/2010 was initiated by filing claims with the National High Court, in which it was stated that the fundamental rights of trade union freedom and collective bargaining, acknowledged in Articles 28.1 and 37.1 of the Spanish Constitution (SC) had been breached. In turn, the National High Court, in an exercise of what might be termed ‘judicial activism’, made requests for the clarification of constitutionality before the Constitutional Court, stating its concerns regarding the constitutionality of the measure consisting in the 5% decrease of the wage bill of public administration employees.

There were two grounds for the requests for the clarification of constitutionality. Firstly, the unsuitability of the use of the decree-law as the legal instrument to change what had been previously established in a collective agreement (the salary increase for public administration employees had been previously agreed by the Government and the main trade unions in the sector). Secondly, the potential breach of the constitutional right to collective bargaining, which, as part of the essential content of trade union freedom (in established Constitutional Court jurisprudence), can also be a breach of the latter.

Constitutional Court Ruling 85/2011 of 7 June⁸ stated that the measures taken by the Government regarding the decrease in the public administration employees’ salary could not be regarded as unconstitutional. This was thus the Government’s first legal victory. To begin with, the Constitutional Court validated the use of the Decree-Law instrument to ‘have an impact’ on fundamental rights. This was due to the fact that, in its view, the ‘general conditions’ for the fundamental right to collective bargaining had not been regulated and ‘none of its contents or essential elements’ had been attacked.

Further, the Constitutional Court stated that a change to the collective agreements for public administration employees regarding the amount of their salaries would not be an attack against the right to collective bargaining as stated in Article 37.1 SC or breach the fundamental right to trade union freedom, as stated in Article 28.1. The reason to uphold the constitutionality of this measure is the principle of the hierarchy of norms established in Article 9.3 of the Constitution. Inasmuch as the Constitutional Court found that the law is hierarchically superior to the collective agreement, the latter must be subject to its regulations, even if the regulations in the law consist in repealing the salary increase which had been previously agreed by the Government and the main trade unions in the sector.

It should be acknowledged that the Constitutional Court has been perfectly consistent (Rodríguez Fernández 2013, 39) in this first decision on the measures taken to comply with the fiscal consolidation policies. It had already upheld these same arguments regarding the limits of decrees-law when they concern fundamental rights and the hierarchy of norms as the ruling principle of relationships between the law and the collective bargaining. However, the Constitutional Court Ruling conveys a feeling of ‘argument apathy’ (Nogueira 2011, 6) or scarcity. It is as if a much richer and elaborated argument should have been given in the face of such a complex problem as that of cancelling collective agreements previously established.

In any case, the experience has been interesting, not so much because of its result but because of the methodology applied. The trade unions built up the lawsuit in such a way that they were able to petition the Constitutional Court, even though they were unable to file an appeal on grounds of unconstitutionality. The judges, in this case the National High Court, clearly aligned themselves with

⁸ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22560> (LF 7th).

this strategy, making the relevant requests for the clarification of constitutionality. This has been an experience of legal ‘collaboration’ between trade unions and judges which has been repeated since and which has become a new way to react against anti-crisis policies.

The Complaint filed with the ILO had no better an outcome. In the 368th Report of the Committee on Freedom of Association of 21 June 2013, it is not established whether the Spanish Government has breached the Conventions referred to in the Claim. The Committee merely ‘regrets that lack of a real process of consultation with trade unions [...] despite the extent of the salary cuts’ and ‘encourages the Government to consider [these issues] in the future as part of social dialogue’.⁹

I would now like to mention two issues before moving on.

The first one is that the ILO, in examining this Complaint, has not considered whether Convention Nos 87, 98, 151, and 154 were being breached so much as the context in which Government action took place. Indeed, the ILO itself acknowledges that Spain’s commitments towards the EU may underlie its decisions: ‘the Committee would like to highlight the complex nature of this case, *linked to a great extent to commitments arising from membership of the single currency in the Euro Zone*’. In this way, the ILO has assumed economic constraints as an argument to rule on a lawsuit which should have been taken place in legal terms. This can be criticized and is rather disappointing, given the expectations which trade unions are placing in the ILO’s intervention¹⁰.

The second one is the value given by this Organization to social dialogue.

4. Ups and downs of social dialogue

The precariousness of social dialogue has been a constant throughout this entire period of government of the crisis. There have been episodes such as that of Decree-Law 8/2010, where social dialogue was clearly avoided when taking anti-crisis decisions. On other occasions, it failed, and, as a result, the Government acted without taking social agents into account. This is the case of Royal Decree-Law 10/2010 of 16 June, on urgent measures for the reform of the labour market,¹¹ which led to the General Strike of 29 September 2010. Or that of Royal Decree-Law 7/2011 of 10 June, on urgent measures for the reform of collective bargaining,¹² enacted after an intense negotiation process between trade unions and employers’ associations which finally led to no agreement.

However, social dialogue was decisive at other times. The reform of the Social Security system and the extension of the retirement age from 65 to 67,¹³ the reform of active employment policies,¹⁴ and the extension of the unemployment benefits in the PREPARA programme¹⁵ were all the result of

⁹http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_216619.pdf (p. 100).

¹⁰ The ‘mild’ answer given by the ILO in the Spanish case is somewhat surprising when compared to its answer to the cutbacks in public employees’ salaries in Greece. In the 365th Report of the CFA on 16th November 2012 (http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_193262.pdf), it is stated that “as regards the successive salary cuts in the public sector, the Committee would like to remind that [...] exercise of the public authorities’ financial prerogatives to prevent or restrict compliance with collective agreements which have been previously negotiated by public organisations *is not compatible with the principle of freedom of collective bargaining*” (p. 286). See further S. Yannakourou, this WP.

