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of austerity measures with the
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da compatibilidade das medidas de austeridade
com a Convenção Europeia dos Direitos Humanos

RAINER PALMSTORFER

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AUSTERITY MEASURES ON TRIAL: ON THE COMPATIBILITY OF AUSTERITY MEASURES WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS

MEDIDAS DE AUSTERIDADE EM JULGAMENTO: DA COMPATIBILIDADE DAS MEDIDAS DE AUSTERIDADE COM A CONVENÇÃO EUROPEIA DOS DIREITOS HUMANOS

RAINER PALMSTORFER¹

Edmundsburg, Mönchsberg 2

5020 Salzburg

rainer.palmstorfer@sbg.ac.at

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Abstract: So far legal analysis has predominantly focussed on the question whether the measures that were adopted in the context of the so-called ‘eurocrisis’ (i.e. European Stability Mechanism, Treaty on Stability, Coordination and Governance etc.) are compatible with the EU Treaties. This discussion has concentrated on competences and the institutional framework of the Economic and Monetary Union (hereinafter “EMU”). Recently, however, the crisis has also developed a fundamental-rights dimension, as it was/is questionable whether austerity measures adopted in the wake of the crisis are compatible with the European Convention on Human Rights (hereinafter “ECHR”), in particular with article 1^o of Protocol 1^o (Protection of Property). Austerity measures such as cuts in social security benefits, pensions or excessive tax rates produced a series of cases before the European Court of Human Rights (hereinafter “ECtHR”) that were decided in 2013. In these cases, the ECtHR conferred a wide margin of appreciation on the national legislators as regards the definition of public interest. However, this margin is not unlimited. The paper will analyse this recent case-law, in particular it shall address the issue of possible limits for the legislator as regards cuts in public sector salaries and pensions.

Abstract: Até ao momento, a análise jurídica tem-se focado predominantemente na questão de saber se as medidas adoptadas no contexto da chamada ‘eurocrise’ (i.e., Mecanismo Europeu de Estabilidade, Tratado sobre a Estabilidade, Coordenação e Governação na União Económica e Monetária, etc.) são compatíveis com os Tratados da União Europeia. Esta discussão tem-se concentrado nas competências e quadro institucional da União Monetária

1. Research Assistant at the Department of Public Law, Salzburg University and research fellow at the Salzburg Centre of European Union Studies (SCEUS); Rainer.Palmstorfer@sbg.ac.at.

Europeia. Recentemente, contudo, a crise também desenvolveu uma dimensão jusfundamental, no âmbito da qual se começou a questionar se as medidas de austeridade adoptadas no contexto da crise são compatíveis com a Convenção Europeia dos Direitos Humanos, em particular com o artigo 1.º do Protocolo 1.º (Protecção da Propriedade). Medidas de austeridade, tais como os cortes nas pensões da segurança social ou o aumento de impostos, esteve na origem de um conjunto de casos perante o Tribunal Europeu dos Direitos Humanos, que foram decididos em 2013. Nestes casos, o ECtHR conferiu uma ampla margem de apreciação aos legisladores nacionais à luz do conceito de interesse público. Todavia, esta margem não é ilimitada. O presente artigo analisará esta recente jurisprudência, e, em especial, irá focar-se na questão de saber se se impõem ao legislador limites no que toca aos cortes nos salários e pensões do sector público.

Summary: 1. Introduction; 2. Austerity measures; 3. The austerity cases of 2013; 3.1. Facts of the cases; 3.2. The findings of the Court; 3.3. Wide margin of appreciation; 3.4. The role of national law, the national legislator and national courts; 3.5. The role of EU law; 4. Conclusion

