SOCIAL RIGHTS AS TRANSINDIVIDUAL RIGHTS

A LAW AND ETHICS APPROACH TO THE EUROPEAN SOCIAL CRISIS

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To Λευκή, Δημήτρης, Ζωή and Δανιήλ,
for showing me that an eutopia can be

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List of Abbreviations

CESCR	United Nations Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EBA	European Banking Authority
EC	European Commission
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilization Mechanism
EMU	Economic and Monetary Union
ESC	European Social Charter
ESCR	Economic Social and Cultural Rights
ESM	European Stability Mechanism
ESR	Economic and Social Rights
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EU	European Union
GDP	Gross Domestic Product
HRC	United Nations Human Rights Committee
HRIA	Human Rights Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary Fund
MoU	Memorandum of Understanding on Specific Economic Policy Conditionality Program
OECD	Organization for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
OJ	Official Journal of the European Union
OMT	Outright Monetary Transaction
OP-ICESCR	Optional Protocol to the ICESCR
RESC	Revised European Social Charter
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance
UDHR	Universal Declaration of Human Rights
UN	Unite Nations
US	United States

I. INTRODUCTION

"Everything depends on *how* we conceive the *process* of social meaning making." *

Leticia Sabsay

1.1. Framing the Questions and Contours of the Research

Social rights discussion is omnipresent, yet the meaning of social rights remains an enigma.[1] On the international plane, social rights have been lamented for being imbued with cynicism in their historical origins and trajectory.[2] They have been gazed upon with skepticism[3] or discontent for their indeterminate content[4] and clothed with pessimism,[5] and doubt for being merely rhetorical,[6] eventually having been written off as a chapter in a story foretold about human rights history as a *fait accompli*.[7] Despite the prognoses, exclamations or aphorisms in which social rights are enveloped and in spite of the growing attention that recurrent crises continue to spark in their name, "the category of 'social rights' is not clearly defined."[8] Within "the cosmology of rights,"[9] social rights are to be

* Leticia Sabsay, 'Permeable Bodies: Vulnerability, Affective Powers, Hegemony' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 292; emphasis added.

1 András Sajó, 'Social Rights: A Wide Agenda' (2005) 1 (1) European Constitutional Law Review, 42; emphasis added.

2 Cf. Caroline Omari Lichuma, 'In International Law We (Do Not) Trust: The Persistent Rejection of Economic and Social Rights as a Manifestation of Cynicism' in Björnstjern Baade and others (eds), *Cynical International Law?: Abuse and Circumvention in Public International and European Law* (Springer Berlin Heidelberg 2020) 199 et seq., 204, pointing out the cynicism in the wording of the International Covenant on Economic, Social and Cultural Rights, and in the origins and drafting history of the Covenant. Discussing Lichuma's argument, see also Heike Krieger, 'Cynicism as an Analytical Lense for International Law? Concluding Observations' in Björnstjern Baade and others (eds), *Cynical International Law? Abuse and Circumvention in Public International and European Law* (Springer 2020) 356

3 For a criticism of the "gendered social vision" of social and economic rights, underpinning Article 25 of the Universal Declaration of Human Rights (UDHR), see Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) 93, 94, 95

4 Leticia Morales, 'The Discontent of Social and Economic Rights' (2017) 24 (2) Res Publica, 259, 269, 270

5 Cf. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press of Harvard University Press 2018) 212 et seq. and Caroline Omari Lichuma, 'Now is (not yet) the Winter of our Discontent–The Unfulfilled Promise of Economic and Social Rights in the Fight Against Economic Inequality' (*OpinioJuris*, 2019) who urges against 'pessimism' which she detects in the analysis of Moyn concerning social and economic rights within the broader scheme of human rights.

6 Cf. Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 (4) Law and Contemporary Problems, 164, 168

7 Cf. Samuel Moyn, 'The End of Human Rights History' (2016) 233 (1) Past & Present, 322

8 Christina Binder and others, 'Introduction to the Research Handbook on International Law and Social Rights' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) xx

9 Malcolm Langford, 'Introduction: Civil Society and Socio-Economic Rights' in Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2013) 16

found under a fanciful combination of words and concepts. Navigating through legal literature, framings such as 'welfare rights,'[10] 'subsistence rights,'[11]'redistributive rights'[12] or more imaginative appeals to 'biopolitical rights'[13] and ideologically-imbued references to 'solidarity rights'[14] are all used to signify a broad understanding of social rights.

In the cartulary of rights, social rights do not seem to have a clear-cut meaning and scholars embark on various inclusions, divisions and combinations when addressing social rights as a concept and as a category.[15] Broadly speaking and within the bounds of the thesis at hand, 'social rights' as a single category is understood here as encompassing, but not being limited to, the following rights: the right to health care, the right to housing, the right or access to water and sanitation, the right to nutrition, the right to education, and the right to social security and social assistance. In addition, social rights denote labor rights

[10] Cf. Martin P. Golding, 'The Primacy of Welfare Rights' (1984) 1 (2) Social Philosophy & Policy, 23, 24; Mark V. Tushnet, 'Social welfare rights and the forms of judicial review' (2004) 82 (7) Texas Law Review; Evangelia Psychogiopoulou, 'Welfare rights in crisis in Greece: the role of fundamental rights challenges' [2014] (1) European Journal of Social Law; Aoife Nolan, 'Welfare rights in crisis: The case of Ireland' [2014] (1) European Journal of Social Law; Diletta Tega, 'Welfare rights and economic crisis before the Italian Constitutional Court.' [2014] (1) European Journal of Social Law. See also Evan Rosevear, Ran Hirschl and Courtney Jung, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019) 49, where the authors contend that economic and social rights "are typically conceived of as a single category of rights or, increasingly, separated into rights relating to labour regulation and organization, on the one hand, and a collection of general *social welfare guarantees*, on the other."; emphasis added.