¹¹ <http://www.boe.es/boe/dias/2010/06/17/pdfs/BOE-A-2010-9542.pdf>

¹² <http://www.boe.es/boe/dias/2011/06/11/pdfs/BOE-A-2011-10131.pdf>

¹³ <http://www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13242.pdf>

¹⁴ <http://www.boe.es/boe/dias/2011/02/19/pdfs/BOE-A-2011-3255.pdf>

¹⁵ <http://www.boe.es/buscar/act.php?id=BOE-A-2011-2701>

tripartite social dialogue. All this was agreed in the *Social and Economic Agreement for growth, employment, and guaranteed pensions*, signed on 2 February 2011.

But we have entered a different period. On 25 January 2012, trade unions and employers' associations picked up bipartite social dialogue and signed the *Second Agreement for Employment and Collective Bargaining*.¹⁶ Social dialogue was thus alive once again and yielding such significant results as strict wage moderation and greater decentralisation of collective bargaining. However, the new Government rejected the Agreement and proceeded to carry out a new reform: Royal Decree-Law 3/2012 of 10 February, on urgent measures for the reform of the labour market (Decree-Law 3/2012).¹⁷

I will now discuss the latter, but before that I would like to highlight the fluctuating nature of social dialogue. It has had its ups and downs and rarely has it been crucial in the shaping of the crisis decisions. This is odd in a country like Spain, which has a significant tradition of social dialogue. Furthermore, the Constitutional Court, in its Ruling 68/2007 of 28 March,¹⁸ described social dialogue as a key part of the social and democratic rule of law in Spain, so that when the impact of social agents on political decision making is reduced, the meaning of the State model established in article 1.1 of the Spanish Constitution is to a certain extent devalued.

This is a sign of the way in which economic constraints are disassembling the basic constitutional elements of labour regulation. The Spanish Constitution of 1978 is possibly not the best example of social constitutionalism (Pisarello 2011, 176 and 178), but it does acknowledge and ensure the fundamental labour rights proper to a social and democratic rule of law. On the basis of these rights and their interpretation by the Constitutional Court has been built, over the last 35 years, what has been called a 'democratic model of labour relations'. At present the text of the Spanish Constitution continues to be the same, but the basic elements, like social dialogue, are becoming trivialised or rendered meaningless. Thus is not strange that there is now talk of the 'de-constitutionalisation' of Labour Law (Baylos 2013, 30) and that many of the fundamental labour rights, as we shall see later, are now seriously endangered.

5. The twofold effect of the European Central Bank (ECB) letter

On 5 August 2011, in the midst of the sovereign debt crisis, the then Spanish Prime Minister received a letter signed by the Chairman of the ECB and the Governor of the Bank of Spain. Perhaps it was in this letter where the imposition of labour policies by the EU and the national share of responsibility in their definition were seen clearly for the first time.

Even though a profound reform of the collective bargaining model had taken place in June, European authorities did not deem it sufficient. This is shown by the *Council Recommendations of 12 July 2011* on budgetary surveillance, which expressly stated that Spain had to review the 'non-agile [...] system of collective bargaining. The prevalence of provincial and sectorial agreements leaves scarce margin to negotiation at company level. The automatic extension of collective agreements, the periods of validity of non-renewed contracts, and the use of the inflation indexation clause *ex post* contribute to salary inertia and prevent sufficient salary flexibility to speed up economic adjustment and re-establish competitiveness.' Following this view, the recommendation was a 'global reform of the collective bargaining process and the salary indexation system to ensure that salary raises would better reflect productivity evolution and prevailing conditions on the local and company level'.¹⁹

¹⁶ <http://www.boe.es/buscar/doc.php?id=BOE-A-2012-1778>

¹⁷ <http://www.boe.es/boe/dias/2012/02/11/pdfs/BOE-A-2012-2076.pdf>

¹⁸ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6035>

¹⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:212:0001:0004:ES:PDF>

These were the demands then made in the letter of 5 August: reinforcing collective bargaining at company level, so that sectorial collective agreements would not restrict their application, and the removal of clauses for wage rise depending on inflation. In addition, the establishment, with an exceptional nature and for a limited period of time, of a contract with cheaper severance payments and the removal of restrictions on the renewal of temporary contracts were demanded.²⁰ The imposition of a political programme of this nature was based on the belief that devaluing salaries (which was the purpose of giving priority to the company-level bargaining and the removal of salary indexing clauses) and the guarantees for employment stability might stimulate the creation of jobs. The Chairman of the ECB possibly believed this, but this was an obsession for the Governor of the Bank of Spain, who had publicly stated that jobs were not being created because Spanish employers were ‘terrified of contracting employees’.²¹

At that time, the Government only complied with the demand concerning temporary contracts. Royal Decree-Law 17/2011 of 26 August, on urgent measures for the promotion of employment among young people, the promotion of employment stability, and the maintenance of the professional requalification programme for people whose unemployment benefits had run out²², temporarily deactivated the conversion into indefinite contracts of the contracts of workers who had been working in a business for more than 24 months on a temporary basis. It is true that the Government did not comply with European demands regarding collective bargaining, as it regarded them as contrary to the Spanish Constitution. However, on 23 August 2011, the Spanish Prime Minister announced a measure which had not been expressed in the ECB letter: a reform to include the limitation of structural deficit in the Constitution, thus anticipating the *Fiscal Compact* demands (Borrell 2012, 165).

However, the new Prime Minister Rajoy, appointed after the election of 20 November 2011, stated that the ECB letter of 5 August would be his roadmap for the new labour reform.²³ And it was. Decree-Law 3/2012, which later became Law 3/2012 of 6 July, on urgent measures for the reform of the labour market,²⁴ establishes the absolute priority of the collective bargaining at company level; it lowers severance payments; and creates a new employment contract for ‘entrepreneurs’: an indefinite contract with a trial period of one year during which employees may be dismissed at any time with no compensation.

The Preamble to the Law expressly stated that all this was due to EU demands: “a significant reform which [...] continues *to be demanded* by all global and European economic institutions”. Its purpose was highlighted later on, in the *Council Recommendation of 10 July 2012*, which urged the Government to ‘monitor [the reform], particularly as regards salary evolution and the reduction of labour market segmentation.’ Indeed, lowering salaries and finding formulas that equate permanent and temporary employees’ employment conditions have always been the ‘recipes’ given by the EU and the International Monetary Fund²⁵ for Spain. The preference for collective bargaining at company level (in a country where almost 90% of enterprises have fewer than 10 employees) is a reflection of the former; the lowering of severance payments and the ‘entrepreneurs’ contract were clearly a reflection of the latter.

