

## **THE MARGIN OF APPRECIATION ACCORDED TO STATES IN TIMES OF ECONOMIC CRISIS**

**AN ANALYSIS OF THE DECISION BY THE EUROPEAN COMMITTEE OF SOCIAL  
RIGHTS AND BY THE EUROPEAN COURT OF HUMAN RIGHTS ON NATIONAL  
AUSTERITY MEASURES**

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### **ABSTRACT**

With a view to upholding fundamental (social) rights in Europe in times of economic crisis, attention is to be paid to the assessment of regressive implementation of social rights during the recent period, under the applicable international instruments for the protection of human rights. The present contribution focuses on the divergent decisions by the European Committee of Social Rights and the European Court of Human Rights on 'austerity measures', bearing in mind the 'complementarity' between the two underlying treaties – the European Social Charter and the European Convention on Human Rights. While the different grounds of violation available in the two treaties may explain divergent outcomes, arguably the most relevant factor concerns the interpretative method(s) followed by each body, especially the varying degree of deference accorded to the national authorities in the sphere of economic and social policy.

### **RÉSUMÉ**

Dans la perspective de maintenir et respecter les droits (sociaux) fondamentaux en temps de crise économique, il y a lieu de considérer l'évaluation des restrictions récemment apportées à la jouissance de ces droits, par rapport aux instruments internationaux de protection des droits de l'homme. La présente contribution analyse les décisions divergentes du Comité européen des droits sociaux et de la Cour européenne des droits de l'homme envers ces mesures 'd'austérité', tout en rappelant la 'complémentarité' qui avait été envisagée entre la Charte sociale européenne et la Convention européenne des droits de l'homme. Si des conclusions divergentes peuvent s'expliquer en raison des différents motifs de la violation dans les deux traités, la question qui relève le plus a probablement trait aux méthodes interprétatives adoptées par le Comité et la Cour, surtout en ce qui concerne le

différent degré de déférence accordé aux autorités nationales dans la sphère des politiques économique et sociale.

## KEYWORDS

Social rights - economic crisis - margin of appreciation - European Committee of Social Rights - European Court of Human Rights

## MOT-CLÉ

Droits sociaux - crise économique - marge d'appréciation - Comité européen des droits sociaux - Cour européenne des droits de l'homme

SUMMARY: 1. The challenges posed by the crisis to the European protection of social rights. - 2. Similar – but not identical – claims. - 3. The relevance of according narrower or wider discretion to States. - 4. Critical remarks.

## **1. The challenges posed by the crisis to the European protection of social rights**

The Turin conference will reflect on the question of respect for human rights by national 'austerity measures' that many European States have adopted in order to face the economic and financial crisis. Such issue has been dealt with by national supreme courts as well as European courts and monitoring bodies. It is closely and intricately interlocked with the other questions which will be discussed in Turin to re-launch the European Social Charter. In several European countries, restrictive measures on public spending and higher taxation for the purposes of budgetary consolidation have seriously impacted on individuals' lifestyle and means of subsistence. The enjoyment of their economic and social, as well as political and civil rights has been affected<sup>1</sup>. In certain notable cases, such measures were adopted according to the requirements stemming from the EU fiscal discipline and the 'conditionality' of lending policies at the European and international levels. Arguably, an account of the contribution of the European Social Charter (ESC)<sup>2</sup> to the crisis exit phase, with a view to integrating the Charter's standards into the EU legal order and policies, would help the EU reach the objective of a "highly competitive social market economy" (art. 3§3 TEU). This would also help re-gain citizens' confidence. Furthermore, a fresh consideration of the Charter's role in times of economic crisis would contribute to the effective implementation of the concept of indivisibility of rights, within a European system of rights' protection, where different texts and their

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<sup>1</sup> See, among other studies, HUMAN RIGHTS COUNCIL (2009); COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS (2013); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2012).

<sup>2</sup> In the present contribution, reference will be made to the European Social Charter without distinguishing between the Charter of 1961 and the Revised Charter of 1996 which, among other innovations, covers additional social rights. In particular, the rights coming into relevance in the analysis below are present in both texts, notably with the difference reported in ft. no. 24 below, as regards art. 12 on the right to social security. All EU member States have ratified the Revised Charter, except for Croatia, Czech Republic, Denmark, Germany, Greece, Luxembourg, Poland, Spain and the United Kingdom, which are bound by the ESC 1961.

control bodies share the same underlying values of human dignity, rule of law, and democracy.

However, with a view to overcoming the crisis by upholding fundamental (social) rights in Europe, policy makers and legal operators at the national and European levels are confronted with a somewhat puzzling assessment of regressive implementation of social rights during the recent crisis, under the main European instruments for the protection of human rights. Although similar measures were challenged before the relevant bodies of the Council of Europe, the EU and the ILO in particular (see 2.1 below), the decisions issued were not wholly coherent if not even sharply contrasting, at least at a first sight. The most striking example of divergent outcomes arises in the Greek financial 'rescue' context. The Greek Confederation of Public Sector Trade Unions (ADEDY) and other organizations and individuals alleged the violation of human rights *i)* by Greek austerity measures, before the European Committee of Social rights (ECSR) and the European Court of Human Rights (ECtHR), and *ii)* by EU acts before the Court of Justice of the European Union (CJEU). While the Luxembourg court declared the applications inadmissible for lack of *locus standi* of the applicants, the ECSR found that the challenged measures did constitute a violation of several rights recognized by the European Social Charter, while the European Court of Human Rights declared the claims manifestly ill-founded and the applications inadmissible, as it considered that Greece had not exceeded the discretion accorded to national authorities facing an economic crisis.

But do contrasting decisions really imply inconsistent interpretation of rights through the relevant treaties? Would such decisions necessarily prevent common and shared standards of protection of social rights from being shaped and effectively implemented in Europe? Should the European Social Charter's rights and their interpretation by the ECSR be evaluated up to the level of the authority of minimum standards for national and European institutions? Should/could the different procedures and bodies available to individuals and groups of individuals at the European level be given a more defined, complementary role? These are some broad questions which require investigation and may prompt moves, under the several issues tackled at the Turin conference.

Bearing such questions in mind, the present contribution will focus on the decisions by the European Committee of Social Rights and the European Court of Human Rights on measures undertaken within the context of the recent crisis. The analysis will be aimed at pointing out the relevant standards of protection emerging from the two bodies, with reference to social rights, in times of economic hardship, i.e. the requirements that governments have to abide by when choosing how to react to an economic and financial crisis.