[11] Cf. Henry Shue on the differentiation of 'basic rights' and 'subsistence rights' against the backdrop of the United States; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy: 40th Anniversary Edition* (1980 1st edn, Princeton University Press 2020). See also Dean Hartley, *Social Rights and Human Welfare* (Routledge 2015) 83 et seq., 99 et seq.; Danwood Chirwa and Nojeem Amodu, 'Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies' (2021) 6 (1) Business and Human Rights Journal, 28, 29

[12] Cf. Aggelos Stergiou, 'Τα κοινωνικά (αναδιανεμητικά) δικαιώματα ενώπιον της κρίσης. Ο δικαστής ως εγγυητής ενός εύλογου επιπέδου ευημερίας ' (2016) 1 Εφημερίδα Διοικητικού Δικαίου ; Julia Dehm, Ben Golder and Jessica Whyte, 'Introduction: 'Redistributive Human Rights?' Symposium ' (2020) 8 (2) London Review of International Law

[13] Pheng Cheah, 'Second-generation Rights as Biopolitical Rights' in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014)

[14] Cf. Stavroula Ktistaki, 'Η Επίδραση της Οικονομικής Κρίσης στα Κοινωνικά Δικαιώματα ' (2012) 4 (635) Επιθεώρησις Δικαίου Κοινωνικής Ασφάλισης, 482, 490, 491. Manisuli Ssenyonjo notes that SER have neen "associated primarily with the socialist tradition prevalent in early nineteenth-century France and have been framed as 'solidarity' rights with an emphasis on collective rights; see Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 10, 11

[15] From a perspective of the historical lineage of human rights, social rights are commonly included in broader categories and referred to as 'second generation rights.' They are also referred to jointly as 'economic, social and cultural rights' or 'socio-economic rights', or they are invoked in abbreviated forms such as 'ESCR' or 'ESR.' This analysis refrains from using abbreviated versions of social rights or from making use of the phrasings 'welfare rights', 'red rights' or 'second generation rights' and adopts the use of the term 'social rights' for the sake of brevity. The present thesis focuses on social rights. Economic and cultural rights, which are commonly grouped together with social rights, are beyond the scope of this study. Occasionally and when needed for the purposes of the analysis, the term 'socio-economic rights' is used in the text.

as a sub-category, which further breaks down into the right to work, the right to form and join a trade union, the right to strike and the right to collective bargaining.[16]

In the human rights palette, where rights are also distinguished in terms of colors, social rights are the ones to be painted in red. By associating colors with particular ideologies and successively with categories of rights, scholars have critically observed that blue rights tend to "be associated with western liberalism, red rights with socialism or communism, and green rights with third world nationalism, which places emphasis on developmental and environmental priorities."[17] Otherwise stated, social rights are occasionally labeled as 'red rights'[18] due to the fact that they have been historically allied to the political ideology of socialism and "are generally held to derive from socialist ideals of the late nineteenth and early twentieth centuries."[19] Subsequently, due to their socialist provenance, social rights have been closely bound up with the rise of the labor movement and the entrenchment of the social-democratic welfare model in post-war Europe. This socialist streak is significant as it is a recurrent, implicit element in the conceptualization of social rights with which we deal at different parts throughout the study at hand.

Ideological differences aside, the idea of *welfare* seems to be nevertheless crucial. That is because, going past the ideological and historical association of social rights with socialism, the concept of welfare stands as a common denominator in conceptions and interpretations of social rights, regardless of the primacy of any ideology. Looking into human rights literature, for some scholars, welfare is not only a notion that grounds social rights, but is essentially "[t]he *primary* notion that underlies *any* theory of rights."[20]

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[16] Cf. Virginia Mantouvalou, 'In Support of Legalisation' in Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Oxford: Hart Publishing 2011) 91; Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 18, 19, 20. See also James Rooney, 'Judicial Culture and Social Rights: A Comparative Study of How Social Rights Develop Within Common Law Legal Systems' (DPhil Thesis, University of Dublin, Trinity College, Faculty of Arts, Humanities and Social Sciences at Trinity College, School of Law 2021) xxxii, where according to Rooney "[t]he term 'social rights' refers to the collection of rights claims that concern *resources* essential for human existence and basic flourishing."; emphasis added. Dean Hartley distinguishes between two categories of social rights, namely what he phrases as the 'rights to livelihood', which include the 'right to work', the 'right to subsistence' and 'subsistence rights of workers', and the 'rights to human services', which include the 'rights to shelter', 'rights to education', 'rights to health' and 'rights to social care'; plural form as stated in the original. See in particular Hartley 83 et seq., 99 et seq. Rosevear, Hirschl and Jung, divide 'social rights' into three categories: environmental rights, standard social rights and non-standard social rights. 'Standard social rights' are rights to child protection, education, health and social security. 'Non-standard social rights' include the rights to development, food and water, housing and land, and are often described as 'subsidies.'; see Rosevear, Hirschl and Jung 50, 51

[17] John C Mubangizi, 'Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context' 4 (1) African Human Rights Law Journal, 98

[18] Ibid

[19] Cf. Cheah 220, 221, where Cheah notes that because second-generation rights, namely social rights, have expressed "the goals of socialist society, they were championed by Soviet states and enshrined in socialist constitutions," as opposed to the abstract civil and political rights of the individual.

[20] Golding 136; emphasis added.

Narrowing the scope to social rights, several commentators have pointed out that a conventional understanding of such rights and their 'social rights dimension,'[21] anchors them to the core of human rights protection, which further entails the enjoyment of basic needs and ensures a standard of dignified living that is essential for human welfare.[22]

Need, *dignity*, and *welfare* appear to be standard signifiers in the rich and diverse repertoire of concepts with which the notion of social rights has been inextricably blended and through which it developed while fitting into comprehensive social theories of justice.[23] However, and in spite of the seemingly existing consensus on the fundamental notions that give substance to the diptych of social rights, their meaning "remains a mystery."[24] That is because, as it has been observed in theoretical appraisals, in light of "the extremely varied combination of national and international systems of *protection* that are to be taken into consideration in setting the standards applicable to one or another right,"[25] an exact meaning cannot be attributed to social rights. Paradoxically, what appears to be the most puzzling element of social rights and what has allegedly been the "dead-end"[26] of the discussion against the backdrop of the European financial crisis, namely that of their protection and justiciability, seems to be one element that does not provide for the actual meaning of social rights. To expand on that thought, within the contours of this study it is argued that lasting debates over social rights, which resurfaced during the crisis years, have been circumscribed within the limits of the *protection* of social rights and the *role* and *positive obligations* of states, seen through an either liberal or social-democratic lens.

