The European Court of Human Rights and austerity measures in the Eurozone: an ally against human rights violations or merely a bystander?

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ABSTRACT

The 2008 financial crisis created a domino effect that affected national economies around the globe, forcing many to adopt severe austerity measures. This paper, using four Eurozone countries (Greece, Ireland, Portugal, the Netherlands) as examples, will attempt to evaluate the mediocre response of ECtHR to violations of the right to property and due process caused by austerity, and subsequently try to explain the ECtHR's stance on the matter by analysing the doctrines of margin of appreciation, subsidiarity and legitimacy. A brief comparison of the responses of the other regional institutions in similar cases, especially the European Committee of Social Rights (ECSR) and the Court of Justice of the European Union (CJEU) will follow before exploring possible implications for the future based on the attitude of the Court towards other crises and the development of its jurisprudence regarding socio-economic rights.

INTRODUCTION

Approximately ten years ago, the international community was shaken by a key event: the global financial crisis, kicked off by the American sub-prime mortgage collapse. It was promptly followed by an economic crisis which went beyond the financial system alone and affected the so-called 'real economy'. This included recessions brought about by housing bubble collapses, retrenchment in banks as well as sovereign debt crises[2]. Although in the beginning the European Union (EU) and the Eurozone seemed immune, it was soon evident that its

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[2] Aoife Nolan, 'Not fit for purpose? Human rights in times of financial and economic crisis' (2015) 4 EHRLR 360

monetary and financial architecture was not prepared to cope with such massive setbacks. In 2010, a financial assistance mechanism was put in place by the Council of the EU to support the economically weakest Eurozone countries, but even the countries with more robust economies implemented austerity measures.[3] Those measures included *inter alia* tax increases, public spending cuts, reduction of pensions and freezing of salaries, and had a devastating effect on the exercise of human rights in Europe. Social and economic rights were particularly affected, but civil and political rights did not escape unscathed. At the same time, regional judicial bodies have been criticized for their hesitation to challenge state fiscal policies that have been detrimental to human rights, prompting some scholars to countenance the 'endtimes of human rights'.[4]

Based on these developments, this paper will attempt to examine the response of the European Court of Human Rights (ECtHR) to the measures adopted in the wake of the global financial and economic crisis in the Eurozone. Using Greece, Portugal, Ireland and the Netherlands as examples, it will first present how the ECtHR handled cases concerning alleged violations of the right to property in Art. 1 Prot. 1 and due process in Art. 6 in relating to the austerity measures. An analysis of the trends observed in this case-law will follow focusing on the Court's apathy towards the measures with specific references to the margin of appreciation, subsidiarity and legitimacy issues. Subsequently, the responses of the ECtHR will be compared with those of other regional institutions in similar cases, especially the European Committee of Social Rights (ECSR) and the Court of Justice of the European Union (CJEU) in order to identify if the Court was the right place to address those questions. The essay will conclude by suggesting what the ECtHR could do differently in the future, drawing from its own experience in dealing with terrorism and socio-economic rights.

1. AUSTERITY MEASURES BEFORE THE ECTHR

On 15 September 2008, Lehman Brothers, an American investment bank heavily involved in mortgage origination, declared the largest bankruptcy in the history of

[3] Margot Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) ILJ 521

[4] Conor Gearty, 'Is the human rights era drawing to a close?' (2017) 5 EHRLR 425

the United States. The American economy suffered its deepest decline since the 9/11 attacks which quickly turned into a financial crisis comparable to the likes of the Great Depression of 1929. The interconnectedness of the banking sector meant that the collapse of the American banks left banks worldwide susceptible to toxic bonds. The European banking sector, as the USA's close collaborator, suffered a major hit. Given assurances that the deposits of the savers are safe, the EU launched the European Economic Recovery Program to rescue the banking sector and help boost growth in the late fall of 2008[5]. Mounting national debts, an excess of initial optimism, the collapse of the Greek economy and the risk of contagion across the eurozone soon provoked a turn towards austerity. Fiscal consolidation to reduce budget deficits and avoid inflation led Eurozone Member States to embark on a series of fiscal retrenchment strategies to stabilize their public finances. Despite quantitative easing by the European Central Bank[6], most Eurozone countries – especially those under the auspices of Troika[7] – have not reversed their policies after almost 10 years since the onset of the economic crisis, leaving a lasting mark on European society.

In general, austerity measures, defined as a combination of economic, policy, and legal tools to reduce debt and control public spending in an attempt to bring the crisis into order fell into four types: regressive taxation measures, labour market reforms, structural reforms to pension plans and public budget contractions affecting social spending.[8] Human rights were not taken into consideration, allegedly due to the urgency to avoid a potential catastrophe. Socio-economic rights relating to work, education, healthcare and housing were among

[5] Aymone Lamborelle et al, 'Timeline of a crisis: Europe's economic strategy from 2008 to today', (Euractiv, 25 May 2016) <https://www.euractiv.com/section/euro-finance/infographic/timeline-of-a-crisis-europes-economic-strategy-from-2008-to-today/> accessed 11 July 2018

[6] Jana Randow et al, 'When Will the ECB Pull Its Trillions From the Markets?', (Bloomberg, 20 July 2017) <https://www.bloomberg.com/graphics/2017-ecb-monetary-stimulus-exit-tracker/> accessed 11 July 2018

[7] A decision group formed by the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) that negotiated, credited and monitored the implementation of financial measures during the post 2010 bailouts in Greece, Ireland, Portugal, Spain and Cyprus

[8] CoE Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis', (2013) 16.

the first victims, but those of access to justice, freedom of expression, information and assembly, traditional civil and political rights, suffered as well. Fiscal consolidation had a direct negative effect on the poorest segments of society, including children and the elderly.[9] Public social protection systems were weakened in the relevant countries, unemployment increased to unprecedented heights for the continent, and household incomes were adversely impacted[10]. Protests staged as a reaction to those measures were subject to interventions and judicial systems also underwent reforms and budget cuts.[11] On the whole, the everyday life and fundamental rights of 350 million citizens were substantially changed.

In an attempt to react to what was perceived by many as an attack on the European way of life and the relevant states' organisational tradition, people inevitably turned to the courts. The national courts were the first to address the violations of rights but when they failed to bring the desired results for the applicants or have an effect on the executive branch, the ECtHR was called to the task. A majority of the cases concerned the right to property as taxation measures and labour law modifications fall under its scope. Significant case-law was also formed regarding due process rights. Amendments to existing judicial structures or the admissibility criteria of national courts aiming to facilitate the collection of outstanding public debts by minimizing the time of the proceedings or to discourage the applicants from pursuing their cases further were also brought under scrutiny.[12] Unsurprisingly, the countries that suffered most under the sovereign debt crisis were the ones more frequently represented. Yet, even those that were considered strong and disciplined failed to protect their citizens' rights whilst simultaneously aiding the banking sector.