Indeed, at its very origin, the European Social Charter was envisaged in a close relationship of 'complementarity' with the European Convention on Human Rights. The latter treaty being confined to civil and political rights,<sup>3</sup> only the right to freedom of association was expressly provided under art. 5 ESC and art. 11 ECHR, with few other rights being partially covered by provisions in both treaties. Broader substantial

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<sup>3</sup> For a framework of the normative relationships between the ESC and the ECHR, see, in particular, AKANDJI-KOMBÉ J.-F. (2010); FLAUSS J.-F. (2002); SUDRE F. (1998).

overlaps between the two have arisen from the case law.<sup>4</sup> The European Court of Human Rights opened the Convention to the social dimension within the procedural guarantees set therein, in particular the right to a fair trial, and by means of the principle of non-discrimination. It also extended the Convention's substantive rights to the protection of social rights. Thus, for those States which are party to both treaties,<sup>5</sup> measures and practices affecting individuals' social rights have to comply with the standards of protection stemming from each instrument, as interpreted by its control body. Although interpretative synergies have been outlined between the two systems, they maintain separate institutions and proceedings.<sup>6</sup> This explains why parallel and concurrent reviews of austerity measures were made by the ECSR and the ECtHR.

In order to make a comparative analysis of such case law, an account must be given of the elements of the comparison, i.e. the facts (the measures under question) and the grounds of the claims **(2.)**. While different grounds available in the ESC and the ECHR might explain divergence of outcomes, arguably the most relevant issue concerns the interpretative method(s) followed by each body, in particular the varying degree of deference accorded to the national governments in the sphere of economic and social policy **(3.)**. The relevance of such insights for the conventional and jurisprudential architecture of the protection of human rights at the European level will be finally discussed **(4.)**.

## **2. Similar - but not identical - claims**

### *2.1. General economic and social measures put under question*

As far as the European Social Charter was concerned, seven collective complaints were issued against one single State, Greece, claiming that it had violated the Charter by adopting certain measures on remuneration and working conditions (complaints nos. 65/2011 and 66/2011) and on reductions in pensions in both public and private sectors (complaints nos. 76/2012 to 80/2012).<sup>7</sup> In particular, the first set of complaints targeted the possibility of dismissing a person without notice or severance pay during the 12-month probation period in an open-ended contract and the possibility for a collective agreement at enterprise level to derogate from provisions on remuneration and working conditions set out in a collective agreement concluded at branch level. Another instance concerned the possibility of concluding "special apprenticeship contracts" with the very young without including the main

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<sup>4</sup> See the thorough overview by MALINVERNI G. (2014).

<sup>5</sup> While the ratification of the ECHR is a condition for membership to the Council of Europe, ratification of the ESC is not. All EU member States are bound by both the ECHR and the ESC 1961 or the ESC 1996 (see *supra*, ft. no. 2). However, while all of them are subjected to the ESC' reporting procedure, only half have accepted the collective complaint procedure provided in the additional, optional Protocol of 1995 (as of September 2014, it is in force towards Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, The Netherlands, Portugal, Slovenia and Sweden; apart from these EU States, only Norway is bound by it). Among the other Members of the Council of Europe, Liechtenstein, Monaco, San Marino and Switzerland are bound to neither the ESC 1961 nor the ESC 1996.

<sup>6</sup> Strengths and weaknesses of such cross-references are outlined by AKANDJI-KOMBÉ J.-F. (2010): 151 ff., who also discusses the possible implementation of institutional and procedural links between the two systems, *ibid.*, 158 ff.

<sup>7</sup> For an analysis of the ECSR's decisions issued on these complaints, see ALFONSO MELLADO, C.L., JIMENA QUESADA, L., SALCEDO BELTRÁN, C. (2014); GUIGLIA G. (2013); JIMENA QUESADA L. (2014).

safeguards which were provided for by labour and social security law, and the possibility of paying new entrants aged under 25 below the minimum wage or daily wage. In the second set of parallel complaints, changes to pension schemes were challenged, which led to the reduction of the additions to pensions known as Christmas, Easter and vacation bonuses, the reductions in primary pensions and in auxiliary pensions, the introduction of pensioners' social solidarity contribution and the suspension or reduction of pensions for pensioners with an occupation.

The European Court of Human Rights faced some of the above-mentioned Greek measures aimed at the pay of persons working or having worked in the public sector (*Koufaki and ADEDY v. Greece*).<sup>8</sup> Portuguese measures under the 2012 State Budget Act relating to pensions were contested too (*da Conceição Mateus and Santos Januário v. Portugal*).<sup>9</sup> These were similar to those adopted by Greece, but the reductions of pensions and the curtailment of the holiday and Christmas subsidies or equivalent benefits were applied only to the public sector and on a temporary basis. Several other measures were complained of, having been adopted by some State Parties to tackle the budgetary deficits in the context of the international economic crisis and, where relevant, to meet international lending commitments. In particular, some measures were aimed either at reducing public expenditure consisting of salaries in the public sector (by temporarily cutting them by a certain percentage but assuring the guaranteed minimum salary, in *Mihăieş and Senteş v. Romania*)<sup>10</sup> and of benefits in the social security sector (e.g., by deleting, through a transitional period, the parental benefit to be allocated to a parent continuing working, in *Šulcs and others v. Latvia*,<sup>11</sup> by outlawing the concurrent receipt of a pension and of a State-paid salary, in *Panfile v. Romania*,<sup>12</sup> by removing several special pension regimes including those of the auxiliary personnel in the judiciary, in *Frimu and others v. Romania*,<sup>13</sup> by removing the applicants' service pensions and replacing them with an allowance, in *Markovics and others v. Hungary*,<sup>14</sup> by recalculating the applicant's pension as a result of State budget legislative amendments notwithstanding a court order on the amount payable under the previous mechanism of calculation, in *Velikoda v. Ukraine*).<sup>15</sup> Other measures were directed at increasing State revenues through taxation (e.g., by establishing retroactive tax liability and applying a 98% tax on remunerations paid in the public sector which were deemed "against the public morals", in *R. Sz. v. Hungary*).<sup>16</sup> Mention should also be made to the lack of compensation to stakeholders following the process of nationalization of Northern Rock by the UK government, which was dealt with in the *Grainger and others* case.<sup>17</sup>

It is worth noting that other monitoring bodies at the international level were addressed as regards both the content of such austerity measures and the way such

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<sup>8</sup> Applications nos. 57665/12 and 57657/12, Court (first section) decision of 7 May 2013 (<http://hudoc.echr.coe.int>).

<sup>9</sup> App. nos. 62235/12 and 57725/12, Court (second section) dec. of 8 October 2013.

<sup>10</sup> App. nos. 44232/11 and 44605/11, Court (third section) dec. of 6 December 2011.

<sup>11</sup> App. no. 42923/10..., Court (third section) dec. of 6 December 2011.

<sup>12</sup> App. no. 13902/11, Court (third section) dec. of 20 March 2012.