Informed of these debates yet following a different angle, if an overarching question could be singled out, around which this thesis unfolds, this could be the following: How is the 'social' conceived in social rights and how has this been legally exemplified during the crisis and against the austerity backdrop? Or phrased differently: Which socio-ontological and ethical assumptions have informed conceptions of social rights during the crisis and how has the law through its discursive practices theorized such assumptions?

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[21] Binder and others xx, xxi

[22] Cf. Virginia Mantouvalou, 'The Case for Social Rights' April 2010 Georgetown University Law Center, Georgetown Public Law Research Paper No 10-18 3; Binder and others xx, xxi; Matthias Goldmann, 'Financial institutions and Social rights: From the Washington Consensus to the Lagarde Concord?' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 440

[23] See for instance Frank I. Michelman, 'Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 (1) Harvard Law Review, 13 et seq.

[24] Sajó 42; emphasis added.

[25] Ibid; emphasis added.

[26] Cf. Akritas Kaidatzis, 'Υπάρχουν κοινωνικά δικαιώματα στην εποχή των μνημονίων; [transl. Do social rights exist during the times of the Memoranda?]' Athens, 9-10.6.2017 Keynote Speech at the Constitutional Law Association's 'Aristovoulos Manesis' Conference 'What type of Constitution for the Next Day?' 4, 12

Mindful of the above, the study suggests that a limited state-centered approach to social rights with an outlook strictly oriented to matters of political economy and doctrinal issues of protection, can result in the disappearance of the 'social' as a prefix to 'rights.'[27] Put differently, an exhaustive preoccupation of scholarship with rights neglects questions on "our social nature,"[28] while the discussion remains mired in an impasse of political economy and governance explanations that do not reflect upon existing issues of the ontological and ethical assumptions that inhibit our understanding of social rights.

Contrary to such perspective, the thesis at hand focuses on the 'social' element in the 'social rights' lexicon and submits that this is a highly legally relevant area of reflection, as is the case with 'rights.' In addressing the concept of the 'social', the analysis works with the underlying ideas of *relationality* and *process* that inform notions of *sociality* and which further ground conceptions of social rights. In this connection, the study builds on two main arches and three central assumptions. Concerning the epistemological axes, one is social ontology and the other is ethics, while the former is taken to inform the latter.

In the shortest possible summary,[29] *social ontology*, I submit here, is about the process of the formation of being. This includes the process of individuation as a process on its own accord, together with the ways in which we as beings, being individuated, conceive this process, ascribe meaning to this process and sequentially make meaning of this process for the society as well as the way in which we relate to society. Implicit in this formulation is the question of human nature as a question that is not only preoccupied with the concept of individuality but essentially with the concept of sociality. In turn, I contend that these concepts provide the foundation of an ontological structure of a given social theory and consequentially determine conceptions and legal formulations of social rights. Thus, my suggestion is that certain ontological premises on the social nature of human existence shape the most basic assumptions upon which social theories are constructed[30] and encourage certain interpretations of social rights in legal terms.

Moving to *ethics*, this study makes a distinction between ethics and morals. This is not to suggest that the research subscribes or engages with the common distinction

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[27] Here, I draw inspiration from the analysis on social movements by Christos Boukalas, 'Politics as Legal Action/Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering' (2013) 22 (3) Social & Legal Studies, 399

[28] On that point, see Carol C. Gould, 'A Social Ontology of Human Rights' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 177

[29] For a more thorough engagement with the term and its content, see Part V. Chapter 10.2. Social *qua* Relational: The Question of Social Ontology.

[30] Cf. Roberto Frega, 'The Social Ontology of Democracy' (2018) 4 (2) Journal of Social Ontology, 158

between 'legal rights' and 'moral rights' that is reproduced in legal commentaries.[31] The question of ethics and morals is far from an uncomplicated one, and this study does not purport to provide definite answers. At the same time, it appears that the terms are often treated indiscriminately, as if they were synonymous and that arguments about their difference in meaning "can be dismissed as mere pedantry."[32] In spite of such tendency, it is taken here that a differentiation between these two notions is significant for reasons not only of categorization but essentially of thinking that precedes categorization.

In theoretical appraisals, ethics is taken "as promoting substantive ends of self-realization and the good life,"[33] while morality pertains to issues of what is right or wrong in procedural terms.[34] Other scholars contend that ethics is about what is *right* at the level of reasoning, while morality is about what is *acceptable* at the level of judgment.[35] Elsewhere, we read that morality is concerned "with what human beings, as individuals or groups, *owe* to other human beings."[36] In this regard, morals consists in the set of standards, which "before the *tribunal of conscience*,"[37] either place "restrictions on our – often *self-interested* – conduct in order to pay proper tribute to the standing and interests of others,"[38] or place restrictions on others with respect to one's own self-interest, which cannot be intruded upon without justification.[39] Despite the variations, it could be said that ethics, morality or morals in the liberal script are commonly understood at the level of conduct, as a series of actions that are motivated by personal morality, indebtedness, and deontology as self-righteousness, and which in any case are grounded in self-interest. Critically, this acknowledgement of self-interest as the nature of being and social reality constitutes an ontological commitment.