Before examining individual cases in Greece, Portugal, Ireland and the Netherlands, it would be useful to briefly define the two rights in discussion as

[9] See: UNICEF, '2.6 million More Children Plunged into Poverty in Rich Countries during Great Recession', (2014)

[10] Directorate general for Internal Policies, 'Austerity and Poverty in the European Union', (2014) 9

[11] CoE Commissioner for Human Rights, (n 7) 20

[12] CoE, Steering Committee for Human Rights (CDDH), 'The impact of the economic crisis and austerity measures on human rights in Europe – Feasibility Study' (2015) 22

they had been formed by the ECtHR prior to the eurozone crisis. A right to peaceful enjoyment of possessions is included in Article 1 of Protocol 1 to the Convention. The term 'possessions' has an autonomous meaning in the Convention context, extending beyond physical goods and covering a wide range of rights and interests which include salary, pensions, and social security benefits.[13] Despite initial ambiguity in its case-law, the Grand Chamber accepted in the *Stec* case[14] that whenever persons can assert a right to a welfare benefit under national law, Art. 1 Prot. 1 applies, promoting an interpretation that renders the rights in the Convention practical and effective. A distinction was drawn between salaries and pensions in the sense that the latter arise from already established rights, have a compensatory character and, thus, a stricter threshold concerning possible interferences is to be applied.[15] The deprivation of property must be in accordance with national law, the general principles of international law and in the public interest. However, the definition of 'public interest' is very wide and there is almost a presumption that a national measure always qualifies as such. The Court has reiterated that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will dispute determinations as to what is 'in the public interest' only if they are manifestly unfounded.[16] A fair balance must be struck between the demands of the general interest of the community and the individual's property rights since the latter cannot be expected to bear an individual and excessive burden.

Enshrined in Art. 6 ECHR, the right to fair trial is a cornerstone of the rule of law and the most frequently invoked by applicants before the Strasbourg court.[17] It contains specific safeguards relating to the fair administration of justice, such as the effectiveness and promptness of the proceedings protecting the individual concerned from living too long under the stress of uncertainty. The reasonableness of the length of proceedings is assessed in light of all of the case's

[13] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (7th edition, Oxford University Press 2017) 554

[14] *Stec a.o. v. UK* App nos. 65731/01, 65900/01 (ECtHR, GC, 12 April 2006)

[15] *Azinas v Cyprus* App no 56679/00, (ECtHR, 28 April 2004), para 44

[16] *James v UK* App no 8793/79, (ECtHR, 21 February 1986)

[17] Rainey et al, (n 10) 274

circumstances,[18] and the Court supports judicial reforms to prevent delays.[19] The non-execution of judgements in cases where the State is the judgment debtor has been a long-standing problem, but the court has reiterated that the State cannot justify non-execution of a judgement by claiming a lack of funds or other resources.[20] Also included in Art. 6 is the concept of procedural and adversarial equality, as the fair balance between the parties to present their case without suffering a substantial disadvantage vis-à-vis the other side. Nevertheless, the States may impose restrictions on would-be litigants, as long as they pursue a legitimate aim and leave the essence of the right intact. There is no right to an appeal as such but where an appeal procedure is provided by national law, it must comply with Art. 6 and access to it must not be blocked disproportionately or unfairly.

Greece has been the Eurozone country at the forefront of the economic crisis due to an exorbitant intake of sovereign debt that made it impossible for the country to compete in the international financial markets. It was the first one to request and receive financial assistance from the Eurozone Member States along with the IMF before the launch of the European Stability Mechanism (ESM) in 2012. Currently implementing the fourth package of austerity adjustments, the crisis has profoundly shaped the Greek reality, affecting national politics and disrupting social cohesion. Support for Greece from the Troika was conditional on reductions in public spending, drastic labour market reform, and 'a welfare state retrenchment unprecedented in the post-war period'.[21] The impact of the measures on jobs, pay, conditions and services has been extensive and according

[18] Having regard in particular to the complexity of the issues before the national courts, the conduct of the parties to the dispute and of the relevant authorities and what was at stake for the applicant – see *Frydlender v. France* App no 30979/96, (ECtHR, GC, 27 June 2000), para 43

[19] *Scordino v. Italy (No. 1)* App no. 36813/97, (ECtHR, 29 March 2006), paras 182-9

[20] *Burdov v. Russia (no. 2)* App no 33509/04, (ECtHR, 15 January 2009), para 70; *Société de Gestion du Port de Campoloro and Société fermière de Campoloro v. France*, App no 57516/00, (ECtHR, 26 September 2006), para 60

[21] Aristea Koukiadaki, Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41(3) ILJ 276

to an IMF's report on Greece in 2013, 'the burden of adjustment was not shared evenly across society'[22].

Human rights challenges to the measures have produced seminal decisions regarding the repercussions of the economic crisis for the protection of human rights which have been employed as a guide for subsequent petitions regarding austerity measures taken by other Council of Europe member states. *Koufaki & ADEDY*[23] refers to petitions filed against the arbitrary reduction in remuneration, benefits, bonuses, and pensions of public servants enforced in compliance with the state's obligations under the Memorandum of Understanding (MoU) which were allegedly detrimental for the quality of life of those affected. The Strasbourg Court declared the applications inadmissible as manifestly ill-founded because the measures were justified by the exceptional crisis calling for an immediate reduction in public spending. Reiterating that the legislature has a wide margin of appreciation in implementing social and economic policies, the Court accepted that the aims of the measures were in the public interest and in that of the Eurozone member States, whose obligation was to observe budgetary discipline and preserve the stability of the zone. Another major development concerned a 2012 law ordering the obligatory exchange of Greek State bonds belonging to private holders for securities nominally worth 50% less. The applicants in *Mamatas a.o.* [24] complained of *de facto* expropriation of their property but the Court found no violation of Art 1 of Protocol 1. Though there has been an interference with the applicant's rights to property, it pursued the public-interest aim of preserving economic stability and restructuring the national debt, at a time when Greece was engulfed in a serious economic crisis. No special or excessive burden was suffered by the applicants given the States' wide margin of appreciation in that sphere and the risk associated with the vagaries of the financial market. The Court came to the same conclusion in the identical case of *Kyrkos a.o.*.[25]

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[22] IMF, 'Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement" (Country Report) IMF (2013) 13/156, para. 47.

[23] App nos 57665/12, 57657/12 (ECtHR, 7 May 2013).

[24] App nos 63066/14, 64297/14, 66106/14..., (ECtHR, 21 July 2016).