1. Introduction

Like no other current challenge, the European sovereign debt crisis has touched upon different fields of law and legal orders. For example, the European Stability Mechanism (hereinafter “ESM”) is an IGO based on a treaty between 18 out of 28 EU Member States under public international law, which closely cooperates with the IMF² and hereby makes use of or refers to the activities of EU institutions (i.e. the European Commission and the European Central Bank)³ under the limits set by the EU Treaties. Like the IMF, the ESM grants financial assistance to its Members.⁴ The decision to grant assistance is based on a memorandum of understanding (hereinafter “MoU”) – the legal nature of which is not clear⁵ – that sets the conditions under which the said financial assistance is given. It does not come as a big surprise that such memoranda make financial assistance conditional on severe cuts in the spending of public households. So far such financial-assistance schemes have mainly raised legal issues as far as their compatibility with the EU Treaties was concerned. In *Pringle*,⁶ the European Court of Justice (hereinafter “ECJ”) held that the TESM does not violate the EU Treaties. Although *Pringle* also touched upon a fundamental-right issue, namely whether the establishment of the ESM outside the domain of EU law is a breach of Article 47^o of the Charter of Fundamental Rights (hereinafter “CFREU”), that is, the right to effective judicial protection,⁷ the ruling predominantly dealt with the compatibility of the ESM with the EMU framework as contained in the TFEU, notably the well-known ‘no-bail-out clause’ of article 125^o TFEU.⁸ It is the very fact that the ESM is not an entity based on EU law that accounts for the non-applicability of the Charter (cf. Art 51^o CFREU), which, by the way, is also the reason for the ECJ’s lack of competence in a recent Portuguese preliminary reference ruling concerning the question whether salary cuts for employees in a nationalized bank infringe article 31^o paragraph 1 CFREU.⁹ And even if a national austerity measure is clearly prescribed by an act under EU law, it is questionable whether the EU act can be directly challenged before the Court, that is, the General Court (hereinafter “GC”). Not surprisingly, in a case concerning an annulment action brought by a Greek trade union against an act by the Council adopted pursuant to article 126^o paragraph 9 TFEU in connection with article 136^o TFEU by which the Council obliged Greece to adopt a series of austerity measures such as pensions reductions or reduction of the Easter, summer and

2. Cf. recitals 8, 13; article 5^o paragraph 5; article 13^o paragraph 1 sub-paragraph b, paragraphs 3 and 7; article 38^o Treaty establishing the European Stability Mechanism (TESM).

3. See recitals 10 and 17; article 4^o paragraph 4; article 5^o paragraph 3; article 5^o paragraph 6 sub-paragraphs e and g; article 6^o paragraph 2; article 11^o paragraph 1, paragraph 4; article 13^o paragraph 1 sub-paragraph a, paragraph 3, paragraph 4, paragraph 7; article 14^o paragraph 5, paragraph 6; article 15^o paragraph 5; article 16^o paragraph 5; article 17^o paragraph 5; article 18^o paragraph 2; article 42^o paragraph 2 sub-paragraph a TESM.

4. Articles 13^o ff. TESM.

5. The MoU seems to have been considered an international treaty by the Greek authorities, see ECtHR, *Koufaki*, paragraph 7.

6. Decision of the European Court of Justice, Case C-370/12 *Pringle*, 27 November 2012, available at <http://curia.europa.eu/>.

7. ECJ, *Pringle*, paragraphs 178-182.

8. ECJ, *Pringle*, paragraphs 129-147.

9. Decision of the European Court of Justice, Case C-128/12 *Sindicato dos Bancários do Norte and Others*, 7 March 2013, paragraphs 11-13, available at <http://curia.europa.eu/>.

Christmas bonuses¹⁰ the GC held that the applicants were not directly concerned and, thus, the GC concerned the action inadmissible.¹¹ Therefore, the applicants were referred to their national system of legal protection. That is, they have to challenge the national implementation act before a national court and then suggest the national judge to initiate a preliminary proceeding pursuant to article 267° TFEU. This shows that although national austerity measures are regularly induced by international acts, such as by Decision 2010/320/EU or by an MoU that sets the conditions under which financial assistance is granted, it is very difficult or almost impossible to challenge these international acts directly. To complicate matters further, it is highly questionable whether the ECJ is at all competent to hear an action against an MoU as its legal nature is unclear. For these reasons, the individuals have to fight against national austerity measures and fight their way through the national court system which will often entail long proceedings.