²⁰ The content of the letter can be found in Rodríguez Zapatero 2013, pp. 248-251.

²¹ <http://www.publico.es/dinero/377953/fernandez-ordonez-culpa-al-gobierno-del-horror-a-contratar>

²² <http://www.boe.es/boe/dias/2011/08/30/pdfs/BOE-A-2011-14220.pdf>

²³ http://economia.elpais.com/economia/2011/12/07/actualidad/1323246781_850215.html

²⁴ https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9110

²⁵ <http://www.imf.org/external/pubs/ft/scr/2013/cr13244.pdf>

6. Changes in mobilisation and judicial reactions

None of the agreements reached in the social dialogue process between trade unions and employers' associations in January 2012 were included in the new labour reform. The role of social agents was thus completely overlooked. So the second general strike of the crisis took place on 29 March 2012. And another appeal was made to the ILO. On 10 May 2012, the Secretaries General of the two main trade unions, CCOO and UGT, filed two Complaints against the Government of Spain. The first one, regarding the absolute priority of collective agreements at company level, as a breach of trade union freedom and the right to collective bargaining and a breach of ILO Convention Nos 87, 98, and 154.²⁶ The second one, regarding the lowering of severance payment and the 'entrepreneurs' contract and its one-year trial period, which, it was argued, breached Convention No 158.²⁷ Neither Complaint has yet been decided.

But something changed with respect to previous reactions against the crisis reforms. Leftist political parties also opposed the labour reform. On 5 October 2012, the *PSOE* (Socialist Party) and *Izquierda Plural* filed a constitutional challenge, which has not yet been ruled on, giving arguments which were similar to those provided by the two main trade unions in its Complaints filed with the ILO.

I will return to these arguments shortly, but first I would like to mention Royal Decree-Law 20/2012 of 13 July, on measures to ensure budget stability and the promotion of competitiveness.²⁸ It was approved a few days after the *Council Recommendation meant to bring the Spanish excessive deficit to an end*, which extended the period to do so by one year²⁹ and a few days before the *Memorandum of Understanding* which established the conditions for the Spanish bank bailout.³⁰ In this context, it is no wonder that its Preamble is full of references to the commitments which Spain must honour to 'achieve the unavoidable goal of budget stability arising from the constitutional framework and the European Union'.

However, none of these European documents mention specific measures to be implemented in practice, so that, once again, they were decided by the Spanish Government. Unemployment benefit cuts and the removal in 2012 of the December extra payment in public administration were strictly national decisions. So was the reform of Article 32 of the Basic Public Employees' Statute³¹ to make the binding force of collective agreements void by the Public Administration whenever it sees it fit for economic reasons.

This led to a new Complaint before the ILO CFA, which was filed on 29 October 2012 by 20 civil servants' trade unions. In this Complaint, the breach of trade union freedom and collective bargaining rights were denounced once again, as well as the breach of Convention Nos 87, 98, 151, and 154.³² It has not yet been decided, but it should be pointed out that this is the first time that all civil servants' trade unions act together under the same strategy against the Government.³³

²⁶ <http://www.ugt.es/actualidad/2012/mayo/Queja%20libertad%20sindical%20OIT.pdf>

²⁷ <http://www.ugt.es/actualidad/2012/mayo/Queja%20OIT%20RDL%203-2012%20Despido.pdf>

²⁸ <http://www.boe.es/boe/dias/2012/07/14/pdfs/BOE-A-2012-9364.pdf>

²⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0397:FIN:ES:PDF>

³⁰ http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-14946

³¹ <http://www.boe.es/buscar/act.php?id=BOE-A-2007-7788&p=20120714&tn=1>

³² <http://www.fep-uso.es/attachments/article/3257/121029%20Registro%20TEXTO%20QUEJA%20OIT.pdf>

³³ The reform of article 32 of the Basic Public Employees' Statute, which, in my view, is of doubtful constitutionality (Rodríguez Fernández 2013), involves cancelling the binding force of the collective agreements for Public Administration employees as a permanent element of the legal system as regards their right to collective bargaining. Thus it seems that it might also infringe the ILO's understanding of these restrictions in the case of Greece: 'such a restriction

The legal ‘collaboration’ between trade unions and jurisdictional bodies has also been reissued. On 29 May 2013, the Constitutional Court accepted the first of the many requests for clarification of constitutionality arising from the removal of the December extra payment in 2012.³⁴ The objection on which the Constitutional Court must rule concerns the alleged breach of the principle of non-retroactivity of provisions which restrict individual rights, established in Article 9.3 SC. The reason for this is that the extra payment was cancelled when it had already started to be accrued.

Finally, there were two remarkable changes in the General Strike of 14 November 2012, which was a reaction to these measures. It was the third general strike during the crisis, but it was no longer called for by trade unions only, but by the Social Summit, composed of 150 social and trade union organisations.³⁵ In this way, mobilisations against anti-crisis policies have become qualitatively different: from being workers’ mobilisations in defence of labour rights, they have become citizens’ mobilisations in defence of social rights. In addition to this change, which has been significant *per se*, there was the fact that this General Strike was part of the European mobilisations called for by the European Trade Union Confederation against the austerity measures. Thus, this was the first European strike on Spanish soil.

7. A danger to the constitutional basis of Labour Law

I have tried to show how the anti-crisis decisions are a mix of EU recommendations and/or impositions and national policies. This is the case because European authorities and the current Spanish Government, whether they state it or not, share the same political vision, the same economic ideology, and the same strategy to overcome the crisis. The ECB letter is the best example of this, as well as of the fact that the aims of both in labour matters may damage the constitutional foundations of Labour Law.