[25] App nos 64058/14 64282/14 64336/14..., (ECtHR, 16 January 2018).

In parallel, the Court reversed its established jurisprudence[26] regarding state procedural privileges in the Greek legal order and the equality of arms principle in the case of *Giavi*.[27] The applicant complaint about the divergence between the State and its public servants when initiating procedures against each other which was five and two years respectively. Although the judgement should have been a routine one, it implicitly accepted the argumentation of the Greek Government that preferential treatment was necessary to protect public property. For this reason, they argued that the clearance of public servants' claims in due time was advised given the large number of similar cases pending, in combination with the adverse fiscal situation of Greece.[28] In finding so, the judgement equated the public interest with the fiscal interests of the public sector and further expanded the state's margin of appreciation in relation to Art. 1 Prot. 1 and Art 6 ECHR. Additionally, under the first MoU, Greece was obliged, as a condition for receiving financial support, to adopt legislation that would streamline the administrative tax dispute and judicial appeal processes.[29] One of those reforms concerned the introduction of the new prerequisite of the absence of existing opposite jurisprudence when appealing a decision before the Supreme Administrative Court. Despite fierce criticism that the provision imported into the Greek legal order the common-law institution of 'legal precedent' and thus disproportionally restricted the right to access a court, the ECtHR found that it was within the discretion of the national authorities to take measures that aimed at the swifter administration of justice and consequently no violation of Article 6 ECHR occurred in the case of *Papaioannou*.[30]

Ireland was strongly affected by the crisis with the collapse of a housing price bubble causing a deep recession and budgetary instability, soliciting

[26] *Zouboulidis v Greece (no 2)* App no 36963/06, (ECtHR, 25 June 2009), paras 30-35.

[27] App no 25816/09, (ECtHR, 03 October 2013).

[28] Ioanna Pervou, 'Human rights in times of crisis: the Greek cases before the ECtHR, or the polarisation of a democratic society' (2016) 5(1) CJICL 113

[29]IMF, 'Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding' (IMF, 28 February 2011)

[30] App no 18880/15, (ECtHR, 02 June 2016)

extensive policy interventions between 2008 and 2011.[31] The IMF and the EU provided financial support to prevent a meltdown in public finances when rating agencies downgraded Irish government bonds to junk status in December 2010. Both public sector pay and pensions in Ireland were reduced substantially, the minimum wage was lowered, and the scope of the 'inability to pay' clause widened.[32] The country was the first to graduate from the Troika mechanism in 2014 and the cuts have not produced any litigation before the ECtHR to date. In parallel, a constitutional amendment for the creation of an Appeals Court that would lessen the backlog of the Supreme Court was approved by referendum on October 2013, and came into operation a few weeks later. The ECtHR had a chance to review its creation in the case of *P.H.*[33] concerning the legality of protracted proceedings under Art. 6 ECHR. There, a patient's claim against their doctor for negligence commenced in January 2009 and was only concluded after over seven years despite the fact that the case was not particularly complex. The Court, reversing its previous rulings relating to Ireland, [34] dismissed the case as inadmissible[35] given that the country had in the meantime taken effective steps to solve its structural problem of delayed proceedings by creating a new Appellate Court.

Portugal, the third Eurozone country to face the risk of bankruptcy, signed an economic adjustment program with the Troika in April 2011. The Portuguese economy suffered a downturn since the early 2000s, but in November 2010 risk premiums on Portuguese bonds hit Euro lifetime highs as investors and creditors worried that the country would fail to rein in its budget deficit and rising debt.[36] The wages of public servants were drastically reduced, resulting in an average wage cut of 20%. The ECHR was given the chance to review the

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[31] Bas van Aarle, Joris Tielens and Jan Van Hove "The financial crisis and its aftermath: the case of Ireland", (2015) 12 *Int Econ Policy* 393

[32] Jim Stewart, "New development: Public sector pay and pensions in Ireland and the financial crisis" (2011) 31(3) *Public Money & Management* 223

[33] App no 45046/16, (ECtHR, 10 October 2017)

[34] *McFarlane v. Ireland*, App no 31333/06, (ECtHR, GC, 10 September 2010), para 93

[35] even though it recognized that the case was not particularly complex to require so much time

[36] João Ferreira Do Amaral, João Carlos Lopes, 'Forecasting errors by the Troika in the economic adjustment program for Portugal' (2017) 41(4) *Cambridge J Econ* 1021

legitimacy of those cuts in the cases of *Da Conceição Mateus and Santos Januário*[37] and *da Silva Carvalho Rico*[38], but rejected both as inadmissible. In light of the exceptional financial problems which Portugal faced at the time and given the limited and temporary nature of the reductions in pension payments, the Court found that the measures had been proportionate to the legitimate aim of achieving medium-term economic recovery. The Court further deemed itself incompetent to decide whether alternative measures could have been envisaged in order to reduce the State budget deficit and overcome the financial crisis given the State's wide margin of appreciation to decide on general measures of economic and social policy. Another part of the 'MoU on specific economic policy conditionality' agreed by Portugal were reforms of the judicial system to increase efficiency[39]. Although they have been heavily criticized, no case has yet reached the ECtHR.[40]

As mentioned before, even Eurozone countries that were considered to be relatively unharmed thanks to traditionally organized economic management did not fully escape the perils of the economic crisis. The Netherlands is a prime example. Although it amply contributed to the saving of the so-called 'PIIGS',[41] it nonetheless passed its own set of austerity measures after a short period of political instability in the spring of 2012. With the aim of reaching the 3% deficit limit, it contained government program cuts, tax increases and labor market reforms.[42] The Court had a chance to review the additional tax which employers

[37] App nos 62235/12, 57725/12, (ECtHR, 08 October 2013)

[38] App no 13341/14, (ECtHR, 1 September 2015)

[39] Commission, 'Portugal; Memorandum of understanding on specific economic policy conditionality'(EC, 17 May 2011)

[40] Andrei Khalip, 'Portugal's judicial makeover: the reform that flattered to deceive?', (Reuters, 22 November 2016) <https://www.reuters.com/article/us-portugal-judiciary-insight-idUSKBN13H0GI> accessed 13 July 2018

[41] During the European debt crisis, the term was used derogatorily to refer to the economies of Portugal, Ireland, Italy, Greece, and Spain, Eurozone member states unable to refinance their government debt or to bail out over-indebted banks on their own.