In this respect, the system of legal protection under EU law does not bring about an added value for the individual compared with the system of legal protection under the ECHR. It does not come as big surprise that it was the ECtHR and not the ECJ that was the first court at European level to hear on and decide on the compatibility of crises-induced austerity measures with fundamental rights. In 2013, the Court delivered several rulings in which it had to rule on this issue.¹² Tellingly, the ECtHR had to decide on the Greek measures which had been brought before the GC unsuccessfully, the difference being that this time it was not the EU act but the national measures themselves that were contested. The result, however, was the same: Like the GC, the ECtHR declared the application inadmissible.¹³

As we will see, these ECtHR rulings raise several interesting questions: Has the crisis changed the ECtHR's stance towards austerity measures? In other words, is there a kind of crisis-law in the ECtHR's case-law? How does the ECtHR perceive its role in this respect? In how far is it influenced by other legal systems? Most importantly, what are the conditions under which austerity measures resulting in public sector salaries and pension cuts do not infringe the ECHR? Is there a red line that must not be crossed by the national legislator? If

10. Decision of the Council of the European Union of 10 May 2010 (2010/320/EU) addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L 145/6, article 2° paragraph 1 sub-paragraphs e and f.

11. Order of the General Court, Case T-541/10 *Anotati Dioikisi Enoseon Dimosion Ypallilon v Council*, 27 November 2012, paragraph 88, available at <http://curia.europa.eu/>.

12. Decision of the ECtHR, *Koufaki and Adedy v. Greece* Application 57665/12 and 57657/12, 7 May 2013, available at <http://hudoc.echr.coe.int>; Judgment of the ECtHR, *NKM v. Hungary* Application 66529/11, 14 May 2013, available at <http://hudoc.echr.coe.int>; Judgment of the ECtHR, *RSz v. Hungary* Application 41838/11, 2 July 2013, available at <http://hudoc.echr.coe.int>; Decision of the ECtHR, *Da Conceição Mateus and Santos Januário v. Portugal* Application 62235/12 and 57725/12, 8 October 2013, available at <http://hudoc.echr.coe.int>; Decision of the ECtHR, *Savickas v. Lithuania* Application 66365/09, 15 October 2013, available at <http://hudoc.echr.coe.int>.

13. See ECtHR, *Koufaki*, paragraph 49.

so, what is it? However, before dealing with the mentioned cases and addressing above questions let us first take a short look at austerity measures in general.

2. Austerity Measures

Austerity measures aim at the reduction of a government deficit either/both by reducing the government expenditure or/and increasing the government revenue. This twofold approach can also be clearly seen in the several MoU that set the conditions for financial support.¹⁴ These MoU do not confine themselves to setting abstract reduction goals, but contain clear rules to be implemented into domestic law.¹⁵ Whether such measures make sense from an economic point of view, is doubtful.¹⁶ However, it is incontestable that austerity measures can considerably hit the population, in particular people dependent on public transfer payments (e.g. pensioners) and public servants. Tellingly, the recent cases before the ECtHR have in common that they concern public servants or public-sector pensioners whose financial benefits have been reduced.

3. The Austerity Cases Of 2013

3.1. Facts of the cases

In the Greek case the reduction took the form of a salary reduction¹⁷ that led to a decrease of the applicant's net salary from EUR 2,435.83 to EUR 1,885.79.¹⁸ More generally speaking, the 13th and 14th pensions and, respectively, wage payments for all public employees were eliminated altogether with the introduction of a flat bonus for lower income segments,¹⁹ these measures being challenged by a Greek trade union organisation representing several unions of public-sector workers.²⁰

14. See for example the Memorandum Of Understanding On Specific Economic Policy Conditionality, available at http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

15. For example, the MoU with Cyprus requires the implementation of "a scaled reduction in emoluments of public and broader public sector pensioners and employees as follows: EUR 0-2.000: 0.8%; EUR 2.001-3.000: 1%; EUR 3.001-4.000: 1.5%; above EUR 4001: 2.0 %." Cf. Memorandum of Understanding on Specific Economic Policy Conditionality, paragraph 2.11, available at [http://www.moi.gov.cy/moi/pio/pio.nsf/All/20B848B51DD5D479C2257BCE001CB6C7/\\$file/MOUEN.pdf?OpenElement](http://www.moi.gov.cy/moi/pio/pio.nsf/All/20B848B51DD5D479C2257BCE001CB6C7/$file/MOUEN.pdf?OpenElement).

16. PAUL DE GRAUWE/ YUMEI JI, From Panic-Driven Austerity to Symmetric Macroeconomic Policies in the Eurozone", in *Journal of Common Market Studies*, LI, 2013, p. 40.