<sup>13</sup> App. no. 45312/11..., Court (third section) dec. of 7 February 2012.

<sup>14</sup> App. no. 77575/11..., Court (second section) dec. of 24 June 2014.

<sup>15</sup> App. no. 43331/12, Court (fifth section) dec. of 3 June 2014.

<sup>16</sup> App. no. 41838/11, Court (second section) judgment of 2 February 2013.

<sup>17</sup> App. no. 34940/10, Court (fourth section) dec. of 10 July 2012.

measures had been adopted by single European governments, in light of these States' international obligations on the protection of human rights.

As already mentioned, at the EU level, the Court of Justice was involved too, with respect to Greek and Portuguese austerity programmes. On the one hand, under the annulment procedure (art. 263 TFEU), ADEDY and single individuals challenged two decisions the Council had addressed to Greece. They were aimed at remedying the country's situation of excessive deficit, by imposing, inter alia, pay and pension reductions as well as reductions to family allowances. The General Court dismissed the applications for lack of direct concern to the applicants.<sup>18</sup> On the other hand, the Tribunal do trabalho do Porto asked the EU Court of Justice for a preliminary ruling on the interpretation of the Charter of Fundamental Right of the European Union (CFREU), having serious doubts on the compatibility of the salary reductions imposed on the public sector by the Portuguese 2011 State Budget Act with the obligations on human rights stemming from EU law towards its Member States. The Court denied it had competence on the case, as the act at stake did not implement EU law and thus did not fall within the scope of application of the Charter according to its art. 51, para. 1.<sup>19</sup>

Within the International Labour Organization (ILO), different bodies expressed concerns about the compatibility of the Greek legislation implementing the terms of the loans agreed with the 'Troika' as well as certain EU decisions, with several ILO Conventions. The Committee of Experts on the Application of Conventions and Recommendations extensively analyzed Greek austerity measures, as appears in its last Annual Reports.<sup>20</sup> To a lesser extent, observations related to the measures adopted within adjustment programmes have addressed Spain and Portugal. In particular, comments were made on the Portuguese government's decisions dealing with minimum wages according to economic policy conditions established in the Memorandum of Understanding concluded with the 'Troika'.<sup>21</sup> Furthermore within the ILO, the Committee on Freedom of Association has received communications from trade unions on Greek and Spanish measures implemented in the context of international loan mechanisms and consolidation programmes, introducing labour

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<sup>18</sup> ECJ, *ADEDY and Others v Council*, Case T-541/10, General Court order of 2 November 2012, (<http://curia.europa.eu>), see also the application in [2011] OJ C30/49); *ADEDY and Others v Council*, Case T-215/11, General Court order of 27 November 2012, application in [2011] OJ C186/29.

<sup>19</sup> ECJ, *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios SA*, Case C-128/12, Court order of 7 March 2013 (<http://curia.europa.eu>).

<sup>20</sup> Expert Committee's Reports (esp Part II on 'Observations concerning particular countries'), submitted to the 100th, 101st, 102nd and 103rd Sessions of the International Labour Conference and discussed therein by the Conference Committee on the Application of Standards, which has published its discussions and conclusions up to the 102nd Session (as of October 2014). Comments are based on: *i*) reports received by the Greek government; *ii*) observations made under article 23 of the ILO Constitution by Greek trade unions including the Greek General Confederation of Labour (GSEE) in communications submitted since 2010 and replies by the government; and *iii*) high-level missions undertaken to the country in 2011 and 2012.

<sup>21</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) (2013) ILO Doc ILC/201/III1(A) 695.

reforms in a way allegedly incompatible with ILO Conventions Nos 87 and 98 on freedom of association and collective bargaining.<sup>22</sup>

## 2.2 Different rights in different treaties

The compatibility of Greek measures concerning remuneration and working conditions with the European Social Charter was assessed with respect to several provisions of the 1961 Charter and the 1988 Additional Protocol, namely the obligations dealing with the right to a fair remuneration (art. 4 ESC), the right of children and young persons to protection (art. 7 ESC), the right to vocational training (art. 10 ESC) and the right to take part in the determination and improvement of the working conditions and working environment (art. 3 Protocol 1988), as well as with the right to social security in regard to the "special apprenticeship contracts" (art. 12 ESC). The complaints against Greek pension cuts were grounded on art. 12 ESC. With regard to the level of pension benefits, the European Committee of Social Rights also referred to the right of the elderly to social protection (art. 4 Protocol 1988).

Under the European Convention on Human Rights, the applications against the Greek pay and pension cuts in the public sector referred to art. 1 of Protocol No. 1 on protection of property. Indeed, the latter was deemed relevant by the Court with reference to the vast majority of applications relating to austerity measures. Furthermore, in some cases, the Court admitted claims of violation of the obligation of non-discrimination under Art. 14 ECHR (and Art. 1 of Protocol No. 12), without constituting a separate standpoint for examination of the facts from other substantive grounds (*R.Sz., Frimu*), while in other cases such claims were declared inadmissible (*Šulcs, Panfile, Koufaki and ADEDY*). Although art. 8 ECHR on the right to respect for private and family life was also invoked in a number of applications, the Court tended to exclude any appearance of violation of such provision in the light of the material at its disposal (*Šulcs, Koufaki and ADEDY*).<sup>23</sup>

Focusing on the challenge of regressive social security measures, it must be noted that the main causes of action under the Charter and the Convention, i.e. art. 12 ESC and art. 1, Prot. No. 1 ECHR, present both different (but partly overlapping) contents and similar limitations.

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<sup>22</sup> This special procedure, which supplements the general procedures for the supervision of the application of ILO standards, was established in 1950-51; governments or organizations of workers and of employers can submit complaints concerning violations of trade union rights by States even when the Conventions on freedom of association and collective bargaining have not been ratified. For more information, ILO (2005). The cases at issue are: Case no. 2820 *Greek General Confederation of Labour (GSEE), Civil Servants' Confederation (ADEDY), General Federation of Employees of the National Electric Power Corporation (GENOP-DEI-KIE) and Greek Federation of Private Employees (OIYE) supported by the International Confederation of Trade Unions (ITUC)*, Report no. 365, para. 784; Case no. 2918, *Citizens' Service Federation of the Trade Union Confederation of Workers' Commissions (FSC-CCOO)*, Report no. 368, para. 323; Case no. 2947, *General Union of Workers (UGT), Trade Union Confederation of Workers' Commissions (CC.OO.), Public Employees Federation of Workers' Trade Union (FEP-USO) and other Unions*, Report no. 371, para. 317.