[42] 'From the ashes, a budget: Dutch politics', (The Economist Online, 27 April 2012) <https://www.economist.com/newsbook/2012/04/27/from-the-ashes-a-budget> accessed 15 July 2018

had to pay on salaries above 150,000 euros in *P. Plaisier B.V. a.o.*.[43] Once again, it declared the applications inadmissible as being manifestly ill-founded, for not going beyond the limit of the discretion allowed to authorities in questions of taxation and respecting balance between the general interest and the protection of the companies' individual rights. The Court noted in particular that it had accepted various countries' austerity measures and that the steps taken by the Netherlands had been part of the country's goal to meet obligations under European Union budget rules.

The Strasbourg court had previously kept the same line in another Dutch case concerning Art. 6 ECHR. Amidst the ongoing collapse of the international banking sector in 2008, the Dutch Government decided to protect the domestic banking industry and customers' savings by nationalizing the banking and insurance conglomerate SNS Reaal. At the same time, it allowed only ten days for bond holders to challenge the lawfulness of the expropriation of their assets through accelerated proceedings, which they complained prevented them from fully exercising their rights. Again, the Court rejected the *Adorisio a.o.*[44] case as inadmissible, as the restrictions had neither averted the applicants from bringing an effective appeal nor have placed them in a particular disadvantage. Concerning in particular the ten-day time-limit, the Court accepted that the Dutch Government had needed to intervene in SNS Reaal as a matter of urgency in order to prevent serious harm to the national economy. [45]

2. HESITATION AND DEFERENCE

The Strasbourg Court was extremely reserved in reacting to the plight of Eurozone citizens affected by the economic crisis and subsequent austerity measures. In all the cases, it directly or indirectly implemented a proportionality analysis that enabled it to determine whether those measures were legal, legitimate and necessary. Indeed, it ruled that the austerity measures were legal as part of national law; they pursued a legitimate aim of assisting the national economies in a state of emergency; and they met the test of stricto sensu proportionality as the means employed to achieve the desired aim of rescuing the national economies

[43]App nos 46184/16, 47789/16, 19958/17, (ECtHR, 14 November 2017)

[44] App no 47315/13, (ECtHR, 17 March 2015)

[45] App no 47315/13, paras 98-101

from bankruptcy were considered to be reasonable. As part of the proportionality assessment, the Court concluded that the authorities of the Member States balanced the relevant public and private interests properly and refused to elaborate on whether there were less intrusive means of achieving the same results. A wide room of discretion was given to the national authorities to implement the legislative measures they deemed necessary as the most capable of diagnosing the situation on the ground and act accordingly. Consequently, a question is posed as to why the Court that prides itself as being the conscience of Europe remained idle to 'massive violations of human rights instituted by the governance of the global financial crisis in the EU'.[46]

Before delving into the reasons that led the Court to maintain such a position, it is essential to further examine the tools it used in its decisions, namely proportionality and the margin of appreciation. The proportionality test is one of the most common reasoning techniques used by the ECtHR when assessing competing rights and interests. In applying a proportionality analysis, the Court does not ask whether the optimal balance has been struck but only whether a proportionate balance has been found. This analysis is preferred by the Court because it creates an analytical framework that facilitates an element of transparency and foreseeability, adding to the consistency of its rulings.[47] At the same time, it represents the efforts of the Court to account for difference in the weighing attributed to the various relevant factors during the process. Its utility notwithstanding, it has also been criticized as merely providing a façade of objectivity while concealing discretionary and ad hoc reasoning of varying degrees of strictness.[48] Especially when combined with a reference to the margin of appreciation enjoyed by the national authorities, it gives a perfect excuse for the Court to avoid dealing in depth with contentious and delicate issues. Based on the Court's jurisprudence, the wider the margin of appreciation on the national level,

[46] Salomon, (n 2)

[47] Fiona de Londras, Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Macmillian Publishers 2018) 103

[48] Filippo Fontanelli, 'The Mythology of Proportionality in Judgements of the Court of Justice of the European Union on Internet and Fundamental Rights' (2016) 36 OJLS 630

the milder the proportionality test would be which more often than not leads to the rejection of the case.[49]

The notion of a margin of appreciation is not defined in the ECHR itself. The ECtHR, even though it employs it often,[50] has neither provided a clear definition for it nor has it designated its boundaries[51]. According to legal theorists, the margin of appreciation is the latitude allowed to the Contracting Parties in their observance of the Convention,[52] the room for error manoeuvre which the Strasbourg organs allow national legislation, executive, administrative and judicial bodies before they are prepared to declare a violation of the Convention.[53] It is deployed by the Court when considering whether the state has rightly interfered with personal rights in order to protect collective goals such as public order or public health or morals, and reflects the need for institutional deference of the Court to the national authorities.[54] In this sense, it is coupled with the notion of subsidiarity, which suggests that the national authorities are generally better placed to solve human rights questions as they arise because they have the expertise of being exposed to the national dynamics, debates and contexts.[55] The doctrines of the margin of appreciation and the principle of subsidiarity have gained prominence among the Court and the Contracting Parties during the reform process initiated in the second decade of the 21st century and after the introduction of Protocol 15 they will be embedded in the Convention's Preamble.

The focus given to the margin of appreciation by the Court has its supporters but has equally been heavily criticized. On the one hand, it has been argued that the margin of appreciation might work as an incentive for national judges to implement directly the Convention, devolving to the domestic level a

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[49] Rainey et al, (n 10) 360

[50] Per a systematic survey after the Brighton Declaration, its usage has increased in case-law; see Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' [2017] *Journal of International Dispute Settlement* 1

[51] Lord Lester famously called it 'slippery and elusive as an eel'

[52] Thomas A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 HRQ 474

[53] Howard Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Springer 1995) 13

[54] George Letsas, 'Two concepts of the Margin of Appreciation' (2006) 26 OJLS 705

[55] *Handyside v UK*, App no 5493/72, (ECtHR, 7 December 1976), para 48

feeling of collective responsibility for ensuring observance of human rights.[56] In such circumstances, the ECtHR's task is to supervise the review conducted by the domestic courts, focusing more on the process followed rather than the substantive decision-making.[57] On the other hand, for some commenters, the margin of appreciation is simply a legal construct for abdicating judicial responsibility and results in a denial of justice, leaving often marginalised people or at least those not favoured by domestic authorities to the mercy of adverse decisions unless they are unanswerably disproportionate.[58] Consequently, it exempts certain groups of the Court's relief simply because the rights, topics or contexts are those where the Court prefers to avoid making a decisions. Simultaneously, the universal character of human rights and the rule of law are undermined by introducing varying standards of human rights protection. So, why would the Court, which has established arguably the most ground-breaking and uniquely influential international mechanism for protecting the individual, choose to distance itself from some issues – in the present analysis that of austerity?