The EU, determined to force salary devaluation and decrease the differences between permanent and temporary employees, has not hesitated to demand that Spain give priority to collective agreements at company level, remove salary indexation clauses, and establish a contract on an extraordinary basis which provides lower severance payments. The 2012 labour reform followed this strategy because it shared it. In fact, it added several measures which went exactly in the same direction: the general decrease of severance payments, the removal of the ultra-activity of collective agreements, and the possibility of substantially modifying working conditions, including salary conditions, with no need for an agreement between employees’ representatives and the company.

This mix between EU demands and contributions from the Spanish Government has led to a more authoritarian labour relations model. The power of businesses has been strengthened, and the role of trade unions in the establishment of work conditions and business decision-making has been strongly devalued. This is not consistent with the role ascribed to trade unions in Article 7 of the Spanish Constitution, or with the role conferred them by the Constitutional Court. In its Ruling 281/2005 of 7 November,³⁶ the Constitutional Court states that trade unions are constitutionally relevant subjects, and a key part of Spain as a social and democratic rule of law. This State model ‘requires strong trade unions with sufficient means for action’, but not that they be removed, as the 2012 reform does, from actual management of labour relations.

(Contd.) _____

should be applied as an exceptional measure, be limited to necessary aspects, *not exceed a reasonable period of time*, and go accompanied by suitable guarantees to protect workers’ living standards’ (p. 287).

³⁴ <http://www.tribunalconstitucional.es/Documents/2013PRO3488-3623-4253/NOTAINFORMATIVANUMERO512013.pdf>

³⁵ http://www.ccoo.es/comunes/recurros/1/1457254-Organizaciones_que_componen_la_Cumbre_Social.pdf

³⁶ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5541> (LF 6th).

Nor is the imposition by law of the criteria for determining wage increases or the levels of collective bargaining which must take precedence consistent with constitutional recognition of trade union freedom and collective bargaining rights. The early Constitutional Court Ruling 31/1984 of 7 March³⁷ stated that, in a social and democratic rule of law, the establishment of salaries and in general the contents of the labour relation ‘correspond to the autonomy of workers and employers’. So no law may establish which parameters should determine salary raises.

In addition, Constitutional Court Ruling 17/1986 of 4 February³⁸ was absolutely clear in stating that the establishment of negotiation levels ‘is an issue that falls exclusively to the agents in the negotiations [...] and no interference from administrative authorities is possible [...] which would breach the constitutional right to collective bargaining’. This is the reason why the law may not establish the absolute priority of any level of negotiation (Rodríguez Fernández 2006, 217).

These arguments are the basis for the Complaint filed with the ILO by CCOO and UGT and the constitutional challenge filed before the Constitutional Court by Leftist parties. They argue that, in a constitutional model where labour relations are based on the recognition and guarantee of collective autonomy, the action of trade unions in representation and defence of workers’ rights must be freely defined by them. And public powers may not interfere in the trade unions’ strategy³⁹.

We cannot know what the rulings of the ILO and the Spanish Constitutional Court will be. But we do know that, when the EU imposes/recommends restricting collective bargaining strategies in a Member States, as in the case of the ECB letter, it ignores (or disregards) the meaning and potentiality of such basic fundamental rights in a Social State as trade union freedom and the right to collective bargaining.

It also ignores the fact that, at least in Spain, the grounds for dismissal and severance payments in case of unlawful dismissal are derived from the Constitution and the social and democratic rule of law.

While Constitutional Court Ruling 22/1981 of 2 July⁴⁰ established the grounds for dismissal as derived from constitutional recognition of the right to work established in Article 35.1 SC; in Ruling 192/2003 of 27 October,⁴¹ it stated that free dismissal could not be included in the Spanish legal system because freedom of enterprise as established in Article 38 SC must be conciliated with ‘the principles of a social and democratic rule of law’. Finally, in its Ruling 20/1994 of 27 January,⁴² the Constitutional Court referred to the constitutional essence of severance payments: ‘the non-existence of an adequate reaction against [it] would dangerously weaken the consistency of the right to work and void the Law that regulates it of its protective function within the social domain as an essential feature of the rule of law.’

These are all the arguments that are being examined by the ILO and the Constitutional Court in the Complaint and the constitutional challenge filed against the ‘entrepreneurs’ contract. This is an apparently indefinite contract with a one-year trial period during which dismissal on no grounds with

³⁷ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/284> (LF 9th).

³⁸ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/580> (LF 2nd).

³⁹ This is the same argument made by the ILO to reject the reforms in collective bargaining made in Greece: ‘the involvement of public authorities with the basic purpose of ensuring that the parties in the negotiation subordinate their interests to the Government’s national economic policy [...] is incompatible with the widely accepted principles *that employee and employer organisations must have the right to freely organise their activities and formulate their programme, and that authorities must abstain from any involvement which tends to restrict this right*’ (pp. 288-289).

⁴⁰ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22> (LF 8th).

⁴¹ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4967> (LF 4th).

⁴² <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/2537> (LF 2nd).

no severance payment is allowed. The European Committee of Social Rights has already stated that this type of contract, also recommended/imposed in Greece, breaches Article 4(4) of the European Social Charter.⁴³ We cannot know what the ILO and the Constitutional Court will decide in the case of Spain. But we do know that a contract of this nature was suggested in the ECB letter, and thus that the EU was asking of Spain something that probably breaches its Constitution.

A final reflection to conclude. In Spain, Constitutional Court Ruling 3/1983 of 25 January⁴⁴ established that the constitutional basis for Labour Law, in a social and democratic rule of law, is the promotion of real equality between employee and employer as established in Article 9.2 SC. Hence it highlighted its ‘compensating and equalising nature’, and stated that its purpose is to ensure a certain degree of power balance between the parties to the employment contract.

In my view, none of this essence has been taken into account in the EU recommendations/impositions on its Member States when it demands labour market reforms. Labour Law is rather seen as an obstacle to the implementation of certain economic policies. For some time now, it has not been conceived as a mechanism to ensure power balance, but rather as just another instrument in the service of the dominant economic ideology. This ideology regards the strengthening of business power and the decrease of workers’ rights as necessary conditions to end the crisis and gain competitiveness. It is this view of Labour Law that undermines, more than anything else, its constitutional basis.