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[31] Cf. Massimo Renzo, 'Human Rights and the Priority of the Moral' (2015) 32 (1) Social Philosophy & Policy; Jeff King, 'Social rights and welfare reform in times of economic crisis' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018) 215; Rowan Cruft, S. Matthew Liao and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015). On international legal norms being distinct from moral norms, see the critique at Samantha Besson and John Tasioulas, 'Introduction' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 10

[32] Hartley 32

[33] Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition?: A Political-philosophical Exchange* (Verso 2003) 10

[34] Ibid

[35] Hartley 44

[36] Besson and Tasioulas 13

[37] Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (Norton 1999) 16

[38] Besson and Tasioulas 13

[39] Holmes and Sunstein 16

Going past such an understanding of ethics, this study broadly considers ethics as the epistemology that organizes and shapes the basic ontological constituents of a given social theory, namely as providing the ontological structure of such theory. Put differently, I take here that ethics is to social ontology what social ontology is to method. Suppose social ontology *constitutes* the process of assuming, understanding and conceptually realizing relations and social reality, then method *organizes* the apprehension of those assumptions and *shapes* our vision of social reality.[40]

Drawing on the tenets of social ontology and ethics, as understood above, the analysis operates on three underlying hypotheses: *first*, I consider that prevailing ontological assumptions, which transpire mainstream theories of social rights, rely mainly on an either rationalist Kantian morality or a liberal contractualist tradition and utilitarian ethics.[41] *Second*, already existing theoretical analyses on rights point out that liberal as well as social welfarist concepts of rights share an either "radically *pre-social* notion of autonomy as a property of isolated and centered actors"[42] and "asocial sociality"[43] or neglect social nature overall and are grounded upon a "putative *asociality*."[44] Placing myself among those who favor such an explanation, I submit that sociality is not reflected upon or scrutinized in assessments or conceptualizations of social rights and that the idea of the individual is uncritically accepted as a limited and always negatively defined entity, understood from a place of negativity, exteriority and separation. *Third*, I assume that, whether coming from a liberal or a social welfarist standpoint, these approaches presuppose an ontology of social relationality that is based on an intersubjective model among already constituted, fully formed, self-enclosed individuals, which in turn fails to address the element of sociality in the social rights equation as part of the process of individuation.

Taking all the above into consideration, the study here coincides with a vibrant strand of literature on social ontology and rights that emphasizes the following: Every social theory, whether it espouses a liberal understanding of the priority of the individual or a social welfarist predilection for institutional structures of societal organization, has an

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[40] Cf. Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 (3) Signs, 527; Carol C. Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press 2004) 4; Frega 159

[41] Virginia Held contends that these three theories are the ones to have dominated the foundations of human rights in general; see Virginia Held, 'Care and Human Rights ' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 629, 634

[42] Günter Frankenberg, 'Why Care - The Trouble with Social Rights ' (1995) 17 (Issues 4-5) Cardozo Law Review, 1381, 1382; emphasis added.

[43] Murray and Schuler refer on the 'asocial sociality' of commercial life in capitalist societies; see Patrick Murray and Jeanne Schuler, 'Social Form and the 'Purely Social': On the Kind of Sociality Involved in Value' in Dan Krier and Mark P. Worrell (eds), *The Social Ontology of Capitalism* (Palgrave Macmillan 2017) 124

[44] Gould, 'A Social Ontology of Human Rights' 177

ontological commitment to the way it conceives social relations, whether the conditions of its validity and theoretical implications are examined or not, and whether they are recognized and spelled out or not.[45]

In this regard, the study takes that theorizing social rights is axiomatically ontological and ethical. The claim here is that rights presuppose an idea and form of relationality as well as an acknowledgement and articulation of that form and therefore an argument for such rights can be made on the grounds of relationality. To that end, the analysis turns to the concepts of vulnerability, relational ontology and transindividuality. In assessing these concepts, the research proceeds in two ways. *First*, it examines how liberal thought endorses the centrality of the individual and sustains the opposition between individual and society. *Second*, it looks at the idea of intersubjectivity and the opposition of individual versus the state in social welfarist approaches. In light of the above, the research proceeds by juxtaposing liberal and social welfarist approaches to social relationality and explores whether these share a pre-social notion of individuality that remains fixated on a conception of the individual, as a negative, pre-defined, static, entity.

Following on from that, my suggestion is that social rights are not founded on need or dependency, nor on self-interest or self-reliance, but are rooted on the concept of relationality. Put simply, this thesis makes the claim that *relationality* begets social rights. Connected to that, it makes a tentative proposal for transindividuality as an ontology of relations that recognizes the mutually constitutive, collective and individual basis of being. A promising application of this is that transindividuality can provide a fruitful theoretical framework for conceptualizing the relationship between the individual and the social. Understood under this prism, social rights could be conceived as having an individual and collective dimension on the basis of relationality. At the heart of the analysis is an attempt to deploy the idea of transindividuality in an effort to conceptualize social rights by unbinding the notion of 'social' from a merely distributional demand imposed on others or on the state or from the utilitarian bias of an individualistic model of rights.

In exploring relationality and the ways in which social rights are conceptualized and have been conceptualized during the crisis, a common thread that runs through the thesis is the idea of *process*. Linked to that, the present study does not understand law as a simple codification of rules, which are static and atemporal, nor does it take "the nature of

[45] Cf. Frega 158, 159; Gould, *Globalizing Democracy and Human Rights* 32

law" to be merely "a social institution."[46] Instead this research takes law as an all-encompassing social phenomenon[47] that reflects on underlying ethical and ontological presuppositions upon which legal rules and practices are grounded yet processed and developed overtime. For this reason, this thesis gives serious consideration to explanations and devotes a considerable part of the analysis to exploring and scrutinizing definitions, such as that of crisis, austerity, justiciability before applying these on the social rights discourse. More closely, an engagement with the concepts of judicial activism and cause lawyering as part of the discussion on the role of courts and lawyers, before applying those concepts in the social rights discourse, is deemed essential. That is because tracing definitions and meanings is considered here to provide insights into *ethicism*, that is, in the application of ethical assumptions, and in *behavioralism*, meaning how "actors actually behave"[48] in real life circumstances and how social meaning is made in this process. In a similar vein, the study engages in depth with relevant debates as these develop around social rights. That is because the present author echoes the conviction that "arguments about rights are inherently arguments about social values."[49]

In all respects, the reader should keep in mind that the use of 'realization' throughout the analysis refers to the conceptual realization of rights at the level of self-realization. That is to say, it does not refer to the commonly implied protection standard of 'progressive realization' as part of the positive obligations of states under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[50] Meaning, realization in the present thesis does not automatically betoken how states realize their obligation to undertake steps to progressively achieve the protection of economic and social rights according to the capacity of their available resources.[51]