The reasons may be found in practical concerns, doctrinal theories about the nature of rights in the ECHR and, of course, political considerations about the Court's legitimacy and its future role in the region. Since the beginning of the new millennium, the ECtHR has been in an alarming state that threatens its very existence due to a steady increase of the number of individual cases it receives. The individual complaint system that was created by Protocol 11, the enlargement of the Council of Europe (CoE) member states and the widening of the scope of the Convention rights by the 'living instrument' interpretation contributed to the case load of the Court surpassing the disturbing 100,000 benchmark in 2009.[59] At the same time, Member States have grown more reluctant in implementing the Court's judgements. The number of judgments ignored by the member states and pending implementation before the Committee of Ministers (CM) is

[56] Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 CLP 49

[57] Dominic McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2016) 65(1) ICLQ 21

[58] Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1993) JILP 843; Ronald St. J. Mcdonald, 'The Margin of Appreciation' in R Mcdonald et al (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993)

[59] Dominic Grieve, 'Is the European Convention working' (2015) 6 EHRLR 584

approximately 11,000.[60] For a system like the ECtHR that relies on Member States to act as the guarantors of the Convention,[61] their denial to follow its judgements can be destructive to the Courts legitimacy and function.

To an extent, it can be argued that the Contracting Parties are unwilling to accept recommendations by a supranational body lacking in democratic legitimacy and distant from their national realities. In their perspective, the ECtHR as a subsidiary supranational court should allow disputes about compliance with the Convention to be first be dealt with at the national level. In their view, only national authorities have the prerequisite expertise and direct knowledge of the domestic situation, law, politics and risks needed to provide the appropriate solutions and, for this reason, an international court located in Strasbourg should refrain from taking decisions about the substance of the cases. Furthermore, they feel that the ambit of the Court's judgements has expanded so much that it no longer reflects the original content of the ECHR to which they have consented and, thus, constitutes an illegitimate interference with their sovereign power.[62] The States' discontent is especially palpable when they are required to follow specific socio-economic policies or when they are asked to incur considerable expenses to alleviate violations of their positive obligations to fulfil certain rights.[63] For them, the original intent of the ECHR, when drafted in the 1950s, was to primarily be a document containing civil and political rights that would protect Europe from totalitarian oppression through restraining Member States' power. Therefore, they insist for the Court to refrain completely from giving its opinion on some matters of policy not, in their mind, clearly regulated by the Convention and to avoid innovative interpretations by not abiding decisions with they do not agree. A particularly infamous example is that of *Hirst v. UK (No. 2)*[64] in which prisoners in the UK were still deprived of their voting rights for twelve years after an adverse ECtHR ruling against the state.

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[60] Steven Greer, Faith Wylde, 'Has the European Court of Human Rights become a "small claims tribunal" and why, if at all, does it matter?' (2017) 2 EHRLR 145

[61] Article 1 ECHR.

[62] Londras, Dzehtsiarou, (n 43) 3

[63] Ingrid Leitjen, *Core Socio-economic Rights and the European Convention on Human Rights* (Cambridge University Press 2018) 25

[64] App no 74025/01, (ECtHR, 6 October 2005)

These have been the conditions since the High-Level Conference in Interlaken took place in 2010 that initiated a reform process to enhance the effective application of the Convention.[65] Since then, Protocol 14 came into force strengthening the exhaustion of domestic remedies, introducing the flexible single-judge formation and enhancing the CM's monitoring role. The following Conferences on the future of the Court held in Izmir, Brighton and Brussels introduced two new protocols to the Convention system, No. 15 and No. 16, emphasized the subsidiary role of the Court and promoted a less hierarchical relation among the Court, the national courts and member States. The latest High Conference in Copenhagen continued to the same direction. The internal Rules of the Court were also amended to create a prioritization system advancing the examination of cases concerning core rights and a pilot judgement proceeding to combat systemic violations. These reforms signalled a transitional period for the Court that would eventually lead to 'a new procedural embedding phase'[66] where the centre of gravity of the Convention system would be lower than it is today. Judge Spano argued that the ECtHR, having infused the Convention principles into the legal systems of Member States, could now focus its resources on guiding the national authorities on implementing the ECHR and should intervene only when it becomes apparent that the domestic processes have failed to take the Convention rights under consideration. Thus, the Court seems to reorient itself towards a more constitutional role,[67] where it would choose its cases and direct its attention more to the procedures followed than in their outcomes.

As a result, the hesitation of the Court to intervene in the cases concerning austerity measures in the Eurozone affecting human rights can be perfectly understood. Austerity measures concern socio-economic policy that the Contracting Parties consider to be solely for them to decide even when affecting rights that can be characterized as civil. In most cases, the measures adopted have been the result of long deliberations with other expert international institutions (e.g. the EC, IMF, ECB), and the Member States would have found it completely

[65] Rainey et al, (n 10) 17

[66] Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) HRLR 1

[67] Rainey et al, (n 10) 673

unacceptable for a supranational human rights court to meddle with their decisions. In addition, they considered the economic recovery as an urgent yet complex matter that affected their survival which permitted them to effectively derogate from their usual international obligations and that no international tribunal was in a better position to understand. Indeed, the Court needed to navigate within a very narrow corridor between doing too much and not doing enough. It seems that in the austerity related cases the Court was not ready to overstep the 'legitimacy wall',[68] an imaginary boundary beyond which it could not go, fearing serious backlash from the Member States. Instead, it chose to accommodate the concerns of the Member States and defer the substantive decision-making to them.

3. COMPARISON WITH OTHER EUROPEAN INSTITUTIONS

Given the unwillingness of the Court to challenge the human rights violations deriving from the recent economic crisis, it has been suggested that perhaps the ECtHR was not the right place for Eurozone citizens to address those claims. Instead, other bodies of the CoE were more suitable for those advocating for a renewed commitment to advocacy and political processes that can prevent rather than react to human rights violations.[69] Undoubtedly, the other instruments of the CoE have not remained silent but have taken action according to their mandates. The Parliamentary Assembly of the Council of Europe had already expressed its concerns in a resolution in 2012[70] and pointed out that 'the restrictive approaches currently pursued […] risk further deepening the crisis and undermining social rights as they mainly affect lower income classes and the most vulnerable categories of the population'. Last year, it urged its members to 'strengthen the pan-European dialogue on social rights and the co-ordination of legal and political action with other European institutions' as part of the Turin process[71]. Likewise, the previous as well as the current CoE Commissioner for Human Rights has been vocal about the adverse effects of the crisis to the

[68] Londras, Dzehtsiarou, (n 43) 34

[69] Nolan, (n 1).