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⁴³<https://wcd.coe.int/ViewDoc.jsp?id=2029575&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>. The Spanish trade unions have been unable to appeal to the European Committee of Social Rights, as the Greek trade unions did, because Spain has not ratified the procedure for collective claims in the European Social Charter.

⁴⁴ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/131> (LF 3rd).

DECONSTITUTIONALISATION OF SOCIAL RIGHTS AND THE QUEST FOR EFFICIENCY

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The eurozone crisis was to result in the imposition of strong sacrifices upon Spanish society. What can nonetheless be questioned is, first, the extent to which such sacrifices have been distributed equally across all the societal spectrum; second, whether this unequal burden share should persist after the settlement of the financial crisis; and third, to what degree these deeply contentious choices should be taken in the absence of a wider political debate.

The papers presented by María Luz Rodríguez and Maribel González portray a phenomenon of ‘deconstitutionalisation’, understood as the dissolution of the constitutional order by serious and continuous violations of the letter and spirit of the Spanish Constitution.¹ The reshaping of the political systems in the aftermath of the financial crisis seems a common denominator for many of the authors of this Working Paper. The European Union, too, has witnessed an alteration of its original constitutional settings in a structural manner.²

The way in which this reshuffle affects social rights is commonly justified through the language of emergency. In times of scarce resources, national budgets and political debates would need constraining for the sake of higher efficiency. The turn towards political managerialism seems obvious in the job market, where Rodríguez highlights the end of the traditional ‘equalising nature’ of labour law. Interestingly, a similar pervasive trend can be observed in the field of welfare rights inasmuch as the bulk of the philosophical foundations of welfare provisions are being altered in an enduring manner.

On the basis of Rodríguez’s and González’s contributions, this paper argues that the Spanish executive counted on a wider-than-considered margin for the re-configuration of social rights in the aftermath of the eurocrisis. This is so because public resources need just distribution irrespectively of whether they are few or numerous. In addition, the ‘eurocrisis toolbox’ is far from situational and emergency-dependent: most of the policies introduced by the executive will persist long after the eventual economic recovery (if any). It is in this light that the lack of social dialogue and parliamentary debate can be fully assessed. Society should have a say in the process of re-constitutionalisation of their political system, and decide whether also in the long run they are willing to trade off equity for managerial efficiency.

Labour law

Employee and employer are not on equal foot and nor is their contracting power. On the contrary, proletarians are constrained to sell their labour force as a way of subsisting while unable to leave the

¹ A Baylos, ‘La deconstitucionalización del trabajo en la reforma laboral del 2012’, *Revista de Derecho Social* 61, 2013, p. 29.

² E Chiti and P G Teixeira, ‘The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis’, *Common Market Law Review* 50, 2013, p. 684.

working class – what Cohen called the ‘proletarian unfreedom’.³ The *raison d’être* of labour law was to address (and to various extents, alleviate) this inequality.⁴

From early in its establishment, the Spanish Constitutional Court has consistently affirmed the sheltering function of labour law. Case 3/1983 of 25th January proclaimed labour legislation as ‘compensating and equalising in order to correct, at least partially, the fundamental inequalities’ between employee and employer.⁵ Although labour rules are tied to the principles of freedom and equality of parties that characterise private contracting, formal equality is overcome by a more material protection. This means that the real equality sought by article 9.2 of the Spanish Constitution demands formal inequality in favour of the worker.⁶

Taking this interpretation further, the remedial and transitional function of labour law has translated into strong protection of social dialogue, trade unions and the guarantee of severance payments. The Spanish Constitutional Court has thus stated that social dialogue bears a transcending value in a social and democratic rule of law; hence the enactment of labour legislation by Decree-Law⁷ is forbidden when used for structural and not interim purposes.⁸ Trade unions are recognised as strong organisations with sufficient means of action to the benefit not only of the workers’ interest, but also that of the public in general.⁹ Lastly, severance payments in cases of unfair dismissal are part of the essential content of labour law and the social domain as an essential feature of the rule of law.¹⁰

In this light, the measures of the ‘eurocrisis toolbox’ flagrantly contradict the very nature of labour law enshrined in the Spanish Constitution. Rodríguez has emphasised the changes introduced by Decree Law 3/2012 and Decree Law 20/2012 that resulted, among others, in the establishment of an ‘entrepreneurship contract’ in which the worker can be dismissed within a one-year period without compensation as well as in the suspension of collective agreements of public employees if the Administration appreciates an alteration of the original economic circumstances. It is no surprise that Baylos¹¹ and Pisarello¹² talk about the ‘deconstitutionalisation’ of labour law as originally understood by most legal systems. The democratic and political functions of labour rights do no longer lie in compensating and equalising. On the contrary, labour law becomes a priority tool for the achievement of macroeconomic objectives irrespectively of the defencelessness in which workers find themselves. And critically, this means that labour abandons its equalitarian nature in pursuit of a utilitarian foundation.

That the labour market should rest on an efficient economic structure is not to be questioned – one could say, a minimum of efficiency is in fact common to any theory of social justice.¹³ Neither it is the

³ G A Cohen, *History, Labour and Freedom: Themes from Marx*, New York: Oxford University Press, 1988, p. 255.

⁴ J M Ramírez Martínez (ed.) ‘Curso de Derecho del Trabajo: Fuentes, Derecho Sindical, Contrato de Trabajo, Seguridad Social, Proceso Laboral’, 14th Ed., Valencia: Tirant lo Blanch, 2005, p. 7.

⁵ Spanish Constitutional Court, Case 3/1983, 25 Jan RTC\1983\3, legal basis no. 3.

⁶ *Ibid.*, legal basis no. 4.

⁷ A Decree-Law is a piece of legislation made solely by the executive in a situation of ‘extreme and urgent necessity’. Remarkably, it cannot affect fundamental rights and freedoms (see Spanish Constitution, art. 86).