<sup>23</sup> Within the EU, the applicants in the *ADEDY and Others* cases claimed that the Council decisions affected their acquired property rights in breach of art. 1, Prot. No. 1 ECHR (implicitly contemplated within the EU legal order, by virtue of art. 6§3 TEU stating that fundamental rights, as guaranteed by the ECHR, constitute general principles of the Union's law). The Portuguese tribunal asking the CJEU a preliminary ruling in the case of *Sindicato dos Bancários do Norte and Others* invoked art. 31§1 CFREU on the right of every worker to working conditions which respect his or her health, safety and dignity.

The European Social Charter does require State Parties to establish or maintain a system of social security (art. 12§1 ESC). It also establishes a minimum threshold requirement by referring to international or European treaties (art. 12§2 ESC)<sup>24</sup> and states the principle of progressiveness (art. 12§3 ESC).<sup>25</sup> According to the Committee, the last provision requires State parties to "maintain the social security system on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security".<sup>26</sup> Nonetheless, as will be seen in detail below, the ECSR considers that reductions in the benefits available in a national security system will not automatically constitute a violation of art. 12§3 ESC.<sup>27</sup> When adopting measures which restrict the rights guaranteed in the Charter, including art. 12, the conditions set out in art. 31 of the 1961 Charter (or art. E of the 1996 Charter) apply, i.e. the State parties must establish that these restrictions or limitations are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

As far as art. 1, Protocol No. 1 to the European Convention on Human Rights is concerned, the European Court of Human Rights acknowledged that social policy measures may legitimately limit the enjoyment of this right. On the other hand, the Court extended the scope of the right to entitlements relating to social security and social protection: according to its well-established case law, the notion of "possessions" covers salaries, pensions and social benefits in general. Moreover, in the leading *Stec and Others v. the United Kingdom* decision, the Court clarified that all social security benefits, both contributory and non-contributory ones, fall under this provision.<sup>28</sup> However, it is repeatedly maintained that the Convention does not guarantee a right to work nor a right to a salary or a pension of a particular amount. As recalled, for example, in the *da Conceição Mateus and Santos Januário* decision,

"Article 1 of Protocol No. 1 places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social-security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a pension – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements [references]. The reduction or the discontinuance of a pension may therefore constitute an interference with possessions that needs to be justified [references]".<sup>29</sup>

At the same time, the Court reiterates that if a State decides to create a benefit or pension scheme, it must do so in a manner which is compatible with art. 14 ECHR. It also states that the principles which apply generally in cases concerning art. 1, Protocol No. 1, ECHR are equally relevant when it comes to salaries or welfare

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<sup>24</sup> The International Labour Convention No. 102 Concerning Minimum Standards of Social Security (in the 1961 Charter) and the European Code of Social Security (in the 1996 Charter).

<sup>25</sup> It is encompassed in the commitment of State parties to "endeavour to raise progressively the system of social security to a higher level".

<sup>26</sup> E.g., complaint no. 79/2012, decision on the merits of 7 December 2012, para. 65.

<sup>27</sup> Conclusions XVI-1, Statement of interpretation on Article 12.

<sup>28</sup> App. nos. 65731/01 and 65900/01, Court (Grand Chamber) dec. of 6 July 2005, paras. 50-53.

<sup>29</sup> *da Conceição Mateus*, cit., para. 18.

benefits.<sup>30</sup> As is reflected in the structure of that article, any interference with the right to peaceful enjoyment of property must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought by the measures enacted by the State. This is assessed against three requirements: any interference with an individual's right must be set by law, pursue a legitimate interest and the means chosen must be proportionate to this interest. Notably, the same requirements apply to limitations to the rights guaranteed under arts. 8 to 11 ECHR, as any interference with those rights must be lawful, pursue a legitimate aim in the public interest and be "necessary in a democratic society".

### **3. The relevance of according narrower or wider discretion to States**

Although the European Committee of Social Rights has shown attention for the interpretative methods of the European Court of Human Rights, it has developed its own interpretations of particular provisions of the European Social Charter and made findings on the violation of the Charter both separately and distinctly. Overall, from previous and recent, crisis-related case law, it results that States' defence based on the margin of appreciation plays a minor role in the Committee's assessment than at the Court.<sup>31</sup> The differences in the tests which are applied by the two bodies with respect to the cases under review are well illustrated when it comes to assess the compatibility of social benefit reductions with the respective treaties.

#### *3.1 Reiterating their own previous approaches...*

Under the European Social Charter, compliance with art. 12 on the right to social security in a context of economic hardship is verified by the European Committee of Social Rights according to a well-established methodology. The overall approach was declared in the General Introduction of the Conclusions XIII-4 (1993-1997): it aimed at maintaining the "common feature" of Contracting Parties' social security systems despite their different features, i.e. the endeavour "to protect all those who may be subject to any of the dangers covered". The Committee recognizes the close relationship existing between the economy and social rights and considers that the pursuit of economic goals is not necessarily incompatible with the principle of progressiveness seen in art. 12§3 ESC.<sup>32</sup> The consolidation of public finances against deficit and debt increase may be a means of safeguarding the social security system.<sup>33</sup> Thus, the ECSR made it clear that alterations in social security systems are allowed to the extent that

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<sup>30</sup> e.g., *Koufaki and ADEDY*, cit., para. 32.

<sup>31</sup> See CULLEN H. (2009). As is well-known, the ECtHR recognizes that States enjoy a certain margin of appreciation when implementing the rights guaranteed by the Convention. This, in light of the principle of subsidiarity of the protection of human rights at the international level with reference to the national dimension. The Court considers that because of their direct knowledge of their society and its needs, the national authorities are better placed than the international judge to appreciate the existence of a problem of public concern warranting measures of control and the choice of the means pursuing the public interest at stake. Nonetheless, the legislature's judgment is not outside the Court's control. Recently, see LEGG A. (2012).

<sup>32</sup> Conclusions XVI-1, 1998; also, complaint no. 79/2012, decision on the merits, cit., para. 67.

<sup>33</sup> Conclusions XIV-1, Austria.

"these are necessary in order to ensure the maintenance of the system in question (...) and where any restrictions do not interfere with the effective protection of all members of society against the occurrence of social and economic risks and do not tend to gradually reduce the social security system to a system of minimum assistance."<sup>34</sup>

However, the Committee reserves the possibility of assessing whether the methods chosen by the Contracting Parties to achieve these objectives are appropriate. In its General observation on art. 12§3 ESC, the Committee specified the test which enables it to carry out a full assessment of the conformity of national situations following restrictive changes into legislation or practices for demographic, economic and financial reasons.<sup>35</sup> State Parties are required to provide information on the following elements:

"- the nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths etc...); - the reasons given for the changes (the aims pursued) and the framework of social and economic policy in which they arise; - the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration); - the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13); - the results obtained by such changes (their adequacy)."<sup>36</sup>

In particular, the Committee also identifies indicators of minimum thresholds to be respected, by determining for example that the income of the elderly should not be lower than the poverty line.<sup>37</sup>

Turning to the approach adopted by the European Court of Human Rights in the cases under review, the Court rehearses its settled case law with respect to the rights at issue when it comes to spheres involving the application of social and economic policies.