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[46] Cf. Stefano Civitarese Matteucci and Simon Halliday, 'Social rights, the Welfare State and European austerity' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018) 7

[47] Cf. Outi Korhonen, 'From interdisciplinary to x-disciplinary methodology of international law' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar 2021) 352; Stephen Riley, 'The philosophy of international law' in Rossana Deplano and Nikolaos K. Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021) 394

[48] Cf. Anne van Aaken and Tomer Broude, 'The Psychology of International Law: An Introduction' (2019) 30 (4) European Journal of International Law, 1227

[49] Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 (1) West European Politics, 83

[50] ICESCR Article 2 para 1, reads as follows: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the *maximum* of its *available resources*, with a view to achieving *progressively* the full *realization* of the rights recognized in the present Covenant by all *appropriate* means, including particularly the adoption of legislative measures."; emphasis added.

[51] Cf. Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 (2) Human Rights Quarterly, 183 et seq.

Building on that last remark, social rights are considered not to be "interpreted or implemented in an institutional, ideological, or political vacuum,"[52] but to rather have a meaning that is the culmination of historical, political and ideological conditions.[53] With that in mind, part of the literature that the thesis engages with, especially with respect to the examined austerity measures, presupposes or directly calls out neoliberalism as an ideology and political project. Neoliberalism is certainly an amorphous, slippery term, which has been defined from a set of domestic and international policies to an intellectual movement and a cultural regime[54] or "as social democracy's philosophical antithesis."[55] Strictly speaking, neoliberalism is said to be a policy paradigm that employs certain strategies and sets particular objectives. In outline,[56] these are taken to include the shrinkage of state intervention, the privatization of welfare state services, the deregulation of labor, the minimizing of taxation, regulation, and state provision and the promotion of technocracy, free trade and open markets.[57] In critical appraisals of neoliberalism, this is not held to be simply a mode of organization or policy, but it is understood as a rationality and a mercantilist process that infiltrates social relations, extends to all fields of existence and thus reinterprets political concepts such as that of social rights.[58] Consistent with the thematic and angle of the thesis at hand, the neoliberal human rights enterprise is understood within the bounds of this undertaking as a fully-fledged project that is in itself "moral and political, rather than strictly economic."[59]

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[52] Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 (4) The American Journal of Comparative Law, 1089

[53] Cf. Lina Papadopoulou, 'Η κανονιστικότητα και εκδικασιμότητα των κοινωνικών δικαιωμάτων, και ταυτόχρονα μία συνηγορία υπέρ του status mixtus των δικαιωμάτων ' [2020] 3-4 Το Σύνταγμα 930

[54] Martha Albertson Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' in Robin West and Cynthia G. Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing 2019) 73; emphasis added

[55] Colm O'Cinneide, 'The Constitutionalization of Social and Economic Rights' in Helena Alviar García, Karl E. Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2015) 265

[56] For an analysis of austerity and neoliberalism, see also Part III. Chapter 3.1. Defining Austerity.

[57] Cf. Peter Taylor-Gooby, Benjamin Leruth and Heejung Chung, 'The Context: How European Welfare States Have Responded to Post-Industrialism, Ageing Populations, and Populist Nationalism' in Peter Taylor-Gooby, Benjamin Leruth and Heejung Chung (eds), *After Austerity: Welfare State Transformation in Europe after the Great Recession* (Oxford University Press 2017) 11; Luke Mergner, 'The Demons of Neoliberalism: Adam Kotsko's Political Theology ' (*Public Seminar Blog*, 2019); Martha Albertson Fineman, 'Vulnerability and Social Justice' (2019) 53 (2) Valparaiso University Law Review, 347

[58] Cf. Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 73; Fernando Atria and Constanza Salgado, 'Social Rights' in Emilios A. Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 363, 367

[59] Whyte 16; Whyte historically documents and critically assesses the centrality of morals in the neoliberal project and the parallel trajectory of neoliberalism with human rights. See also Jessica Whyte, 'Human Rights and the Collateral Damage of Neoliberalism' (2017) 20 (1) Theory & Event, 143 et seq.

1.2. Case Studies and Case Selection

i. Selection of Focus Countries

This thesis focuses on the countries of Greece and Portugal, set against the backdrop of Europe, the European South, and their national context, taken together and approached separately in their particularities. A few questions that might spontaneously arise from such selection are why these countries? And why compare them to each other? Another issue that calls for clarification is what is meant here by the appeal to the amorphous and highly nuanced notion of Europe and South Europe, more specifically.

Starting from the last point for discussion and taking our inspiration from a similar line of questioning raised by Georg Nolte and Helmut Aust, what is understood by 'Europe' in this undertaking "is not limited to the instances in which the European Union 'speaks with one voice' on the world stage."[60] Europe in the present study does not stand as a synonym for the European Union. It does not limit itself to an understanding of Europe as a monetary union or a supranational union of sovereign states, with "sovereignty, however defined."[61] Rather this notion encompasses "the accumulated *structures* and identity-forming *experiences*, and perhaps even the style in which 'Europe' acts or 'Europeans' *interact* with each other and with others."[62] Stated differently, Europe is understood here as comprising of not only state or supra-state structures and institutions but essentially as environing interactions, lived experiences and processes of social realization within the geographical limits of the European continent and the historical and cultural idiosyncrasies which are encountered and have morphed in it. Appeals to Europe do not signify a single, coherent and concise legal order. The latter is relevant for this study, because whenever Europe is invoked, this alludes to the multi-layered human rights architecture that compiles the European Union, the Council of Europe, and the human rights treaties which bind the contracting member states.

In narrowing the scope, the examined states are positioned within an arrangement of countries,[63] commonly referred to as Southern Europe. This formulation does not simply stand for a geographical distinction. Instead, what is implied by 'Southern Europe'

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[60] Georg Nolte and Helmut Philipp Aust, 'European Exceptionalism?' (2013) 2 (3) Global Constitutionalism, 411; Georg Nolte and Helmut Aust make these arguments while examining the notion of 'Europe' and 'Europeanness' and while juxtaposing the use of term 'European exceptionalism' against the notion of 'American exceptionalism.'

