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A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone

Abstract

The Eurozone crisis and its management prompted dramatic changes to social rights and entitlements, specifically in the Member States which were most severely affected by the economic downturn. Fundamental rights, including fundamental social rights, from different sources can be a means to contest those crisis-imposed changes to social rights. The aim of this paper is to provide a comparative framing of fundamental rights challenges to social crisis measures in the Eurozone. The paper examines the decline in social rights, broadly defined, in a number of Eurozone Member States intensely affected by the crisis, and analyses the content, location and background of fundamental rights' challenges made to crisis-imposed changes to work and welfare rights in those States. The analysis prompts difficult yet central questions of the role of the EU as a human rights actor, the attitudes of courts in fundamental rights cases, as well as the significance of the Charter as a guarantor of fundamental social rights in the EU.

1 Introduction

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 paper 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. In this paper we explain each of these choices more fully and provide some interesting comparative findings and further puzzles arising from the analysis of social rights in crisis in Europe.

2 The choice of states

We analyse a subset of EU Member States, only Eurozone states but not only Eurozone states in bailouts.

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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 International Monetary Fund (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 new financial assistance vehicle replacing the EFSM and EFSF, the European Stability Mechanism (ESM), came into force.[4] The key point about these bailout sources is that the loan conditions in individual bailouts were replete with social requirements and impacts such as cutting public sector pay or minimum wages. Further examples of these requirements and impacts are given in the next section.

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,[5] our goal here is rather to see how these sources were perceived and acted upon in bailout states. What is most significant is that the bailout measures are rarely and barely conceptualised and articulated in legal challenges as either an implementation of EU law or as acts of EU institutions.

Whatever the reasons may be for this 'overlooking' of the EU legal and institutional nature of the bailout programmes, the consequences in terms of shaping fundamental rights challenges are profound. When the national bailout measures are viewed as an implementation of EU law or as acts of EU institutions, national courts including Constitutional Courts considering they conflict with fundamental rights' guarantees should make validity references to the Court of Justice of the European Union (CJEU) concerning applicability to the bailout norms of the EU Charter of Fundamental Rights as well as the Court of Justice's established body of general principles of EU law and general constitutional principles embodied in the Treaties. If, however, national measures taken in the context of sovereign debt loan assistance are viewed as purely national, normal national constitutional review can take place.

As to the reasons, the complex and variegated legal nature of the bailouts, both their hybrid EU/international nature and the prominent position given to Memoranda of Understanding (MoUs) as a bailout component is relevant. It may indicate that national actors did not

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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. Greece I was planned to run from May 2010 until 2014 with a Eurozone contribution of €80 billion. 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).

4 ESM Treaty agreed on 2 February 2012. Requiring ratification by its 17 eurozone signatories, it came into effect on 27 September 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 from May 2013 (until 2016) in part because it was too recent.

5 On which see R. Cisotta and D. Gallo, 'The Impact of the Troika's Austerity Measures on the Portuguese Labour Law System: A General Assessment on the Scope of Social Sovereignty', forthcoming *European Journal of Social Law* in which they argue bailouts are essentially international rather than EU law measures. For a series of counter-arguments see C. Kilpatrick, 'Are the bailouts immune to EU Social Challenge because they are not EU law?' forthcoming *European Constitutional Law Review*.

consider that the normal regime for considering EU sources in their national legal order applied here.[6] A complementary reason is that not addressing the EU nature of the bailouts may have served to avoid what promised to be an open and highly charged conflict with the EU institutions and legal order, including the Court of Justice, by taking validity challenges against the EU components of bailout programmes. While the Portuguese Constitutional Court's findings that national bailout measures were unconstitutional provoked intense national and EU institutional responses,[7] the nature of the conflict and controversy would have been different had it been openly framed by that constitutional court as EU (bailout) sources breaching fundamental rights and principles in the Portuguese Constitution.

