

The Welfare State - At the Mercy of the Financial Markets?

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“Interference with social rights and legal strategies
against the backdrop of ILO and Council of Europe”

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OVERVIEW

I. Crisis and violation of fundamental social rights

- 1. Council of Europe cases**
 - 1. Cases 65 and 66/2011**
 - 2. Recent collective complaints on austerity measures in pension field from Greece**
- 2. ILO – Case 2820**
- 3. Constitutional reviews against austerity provisions**

II. Litigation strategies?

- 1. International and national reviews v. European reviews?**
- 2. Litigation strategies at European level?**
- 3. Is the Lisbon Treaty of any help?**

1. COUNCIL OF EUROPE (1)

COLLECTIVE COMPLAINTS ON AUSTERITY MEASURES:

- **No. 65/2011** General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece
- **No. 66/2011** General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece

Cases submitted on 21 February 2011,

ECSR decision admissibility 30 June 2011;

ECSR decision of violation 18 June 2012;

Committee of Ministers Resolution 5 February 2013

Reply of Greek Government:

1. COUNCIL OF EUROPE (2)

The complaint 65/2011 alleged:

- making it possible to **dismiss a person without notice or severance pay during the probation period in an open-ended contract**, is in breach of Art. 4§4 of the 1961 Charter
- **the derogation by means of a collective agreement concluded at enterprise level from the provisions set out in a collective agreement concluded at sectoral level** leads to a deterioration in working conditions for the employees concerned, in breach of Art. 3§1a of the 1988 Additional Protocol to the 1961 Charter;
- **in a situation where there is no trade union in the enterprise, enable for the collective agreement at enterprise level to be concluded by trade unions of a different level** (corresponding to sectoral trade union or federation), in breach of Art. 3§1a of the 1988 Additional Protocol to the 1961 Charter.

1. COUNCIL OF EUROPE (3)

ECSR concluded for complaint 65/2011:

- Unanimously: **violation of Art. 4** regarding the possibility for dismissal without notice or compensation during the probation period in an open-ended contract
- 14 votes to 1: no violation of Art. 3§1 of the Additional Protocol as it does not concern the right to collective bargaining; this right is covered by article 5 and 6 of the Charter but can not be examined as these articles are not ratified by Greece

1. COUNCIL OF EUROPE (4)

ECSR ‘considers that while it may be reasonable for the economic crisis to prompt changes in current legislation and practices to restrict certain items of public spending or relieve constraints on businesses, **these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter**’.

‘The Committee considers that a greater employment flexibility in order to combat unemployment and encourage employers to take on staff, should **not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labour law, protecting them from arbitrary decisions by their employers or from economic fluctuations**’.

1. COUNCIL OF EUROPE (5)

Committee of Ministers Resolution 2013(2): confirmed the violations and called upon the Greek government to revoke the above-mentioned measures as soon as possible and keep the Committee of Ministers regularly informed of all progress made.

Appendix to Resolution : an answer by Greece to the conclusions of the ECSR in which:

- It accepted the conclusions of the ECSR
- it pointed out that the measures were of a **provisional nature**.
- the Greek Government had the firm intention to revoke these measures **as soon as the economic situation of his country would allow**. However, no timeframe could be given and very unlikely that impact of reform is clear before 2015

1. COUNCIL OF EUROPE (6)

The complaint 66/2011 alleged:

- introducing “**special apprenticeship contracts**” between employers and individuals aged 15 to 18 with lesser labour law and social security rights violates Art.1§1, 7§2, 7§7, 7§9, 10§2 and 12§2 of the 1961 Charter;
- Measures concerning the **employment of new entrants** to the labour market aged under 25 (**remuneration below minimum wage**) violates Art. 4§1, taken in conjunction with Art. 1§2 of the 1961 Charter.

1. COUNCIL OF EUROPE (7)

ECSR considers:

- **the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter.**
- 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 most need the protection. I
- that what applies to the right to health and social protection should apply equally to labour law.
- While it may be reasonable for state parties to respond to the crisis by changing current legislation and practice 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.**

1. COUNCIL OF EUROPE (8)

ECSR considers (continued):

- that 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, which protect them against arbitrary decisions by their employers or the worst effects of economic fluctuations. **The establishment and maintenance of these basic rights is a core objective of the Charter.”**

Committee of Ministers Resolution 2013(2) is identical as in collective complaint 65/2011

2. COUNCIL OF EUROPE (9)

2012 COLLECTIVE COMPLAINTS - PENSIONS

- **No. 80/2012 Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece**
- **No. 79/2012 Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece**
- **No. 78/2012 Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece**
- **No. 77/2012 Panhellenic Federation of Public Service Pensioners v. Greece**
- **No. 76/2012 Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece**

All cases submitted on 2 January 2012,

ECSR decision admissibility 23 May 2012;

ETUC observations 12 August 2012;

ECSR decision of violation 20 December 2012;

Committee of Ministers Resolution not yet published.

2. COUNCIL OF EUROPE (10)

Cases 80-76: pension reform in public and private sector

- Reduction of primary and auxiliary old age pensions and additions to pensions
- Reduction of the additions to pensions known as Christmas, Easter and vacation bonuses
- Reductions in primary pensions
- Reduction in auxiliary pensions
- Introduction of Pensioners' social solidarity contribution
- Suspension or reduction of pensions for pensioners with an occupation
- Reduction of private sector pensioners' social solidarity benefit (only for case 76)

2. COUNCIL OF EUROPE (11)

ECSR considers:

- Unanimously in all 5 cases a violation of Art.12§3
- Basically that “even though restrictions to the benefits available in a national social security system do not under certain conditions breach the Charter, the cumulative effect of restrictions made as austerity measures, together with the procedures applied to put them into place, amounted to a violation of the right to social security.”