17. The applicant lost her Christmas, Easter and holiday allowances since her total monthly pay exceeded an income threshold (EUR 3,000). In a further step, the applicant's salary was again reduced, see ECtHR, *Koufaki*, paragraphs 9 and 27.

18. ECtHR, *Koufaki*, paragraph 45.

19. This measure was agreed upon in the MoU of 3 May 2010 see ECtHR, *Koufaki*, paragraph 6.

20. This raised the interesting question whether a trade union could bring a case to the ECtHR pursuant to article 34^o ECHR. As the Court considered the application inadmissible, it did not elaborate on this issue.

The Hungarian cases dealt with a tax on severance payments and other payments related to the termination of employment.²¹ According to the relevant domestic law, this tax amounted to 98 % if these payments exceeded a certain threshold.²² This tax was introduced on 1 October 2010, but was applied retroactively to the relevant revenues as from 1 January 2010.²³ Like Greece, Hungary also had concluded an MoU – with the then European Community (November 2008) – in order to get financial assistance. However, unlike the Greek elimination of the 13th and 14th payments, the Hungarian tax of 98% was not agreed upon in the MoU, which e.g. obliged to a nominal freeze in the public sector and an elimination of the 13th monthly salary for all public sector employees.²⁴

The third case was a Portuguese one and concerned public-sector pension reductions.²⁵ As with Greece, Portugal had signed an MoU as precondition for getting financial assistance, which also contained pension cuts. In order to implement the MoU, the Portuguese legislator adopted a state budget act that, among other measures, prescribed a reduction of holiday and Christmas subsidies for public-sector scheme pensioners. This reduction was temporary, that is, it would apply only for the duration of the Economic and Financial Assistance Programme. Owing to this measures, the applicants, two public sector pensioners, had a cumulative loss of 10.8% and 10.7% of the respective total annual pension payments.²⁶

The Lithuanian case concerned a salary reduction of 30 per cent for judges. Given the fact that this measure was taken in 2000, the case predominantly dealt with issues under article 6° ECHR. However, also article 1° of Protocol 1° was invoked. As in the Greek and Portuguese cases, the court, however, has not found a violation.

Above measures were challenged on the grounds that they violated article 1° of Protocol 1° (i.e. right to property) – alone or in combination with articles 6°, 8°, 13° and 14°. By contrast, the Portuguese application did not invoke any particular provision of the Convention.²⁷ The ECtHR predominantly examined whether the austerity measures violated article 1° of Protocol 1°. It held the applications in *Koufaki*, *Da Conceição Mateus* and *Savickas* inadmissible, whereas it found a violation of article 1° of Protocol 1° in the two Hungarian cases.

21. ECtHR, *NKM*; ECtHR, *RSz*.

22. Approximately EUR 11,900.

23. ECtHR, *NKM*, paragraph 9.

24. Memorandum Of Understanding between the European Community and the Republic of Hungary, available at http://ec.europa.eu/economy_finance/publications/publication13495_en.pdf.

25. ECtHR, *Da Conceição Mateus*.

26. ECtHR, *Da Conceição Mateus*, paragraph 7.

27. ECtHR, *Koufaki*, paragraph 20; ECtHR, *RSz*, paragraph 3; ECtHR, *NKM*, paragraph 3; ECtHR, *Savickas*, paragraphs 56 ff.