We also 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 had a more restricted loan assistance programme applying to its financial sector.[8] Indeed the Spanish example underlines how even sectorally restricted loan assistance can create highly complex constitutional fundamental rights dynamics. The Spanish Constitutional Court in 2014[9] has suspended regional Spanish laws protecting the right to housing by suspending evictions related to mortgage foreclosures on the basis that such regional laws jeopardised Spain's banking financial assistance programme and compliance with the international obligations that assistance entailed.[10] Moreover, 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, the atypical source of secret letters from the European Central Bank (ECB) to Italy and Spain in August 2011 also played an important role in public and political discussions of labour law reform.[11] Accordingly, setting full bailout, sectorial 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 legal pedigree, in their content, in their intensity or in their compliance pull.

2 A broad definition of 'social'

We adopt a broad definition of 'social' to encompass both work and a broader range of 'social or welfare' rights to housing, health, education, income. As noted, the measures adopted at national level can flow directly from specific loan conditions or other instructions in the new EU macro-economic governance framework (e.g. 'cut minimum wages by 10 %') or can be an indirect consequence of broader requirements (e.g. 'reduce public sector spending by 10 %') aimed at goals such as rapid fiscal consolidation.

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. A further central dimension 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

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6 For other reasons, see C. Kilpatrick, 'On the Rule of Law and Economic Emergency: the Degradation of Basic Legal Values in Europe's Bailouts' forthcoming *Oxford Journal Legal Studies*.

7 An excellent recent example is the Press Release of 12 June 2014 of the European Commission, the ECB and the IMF on Portugal in light of the ruling by the Constitutional Court on 30 May 2014 (Judgment 413/2014) that various measures in the Budget Law of December 2013 were unconstitutional. It states *inter alia*, 'We welcome the government's firm commitment to identify the measures needed to fill the fiscal gap created by the Constitutional Court rulings, in order to reach the budgetary targets agreed under the programme.'

8 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 was carried across from the EFSF to the ESM.

9 Spanish Constitutional Court Decisions 69/2014 (10 February 2014), 115/2014 (8 April 2014).

10 See M. González Pascual, 'Austerity Measures and Welfare Rights: The Spanish Constitutional System under Stress' forthcoming *European Journal of Social Law*.

11 For the European features of these secret letters see C. Kilpatrick above n.6. For their domestic impact see for Italy A. Lo Faro, 'Italian Labour Law in Recession: Legislative Actions and Judicial Reactions' and D. Tega, 'Welfare Rights and Economic Crisis Before the Italian Constitutional Court', forthcoming *European Journal of Social Law*; For Spain, see M.-L. Rodríguez, 'Labour Rights in Crisis in the Eurozone: The Spanish Case' forthcoming *European Journal of Social Law*.

bargaining. Collective bargains have been overridden and changes made to decentralise or otherwise weaken collective bargaining as a source of labour regulation. 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). Sharp reductions in funding of welfare services have led to indirect interferences with social rights, such as the closing of hospitals in remote areas, making urgent medical help unavailable and the downsizing of scholarships schemes that allow access to higher education.

Hence, the crisis measures seem to demand a broad definition of 'social' rights and measures. In this sense our approach contrasts with much 'social' scholarship in recent decades[12] which overall retains a strong disciplinary separation between 'labour law' and 'social law', the latter being the focus of much recent interesting comparative constitutional analysis.[13]

One goal of an expanded social definition is to explore whether fundamental rights' challenges vary according to whether the rights are welfare rights or work rights. Indeed this is often the case, so that analyses of challenges to work rights focus extensively on International Labour Organization (ILO) sources and institutions whilst welfare challenges focus more on other United Nations (UN) human rights sources and bodies such as the Economic Social and Cultural Rights Covenant (ESC Covenant). Nonetheless there are interesting indications that the crisis has fostered an opening to a broader range of sources. Hence Irish unions effectively turned to the UN Human Rights Council to exert pressure to obtain an expanded national definition of collective bargaining[14] and Psychogiopoulou points to the significance of the ILO's Committee on the Application of Conventions and Recommendations comments in 2013 on Greek pensions.[15] Moreover, some fundamental rights instruments themselves embody a broader vision of the 'social' and so attract fundamental rights' challenges easily criss-crossing the work-welfare borders: the European Social Charter (ESC) is perhaps the best example. Evidently there is much potential for a further integration of work and welfare: for instance, the body of ILO sources holds much of relevance for 'welfare' rights as does the ESC Covenant and the broader set of UN human rights instruments for work rights. And, as explored further below, the fact that many of the fundamental rights' challenges, especially national constitutional challenges, were not based on fundamental social rights but broader fundamental principles such as equality, the protection of legitimate expectations and non-retroactivity, also blurs the work-welfare distinction.