2. COUNCIL OF EUROPE (12)

ECSR considers (continued):

“The fact that the **contested provisions of domestic law seek to fulfill the requirements of other legal obligations (Troika loan arrangements) **does not remove them from the ambit of the Charter.**”**

Despite the later international obligations of Greece, there is nothing to absolve the state party from fulfilling its obligations under the 1961 Charter.”

3. ILO COMMITTEE OF FREEDOM OF ASSOCIATION (1)

- ILO CEACR observations /direct requests 2011-2012 of GSEE in 2010 on 12 conventions (CEACR reports 2011/2012)
C122 on Employment Policy: BU, ES, FI, HU, LT,
C150 on Labour administration: PT
- ILO – 365th Report of the Committee of freedom of association (316th session 1-16 /11/ 2012) : Greece: *Case No. 2820 (Greece)*:
Suspension of and derogation to the collective agreements via Decree (Austerity measures) as a violation of ILO C98
Derogation in pejus and decentralisation of collective bargaining as a violation of ILO C87 and C98

3. ILO COMMITTEE OF FREEDOM OF ASSOCIATION

- ILO – 365th Report of the Committee of freedom of association (316th session 1-16 /11/ 2012) : Greece: *Case No. 2820 (Greece)*:

‘While deeply aware that these measures were taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis, the Committee found that there were a **number of repeated and extensive interventions into free and voluntary collective bargaining and an important deficit of social dialogue** and thus highlighted the need to promote and strengthen the institutional framework for these key fundamental rights.

The Committee expects that the **social partners will be fully involved in the determination of any further alterations within the framework of the agreements with the Troika that touches upon matters core to the human rights of freedom of association and collective bargaining and which are fundamental to the very basis of democracy and social peace.**

4. NATIONAL CONSTITUTIONAL REVIEWS

- Estonian Supreme Court (Riigikohus) in a judgement of 12 July 2012 Case No. 3-4-1-6-12 □ Art. 4 (4) ESM Treaty violates the principle of sovereignty in Estonian Constitution
- The Hague District Court of 1 June 2012 (Wilders e.a. v. State of the NL): ESM violates Art. 125 TFEU (no bail out clause)
- German Constitutional Court (12 Sept 2012) has rejected legal challenges to the creation of a permanent bail-out fund, but not without imposing restrictions on the size of the country's contribution.
- Greek Constitutional Court: (7 Nov 2012) (Areios Pagos) unanimously ruled that the new cuts in judges' and prosecutors' wages were against the Greek Constitution

4. NATIONAL CONSTITUTIONAL REVIEWS

- Portuguese Constitutional court Decision of 5 April 2013 has rejected 4 of the 9 austerity measures drawn up by the government, based on the adjustment programme Portugal agreed with the European Union (EU) and the IMF in May 2011.

The court rejected cuts in public-sector pay and state pensions, cuts in pensioners' and public servants' holiday bonuses, as well as reductions to sickness leave and unemployment benefits that were in breach of the constitution

5. LITIGATION STRATEGIES (1)

1. **Legal proceedings = confusion**

Who can lodge a complaint

Where to lodge a complaint

What act can be challenged

Whose act can be challenged

• 2. **Legal activism:**

ILO

CoE

National constitutional reviews

• 3. **EU**

Lisbon Treaty (CFR rights) of any help?

Pringle case

5. LITIGATION STRATEGIES (2)

- **AT THE EUROPEAN LEVEL**

Whose acts can be challenged? CJEU rules on the validity of acts adopted by the EU institutions:

- Ecofin ; European Commission; ECB ; European Council and European Parliament (when adopting legally binding acts: Art. 263 TFEU); Euro Area Summit (as soon as Fiscal Compact Treaty is adopted)

What kind of acts can be challenged?

- MoU (legal nature?); EMU ; Process (competence); national measures when not respecting ESC

Who can challenge?

- European Commission (as primary guardian of the Treaty)
- ECB
- Natural and legal persons when EU acts are addressed to them or concern them directly and individually (Art. 263 (4) TFEU)

European Parliament / National governments ?

5. IS THE LISBON TREATY OF ANY HELP (1)

- ART. 3 (3) TEU

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

- ART. 6 (1)

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

5. IS THE LISBON TREATY OF ANY HELP (2)

Charter of Fundamental Rights of the European Union

- Article 21 Non-discrimination
 - Article 27 Workers' right to information and consultation within the undertaking
 - Article 28 Right of collective bargaining and action
 - Article 30 Protection in the event of unjustified dismissal
 - Article 31 Fair and just working conditions
 - Article 34 Social security and social assistance
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- ART. 6 (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

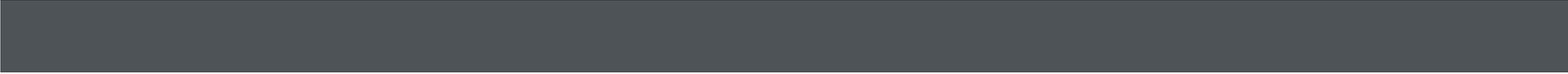
5. IS THE LISBON TREATY OF ANY HELP (3)

- ART. 9 TFEU (TITLE II - PROVISIONS HAVING GENERAL APPLICATION)

In **defining and implementing its policies and activities**, the **Union shall** take into account requirements linked to the **promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.**

- ART. 151 TFEU (TITLE X -SOCIAL POLICY)

The **Union and the Member States**, having in mind **fundamental social rights (...)** shall have as their objectives the **promotion of employment, improved living and working conditions (...)** **proper social protection, dialogue between management and labour**, the development of human resources with a view to **lasting high employment** and the **combating of exclusion.**



Any further question?!

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