[70] PACE, Resolution 1884 (26 June 2012)

[71] PACE, Resolution 2180 (30 June 2017)

enjoyment of human rights through a plethora of reports,[72] comments[73] and country visits,[74] sometimes in cooperation with the CM.[75]

Another body proposed was the ECSR given the socio-economic nature of the majority of the rights violated. In 1961, the European Social Charter was introduced to protect socio-economic rights, creating a separate but parallel structure to the Convention. Since 1995, the government reporting process has been complemented by a system of collective complaints addressed to the ECSR. Specific organisations registered in a list for every Member State can bring an application alleging violations of the Charter in an attempt to include more actors in assessing compliance and increase its effectiveness. So far, the response of the ECSR to austerity cases has been tremendous. Multiple Greek trade unions have brought cases before the Committee complaining about the worsening working conditions, pay cuts and pension system restructuring and they have all been vindicated.[76] For instance, in *GENOP-DEI and ADEDY v Greece*[77], a cut of the minimum wage for workers under the age of 25 was ruled to be disproportionate to the objective of getting younger people into the labour market at a time of economic crisis, even though it was required by the bail-out conditions. Similarly, Ireland was found to be in breach of its obligations to ensure the right to housing of an adequate standard for families living in local authority housing due to budget restrictions in *FIDH v Ireland*.[78] Sadly, none of the above-mentioned decisions have produced any results on the national level to date, leaving the legislative

[72] Among others: CoE CommDH, (n 7)

[73] For instance: CoE Commissioner for Human Rights, 'Youth human rights at risk during the crisis' (CommDH, 3 June 2014)

[74] Inter alia: CoE CommDH, 'Greece: immediate action needed to protect human rights of migrants' (Commissioner for Human Rights, 29 June 2018); CoE Commissioner for Human Rights, *Report by Nils Muižnieks on his visit to Portugal* (7-9 May 2012), CommDH(2012)22

[75] CoE, CDDH, (n 11)

[76] *GSEE v. Greece* CC no. 111/2014, (ECSR, 23 March 2017); *IKA-ETAM v. Greece* CC No 76/2012, (ECSR, 7 December 2012) and another 4 complaints; *FPP-OTE v. Greece* CC no 156/2017, (ECSR, 22 March 2018).

[77] CC no 65/2011, (ECSR, 23 May 2012)

[78] CC no 110/2014, (ECSR, 12 May 2017)

measures that caused the violations intact. Therefore, it can be safely assumed that despite the undeniable educational and guiding value of the actions of the other organs of the CoE, they cannot provide relief for those individuals looking for practical ways to enforce their rights against the state.

Alternatively, another appropriate regional forum to challenge the austerity measures could be the CJEU. As a supranational court is less vulnerable than the ECtHR, since its judgements have direct effect in the legal order of the Member States of the EU and it can be more assertive when dealing with sensitive issues. Furthermore, it can reply preliminary questions posed by the national courts and guide their decision accordingly, a procedure which is less intrusive in their sensitive sphere of sovereignty. In excess, many of the austerity measures were adopted following the signing of Memoranda of Understanding with organs of the Union. Some scholars, including Advocates General,[79] have indeed argued that for this reason they constitute part of EU law, falling under the competency of CJEU to review the legality of their actions. Moreover, although the CJEU started as a court that dealt mainly with business provisions of the single market, it has developed a sizeable human rights case-law inspired by the ECtHR which is set to grow more after the adoption of the Charter of Fundamental Rights that refers explicitly to socio-economic rights contrary to the ECHR.

Yet, efforts by litigants to find an effective remedy to the violations of their rights in the CJEU have so far been unsuccessful. The CJEU has positively assessed the legality of the response mechanisms to the Eurozone crisis finding the creation of the ESM and the Outright Monetary Transactions program of the ECB to be in accordance with the Treaties in *Pringle*[80] and *Gauweiler*[81] respectively. In the former, it also liberated the EC and the ECB from producing legally binding decisions when acting within the ESM's framework and the Eurogroup, meaning that MoU could not be annulled before the court. A second category of cases concerned the direct challenging of measures adopted by Member States based on the financial adjustment programs in Portugal, Greece and Cyprus. The

[79] Case C-105/15 *Mallis and Malli v Commission and ECB* (ECJ, 20 September 2016), Opinion of AG Wathelet, para 132

[80] Case C-370/12 (ECJ, 27 November 2012)

[81] Case C-62/14 (ECJ, 16 June 2015)

preliminary questions concerning the bailout of Portugal[82] were rejected as inadmissible due to a lack of link between the national measures and EU law. *ADEDY a.o. v Council*[83] was dismissed for a lack of standing because of the wide discretion left to the Hellenic Republic to choose the means to reduce the country's excessive deficit, while efforts by bond holders to attribute liability to ECB for their losses after the 'voluntary' reduction of the nominal value of Greek bonds failed to persuade the CJEU, which held the Greek government as the sole responsible for the decision.[84]

Regarding the 'haircut' of savings in Cyprus, the CJEU once again rejected the recent cases but this time it deliberated the substance of one of them regarding a right to damages, before finding a lack of casual link between the actions of the EU organs and the losses suffered by the applicants.[85] This year in a new preliminary question from Portugal concerning the reduction in the remuneration paid to judges and the subsequent infringement of 'the principle of judicial independence', the CJEU overcame the admissibility stage because it found that it was relevant to EU law. [86] Nonetheless, the salary-reduction measures at issue were not considered to impair the independence of the judiciary. The CJEU, as the ECtHR before, either endorsed the structural reforms in the EU or 'dodged the bullet' of needing to take a substantive decision by presenting formalistic procedural excuses.[87] Therefore, despite its limitations, the ECtHR still appears, at least in theory, to be the most relevant setting for citizens to productively combat breaches to their fundamental rights by their governments: it is sufficiently distant from both national parliaments and the EU, it is solely

[82] Case C-128/12 *Sindicato dos Bancários do Norte v BPN* (ECJ, 7 March 2013); Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* (ECJ, 26 June 2014); Case C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins* (ECJ, 21 October 2014)

[83] Case T-541/10, (GC, 27 November 2012)

[84] Case T-79/13 *Accorinti and Others v ECB* (GC, 7 October 2015); Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB* (ECJ, 4 June 2015)

[85] Case C-105/15 *Mallis and Malli v Commission and ECB*; Case C-8/15 *Ledra Advertising v Commission and ECB* (ECJ, 20 September 2016)

[86] Case C-64/16 *Associação Sindical dos Juízes Portugueses* (ECJ, 27 February 2018)

[87] Stéphanie Laulhé Shaelou, Anastasia Karatzia, 'Some preliminary thoughts on the Cyprus bail-in litigation: a commentary on Mallis and Ledra' (2018) 43(2) EL Rev 249

concerned with human rights claims, it can be relatively easily reached by individual and its decisions remain binding for the Member States.