Another aim of a broad definition of the social is to explore whether those taking the challenges, or organising more broadly anti-crisis mobilisations, are split into unions pursuing only work-related challenges and other civil society groups pursuing welfare challenges or whether the crisis has sometimes produced new more blended combinations. Here a comparative overview produces some interesting conclusions. First, it is often the case that trade unions *are* the main component of civil society rather than being placed in juxtaposition to it. Related to this is that often where unions are not taking legal challenges no-one is: 'Civil society in Greece with the exception of labour-related associations and trade unions, is not particularly developed, active or influential'.[16] Nonetheless the crisis has also produced new patterns of mobilisation so that in Spain mobilisation evolved during the crisis from being primarily worker mobilisation about labour

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12 For a fascinating history of the 'social' and its supercession by 'human rights-constitutional' legal consciousness post WW2, which is relevant to our analysis, see D. Kennedy, 'Three Globalisations of Law and Legal Thought: 1850-2000' in D. M. Trubek and A. Santos (eds) *The New Law and Economic Development: A Critical Analysis* (CUP, 2006) 19.

13 See, for example, K. G. Young, *Constituting Economic and Social Rights* (OUP, 2012) which contains no work-related examples.

14 A. Kerr, 'Social Rights in Crisis in the Eurozone: Work Rights in Ireland' forthcoming *European Journal of Social Law*.

15 E. Psychogiopoulou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges' forthcoming *European Journal of Social Law*.

16 Ibid.

rights to broader-based citizen mobilisation around a range of social rights with important legal challenges resulting especially in the area of the right to housing.[17]

3 Fundamental rights challenges to changes to social rights and entitlements

Having outlined the changes to social rights, broadly defined, and their links to bailout and EU macro-economic governance sources, the third aim of this paper is to consider what roles fundamental rights' challenges have played. In other words, we focus on the actions of the EU and national legislatures from the specific angle of the reactions those actions have produced within the national, supranational and international bodies entrusted with respect of relevant fundamental rights.

The panorama of fundamental rights' challenges and decisions raises interesting questions including questions of mobilisation choices, the fundamental rights' grounds on which challenges were made to these changes to social rights and before which courts or other institutions monitoring compliance with Fundamental Rights ('fundamental rights bodies'), how the economic crisis shaped reasoning and argumentation on fundamental rights' application and the impact of findings of fundamental rights' bodies. While we highlight matters of interest in each of these areas, it is important to stress that this is a set of stories which are not yet finished: of pending challenges and ongoing reflection.

3.1 Mobilisation choices

Regarding mobilisation choices, the focus is on the actors behind fundamental rights' challenges and the specific avenues they took (e.g. 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 worker-pensioner associations have adopted the most active and multi-pronged approach to fundamental rights' challenges. At the other end of the legal mobilisation spectrum is Ireland, with very limited fundamental rights based challenges so far.

The dominance of trade unions and associations of pensioners (former workers) in taking legal challenges has meant that work rights and occupational pensions have been central to many challenges whilst there are few traces of challenges to health and education cuts. In Portugal and Spain, though, constitutional review mechanisms were used by political actors (including regional governments in the case of Spain) and by the Ombudsman. Those 'privileged applicants' have challenged cuts (or reduced coverage) of welfare benefits and health care services. Housing was a special focus of legal mobilisation in Spain. In this area, litigation was not directed against the austerity measures themselves, but against contract and consumer laws favouring the rights of banks over those of borrowers that led to massive house evictions.

In a comparative perspective it is important also to underline that different avenues of challenge are available depending on the opportunity structures created by national rules on constitutional challenges as well as the international human rights channels accepted by different states. It makes a difference, for example, that Greece has accepted the Collective Complaints Procedure (CCP) but has only ratified the 1961 European Social Charter and not the revised ESC of 1996 whilst Spain has not accepted the CCP or ratified the revised ESC. It shapes litigation choices and outcomes in Spain that the *recurso de amparo* (whereby individuals can claim constitutional violations before the Spanish Constitutional Court) is not available for welfare rights other than education. Nonetheless, the availability of a channel is a necessary but not a sufficient condition for its utilisation: although Italy, Ireland and Portugal have all ratified the revised ESC and the CCP no crisis-related Collective Complaints have resulted to date.