28. ECtHR, *Da Conceição Mateus*, paragraph 12.

3.2. *The findings of the Court*

The different outcome in the austerity cases requires some explanation. In the Hungarian cases, the Court starts out with an elaboration on the protective scope of article 1^o of Protocol 1^o and considers the severance payments to be caught by the provision before assessing the question whether the interference is lawful. Stressing that lawfulness under domestic law is not sufficient to fulfil this criterion, the Court nevertheless considers the measure to be lawful although it was questionable whether the measure was in conformity with Hungarian constitutional law.²⁹ Considering the tax to pass the lawfulness test, the Court then goes on to look at the public interest and, not surprisingly, holds that, given the wide margin of appreciation granted to national authorities, the protection of the public purse and distribution of public burdens is a legitimate aim, although – in line with the Hungarian Constitutional Court –, it has doubts as to the achievement of this aim primarily by means of taxation. Irrespective of these doubts, it is the proportionality test that eventually results in the violation of article 1^o of Protocol 1^o. In other words, the Court finds that a fair balance between the interests of the public and the protection of the individual's rights has not been struck, for there needs to be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'³⁰. The fact that the tax rate was considerably higher than the tax rate for other revenues alone was not decisive – given the broad margin of appreciation in this field of law. The Court examines the personal situation of the applicant and finds a violation for the following reasons: The applicant who was in (i) good faith, (ii) suffered a substantial deprivation of income serving (iii) social labour-market reintegration by (iv) a retroactive measure³¹ that could expose the applicant to substantial personal hardships, which was (v) not intended to remedy technical deficiencies of the pre-existing law. Thus the measure is considered to entail an 'excessive and individual burden on the applicant's side'.³² Having found a violation, the Court also stresses the different treatment between the applicant and the majority of the population who 'were not obliged to contribute, to a comparable extent, to the public burden'³³.

By contrast, in the Greek and, respectively, Portuguese case, the Court did not

29. There have been a series of cases before the Hungarian Constitutional Court. Given its restricted scope of control, the Constitutional Court could no longer declare the measures unconstitutional. The lawfulness-test applied by the ECtHR is therefore a rather toothless one. But what would have been the alternative? Is the ECtHR competent to function as a kind of second constitutional court, using the lawfulness criterion to assess indirectly the compatibility of the measure with national constitutional law?

30. ECtHR, *RSz*, paragraph 49.

31. The situations of the Hungarian applicants differ in so far as the applicant in ECtHR, *RSz*, paragraph 7 got the severance pay and was charged the higher tax rate afterwards. By contrast, the applicant in ECtHR, *NKM* never received the full amount of severance pay. Nevertheless the Court treats these two situations alike, the decisive criterion being that in both cases a considerably higher tax rate was applied than that in force when the severance pay was generated (i.e. during the employment relationship).

32. ECtHR, *RSz*, paragraph 59.

33. ECtHR, *RSz*, paragraph 60.

find a violation of article 1º of Protocol 1º. The same holds true for the Lithuanian case. What is more, the Court even declared the applications to be inadmissible. The Court applies the same examination as in the Hungarian Cases. In *Koufaki*, the Court first examines whether the measure aims at a public interest and, referring to the considerations of the Greek Supreme Administrative Court, it comes to the conclusion that the measure serves such an interest.³⁴ Examining whether the measures were proportionate, the Court – like the Greek Supreme Administrative Court – holds that the measure does not place the applicant “at risk of having insufficient means to live on and thus to constitute a breach of article 1º of Protocol 1º” and concludes as follows: “In view of the foregoing and of the particular context of crisis in which the interference in question occurred, the latter could not be said to have imposed an excessive burden on the applicant.”³⁵

In the Portuguese case, the Court uses its case-law on pensions as a starting point. Referring to its settled case law it holds that “while a total deprivation of entitlements resulting in the loss of means of subsistence would in principle amount to a violation of the right of property, the imposition of a reasonable and commensurate reduction would not.”³⁶ Considering that – unlike their Greek counterparts – the Portuguese measures are limited in time, the Court does not find a violation of article 1º of Protocol 1º. Here the issue of insufficient means of living is not discussed, as the basic salary was left untouched. Although the Court refers to its reasonable-and-commensurate reduction standard, the Court does not expressly put the Portuguese measure to this test. Considering that the measure was limited, one may assume that the loss of 10.8% and 10.7% can be therefore considered a reasonable and commensurate reduction. This red line can also be seen in previous cases, for example in *Asmundsson*,³⁷ a case dealing with the amendment of pension provisions leading to the total loss of the pension of the applicant. The fact that in the Portuguese context the reduction only concerned the public sector was commented upon by the Court as follows: “In these circumstances, it was not disproportionate to reduce the State budget deficit on the expenditure side, by cutting salaries and pensions paid in the public sector, when no equivalent cuts were made in the private sector.”³⁸

In *Savickas*, the Court acknowledged the fact that Lithuania was confronted with an unexpected budgetary crisis. More importantly, the ECtHR stressed that the austerity programme did not single out the judiciary but concerned the entire public sector. Nevertheless the Court differentiates between judges and other public officials, for the former – being independent – play a vital role for safeguarding the standards under article 6º. In particular, the fact that the measure was temporary and, more importantly, that it did not pose a threat to

34. ECtHR, *Koufaki*, paragraph 41.

35. ECtHR, *Koufaki*, paragraph 46.

36. ECtHR, *Da Conceição Mateus*, paragraph 24.

37. Judgment of the ECtHR, *Kjartan Ásmundsson v. Iceland* Application 60669/00, 12 October 2004, paragraph 45, available at <http://hudoc.echr.coe.int>.