As concerns the requirement that any limitation must be set by law, the Court stated that "the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle" but that the legal basis must be "compatible with the rules of law and must provide guarantees against arbitrariness".<sup>38</sup> As confirmed in the recent case law related to austerity measures, the Court is usually satisfied with the provision of the interference by an act of the legislature. However, regarding tax, the Court accepts that States are afforded "some degree of additional deference and latitude in the exercise of their fiscal functions".<sup>39</sup>

Under the requirement of the legitimacy of the aim pursued, according to the Court's well-established case law, the notion of "public interest" is necessarily extensive and a wide margin of appreciation is usually allowed to the States under the Convention

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<sup>34</sup> Conclusions XVI-1, 1998.

<sup>35</sup> Conclusions XIII-4.

<sup>36</sup> Conclusions XVI-1, 1998.

<sup>37</sup> Conclusions 2009, e.g. Ireland.

<sup>38</sup> *R.Sz.*, cit., para. 36.

<sup>39</sup> *Ibid.*, para. 39. The ECtHR's case law on fiscal measures is reviewed by ERGEC R. (2011).

when it comes to general measures of economic or social strategy,<sup>40</sup> including policies concerning pensions and social benefits.<sup>41</sup> The Court justifies the latitude left to national authorities by observing that opinions within a democratic society may reasonably differ widely on matters of general social and economic policy.<sup>42</sup> This approach applies to laws regulating social policy in view to balancing State expenditure and revenue: the Court's control will be limited to verifying that the legislature's judgment is not "manifestly without reasonable foundation". More specifically, the Court considers that the decision to enact law to balance State expenditure and revenue commonly involves the consideration of political, economic and social issues, thus the national authorities are, in principle, better placed than the international judge to choose the most appropriate means of achieving that aim.<sup>43</sup> The margin is even wider when the issue involves an assessment of the priorities as to the allocation of limited State resources.<sup>44</sup>

It is at the stage of the Court's evaluation of the third requirement, i.e. on the "proportionality" of the means chosen by the State in relation to the aims pursued, that each right at issue in a given case comes into relevance. In particular, under art. 1, Protocol No. 1 ECHR, the Court considers that the requisite fair balance is not struck where the person concerned bears an individual and excessive burden.<sup>45</sup> In turn, when the measure concerns pension rights or social legislation in general, what counts is whether "the applicant's right to derive benefits from the social insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of the right".<sup>46</sup> The Court recalls its previous case law according to which "a total deprivation of entitlements resulting in the loss of the means of subsistence would in principle amount to a violation of the right of property", while "the imposition of a reasonable and commensurate reduction would not".<sup>47</sup> Another relevant factor relates to the nature of the benefit removed, i. e. whether it belonged to a special advantageous scheme available only to a certain group of persons or not. In any case, the assessment varies depending on the particular circumstances of the case and the applicant's personal situation.<sup>48</sup>

### 3.2 ... and applying them (with some variations)

The European Committee of Social Rights has maintained its general attitude towards the relation between economy and social rights, when controlling the respect for the European Social Charter in the recent crisis period. On the one hand, this means that the application of the Charter cannot be suspended because of fiscal consolidation needs but the individuals must be guaranteed effective protection of their social rights. Such a tone is set in the general introduction to the Conclusions

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<sup>40</sup> *James and Others v. the United Kingdom*, app. no. 8793/79, Commission (Plenary) report of 11 May 1984.

<sup>41</sup> *Stec*, Court (Grand Chamber) judgment of 12 April 2006, paras. 51-52; see, e.g., *Panfile*, cit., para. 27, *Frimu*, cit., para. 41, *Grainger*, cit., para. 36.

<sup>42</sup> *Stec*, 2006, cit., para. 52; see *R. Sz.*, cit., para. 38.

<sup>43</sup> *Janković v. Croatia*, app. no. 43440/98, Court (fourth section) dec. of 12 October 2000; see *Koufaki and ADEDY*, cit., para. 31.

<sup>44</sup> E.g., *Pentiacova and Others v. Moldova*, app. no. 14462/03, Court (fourth section) dec. of 4 January 2005; in the recent case law relating to austerity measures, see *Koufaki and ADEDY*, cit., para. 31.

<sup>45</sup> E.g., *Panfile*, cit., para. 16, *da Conceição Mateus*, cit., para. 23, *R. Sz.*, cit., paras. 50-51.

<sup>46</sup> E.g., *Panfile*, cit., para. 24.

<sup>47</sup> See *Kjartan Ásmundsson v. Iceland*, app. no. 60669/00, Court (second section) judgment of 12 October 2004, paras. 39-45; see further references in *da Conceição Mateus*, cit., para. 24.

<sup>48</sup> As far as taxation is concerned, see *R.Sz.*, cit., paras. 52-53.

XIX-2 (2009) on the repercussions of the economic crisis on social rights. Here, the ECSR concludes that

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

However, on the other hand, in times of economic crisis the effective realization of the rights enshrined in the Charter is assessed with reference to the reasonableness of the changes, and the proportionality of the burden suffered by individuals:

"while it may be reasonable for state parties to respond to the crisis by changing current legislation and practices to limit public expenditure or relieve constraints on business activity, such measures should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter."<sup>49</sup>

The Committee does not restraint itself from assessing the adequacy of the method chosen by national authorities to counteract the crisis, against what is required in conformity with the Charter:

“doing away with such guarantees would not only force [the persons concerned] to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection”.<sup>50</sup>

This approach is applied equally to such rights as the rights to health, social security and social protection, and labour law. The combination of the principles in these areas results in the following levels of protection.

As regards labour rights, because the establishment and maintenance of labour law is a core objective of the Charter, which protects employees against arbitrary decisions by their employers or the worst effects of economic fluctuations, "measures taken to encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law". Hence, the lack of provisions for notice periods or severance pay in a case such as the probationary period envisaged by the Greek legislation (see *supra*) renders the guarantees provided by them ineffective and constitutes a violation of the ESC.<sup>51</sup>

Regarding the right to social security, and specifically art. 12§3 ESC, the said approach implies that the introduction of measures aimed at consolidating public finances may be necessary to ensure the maintenance and sustainability of the existing social security system. However, those measures which fail to

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<sup>49</sup> Complaint no. 66/2011, decision on the merits of 23 May 2012, para. 13.