[61] Here, I borrow this phrasing in its skepticism from Tomer Broude, 'Deontology, Functionality, and Scope in The Sovereignty of Human Rights' (2017) 15 (1) Jerusalem Review of Legal Studies, 121

[62] Nolte and Aust 411; emphasis added.

[63] The terms 'country' and 'state' are used here interchangeably.

or the 'European South' draws on a more considerable analogy, similar to the critical use of 'Global South,' which we usually encounter in international law analyses. 'Global South' in this vein, "does not refer to one place but connotes a sensibility to questions of marginalization and exclusion,"[64] and raises further issues of social justice that can ensue in all places across different regions. In a similar spirit, the use of 'European South' in this study does not strictly connote a geographical part of the world or a signifier of sovereign states, but rather stands as a spatial and temporal cartography of relations, economic and social disparities and resource flows, which invoke a collective lived materiality and experience mediated through, but not exhausted in, state and non-state institutional structures and interactions.

Moving along to Greece and Portugal as the selected focus countries of this thesis, few explanations for this preference are in order. At the onset of the crisis and long after that, a major theme of successive governments in Portugal has been "to distance the ailing situation of the country from that of Greece."[65] In this regard, politicians have depicted the two economies as being different in their competitive outlook, the media has set the national apex courts against one another and people have found themselves in the center of a political vortex in which differences have been instrumentalized and accentuated and legal and social confusion has been heightened.[66] However, the historical and political reality has been quite different and the similarities between these two countries have been more than their differences, especially with respect to the question of social rights.

Certainly, Greece and Portugal are by now quite well-known and internationally discussed case studies concerning the austerity impact on social rights. Human rights commentators have already underlined this fact and stressed that even though other national courts in Europe have dealt with social rights concerns in relation to austerity reforms, these have been nonetheless less commonly featured.[67] This observation holds true, and it would be a point to mull over if the comparison element to this thesis was restricted into describing and laying out the reforms and judicial developments that took place during the financial crisis years across different countries.[68] However, the selection

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[64] Philipp Dann, 'The Global South in Comparative Constitutional Law' (*VerfBlog*, 2017)
[65] Cf. Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone too Far?* (Cambridge University Press 2014) 352
[66] Ibid 352, 353, 358
[67] Ulrich Becker, 'Introduction' in Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2020) 22, 23
[68] Cf. George Gerapetritis, *New Economic Constitutionalism in Europe*, vol 27 (Hart 2019). For a country-based report on the legal status, implementation and constitutional challenges to the financial crisis in all 27 member states of the European Union, see *Constitutional Change through Euro-Crisis Law*, run by the European University Institute from 2013 to 2015; https://eurocrisislaw.eui.eu/ <last accessed 12.08.2021>

of Greece and Portugal is not made here as part of a comparative mapping exercise of the austerity reforms in financially assisted countries in Europe. Greece and Portugal are rather chosen for a variety of other reasons that surpass that of a mere description and documentation of the legal replies to the austerity measures.

Setting Greece against the broader global background, it has been observed in scholarship that the management of the debt crisis exhibited "some striking underlying similarities to the management of previous debt crises in the Global South."[69] Bringing the comparison to Europe, the economic malaise of Greece has also been suggested to manifest "remarkable similarities with the Hungarian experience"[70] of financial assistance schemes agreed with international financial institutions in the late 1980s. That is to say, Hungary has been the trailblazer among former socialist countries in Central and Eastern Europe during the market reforms and gradual liberalizing of their economies in the late 1980s.[71] In a similar vein, Greece and Portugal, have been the first countries in Southern Europe to have agreed to external lending solutions which were conditional upon massive austerity reforms aiming at the liberalization and privatization of their economies in the late 2010s.[72] In this connection, these two states have been the frontrunners in developments that pertained to broader questions of transformation of the South European social welfare model and the relation of such model with the protection and understanding of social rights.

Drawing on this last remark, two clarifications are deemed helpful at this point. The *first* one concerns the meaning of the welfare state in the present study.[73] As a working definition that runs throughout the analysis, the social welfare state is understood as a political version of the social democratic state that has a strong dignitarian and internal

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[69] Jerome Roos, *Why Not Default?: The Political Economy of Sovereign Debt* (Princeton University Press 2019) 272. See also Bonaventure Soh Bejeng Ndikung, 'Introduction to A United Front Against the Debt by Thomas Sankara' (*South Magazine#6 [Documenta 14#1] Documenta 14 April 8–September 17, 2017, Athens, Greece and Kassel, Germany*, 2015), where Soh Bejeng Ndikung, notes: "The moments of déjà vu for me and others became all the more striking for the remarkable fact that, in the heat of the debates on Greek debt and the crisis in general, very few 'specialists' were savvy enough to make the African connection, or were willing to do so." Soh Bejeng Ndikung draws attention in this regard to the similarities of the Greek debt crisis and austerity-led financial assistance packages in the African history of indebtedness during the 1980s.

[70] On that observation, see the analysis at Akritas Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021) 288.

[71] Akos Valentinyi, 'The Hungarian crisis' (*VoxEu - CEPR Research-based policy analysis and commentary from leading economists*, 2012)

[72] For a detailed analysis of austerity as a social policy strategy, see Part III. Chapter 3.1. Defining Austerity.