38. ECtHR, *Da Conceição Mateus*, paragraph 28.

the livelihood of the judges seemed to be decisive for the Court.³⁹ Again the subsistence-level comes into play.

Looking at above cases, one can see that the Court starts from different lines of case law but ultimately has to decide whether or not the respective measure was disproportionate, that is, whether it brought about an excessive burden for the applicant. In all cases, it looked at the personal situation of the applicant. Here the decisive element seems to be whether or not the measure leaves the applicant sufficient means to live on. The sufficient-means criterion was expressly mentioned in the Portuguese case, which however dealt with a comparatively limited reduction. The outcome in the Hungarian cases was due to the fact that the applicant could be exposed to a substantial personal hardship by a measure being retroactive and lacking a transitional period. If the scope of protection of article 1º of Protocol 1º boils down to a sufficient-means test, this ultimately leaves a lot of room for manoeuvre for national legislators. Coming back to *Ásmundsson*,⁴⁰ it is nevertheless noteworthy that the Court found an excessive and disproportionate burden, although the loss amounted to one third of the applicant's gross monthly income. In other words, in this case the Court did not go on to examine whether the pension cut has led to the applicant's losing his means of subsistence.

An interesting issue that has been raised in all cases was the (in)equality of the measure: The measures concerned (former) public employees and not the private sector. In the Hungarian case this was another reason for finding a violation.⁴¹ By contrast, in the Greek case, it can be read through the lines that the Court viewed the measure as part of package that hit all Greece and not only the public employees.⁴² The same goes for the Lithuanian case.⁴³ Yet the aspect of equality was not the decisive one. This can be seen in the Portuguese case, which might suggest that the different treatment of public and private sector only comes into play when the cut has reached a certain threshold. This shows that in this context the legislator's margin of appreciation how to reduce the budget deficit trumps the issue of discrimination. Nevertheless, if the legislator singles out and burdens only a particular group, this would probably be tantamount to an overstepping of this margin.⁴⁴ That non-discrimination is an important consideration in the field of pension cuts cannot only be seen in the Hungarian cases but also in *Ásmundsson*⁴⁵, for in this case it was decisive for finding an excessive and disproportionate burden that the total loss of pension payments concerned only a very small number of individuals, whereas the vast majority received pensions at the same level as before.⁴⁶ It is questionable how this notion can be transferred

39. ECtHR, *Savickas*, paragraph 94.

40. ECtHR, *Kjartan Ásmundsson*, paragraph 45.

41. ECtHR, *RSz.*, paragraph 60; ECtHR, *NKM*, paragraph 72.

42. ECtHR, *Koufaki*, paragraphs 38 and 40.

43. ECtHR, *Savickas*, paragraph 94.

44. ECtHR, *Savickas*, paragraph 93.

45. ECtHR, *Ásmundsson*, paragraphs 43 et seq.

46. In order to solve the financial difficulties of a pension fund the legislator adopted new legislation also for current pensions. This amendment led to the fact that 15% of the persons who were in receipt of a disability pension lost their pension altogether.

to the comparison between public employees and private employees, or, more provocatively speaking, between individuals receiving public payments and the financial sector. And yet, one thing seems clear: Despite the wide margin of appreciation, the national legislator does not have a carte blanche to burden only public employees or pensioners while at the same time leaving other groups totally untouched.