4. FUTURE CONSIDERATIONS

The ECtHR could still materialize the expectations of those who believe in its potential by drawing inspiration from its attitude in other crises. The Court has faced crises in its jurisdiction before,[88] ranging from the influx of refugee to the Mediterranean to the armed conflicts in the Balkans and Eastern Europe. While its success in handling some of them can be debated, it has undoubtedly produced well-developed and innovative case-law in its review of the counter-terrorism measures taken in Europe after the 9/11 attacks. The current economic crisis has been compared to the previous security one[89] and the argument of the "fiscal interest" of the State has become almost analogous to that of 'a threat to national security' in the last decade. Hence, a closer look to the Court's attitude, particularly towards the UN sanctions system, can offer valuable insights. As with the global financial and economic crisis, an international state of emergency was unofficially declared when the 'war on terror' broke out. The UN Security Council called for all states to work together urgently to prevent and suppress terrorist acts[90] and created the Counter-Terrorism Committee, a new international bureaucracy to drive the titular agenda.[91] The latter was the main enforcer of targeted sanctions, a system of blacklisting of individuals and entities designated as being associated with international terrorist groups. Although sanctions were implemented before, the range of those included in this regime broadened and the level of UN oversight of their enforcement deepened[92] without the possibility to refute them.

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[88] Linos-Alexandre Sicilianos, 'The European Court of Human Rights at a time of crisis in Europe' (2016) 2 EHRLR 121

[89] For example, Gearty describes them as "two of the devastating viruses that have eaten away not only at the physical health but also at the soul of Europe" in Conor Gearty, 'The state of freedom in Europe' (2015) 21(6) EJL 706

[90] UNSC Res 1368 'Condemnation of 11 September attacks against US' (12 September 2001)

[91] UNSC Res 1373 'On threats to international peace and security caused by terrorist acts' (28 September 2001)

[92] Conor Gearty, *Liberty & Security* (Polity Press 2013) 30

The first decision of the ECtHR about UN sanctions and their application on national level came in 2005 in the case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*[93] concerning the trade embargo against the Federal Republic of Yugoslavia. The application was brought by a Turkish airline charter company claiming its right to property has been violated when its leased Yugoslavian aircraft was seized by Irish authorities. The ECtHR rejected the application finding the measure proportionate to the interest of international cooperation, given that the Irish authorities had no discretion when implementing supranational law and assuming that the protection of human rights in the EU was equivalent. Alas, at the time there was no process to react to the sanctions on UN or EU level, so the applicant faced a *de facto* denial of justice. In its second encounter, this time with the renewed targeted-sanctions framework, the Court was more assertive. Yousef Nada was an elderly banker living in a tiny commune in Switzerland who found himself prevented from leaving his home area and unable to access his financial accounting when he was blacklisted for supposed ties to the Moslem Brotherhood. Unable to instigate criminal proceedings before the national courts due to a lack of evidence, he addressed the ECtHR which confirmed the violation of his private life and the lack of an effective remedy[94] domestically or supranationally. At around the same time, other important decisions came out challenging indefinite detention[95], deportation orders due to suspected terrorist activity,[96] ill-treatment in secret sites[97] and other derogations from standard criminal proceedings[98] which severely restricted European residents' liberty.

[93] App no 45036/98, (ECtHR, GC, 30 June 2005)

[94] *Nada v. Switzerland* App no 10593/08, (ECtHR, 12 September 2012)

[95] *A. and Others v. UK* App no 3455/05, (ECtHR, GC, 19 February 2009)

[96] *Daoudi v. France* App no 19576/08 (ECtHR, 3 December 2009); *Omar Othman v. UK* App no 8139/09, (ECtHR, 17 January 2012)

[97] *Husayn (Abu Zubadayah) v. Poland* App no 7511/13, (ECtHR, 24 July 2014); *Al Nashiri v. Poland* App no 28761/11 (ECtHR, 24 July 2014)

[98] *El Haski v. Belgium* App no 649/08 (ECtHR, 25 September 2012); *M.S. v. Belgium* App no 50012/08, (ECtHR, 31 January 2012); *Gillan and Quinton v. UK* App no 4158/05 (ECtHR, 12 January 2010)

This trajectory indicates that in the immediate aftermath of 9/11, the Court was lenient in its review of counter-terrorism measures, but it gradually found its voice and produced some of its most influential cases. In this regard, the ECtHR has not acted differently from national, even constitutional courts, in crises. Critical situations provide a perfect excuse for the executive branch of government to increase its power and release itself from the constraints provided by law. Although an unprincipled and exorbitant executive response usually leads to abuses, in emergencies, the courts are always more prepared to defer to the executive[99] than in times of peace citing as reasons their own lack of expertise and accountability to the electorate. The Court has been seen to be equally eager to defer to the national authorities with the excuse of its subsidiary role and the lack of popular support, which usually leads to a primary role for the executive. However, while the courts, be it domestic or international, must take into account their own limitations, they must never surrender the duties placed on them. In their attempts to find the balance between the well-being of the community and individual rights, 'they should guard against a presumption that matters of public interest are outside their competence and be ever aware that they are the ultimate arbiters of the necessary qualities of a democracy in which the popular will is no longer always expected to prevail'.[100] The ECtHR should act as a leading example for national courts and demonstrate that when gross violations of human rights occur, they have a duty to upkeep the imperatives of a rights-based democracy.

Especially when it comes to economic emergencies, Greene has presented additional reasons as to why judicial deference should not be called for.[101] Contrary to security emergencies where national governments of the advantage of handling sensitive or specialist data, when dealing with economic crises information is publicly available, depriving the state from arguing in favour of secrecy. Additionally, due to the 'polycentric' nature of economic disputes, a convergence in political opinion is lacking which undermines the objectivity of the 'necessity' of decisions made. The courts should be even more careful since economic crises encourage transformative rather than temporary responses that

[99] Johan Steyn, 'Guantanamo Bay: The legal black hole' (2004) 53 ICLQ 1

[100] Jeffrey Jowell, 'Judicial deference: servility, civility or institutional capacity?' (2003) PL 592

[101] Alan Greene, 'Questioning executive supremacy in an economic state of emergency' (2015) 35(4) LS 594.

leave permanent change, with restoration of the status quo either perpetually suspended or rejected as a goal. These are all elements that the ECtHR should take under consideration when reviewing cases related to austerity measures to rebut the arguments of the Member States that they are in an expert position to deal with the economic crisis. If 'necessity' and 'urgency' are also abolished given the permanent character of the emergency, the Court could lower the threshold in its proportionality test and facilitate the diagnosis of violations in line with the recommendations of the UN Committee on Economic, Social and Cultural Rights for the non-retrogression of rights.[102]