Given how the organisation of legal mobilisation has framed litigation choices, the cyclical reporting

[17] See González and Rodríguez, above n.10 and n.11. There is now a White Tide movement (health professionals) a Green Tide (education professionals) and a Platform for the Defence of People Affected by Mortgages.

mechanisms of international human rights bodies, as well as the role of special institutional figures, such as the UN Independent Expert on Foreign Debt and Human Rights,[18] can be seen as a crucial complement to litigation and complaints mechanisms, as these provide fundamental rights monitoring and accountability in relation to issues where no civil society legal mobilisation occurs.

One notable outcome of the crisis is that dormant or hitherto unused avenues of challenge were re-discovered or activated for the first time. Hence the crisis produced the first ever batch of Collective Complaints by Greek unions to the European Committee of Social Rights.[19] It also provoked a new turning to the ILO Committees by unions in Italy and Spain. Hence the Italian crisis-linked complaint to the ILO's Committee on Freedom of Association was its first since 1979.[20]

Constitutional courts were also sites of innovation in a range of ways. The Italian Constitutional Court made its first ever preliminary reference to the Court of Justice on the compatibility of crisis-linked reforms to fixed-term work with the EU Fixed-Term Work Directive.[21] New forms of collaboration between unions and high courts in Spain cleared the way for constitutional challenges before the Constitutional Court.[22] Very extensive use of political constitutional review mechanisms in Portugal, by which ex post and preventive review of measures before the Constitutional Court is triggered by Parliamentarians, the Ombudsman or by the President of the Portuguese Republic, led to no fewer than eight highly significant rulings on bailout measures by the Constitutional Court between 2011 and mid-2014.

The crisis may even contribute to a rethinking of the constitution itself. Hence the current Irish Constitutional Convention process has resulted in unanticipated support for including a broader range of social rights in the constitutional text.[23]

3.2 Grounds and locations of fundamental rights challenges

Constitutional or fundamental rights' challenges often concerned pay and pension cuts, the latter in particular straddling the work-welfare boundary. At national level, this primarily concerned constitutional challenges. It is worth underlining that many of these challenges do not hinge on the fundamental social rights in the constitutional text[24] 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.[25] 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[26] and some of the labour law reform constitutional challenges in Portugal.[27]

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18 For the role of this expert in Greece see Psychogiopoulou above n.15. For further highly relevant examples see the Issue Paper by the Council of Europe Commissioner for Human Rights *Safeguarding Human Rights in Times of Economic Crisis* (2013). See also the Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (on austerity measures).

19 Complaint 65/2011 and Complaint 66/2011, Decisions of 23 May 2012, Complaints 76/2012, 77/2012, 78/2012 and 79/2012, Decisions of 7 December 2012.

20 A. Lo Faro above n.11.

21 C-418/13, *Napolitano and Others v Ministero dell'Istruzione, dell'Università e della Ricerca* pending; see further Lo Faro, above n.11.

22 See further Rodríguez above n.11.

23 See further A. Nolan, 'Welfare Rights in Crisis in the Eurozone: Ireland' forthcoming *European Journal of Social Law*.

24 See M. Nogueira de Brito, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Rights Challenges in Times of Crisis' forthcoming *European Journal of Social Law*. He explores and critiques the choice by the Portuguese Constitutional Court not to use the many specific work and welfare rights (eg to housing, health) in the Portuguese Constitution and instead reply on broader non-social provisions of equality, dignity and legitimate expectations as the primary basis for its constitutional reasoning.

25 See further Lo Faro above n.11.

26 Above n.19.

27 Portuguese Constitutional Court: Judgment 474/2013, 29 August 2013 (relaxing dismissal regime for public sector workers); Judgment 602/2013, 20 September 2013 (relaxing private sector employment protection); Judgment 794/2013, 21 November 2013 (increasing normal working hours of public sector).