3.3. Wide margin of appreciation

The states have a wide margin of appreciation when it comes to defining public interest. It has been criticised that the ECtHR so far has not given a definition of what actually is meant by public interest.⁴⁷ However, it is not for the Court to define what aims a national legislator is to achieve for its society. It can only control whether a certain measure violates the rights of an individual. According to settled case law, states enjoy a broad margin of appreciation when it comes to social and economic policy.⁴⁸ This margin is even bigger in times of limited economic resources. This case law is older than the current crisis.⁴⁹ Not surprisingly, the Court does not wear of emphasising this margin in the austerity cases.⁵⁰

In the two cases concerning Eurozone members as well as in the Lithuanian case, the Court stresses the exceptional situation in which the measures have been adopted.⁵¹ This had influence on the Court's assessment, which can be clearly seen in the Court's reasoning in the Portuguese case.⁵² The ECtHR, thus, resorted to what has been called a 'Rhetoric of Emergence'.⁵³ Interestingly enough, this consideration cannot be found in the Hungarian cases, although the measures were also triggered by a sovereign debt crisis. But did the eurocrisis really matter that much? One cannot help getting the impression that the ECtHR was not eager to decide on eurocrisis measures at all. Given the high relevance of these measures for a large number of people and the fact that the applications were not far-fetched considering the Court's case law, one would have preferred a deeper legal analysis by the Court.

47. ANNA TSETOURA, "Property Protection as a Limit to Deteriorating Social Security Protection", in *European Journal of Social Security*, XV, 2013, p. 64.

48. ECtHR, *RSz*, paragraph 38; ECtHR, *NKM*, paragraph 49; ECtHR, *Da Conceição Mateus*, paragraph 22; ECtHR, *Koufaki*, paragraph 31.

49. Decision of the ECtHR, *Pentiacova v. Moldova* Application 14462/03, 4 January 2005, available at <http://hudoc.echr.coe.int>; Decision of the ECtHR, *Huc v. Romania and Germany* Application 7269/05, 1 December 2009, paragraph 64, available at <http://hudoc.echr.coe.int>.

50. See ECtHR, *Koufaki*, paragraphs 31, 39, 48; ECtHR, *RSz*, paragraphs 38, 44, 48, 50, 54, 56; ECtHR, *NKM*, paragraphs 37, 49, 55, 59, 61, 65, 67; ECtHR, *Da Conceição Mateus*, paragraphs 22, 23, 28; ECtHR, *Savickas*, paragraph 92.

51. See ECtHR, *Koufaki*, paragraph 31; ECtHR, *Da Conceição Mateus*, paragraphs 25, 29; ECtHR, *Savickas*, paragraphs 92 f.

52. ECtHR, *Da Conceição Mateus*, paragraph 29: "In the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and the temporary effect of the reduction of their holiday and Christmas subsidies, the Court considers that the applicants did not bear a disproportionate and excessive burden."

53. ANDREAS DIMOPOULOS, "Constitutional Review of Austerity Measures in the Eurozone Crisis", 2013, p. 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320234.

3.4. *The role of national law, the national legislator and national courts*

One reason for the different outcome in the cases may also be seen in the legality of the measures under national law. Whilst the Greek Supreme Administrative Court, the Portuguese as well as the Lithuanian Constitutional Courts gave green light to the measures, the Hungarian Constitutional Court viewed them to be unconstitutional. Of course, the ECtHR only applies the Convention and examines whether it has been violated. Nevertheless, it is not an isolated institution but embedded in a bigger network of judicial protection. The fact that supreme national courts consider a very controversial measure such as an austerity measure to be constitutional carries weight – also for the ECtHR. This can be seen in two Eurozone cases, with the ECtHR referring to and adopting the reasoning of the national courts.⁵⁴ By contrast, the fact that the Hungarian measures were unconstitutional did have an impact on the ECtHR's considerations,⁵⁵ although the Court did not find a violation of the Convention due to their violation of Hungarian law.

The above described margin-of-appreciation doctrine cannot be fully understood without looking at how the ECtHR perceives its role with regard to the national legislator. This becomes clear in *Koufaki* where the Court stresses that “the decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, and the margin of appreciation available to the legislature in implementing social and economic policies is a wide one. The Court will thus respect the legislature's judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation (...) In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.”⁵⁶ Moreover, it is not for the ECtHR to assess whether an alternative solution would be better suited to achieve the aim.⁵⁷

3.5. *The role of EU law*

The fact that the contested Greek and Portuguese measures go back to an MoU and, respectively, an economic adjustment programme also seems to have had some influence on the ECtHR's reasoning. In the Greek case, the ECtHR referring to the text of the MoU considered the abolition of the 13th and 14th payments to be proportionate because persons receiving payments below a certain threshold were compensated for.⁵⁸ In the Portuguese case, the Court also

54. ECtHR, *Da Conceição Mateus*, paragraph 25 ; ECtHR, *Koufaki*, paragraph 44: “The Court attaches particular weight to the reasons given by the Supreme Administrative Court which, in its judgment of 20 February 2012, dismissed several arguments to the effect that the measures in question had breached the proportionality principle.”