⁸ Spanish Constitutional Court, Case 68/2007, 28 Mar RTC\2007\68, legal bases no. 10 and 11.

⁹ Spanish Constitutional Court, Case 99/1983, 16 Nov RTC\99\1983, legal basis no. 2.

¹⁰ Spanish Constitutional Court, Case 20/1994, 27 Jan RTC\1994\20, legal basis no. 2.

¹¹ A Baylos (*op. cit.* above at no. 1).

¹² G Pisarello, ‘El regimen constitucional español, 34 años después. Reforma o ruptura democrática?’ *Sin Permiso*, 16/12/2012, <http://www.sinpermiso.info/articulos/ficheros/2Cons.pdf> (revised as of 12 Jan 2014).

¹³ N Barr, *Economics of the Welfare State*, Oxford: Oxford University Press, 2012, p. 46.

possibility of reconfiguring the traditional philosophical foundations of labour law¹⁴ towards an efficiency-oriented instrument – I shall be agnostic; such was the option taken in Thatcher Britain with more or less social unrest. Yet the right balance between efficiency and equity (assuming these concepts oppose each other) should be decided by the bulk of society and/or the constituencies affected. What is striking is that this process of ‘reconstitutionalisation’ of labour rights is instead carried out in an exercise of political managerialism. Social dialogue has been suspended since the crisis started, and trade unions are not heard when the administration decides to suspend the applicability of collective agreement.¹⁵ The approval of the 2012 amendments through Decree-Laws has enabled avoiding broad parliamentary discussion of the issues at stake. As argued in the sections below, the road towards the reconfiguration of a polity entails social debate *ex ante* and political accountability *ex post*. Regrettably, both options are excluded from the current crisis management.

Welfare rights

The readjustment of welfare expenditures in the aftermath of the eurozone crisis has been particularly hard on vulnerable sectors of society. The Concluding Observations of the United Nations Committee on Economic, Social and Cultural Rights¹⁶ are clear: welfare rights are now enjoyed in an inequitable or discriminatory manner. González observes that instructions from the Commission for the address of macroeconomic imbalances were so demanding that the deep change of social policies was unavoidable. Yet within an economic crisis the scale and scope of the welfare state should not be *minimized* – rather, its scale and scope should be *optimised*.¹⁷ The configuration of social protection provisions as rights demands (and has been traditionally understood as) an equal exercise among the subjects of these rights, a fair distribution of available public resources irrespective of whether these resources are scarce or ample.¹⁸ Instead, the reforms on healthcare and education pave the way for another ‘deconstitutionalisation’ of the egalitarian philosophy behind these rights towards more utilitarian, sometimes even meritocratic conceptions.

The housing market illustrates an extreme systematic favourable treatment of the financial sector to the detriment of vulnerable individuals. The Spanish legislation has, until the intervention of the ECJ,¹⁹ allowed for the inclusion of abusive terms in mortgage contracts in combination with the inability for the judge to grant interim relief in case of evictions. Here, the proper articulation of the housing right would not have even required direct public expenditure from the Spanish government, but the allocation of proportional burdens among the parties of the contract according to their respective contractual power. The preliminary ruling given in *Aziz*²⁰ has enabled the Spanish Supreme Court (and to a certain extent the legislature) to mitigate the devastating effects of mortgage legislation in times where evictions have escalated. The initial reaction by the Spanish Constitutional Court, however, was disappointing and reflected the same indulgence *vis-à-vis* the executive as the other decisions on the eurocrisis measures.

¹⁴ For a broader discussion, see H Spector, ‘Philosophical Foundations of Labour Law’, Florida State University Law Review, Vol. 33, 2005 – 2006, p. 1119.

¹⁵ See the new Art. 32 of ‘Ley 7/2007, 12 April of the Basic Statute of the Public Employee as modified by the Royal Decree Law 20/2012 of 13 July’.

¹⁶ UN Economic and Social Council, ‘Considerations of reports submitted by States parties under articles 16 and 17 of the Covenant: Spain’, E/C.12/ESP/CO/5, 6 June 2012.

¹⁷ N Barr (*op. cit.* above at no. 13), p. 4.

¹⁸ H Correa Lugo, *La salud como derecho humano*, Bilbao: Universidad de Deusto, 2005, p. 43.

¹⁹ Case C- 415/11 *Mohamed Aziz v Catalunyaixa*.

²⁰ *Ibid.*

i) The case of healthcare

Universal access to healthcare can pose problems of sustainability since public budgets are limited and progressively more constrained. The institutional structures of healthcare streamlining manifest societal choices as to the balance between the universality and the viability of system. This means that the minimum content of healthcare rights varies across countries with diverse acquisitive power, but also with different opinions on the limits that their public system should reach. In Spain, Article 43 of the Constitution recognises the right to healthcare protection through preventive measures as well as the social services deemed necessary. The Spanish Constitutional court has stated that Art. 43 demands a minimum of equipment, structures and organisation common to every healthcare centre so access to healthcare is equal for all Spanish citizens²¹. Further, the Court has acknowledged the link between Art. 43 and the fundamental right to life and to physical and moral integrity (Art. 15), which would demand that minimum conditions of healthcare system be available to immigrants irrespectively of their legal residence in Spain²².

The latest reforms to the Spanish healthcare system have included, as Gonzalez details, the increase of medicine prices in some regions, the exclusion of illegal immigrants from healthcare services and the shutdown of emergency services located in rural areas. These measures seek the reduction of public expenses while maintaining the aggregate efficiency of the system, yet they result in particular situations of injustice. They disproportionately affect the chronically ill and the elderly with dramatic consequences for patients of severe diseases like AIDS. The shutdown of rural services could determine the impossibility for certain inhabitants to reach an emergency centre in less than one and a half hours and an ambulance in less than two hours, a margin that can in certain circumstances pose a risk to their lives.