<sup>50</sup> Complaint no. 65/2011, decision on the merits of 23 May 2012, para. 18.

<sup>51</sup> *Ibid.*, paras. 26-28

"maintain in place a sufficiently extensive system of compulsory social security and refrain from excluding entire categories of workers from the social protection offered by this system (...) constitute retrogressive steps which cannot be deemed to be in conformity with Article 12§3".<sup>52</sup>

Hence, the Charter is violated by measures such as those establishing the special conditions of "special apprenticeship contracts" (see above), which have "the practical effect of establishing a distinct category of workers who are effectively excluded from the general range of protection offered by the social security system at large".<sup>53</sup> Most relevantly, with reference to the second set of collective complaints against Greece, the Committee found that certain individual measures complained of, would not in themselves constitute violations of the Charter. However, the Committee pointed out that the cumulative effect of the restrictions was such as to bring about "a significant degradation of the standard of living and the living conditions of many of the pensioners concerned".<sup>54</sup> It so stated, in light of the factual information provided by the complainant organizations. The ECSR also found that the Greek government had not met the requirements of art. 12§3 ESC as it had not established that efforts had been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, in particular by investigating and discovering whether other measures could have been put in place to offset the negative consequences of the restrictions to pensions.<sup>55</sup> In particular, the government should have conducted a minimum level of research and analysis into the effects of the far-reaching measures it would adopt on the vulnerable groups of society. Furthermore, the government should have discussed the available studies with the organizations representing the interests of groups mostly affected by the measures.<sup>56</sup>

On the contrary, as far as the European Court of Human Rights is concerned, by applying the margin of appreciation doctrine in the cases related to the economic crisis the findings generally exclude that the States at issue violated the Convention.<sup>57</sup> In particular, it clearly emerges that States are accorded a broad leverage when setting the legitimate aims to be pursued in the context of an economic crisis and that interference with the applicants' rights is accepted, unless the applicants are totally deprived of the rights at issue. It has been advanced that the margin of appreciation "can result in situations of concern" as today the Court "is not untouched by the dominant austerity discourse".<sup>58</sup>

The Court states that the aim to re-establish the balance in the State social budget is to be considered as legitimate and that for purposes of sustainability of the overall social budget, a specific social benefit may be affected.<sup>59</sup> The Court also accepts the purposes of safeguarding the budgetary equilibrium of a State which faces an

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<sup>52</sup> Complaint no. 66/2011, decision on the merits, cit., para. 47.

<sup>53</sup> *Ibid.*, para. 48.

<sup>54</sup> Complaint no. 79/2012, decision on the merits, cit., para. 73.

<sup>55</sup> *Ibid.*, para. 77. Similarly, Complaint no. 66/2011, decision on the merits, cit., para. 47.

<sup>56</sup> Complaint no. 79/2012, decision on the merits, cit., para. 75. GUIGLIA G. (2013) notes that the Committee envisages the obligation stemming from art. 12§3 ESC as being an obligation of results, not only an obligation of means.

<sup>57</sup> This leads the Court to declare most of the cases inadmissible as manifestly ill-founded under art. 35 §§ 3 and 4 ECHR.

<sup>58</sup> TULKENS F. (2014).

<sup>59</sup> Šulcs, cit., paras. 25 and 29.

economic crisis,<sup>60</sup> of rationalising public expenditure as dictated by the exceptional context of a global crisis on a financial and economic level, and of correcting existing inequalities among different pension schemes in the economic crisis context.<sup>61</sup> It must be pointed out that the Court is prompted to recognize the legitimate nature of such aims as it stems from the decisions made by the national supreme courts, whose reasoning is expressly "referred to" or "taken account of".<sup>62</sup>

On this point, it is worth recalling that at the national level, the intricacies of and relations among fiscal consolidation measures, the need for international financial assistance in times of economic emergency, and the obligations stemming from membership of international/European organizations have weighed on the decisions adopted by some national supreme courts on the compatibility of certain austerity measures with constitutional principles and human rights guarantees.<sup>63</sup> This has occurred in Greece,<sup>64</sup> Portugal,<sup>65</sup> and Spain.<sup>66</sup>

At the same time and accordingly, specific considerations on the intensity and exceptional nature of the crisis are devoted by the European Court of Human Rights to the Greek and Portuguese austerity measures. Not only did the Court refer to the Greek Supreme Administrative Court, but it also noted that "the adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history" and that these measures were part of a broader legislative intervention encompassing tax equity and tax evasion, reform of the social security system, audit of the public finances, and market liberalization.<sup>67</sup> Similarly, as regards Portugal, the Court cites long excerpts from a report by the European

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<sup>60</sup> *Mihăieş and Senteş*, cit., para. 7.

<sup>61</sup> *Frimu*, cit., para. 42.

<sup>62</sup> *Šulcs*, cit., para. 25, *Panfile*, cit., para. 21, *Frimu*, cit., para. 44, *Koufaki and ADEDY*, cit., para. 38, *Grainger*, cit., para.39.

<sup>63</sup> On the judiciary reaction to the crisis in several European States, see CONTIADES X. *ET AL.* (2013).

<sup>64</sup> Quite extensive quotations of relevant paragraphs from the Greek Council of State's decision No 668/2012 are contained in *Koufaki and ADEDY v Greece*, cit. On the decisions adopted by the Greek Council of State on the appeals lodged by the Athens Bar Association, regional bar associations, several trade unions and other bodies as well as individuals against wage and benefit cuts based on the Memorandum of Understanding agreed by the Greek Central Bank with the 'Troika', see, among others, CONTIADES X., FOTIADOU A. (2012): esp. 682-684.

<sup>65</sup> Portuguese Constitutional Tribunal: *Acórdão* no. 396/2011 [2011] 199 *Diário da República*, 1ª série 41096; *Acórdão* no. 353/2012 [2012] 140 *Diário da República*, 1ª série 3846; *Acórdão* no. 187/2013 [2013] 78 *Diário da República*, 1ª série 2328, esp paras 26, 29-30, 35, 41. On these judgements, NOGUEIRA DE BRITO M. (2012); CISOTTA R, GALLO D. (2013); MOLA L. (2013).