Moreover, the fear from tensions with the Contracting Parties should not discourage the ECtHR from expanding the protection of the Convention as it has done before. Letsas has argued that though pragmatic considerations such as the reluctance of States to execute the Court's judgement endangering its legitimacy should not be entirely ignored, they should not be determinative. [103] The moral value of human rights should pave the way for a careful and reasonable evolutive interpretation where it seems normatively acceptable to undertake it. Therefore, there are three arguments in favour of the inclusion of socio-economic interests under the scope of the Convention given its dynamic status. Firstly, human rights are indivisible, interdependent and interrelated meaning that setbacks concerning economic and social rights would eventually infringe upon the enjoyment of civil and political rights, so they should not be ignored.[104] Secondly, it is widely accepted and recognized by the Court that States do not have only negative obligations to abstain from violating rights but must also take

[102] In 2012, the UN CESCR released an open letter laying a specific non-retrogression test for the states that wanted to adopt austerity measures leading to the deterioration of socio-economic rights: such policies should be temporary, necessary and proportionate. For further information see: Ben T.C. Warwick, 'Socio-economic rights during economic crises: a changed approach to non-retrogression' (2016) 65(1) ICLQ 249

[103] George Letsas, *A theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007)

[104] the ECtHR has famously found "that an interpretation of the Convention may extend into the sphere of social and economic rights' because '[t]here is no watertight division separating that sphere from the field of civil and political rights covered by the Convention" in *Budina v. Russia* App no 45603/05 (ECtHR, 18 June 2009)

positive steps to ensure their fulfillment, bringing policy considerations under the scope of human rights protection.

Most importantly, an argument that the purpose of the Convention has evolved since the 1950s to encompass more than just the protection against tyranny and oppression can be articulated. The state parties to the Convention increasingly protect some kind of economic and social rights by constitution or legislation and in their majority have ratified the International Covenant on Economic, Social and Cultural rights (ICESCR). This fact, as O'Cinnéide has convincingly shown, [105] proves that there is consensus among them that social constitutionalism as part of the European legal heritage exists albeit in a vague and embryonic state. So, if the Convention truly reflects a 'common heritage of political traditions, ideals, freedom and the rule of law'[106] of its signatories and the limited protection of socio-economic goods is contained in it, then there is no reason why the Convention cannot cover it as well. Thus, the ECHR can be transformed into a document that would strive to both preserve the rule of law in the continent and support human flourishing through the protection of fundamental rights.[107]

In other respects, expanding the protection available under the Convention to address situations of material need in cases where the state has failed to provide basic necessities for the realization of the protected right will not be a significant jurisprudential leap. Indeed, the Court has already produced similar case-law under a variety of rights. The ECtHR has accepted in what is now a well-established principle that extreme poverty can activate the protection against inhuman and degrading treatment of Art. 3 ECHR.[108] Although to date it has been modest in diagnosing violations only for members of particularly vulnerable groups dependant on state support,[109] in the case of *Budina v Russia*,[110] it has left leeway for its application to the general population when 'the level of

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[105] Colm O'Cinneide, 'European Social Constitutionalism' in K. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2018)

[106] ECtHR, Preamble

[107] Londras, Dzehtsiarou, (n 43) 147

[108] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15(4) HRLR 669SS

[109] Inter alia: *M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, GC, 21 January 2011)

[110] (n 100)

pension and social benefits are insufficient to protect from damage to physical or mental health or from a situation of degradation incompatible with human dignity'. Nevertheless, given the high threshold needed to apply Art 3 ECHR, breaches of corporal and mental integrity attributed to austerity measures could be accommodate under Art 8 ECHR as in the case of *McDonald v UK*[111] concerning the reduction of weekly care to an elderly, disabled lady. Similarly, breaches of Art 6 ECHR are possible in relation to socio-economic rights as in *Tchokontio Happi v France*[112] and the lack of enforcement of a public housing decision.

Finally, the ECtHR has made noteworthy progress in developing jurisprudence under Art 1 Prot 1 ECHR. Returning to its previous case-law, the Court found a violation of the right to property by the imposition of a 98% tax on the severance pay of a civil servant in Hungary as a disproportionate means to the aim of protecting the public purse.[113] Moreover, in an unprecedented judgement, the Grand Chamber severely limited the margin of appreciation of States to make changes to social benefits and impose conditions. In *Bèlànè Nagy v Hungary*,[114] a legislative change in to the contributions necessary for a disability pension deprived the applicant from receiving it entirely, which was deemed to be unjustifiably incompatible with her legitimate expectation to have access in the future based on her previous entitlements. Two cases against Italy concerning the same legislative amendment but produced in course of three years provide a further sign that the ECtHR might becoming more engaged in dealing with socio-economic rights. In *Maggio a.o.*,[115] the Court limited its examination to the percentage of reduction in pensions to reject the claim finding that 25% was not enough to create a disproportionate burden for the applicants. But, in *Stefanetti a.o.*,[116] it took under consideration both the substantial decrease of the pension and its negative effect in the way of life of the applicants to confirm a violation,

[111] App no 4241/12, (ECtHR, 20 May 2014)
[112] App no 65829/12 (ECtHR, 9 April 2015)
[113] *N.K.M. v. Hungary* App no 66529/11 (ECtHR, 14 May 2013)
[114] App no 53080/13 (ECtHR, GC, 13 December 2016)
[115] App no 46286/09, 52851/08, 53727/08... (ECtHR, 31 May 2011)
[116] App nos 21838/10, 21849/10, 21852/10... (ECtHR, 15 April 2014)

setting as a criterion the poverty level following the ECSR example in similar cases.

5. CONCLUSION

In conclusion, the ECtHR has so far been at best hesitant to safeguard Eurozone citizens against a regression of their fundamental rights due to the economic crisis and subsequent austerity measures. Using the constructs of margin of appreciation and subsidiarity, it has allowed the Eurozone countries to retain the principal authority in designing their socioeconomic policy in order to salvage public finances. Notwithstanding this, given that the austerity measures are not revoked even after the end of the Troika supervision and their adverse effects are perpetuated, there is reserved optimism that the Court might react. By drawing from experience in other crises, avoiding judicial deference, refuting arguments of urgency and necessity, and implementing a moderate evolutive interpretation, the Court can become instrumental in counterbalancing state arbitrariness and expand the protection of the Convention to ensure the prosperity of millions of individuals. Although it missed the momentum to take action in the wake of austerity, it can be imagined that by reversing some of its judgments or accepting arguments under different articles for the same factual situations, the Court can hinder the establishment of a permanent state of emergency impeding the progressive realization of socioeconomic rights in Europe.