The utilitarian reasoning of the executive behind the reforms is not new in the field of healthcare rights. Maximisation of the aggregate health of the society as a whole with the available resources has been a trend particularly dominant in the Anglo-Saxon world²³ – for instance, economists of healthcare have developed the criteria of ‘Quality-Adjusted Life Year’²⁴ for the calculations of the most optimum summative state of health of the population. Macro estimates can all be satisfactory, but this type of measures result in the abovementioned discriminations *vis-à-vis* vulnerable sectors and result in the violation of the minimum core content of welfare rights to some individuals²⁵. Utilitarianism of healthcare might well represent a societal choice in some countries. However, it was not the way in which healthcare rights were shaped in the Spanish Constitution nor, as the Constitutional Court has stated, a conception consistent with the very egalitarian conception of healthcare in Spain.

The Spanish Constitutional Court and the Tribunal Superior of Castile-La Mancha have ordered the suspension of the measures while the formal judgements are released. Sadly, the grounds on which they have done so are no less utilitarian than the measures themselves. On the medicine prices increase, the Constitutional Court has warned that the public savings effectuated are clearly quantifiable, while the abstract damages to the citizens’ health are not²⁶. Regarding the restriction of

²¹ Spanish Constitutional Court, Case 32/1983, 28 April RTC\32\1983, legal basis no. 3.

²² Spanish Constitutional Court, Case 95/2000, 10 April RTC\95\2000.

²³ See A Sen, ‘Equality of What?’, in *McCurrin S Tanner Lectures on Human Values*, Vol. 1, Cambridge: Cambridge University Press, 1980.

²⁴ P. Dolan ‘Utilitarianism and the Measurement and Aggregation of Quality-Adjusted Life Years’, *Health Care Analysis* 9(1), 2001, p. 66. For a critique, see C. Lema Añon, *Salud, justicia, derechos. El derecho a la salud como derecho social*, Dykinson, 2010, p. 209.

²⁵ UN Economic and Social Council, (*op. cit.* above no.16), recommendation n. 8.

²⁶ Spanish Constitutional Court, Decision 122/2013, 21 May, RTC 122\2013 AUTO.

access to healthcare attention for immigrants, the Court acknowledges the link or the right to health with the right to life, but also remarks that limited access to ordinary services could increase the expenses in emergency services. A similar reasoning is performed by the Superior Court of Castile-La Mancha when deciding on the shutdown of emergency services in countryside areas on the grounds that damages to the whole population had not been quantified by the regional government.²⁷ Gonzalez rightly points out that this reasoning biases the outcome towards the validation of the austerity measures inasmuch as accounts of public savings are more straightforward than calculations of their impact on the population as a whole. All in all, the politics of healthcare adjustment and their judicial decisions suggest another process of ‘deconstitutionalisation’ of healthcare rights, one that challenges equality of access for all Spanish citizens and minimum coverage for all human beings in the pursuit of aggregate macroeconomic efficiency.

ii) The case of education

Tuition fees for tertiary education have risen while conditions for the obtaining of supporting scholarships have been hardened. The Spanish Government announced its intention to increase the minimum grades for the award and maintaining of the scholarship to 6.5 (the normal requirement for accessing university and passing the courses is 5). University chancellors voiced their concerns for this measure would preclude 36,206 students from accessing university education and nearly 22,000 from continuing it, in the paradox that individuals from lower socio-economic backgrounds (and hence more needy of assistance) are precisely those more likely to get lower grades during and after secondary school.²⁸ The UN Committee on Economic, Social and Cultural rights has denounced the measures adopted by the Spanish Government for jeopardising equal access to higher education.²⁹ Indeed, the measures represent a regressive turn towards a meritocratic conception of social help, in a constitutional order where a scholarship scheme cannot be imposed on the legislator but, when it exists, must be configured according to the principle of equality³⁰.

iii) The case of the housing right

The large number of evictions generated in the aftermath of the crisis has been a cause of social unrest and litigation. Until recently, the Spanish legal system conferred special force on judicial foreclosures of mortgages: the judge was precluded from taking preventive measures against an eviction even if he suspected that the terms of the mortgage could be illegal. When the Spanish Supreme Court requested from the Constitutional Court its opinion on the constitutionality of the mortgage legislation and its judicial enforcement, the latter considered the referral as manifestly unfounded and accused the Supreme Court of trying to question the current legal order using another hypothetical legal order as a reference.³¹ The Constitutional Court succinctly decided the issue on the grounds of the traditional priority of mortgage foreclosures, which dated back to 1872. It was the European Court of Human

²⁷ Superior Court of Castile-La Mancha, Decision 13/2013, 21 Jan, RJCA 2013\50.

²⁸ Conferencia de Rectores de las Universidades Españolas, *Informe sobre el “Proyecto de real decreto por el que se establecen los umbrales de renta y patrimonio familiar y las cuantías de las becas y ayudas al estudio para el curso 2013 – 2014, y se modifica parcialmente el Real Decreto 1721/2007, de 21 de diciembre, por el que se establece el regimen de las becas y ayudas al estudio personalizadas”*, 24 June 2013, accessible at http://www.upct.es/contenido/destacados/ficheros/2779Documento_trabajo_RD_Becas.pdf (consulted as of 12 Jan 2014).

²⁹ UN Economic and Social Council (*op. cit.* above no. 16), recommendation no. 28.

³⁰ Spanish Constitutional Court, Case 188/2001 20 Sept, RTC/188/2001, legal basis no. 4.

³¹ Spanish Constitutional Court, Decision 113/2011, 19 July, RTC/2011/113 AUTO, legal basis no. 4.

Rights which ordered the suspension of evictions of families with underage children.³² Later, the ECJ declared that the preclusion of interim relief while deciding on the unfairness of a mortgage contract was against effective judicial protection.³³ This ultimately allowed the Spanish Supreme Court to suspend a number of evictions and to declare their mortgage conditions as abusive.