<sup>66</sup> *Auto* no. 85/2011 [7/6/2011] *Boletín Oficial del Estado* (BOE 4/7/2011) (Spanish Constitutional Court); see also Decrees nos. 101/2011 and 104/2011 of 5 July 2011. The Court refused to consider the issue of the alleged unconstitutionality of the Royal Decree-Law no. 8/2010 which adopts extraordinary measures to reduce the public deficit. This act *inter alia* suspends a collective agreement relating to an increase in remunerations throughout the public administration. The Court put forward arguments concerning the need and urgency of the Act aimed at limiting repercussions of the crisis on sovereign debt and the consequences for State financing (*Auto* no. 85/2011, par.a I-3). As regards the ILO Committee on Freedom of Association's review of these measures, notably the first report issued on Spain was adopted *after* the Tribunal Constitucional de España refused to consider the issue of the alleged unconstitutionality of governmental measures vis-à-vis financial threats. It thus echoes national courts on the intricate relations among austerity measures, commitments stemming from adherence to the EU Economic and Monetary Union, and a widespread economic crisis. At the same time, it recalls its 'case law' on the conditions of admissible restrictions to the right of collective bargaining undertaken as emergency measures, as part of a government's stabilization policy. In this case, the Committee "invites the Government to, in the future, consider, within the framework of social dialogue, the principles set forth in the conclusions regarding collective bargaining in the event of economic difficulty or crisis". See ILO Freedom of Association Committee, Report no. 368, cit., paras 361-364; see also Report no. 317, cit., para. 465.

<sup>67</sup> *Koufaki and ADEDY*, cit., paras. 37 and 39.

Commission on the country's situation and observes that the magnitude of the programme encompassing public spending cuts "shows that the economic crisis (...) and its effect on the State budget balance were exceptional in nature", with further reference to the Constitutional Court. According to the ECtHR, this shows that the restrictive measures "were clearly in the public interest within the meaning of Article 1 of Protocol No. 1".<sup>68</sup> Thus, the Court's review on the adequacy of the measure is limited to its reasonableness and suitability to achieving the legitimate aim being pursued. In particular, the Court does not enquire into the question whether the national authorities have adopted the best solution or should have exercised their discretion in another way.<sup>69</sup>

As regards the evaluation on the proportionality of the measures at stake under art. 1, Protocol No. 1 ECHR, various degrees of interference are allowed indeed. Thus, for example, the Court identifies the essence of the right to parental benefit in the provision for a substitute of loss of earnings caused by the birth of a child, and finds that the fact that alternative options providing for income remained available to new parents entails that they were not deprived of their right.<sup>70</sup> The Court also considered that an individual which, following the measures at stake, received an income higher than the national gross average salary, did not suffer a total deprivation of his entitlements, nor was divested of all means of subsistence.<sup>71</sup> Again, Greece was allowed a very wide margin of appreciation by referring to the national judge ("the Court attaches particular weight to the reasons given by the Supreme Administrative Court").<sup>72</sup> Neither the retroactive nature of the Greek cuts nor their permanent provision affected the Court's judgment on their proportionality, although the Court would then positively emphasize the transitory character of the Portuguese cuts on social security benefits as compared to the Greek ones.<sup>73</sup>

Among quite consistent ECtHR's case law relating to austerity measures, the case of *R. Sz.* is to be singled out. Here, the Court found that the applicant suffered an excessive and individual burden. The Court assumed that the measures served the interest of the State budget at a time of economic hardship. However, it noted that the measures at issue only targeted a certain group of individuals, apparently because their pay originated from the public purse, while the majority of citizens were not obliged to contribute, to a comparable extent, to the public burden. In addition, the Court did not make reference to the level attained by the income of the applicant following the implementation of the measures, but noted that he was deprived of "the larger [sic] part of an acquired right", namely the right to severance pay, which serves the special social interest of labour-market reintegration. The doubts on the legitimacy of the aims pursued and other specific circumstances of the case were certainly relevant too. However, the general considerations made by the Court may have broader implications, as will be seen below.

#### 4. Critical remarks

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<sup>68</sup> *da Conceição Mateus*, cit., para. 25.

<sup>69</sup> *Markovics*, cit., para. 39. The Court also considered that the possible existence of alternative solutions does not in itself render the contested legislation unjustified, in *Koufaki and ADEDY*, cit., para. 48.

<sup>70</sup> *Šulcs*, cit., para. 31.

<sup>71</sup> *Panfile*, cit., para. 23.

<sup>72</sup> *Koufaki and ADEDY*, cit., para. 44.

<sup>73</sup> *da Conceição Mateus*, cit., para. 26.

Taking all the cases under review into consideration, do the European Social Charter and the European Convention on Human Rights, as interpreted by the Committee and the Court respectively, share common standards of protection of social rights in times of economic crisis? The analysis of the above seems to show that the major difference in the case law of the ECSR and the ECtHR on austerity measures lies in the approach to and the intensity of the review of national choices. However, this may be justified by the different nature of the control mechanisms and the underlying treaties. This is exactly the point around which further reflection is needed, should truly European social rights standards be the desirable outcome of an integrated system of protection of human rights. Four comments may reasonably be made in this respect.

The first one is prompted by observing that, within the 'austerity'-related case law, the European Committee of Social Rights has made extensive reference to a broad range of international authorities, as regards the impact of the crisis on the enjoyment of human rights and the content of the specific social rights under review. On the contrary, the European Court of Human Rights has accorded higher attention to the national courts within its margin-of-appreciation approach. Indeed, as highlighted in the literature<sup>74</sup>, the degree of deference accorded by the ECtHR to the national authorities depends on some external factors. In particular, the margin of appreciation is narrower when there is – in the Court's own words in the *Demir and Baykara* judgment – a "consensus emerging from specialised international instruments and from the practice of Contracting States"; in fact, this "may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases".<sup>75</sup> Indeed, in a case regarding freedom of association and the exercise of the right to collective action, the Court has recently acknowledged that

"the interpretative value of the ECSR [in the matter] appears to be generally accepted by States and by the Committee of Ministers. It is certainly accepted by the Court, which has repeatedly had regard to the ECSR's interpretation of the Charter and its assessment of State compliance with its various provisions".<sup>76</sup>

May such consideration emerge as far as social protection is concerned? It should be noted that national courts' and the Committee's assessments on the respect by austerity measures for social rights have been divergent in the vast majority of cases so far. Moreover, a distinct approach *vis-à-vis* State Parties' other international obligations emerges between the European Committee of Social Rights and the European Court of Human Rights. While the latter has considered that pursuance of objectives set at the EU and multilateral level added legitimacy to austerity measures,<sup>77</sup> the former has specified that any measure agreed at the international level which relates to matter within the scope of the Charter should comply with the

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<sup>74</sup> LEGG A. (2012): esp. 116 ff.

<sup>75</sup> *Demir and Baykara v. Turkey*, app. no. 34503/97, Court (Grand Chamber) judgment of 12 November 2008, para. 85. Here, a decision by the ECSR played a fundamental role in the evolution of the Court's jurisprudence with regard to the right of freedom of association in the public sector, even though Turkey had not accepted (and has not accepted yet) the relevant Charter's right, i.e. art. 5 ESC (see the ESC's Parties' accepted provisions on: [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013_en.pdf)).