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 (ECHR) and European Social Charter) and their interpreters, the European Court of Human Rights (ECtHR)[28] and the European Committee of Social Rights[29], have produced significant decisions on crisis measures in bailout states.

The Court of Justice of the European Union (CJEU) is another route to challenging the social rights content of crisis measures. Portuguese courts have made a series of references to the Court of Justice on the compatibility of public sector pay-cuts with the EU Charter of Fundamental Rights.[30] 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.[31]

The CJEU played a more indirect but important role in Spain.[32] In its *Aziz* judgment,[33] 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. Indeed, the broader claim can be made that the most effective use to date of EU law to combat the crisis measures has entailed using the social *acquis*, that is to say, the body of protective legislation concerning especially worker and consumer protection made under EU law from the 1970s onwards as part of its mission to accompany its market-building project with a 'social dimension'. While *Aziz* provides an important example related to the right to housing, the Irish case of *Hogan* provides an example of the EU's significant legislative protection of workers in case of their employer's insolvency.[34] Although not always successful,[35] these challenges have not failed, as those based on the EU Charter or on challenging the validity of EU crisis measures in annulment actions have all done so far, at the admissibility stage. That is to say, EU social rights challenges have been more effective than EU fundamental rights challenges. However, while successful litigation using the EU social acquis can place limits on social crisis measures, it does less to achieve the goal of EU legal accountability for the crisis measures taken.

3.3 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. The point to emphasise is that there are real differences in approach between different

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28 See, for example, ECtHR, Decision of 7 May 2013, Joined Cases 57665/12 and 57657/12, *Koufaki & ADEDY v Greece* [2013].

29 See above n.19.

30 C-127/12, *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindacato Nacional dos Profissionais de Seguro* v *Fidelidade Mundial*, Order of 26 June 2014.

31 T-541/10 and T-215/11, *ADEDY and others v Council supported by the Commission*, Orders of the General Court of 27 November 2012.

32 See González above n.10.

33 Case C-415/11, *Mohamed Aziz* v. *Catalunyacaixa*, Judgment of the Court of Justice (First Chamber) of 14 March 2013.

34 When Waterford Crystal became insolvent in 2009 with the loss of 1700 jobs in Waterford its employees challenged the Irish state's guarantee of only 20% of their occupational pension entitlement under an EU directive (2008/94/EC) protecting employees in the event of their employer's insolvency. The Court of Justice refused to depart from its earlier case-law requiring the State to guarantee at least 50% of occupational pension benefits on the basis *inter alia* of Ireland's economic crisis (C-398/11, judgment of 25 April 2013 especially para 41).

35 See, for example, Lo Faro's discussion above n.11 of the preliminary references on crisis-propelled changes to fixed-term work in Italy and the preliminary references from Italian courts to the Court of Justice on this issue.

fundamental rights' bodies in relating the economic crisis with fundamental rights. In a country such as Italy, where the constitutional court had an established doctrine on the justifiability of social rights, that doctrine was reconsidered but not abandoned, in the new 'emergency environment' created by the euro crisis.[36] The European Committee of Social Rights has stressed that the 'economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter' and that 'governments should take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when citizens need it most' whilst the European Court of Human Rights has adopted a different approach.[37] The reasoning of the Council of State in Greece and the Portuguese Constitutional Court on how to construct the relationship between constitutional guarantees and pressing economic circumstances also differ widely. This is a comparative field ripe for further study and reflection.

3.4 The impact of findings of international human rights violations

A final important focus of attention is whether findings of fundamental rights violations by international bodies have led to changes in social rights protection at the national level. There is little evidence for this so far. One reason is that international courts with the power to give binding judgments on human rights violations (the CJEU and the ECtHR) have not yet found such violation in this area (the CJEU's *Aziz* judgment found Spanish law to be contrary to EU legislation on consumer protection, but no violation of EU fundamental rights); whereas the international bodies that did adopt a more critical stance (such as the ILO) or even openly found a violation of rights (the European Committee of Social Rights) do not have the power to adopt binding decisions. So, the ECSR's decision on Greece of December 2012 could, strictly speaking, be ignored with impunity by the Greek authorities.