In light of the problematic Spanish housing market, articulation of social justice meant an appropriate attribution of responsibility between financial actors and mortgage debtors according to their respective contractual power. The Spanish Constitutional Court failed to do so. Its decision canonically stated that ‘when signing a mortgage, it is agreed to suffer a temporarily reduced defence, for it is not appropriate to suspend the foreclosure’³⁴. The great problem of this position is that, as the dissenting opinion claims, the financial drift that caused a great part of the evictions could not be taken into account in 1872. Neither could this crisis be known to the recipients of a mortgage credit nor even foreseen by the financial professionals themselves.³⁵ Besides, (unaware) minors were frequently the ones most affected by an eviction. The Court’s decision was oblivious to the social problematic created by the Spanish housing bubble, insensible to the real inequalities behind a mortgage contract and ultimately a rubber stamp over an unjust branch of law.

The judicial permissiveness of the Constitutional Court places Spain in a paradoxical position: while much of the pressures over public expenditures have been externally imposed, the European Courts have been the only ones to challenge the deficiencies of the Spanish housing system. If national judicial bodies are not willing or able to constrain the executive in times of crisis then one might wonder to what extent these measures are only temporary or subject to mechanisms of political accountability. As the next sections contend, neither of the two holds in contemporary Spain.

The permanence of emergency measures

All the measures curtailing social rights taken by the Spanish executive have been presented as required responses to an urgent (economic) threat. Although the ‘politics of emergency’ have been traditionally related to armed conflicts and terrorism prevention, Jonathan White rightly points out that the eurozone crisis has resulted in the adoption of improvised policies out of a necessity for bare survival.³⁶ When emergency politics take place, Courts cannot always stand above the crisis in the name of the constitution³⁷ – perhaps because no judge desires to cause a serious harm to the national (economic) affairs, and because ultimately no constitution is a suicide pact.

The main problem of equating Spanish eurocrisis measures with emergency politics is that in pure theory the latter forbid permanent changes in the legal/constitutional system.³⁸ Ferejohn and Pasquino find that modern emergency powers are modelled on the ancient Roman dictator, about whom Machiavelli claimed that ‘he could do nothing to diminish the power of the State, such as would have been the taking away of authority from the Senate to the people, to destroy the ancient institutions of

³² *Ibid.*, legal basis no. 3.

³³ Case C- 415/11 *Mohamed Aziz v Catalunyacaixa*.

³⁴ Spanish Constitutional Court, Decision 113/2011, legal basis no. 4.

³⁵ Spanish Constitutional Court, Decision 113/2011, dissenting opinion of Eugeni Gay Montalvo.

³⁶ J White, ‘Emergency Europe’, *Political Studies*, forthcoming.

³⁷ D Cole, ‘Judging the next emergency: Judicial Review and Individual Rights in Times of Crisis’, *Michigan Law Review* 101(8), 2013, p. 2569.

³⁸ J Ferejohn and P Pasquino, ‘The law of the exception: A typology of emergency powers’, *Int J Constitutional Law* 2(2), 2004, p. 211.

the City and the making of new ones'.³⁹ In contrast, the Spanish policies discussed here bear strong implications for social rights as traditionally configured by the *pouvoir constituant* and the Constitutional Court. Judicial minimalism does not result in 'democracy-promoting decisions',⁴⁰ for it does not prompt judgements of democratically accountable actors – quite the opposite, the government has made good efforts to restrain social dialogue and political protest.

The deconstitutionalising (or indeed re-constitutionalising) nature of the legislative measures introduced in Spain highlights the problems that come with their undemocratic character. The approval of labour reforms by Decree Law has precluded any trace of parliamentary discussion and, one can add, even of real social awareness. The suspension of the binding force of collective agreements of public employees at the sole request of the Executive is to persist even if the financial crisis is settled; and so are the measures for the rationalising of the healthcare system taken in the absence of dialogue with the affected collectives. It is highly dubious that these are the only measures that could be taken in the light of an economic emergency. Even if so, given their structural character, they should be subject to broad social and parliamentary debate.

Conclusion: re-constitutionalisation behind closed doors?

The radical reconfiguration of social rights experienced during the Spanish economic crisis calls for a broader reflection on the welfare state model that Spain is advancing. Challenges to the equalitarian character of healthcare and scholarship schemes are subtle but continuous; so are the reforms turning labour law into a utilitarian, efficiency-oriented branch. National judicial bodies have dangerously adopted a similar utilitarian language in the assessment of challenged crisis policies. When political debate is greatly constrained, societal awareness on the importance of these issues cannot be assured. And yet when political contestation has been prominent, the executive has reacted by constraining the options to manifest discontent – be they the resort to the regional ombudsman⁴¹ or the holding of street protests.⁴²

Once it is manifest that the (economic) emergency measures adopted are to have a structural impact, democratic legitimisation of these measures cannot be avoided. The famous link between social and civil rights is thus fully illustrated: social entitlements are fought for and legitimised by means of democratic participation. The assumption that in times of crisis there is a trade-off between democracy and equity, on the one hand, and efficiency on the other one is far from self-evident. Making the managerial efficiency model prevail on an enduring basis is a step that should be carefully debated and decided upon – not one that could be introduced

³⁹ N Machiavelli, *Discourses on Livy*, Chicago, University of Chicago Press, 1517/ 1996, p. 73.

⁴⁰ C Sunstein, 'Minimalism at War', John M Olin Law & Economics Working Paper No. 231, Dec 2004, p. 2.

⁴¹ Individual complaints for violation of fundamental rights pursuant the Spanish Constitution can only be initiated by the president of the Spanish Government, fifty deputies, fifty senators, the regional governments, the regional parliaments and the national ombudsman. Since social policies are mostly competence of the regions, the national ombudsman greatly relies on the reports presented by the regional ombudsmen. Paradoxically, one of the first measures within the financial crisis has been to suppress the regional ombudsman of Castile- La Mancha.

⁴² The 'Anteproyecto de Ley Orgánica de Protección de la Seguridad Ciudadana', a bill not yet discussed at the Spanish Parliament, foresees the imposing of penalties of up to 600,000€ for participants of street protests not previously authorised by the Government.