[73] For an overview of the different categories and their characteristics of "ten ideal-typical welfare regimes" identified in theory, that is, ideal-types of welfare state systems, namely "the *Social Democratic Model*, the *Christian Democratic Model*, the *Neoliberal Model*, the *Pro-Welfare Conservative Model*, the *Anti-Welfare Conservative Model* […]," among others, see Christian Aspalter, 'Real-typical and Ideal-typical Methods in Comparative Social Policy' in Bent Greve (ed), *Routledge Handbook of the Welfare State* (2nd edn, Routledge 2019) 323, 324

material distribution element attached to it, in the sense that it presupposes a community of people, who are bound by social citizenship and are collectively committed to redistribute common goods and public funds with each other.[74] In broad strokes, the latter translates in that a social democratic welfare state is publicly funded and financed primarily through taxation, while it provides adequate surveillance, monitoring and regulation of the market, and effectively controls employment opportunities and social resources such as property.[75] Moreover, a social welfare state not only provides the minimum *conditions* for a dignified life, but essentially secures the provision *of* and equal access *to* services for all people, regardless of need.[76]

A *second* exposition concerns the model and inclusion of the welfare system as this has been morphed in the targeted countries of Greece and Portugal. In this connection, even though standard scholarly testimonials to the welfare model refer indiscriminately to a post-war, continental, European welfare regime, varieties within that regime exist and have been of importance, especially when held against the backdrop of austerity and the crisis. To be more exact, as it has been stressed in literature, "there is little doubt that, in the early 1990s, at the precise moment that the literature on the welfare state was endorsing the threefold partition of the worlds of welfare into the 'Anglo-Saxon', 'Scandinavian' and 'Continental' varieties,"[77] Greece, Portugal, Spain and Italy "were reaching their peak of *commonality*, supporting the claim that there was a fourth regime that had been unduly ignored by mainstream research."[78] Even though Southern countries followed distinctive reform pathways in the decades of the 1990s and 2000s,[79] at the same time they have also displayed significant similarities in their internal processes of change and in the designing

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[74] Cf. Grete Brochmann and Erik Jon Dølvik, 'The welfare state and international migration: The European challenge' in Bent Greve (ed), *Routledge Handbook of the Welfare State* (2nd edn, Routledge 2019) 510

[75] Cf. Heike Krieger, 'The Protective Function of the State in the United States and Europe: A Right to State Protection? – Comment' in Nolte Georg (ed), *European and US Constitutionalism* (Cambridge University Press 2005) 193. See also Mirjam Katzin, 'Freedom of Choice Over Equality as Objective for the Swedish Welfare State? The Latest Debate On Choice in Education' in Martha Fineman, Ulrika Andersson and Titti Mattsson (eds), *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective* (Routledge 2017) 166, 167, where Katzin makes mention of "welfare state universalism" and in her version of such universalism, singles out as common and significant factors of such model the following ones: "(1) Equal access to services, regardless of need; (2) Equal treatment; (3) Equal quality throughout the system; (4) High quality, at a level where it is deemed attractive to most citizens; (5) Based on social rights rather than voluntary commitments; (6) Publicly funded and financed primarily through taxation."

[76] Cf. András Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court' in Roberto Gargarella, Theunis Roux and Pilar Domingo (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Routledge 2006) 90, 91. Katzin 166, 167

[77] Pau Marí-Klose and Francisco Javier Moreno-Fuentes, 'The Southern European Welfare model in the post-industrial order' (2013) 15 (4) European Societies, 476

[78] Ibid; emphasis added.

[79] Ibid; Maria Petmesidou, 'Southern Europe' in Bent Greve (ed), *Routledge Handbook of the Welfare State* (2nd edn, Routledge 2019) 173

of their justice and governance models, which has resulted in them forming a *hybrid* Mediterranean or Southern European welfare system.[80]

Building on this model, which has steadily been either overlooked or rejected overall,[81] I find that Greece and Portugal display a series of common features and particularities that are crucial for the analysis here and which have gone unquestioned in interdisciplinary legal analyses of the crisis and social rights. These common characteristics and affinities could be summarized as follows: *First*, both Greece and Portugal are characterized at the level of governance by heightened centralism and strong statist elements, while at the level of culture, they manifest shared cultural traits and an emphasis on familialism as opposed to individualism.[82] This familistic ethos has traditionally translated in the extensive role granted to the family and to the 'male breadwinner model,'[83] which has been sustained by the social doctrine of the Catholic and Greek Orthodox Church in Portugal and Greece respectively.[84]

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[80] Cf. Marí-Klose and Moreno-Fuentes 475, 476 et seq.;Petmesidou 163 et seq.; Alejandro Quiroga and Helen Graham, 'After the Fear was Over? What Came After Dictatorships in Spain, Greece, and Portugal' in Dan Stone (ed), *The Oxford Handbook of Postwar European History*, vol 1 (Oxford University Press 2012) 502, where 'change' implies the transition from rural to urban living and from an agrarian to an industrial economy.

[81] In the field of comparative welfare state research, the typology that is widely accepted is the one that Gøsta Esping-Andersen has developed; see Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990). According to this typology, there are three welfare models which are further distinguished between the 'liberal Anglo-Saxon,' the 'conservative continental' and the 'social democratic Scandinavian,' whereas the inclusion of a fourth 'Mediterranean welfare model' has been dismissed for being "too small to be considered germane"; see Kees van Kersbergen, 'What are welfare state typologies and how are they useful, if at all?' in Bent Greve (ed), *Routledge Handbook of the Welfare State* (2nd edn, Routledge 2019) 121. A discussion of this debate lays beyond the scope of this study. For the purposes of this thesis, the Southern European countries of Portugal, Spain, Italy and Greece are considered to assemble a distinct welfare model; see Marí-Klose and Moreno-Fuentes 475, 476 et seq.; Petmesidou 163 et seq. The thesis stands closer to what Diamond observes, namely that welfare states are "the unique product of the ideological traditions and institutional structures of a given polity and society"; see Patrick Diamond, 'Globalisation and welfare states' in Bent Greve (ed), *Routledge Handbook of the Welfare State* (2nd edn, Routledge 2019) 341