<sup>76</sup> *National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom*, app. no. 31045/10, Court (fourth section) judgment of 4 April 2014, para. 94.

<sup>77</sup> *Koufaki*, para. 38.

obligations stemming from this treaty.<sup>78</sup> In practice, only by strengthening the force and role of the European Social Charter and its controlling bodies' determinations within national legal orders (and the EU's) could a virtual circle be drawn concerning the spheres of labour and social protection in general.

A second remark follows the Strasbourg Court's assertion on the "distinct character of the Court's review compared with that of the supervisory procedures of (...) the European Social Charter".<sup>79</sup> The Court highlighted that the European Committee of Social Rights and itself examine national measures from different standpoints. The Committee reviews the relevant domestic law and practice "in the abstract" (i.e., in more general terms and with broad categories of individuals or the population in mind), the Courts determines whether the actual implementation of relevant domestic law has affected the applicant in a manner that infringes the Convention's right at issue.<sup>80</sup> It is true that several general situations falling under the review of the Committee may also be challenged in an individual application to the Court, but the focus adopted in evaluating such measures has varying implications on the findings. Indeed, this seems to be reflected in the differences between the *Koufaki and ADEDY* case before the ECtHR and the collective complaints against Greece before the ECSR. While the Court did not find an excessive burden on the applicant in the instant case with respect of a single measure affecting her right to property, the Committee avoided assessing the impact of individual measures but found that their cumulative implementation violated the country's obligations under the Charter, as they risked bringing about "a large scale pauperisation of a significant segment of the population".<sup>81</sup> Moreover, the Committee itself, on the one hand, extensively quoted the Court's jurisprudence and recognized that pension entitlements is a matter on which individuals may have legitimate expectations in respect of the stability of the rules applicable to social security benefits under the principle of progressiveness. On the other hand, the Committee considered that "other mechanisms are more suited to address complaints relating to the effects of the contested legislation on individual pensioners' right to property. In this regard, also domestic courts are in a significant role".<sup>82</sup> It thus envisaged a complementary role to be played by regional and national courts and supervisory bodies.

Thirdly, but linked with the previous point, is the importance of the grounds on which violations are claimed under each treaty - the European Social Charter and the European Convention on Human Rights. Although the constructive interpretation of art. 1, Protocol No. 1, ECHR has resulted in significant openness of the Convention to social protection (see *supra*, 2.2), the recent case law on austerity measures seems to show the limitation of this advance compared with the situation resulting from an overall programme of economic and social reform. However large the notion of "possession" under that provision is, its scope nonetheless depends on the entitlements granted within the national legal orders. Moreover, the guarantee which is recognized to the right to property qualifies it as a "weak" right within the Convention's context. It may be argued that other grounds therein would better fit the

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<sup>78</sup> Complaint no. 79/2012, decision on the merits, paras. 46-48.

<sup>79</sup> *RMT*, para. 98.

<sup>80</sup> *Ibid.* The collective complaint procedure may prevent *ex-post-facto* individual claims, as it is not premised on the rule of prior exhaustion of local remedies, which instead constitutes a criterion of admissibility of individual applications before the European Court of Human Rights (art. 35§1 ECHR): BELORGEY J.M. (2011).

<sup>81</sup> Complaint no. 79/2012, decision on the merits, para. 77.

<sup>82</sup> *Ibid.*, para. 78.

situation incurred by individuals, especially by the most vulnerable in the society, as a consequence of the crisis and of austerity programmes. Notably, a stricter test of proportionality is adopted by the Court where a measure interferes with "the individual's identity, self-determination, physical and moral integrity, maintenance of relationship with others and settled and secure place in the community". This is the sphere of action of article 8 ECHR.<sup>83</sup> Within the limits of the present contribution, suffice it to notice that there are both promising developments, but also limits with regard to tackling poverty in the text of the Convention and in the Court's case law. This may occur from the standpoints of the prohibition of inhuman and degrading treatment, the right to access to justice, the rights to private and family life and respect for the home, if not even a right to housing.<sup>84</sup>

Finally, if one sticks to the above case law and excepts the peculiar aspects of the two systems, it may be asked whether any common indications are addressed by the Committee and the Court to European governments, as regards their obligations in the field of social rights in the context of an economic crisis. Within the Convention's ambit, the focus on individual applicants and the approach according governments a broad margin of appreciation leads the Court to exclude in the vast majority of cases that individuals suffer an excessive burden as a result of cuts in pensions or wages. This is found when the individuals' situations are compared with the majority of the population, for example because the reductions concerned special advantages that had been previously granted to the category the individuals belonged to. Yet, this finding is sometimes also justified in light of the circumstance that the individuals are not deprived of their means of subsistence, or the essence of the right, in particular as their income does not fall below the average national income after the application of the measure at issue. In the context of the European Social Charter, the Committee reiterates that regressive measures on pensions and wages may be reasonably adopted provided that distinct, broad categories of persons are not deprived of their fundamental rights. *In concreto*, the Committee finds that the Charter is violated by referring to the poverty line as the minimum threshold. Yet, the established poverty line is a country-based indicator relating to the household average income, thus subject to economic trends.<sup>85</sup> Overall, both the Committee and the Court have accepted the balancing between the general objective of fiscal consolidation and the safeguard of individual human rights, but required that a minimum core of protection is preserved.<sup>86</sup> The issue is to give content to such minimum threshold and the related minimum obligations of States, in particular whether the minimum protection should be set in relative or absolute terms as regards its content and the persons concerned.

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<sup>83</sup> *Connors v. the United Kingdom*, app. no. 66746/01, Court (first section) judgment of 27 May 2004, para. 81, see esp. paras. 81–84; see, recently, *Berger-Krall and Others v. Slovenia*, app. no. 14717/04, Court (fifth section) judgment of 12 June 2014, para. 268.

<sup>84</sup> See MALINVERNI G. (2014); TULKENS F. (2014). For a discussion of the limits of the protection of social rights through such ECHR articles, see NAPOLETANO N. (2014): 417 ff. For example, measures in the housing sector may fall under both art. 1, Protocol No. 1 or art. 8 ECHR. In the Court's settled case law, the margin of appreciation in housing matters is narrower when it comes to the latter provision (*Connors*, cit., para. 82). The right to housing is enounced by art. 31 of the Revised ESC (1996): see GUIGLIA G. (2011).

<sup>85</sup> In the ESCR's 'case law', the established level of poverty line is 50% of the national average wage (see collective complaint no. 66/2011 as regards the wages of the young persons according to Greek legislation), or 40% of median equivalised income as calculated by Eurostat (see the part on the income of the elderly in the collective complaints nos. 76-80/2012).

<sup>86</sup> For broader analysis of this line of argument, see COSTAMAGNA F. (2014).

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