55. ECtHR, *NKM*, paragraph 53: “The Court cannot overlook the legislative process leading to the enactment of the law affecting the applicant. It observes that the Constitutional Court found, in its first decision (...), the measure unconstitutional for being confiscatory (...).”

56. ECtHR, *Koufaki*, paragraph 39.

57. ECtHR, *Koufaki*, paragraph 48.

58. ECtHR, *Koufaki*, paragraph 47.

quotes the EU's assessment of Portugal's situation in 2011 for pointing out in which difficult situation Portugal had been at that time.⁵⁹ This does not mean that EU law is only used to support the legality of austerity measures under the Convention, for in the Hungarian cases, the Court refers to article 34° CFREU and the ECJ⁶⁰ to underline that severance payments deserve protection. The reference to article 34° CFREU, however, is redundant, for the Court has already considered severance payments to fall under the scope of protection of article 1° of Protocol 1°.

4. Conclusion

It is an irony that the right to property, a fundamental right that has been considered to be a barrier for achieving social justice, now turns out to be a crucial element in defending the receivers of payments by the state against cuts. However, as has been shown by the austerity cases, this does not mean that such payments are safe from reductions. Given their wide margin of appreciation and the strained financial situation of states, restrictions of payments only violate article 1° of Protocol 1° when they are tantamount to a 'disproportionate and excessive burden'⁶¹ or 'individual and excessive burden'⁶². As this criterion suggests, the ECtHR's role is a rather limited one. It has been claimed that the ECtHR does not want to interfere with the consequences of the crisis and that the Convention only offers very limited protection against austerity measures.⁶³ There is a lot of truth to this claim. Even before delivering its rulings in the austerity cases, the Court described its stance towards the crisis in a seminar background paper in early 2013 as follows: "(...) from the Court's perspective, the economic crisis will have little impact on how it assesses the acts and omissions of the public authorities. At the same time, where it is necessary to weigh up the individual interest against that of the community, it may be that the economic situation tips the scales in favour of the community in certain circumstances."⁶⁴ The Court seems to be willing to find a violation by a crisis-driven measure only if this measure endangers "minimum standards"⁶⁵. As can be seen from the austerity cases, such minimum standards are rather low. However, given the international character of the Court and the high political sensitivity of the issue of austerity measures, such measures are, on principle, better decided on by the national legislator and controlled by national courts, for the latter institutions are democratically legitimated by those who are concerned

59. ECtHR, *Da Conceição Mateus*, paragraphs 11 and 25.

60. Judgment of the ECtHR, Case C-499/08 *Andersen v Region Syddanmark*, 12 October 2010, [2010] ECR I-09343, paragraph 29.

61. ECtHR, *Da Conceição Mateus*, paragraph 29.

62. ECtHR, *Koufaki*, paragraph 32; ECtHR *RSz*, paragraph 60; ECtHR, *NKM*, paragraph 72.

64. ECtHR, Implementing the European Convention on Human Rights in times of economic crisis (Seminar Background Paper 25 January 2013), 2013, paragraph 22, available at http://www.echr.coe.int/Documents/Seminar_background_paper_2013_ENG.pdf.

65. ECtHR, Seminar Background Paper, paragraph 24.

by these measures. Nevertheless, we are not living in a perfect world, for these national institutions themselves often act in a difficult situation. What is more, all institutions, both national and international, act in a fog of war. Nobody knows what (fiscal) consequences to expect, if a Court declares a package of austerity measures to be illegal. The ECtHR was undoubtedly aware of this. Thus, the there-is-no-alternative argument somehow has seemed to make its way in the jurisprudences although it is regularly not directly spelled out in the rulings.