However, one also needs to take into account the effect of the various international sources in domestic law. First of all, the European Court of Human Rights has left, in its crisis-related judgments, a large margin of appreciation to the countries concerned. This margin of appreciation disappears, in principle, when *national* courts apply the ECHR, and one might therefore find national courts applying a stricter standard than the Strasbourg court. An example of this approach is the decision of the Greek Court of Auditors which found a violation of the right of property guaranteed by Protocol 1 to the ECHR, contrary to what the Strasbourg court had held in respect of the same Convention right.[38] But other international human rights treaties, such as the Social Charter or the International Covenant of ESC Rights might also come into play before national courts. The fact that their *international* monitoring bodies do not have the power to take binding decisions does not prevent those instruments from being a source of rights at the *national* level. In Greek, Portuguese and Spanish law, international treaties prevail over national legislation (and in traditionally dualist Italy only over *earlier* national legislation). National courts may decide that rights laid down in those treaties have direct effect in the national legal order and can thus be relied upon to challenge austerity measures. In doing so, those national courts can find inspiration in the interpretation given to those rights by (non-binding) rulings of the international monitoring bodies. In Greece, notably, the Council of State has confirmed that the Social Rights Charter prevails over national law and that at least some of its provisions can have direct effect.[39]

So, it is perhaps a matter of time before the critical stance taken by the Social Rights Committee in the Greek pensioners complaints (Nos. 76 to 80/2012) is translated into domestic rulings of Greek courts. Indeed, the *reasoning* of the Social Rights Committee could find its way into the case law of courts of other European countries, even when they apply their own constitutional rights rather than the Social Charter as such. Findings of breaches of international obligations by international bodies could also – more simply – be heeded by governments despite their lack of binding force. The domestic effect of international treaties in the Greek legal order may have helped to convince the Greek government that it needed to respond to the

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36 See further Tega above n.11.

37 See above n.19 and 28.

38 See Psychologiopoulou above n.15.

39 See M. Yannakourou, 'Legal Challenges to Austerity Measures Affecting Work Rights at Domestic and International Level: The Case of Greece' forthcoming *European Journal of Social Law*, referring to Council of State Decision 1571/2010 .

findings of the Social Rights Committee.[40] Finally, the practice of the international bodies can also play a more diffuse role in broader social mobilisations against the crisis (strikes, demonstrations).

The overall picture, thus far, confirms however the existence 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, especially interesting. It is surely the first time the Portuguese Constitutional Court has regularly featured in prominent articles in the *Financial Times*, depicting it as follows:

> Robed in black and accustomed to the quiet of their Lisbon Chambers, the 13 judges of Portugal's constitutional court have found themselves propelled unexpectedly into the cut and thrust of high European politics.
>
> Defenders of the inviolability of national laws for some, enemies of reform to others, the seven men and six women have become critical to the success or failure of Portugal's 78 billion euro bailout programme and, by implication, the resolution of the Eurozone crisis.[41]

The modest aim of this paper is to provide a comparative framing of fundamental rights challenges to social crisis measures in the Eurozone. We hope it will be taken as a set of starting-points for further inquiry. Going beyond the EU, these should link new EU sovereign debt governance and its interaction with fundamental rights challenges with other episodes outside the EU of reconciling sovereign debt requirements and economic 'emergency' with international human rights obligations and constitutional guarantees. At the same time, the EU-specific questions this sovereign debt experience raises for the EU's relationship with social rights deserve further exploration. What does it do to our classical understanding of the EU's operating system when national constitutional courts strike down as constitutional violations national norms implementing social loan conditions contained in EU sources and enforced and monitored by EU institutions? What is the position of the EU as a human rights actor in Europe when social loan conditions are condemned by a range of regional and international social and human rights supervisory bodies? Should the normative stance taken by the EU towards social rights in the loan conditions be seen as an exceptional aberration, a continuation of established trends or a new EU social policy path?

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[40] See, in this respect, the Resolution of the Committee of Ministers of the Council of Europe of 2 July 2014, containing the statement by the Greek government on the measures taken to respond to the Social Rights Committee's decision of December 2012 (*Resolution CM/ResChS(2014)7, Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece, Complaint No. 76/2012).*

[41] Financial Times, 24 October 2013.

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