[82] Kersbergen 121; Petmesidou 173; Christian Aspalter, 'Ten ideal-typical worlds of welfare regimes and their regime characteristics' in Bent Greve (ed), *Routledge Handbook of the Welfare State* (2nd edn, Routledge 2019) 304; Brochmann and Dølvik 511; Sotirios Zartaloudis, 'The Impact of the Fiscal Crisis on Greek and Portuguese Welfare States: Retrenchment before the Catch-up?' (2014) 48 (4) Social Policy & Administration, 433; Marí-Klose and Moreno-Fuentes 476, 490; José M. Magone, *Portugal: Local Democracy in a Small Centralized Republic*, vol 1 (Oxford University Press 2010) 385. Hlepas and Getimis argue that Greece is "the most centralist state in Europe"; see Nikos Hlepas and Panagiotis Getimis, 'Greece: A Case of Fragmented Centralism and 'Behind the Scenes' Localism' in Frank Hendriks, Anders Lidström and John Loughlin (eds), *The Oxford Handbook of Local and Regional Democracy in Europe*, vol 1 (Oxford University Press 2010) 411

[83] On the 'male breadwinner model' see also the analysis in Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* 95

[84] Cf. Kersbergen 121; Petmesidou 173; Brochmann and Dølvik 511; Marí-Klose and Moreno-Fuentes 479. Paschalis Kitromilides remarks that influential religious brotherhoods of the Greek Orthodox Church have cultivated a conservative ideology and value system, which culminated in the well-known slogan in the Greek society "Motherland-Religion-Family," and have used this "as a bulwark against social change and as a means of instilling pietism, puritanism, discipline, and docility to ward entrenched forms of inequality in Greek society"; see Paschalis M. Kitromilides, 'Church, State, and Hellenism ' in Kevin Featherstone and A. Dimitri Sotiropoulos (eds), *The Oxford Handbook of Modern Greek Politics* (Oxford University Press 2020) 94

Second, contrary to the mature welfare states of Central and Northern Europe, whose pension and social benefit systems fully developed in the 1980s,[85] the trajectory to welfare expansion for both Greece and Portugal has been anomalous and delayed, while social expenditure only started to increase after the restoration of their democracies at an initially slow pace that intensified during the 1990s.[86] The transition from authoritarian regimes to democratic forms of government that has been historically described as the 'third wave' of democratic transitions "began with the Portuguese coup d' état by leftist pro-democracy officers in 1974, an event that coincided with the end of the authoritarian military regime in Greece in the same year."[87] The parallel political plights and struggles of these countries has been another distinctive feature that prompted some scholars to classify them, while configuring the welfare state, as "ex-dictatorship countries,"[88] and to pinpoint a distinct post-dictatorship welfare state tradition.[89] Chronologically, another pivotal moment in the modern history of both Republics was their entry into the then European Communities and now European Union, which took place with a time lag of just few years between the two nations, in 1981 for Greece and in 1986 for Portugal.[90]

Singling out and highlighting these commonalities is more than a chronological matter, however. The democratic transition has been particularly important for the ways in which social rights have largely come to be conceptualized, realized and disputed in the countries in question, leading up to the years of the fiscal and debt crisis. In Portugal, following the socialist *Carnation Revolution (Revolução dos Cravos)* that led to the fall of the dictatorship and to democratization after 1974, the country has inherited one of the most powerful Constitutions in Europe when it comes to the protection of social rights.[91] Including as many as twenty-nine articles covering a wide range of social issues,

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85 Cf. Lyle Scruggs, 'Welfare state generosity across space and time' in Jochen Clasen and Nico A. Siegel (eds), *Investigating Welfare State Change: The 'Dependent Variable Problem' in Comparative Analysis* (Edward Elgar 2007) 147

86 Cf. Diamond 341. Differently to such an account, Petmesidou contends that social expenditure has increased at a fast rate in the late 1970s and most of the 1980s due to extensive social pressures around unmet needs, serious inequalities, social welfare imbalances, and significant functional and administrative inefficiencies; see Petmesidou 167

87 Ebrahim Afsah, 'Guides and guardians: judiciaries in times of transition' in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing 2016) 255, 256

88 Vicente Navarro, John Schmitt and Javier Astudillo, 'Is globalisation undermining the welfare state?' (2004) 28 (1) Cambridge Journal of Economics, 136

89 See Diamond 341; Diamond refers to a 'dictatorial' model with respect to Greece, Portugal, Spain, Italy. I take that 'post-dictatorship' might be a more suitable term.

90 Afsah 265

91 Cf. Christina Akrivopoulou, 'Striking Down Austerity Measures: Crisis Jurisprudence in Europe' (*International Journal of Constitutional Law Blog*, 2013). For a historical comparative perspective between Greece, Spain and Portugal and the Carnation Revolution, see also Quiroga and Graham 514;

from labor law and access to education to public health and intergenerational rights, this thorough catalog of social rights in the Portuguese Constitution stood as the symbolic commitment to social security expansion[92] and as a historical marker of what has come to be known in Portugal "as the 'conquests' of the Revolution of 25 April 1974,"[93] while it made Portugal stand out of the rest of the countries in the European Union, "for its constitutional pre-commitment to social and economic rights."[94]

In a similar spirit, in Greece, following the overthrow of the autocratic *Regime of the Colonels* or *Greek junta* in 1974[95] and the establishment of the liberal democracy of the *Third Hellenic Republic* that extends up to this date, social rights have been established in public conscience not "as discretionary conveniences that the Constitution provides to individuals"[96] but as "institutional guarantees based on the *protective intervention* of the state."[97] This protective and intervening character of the state has determined the way that social rights have been theorized during the crisis and the manner in which 'social' stood as a synonym for social guarantees ensured by the Greek "welfare state rule of law."[98]

In the so-called *Metapolitefsi (Μεταπολίτευση)* period, that is, the post-transition era which followed the end of the military dictatorship in Greece (1967-1974) and the restoration of democracy, social struggles and victories which resulted in the constitutional vesting of social rights formed the concept of the national 'social acquis.' This concept has been elevated to one of the main manifestations of the protective function of the welfare state that continued to dominate the discourse up until, during and after the crisis. In this framework, the 'social acquis' stood at a theoretical and practical level as a hallmark of

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[92] Cf. on the commitment to social security expansion in the beginning of the 1980s, see also the analysis at Matthieu Leimgruber, 'The Embattled Standard-bearer of Social Insurance and Its Challenger: The ILO, The OECD and the 'Crisis of the Welfare State', 1975–1985' in Sandrine Kott (ed), *Globalizing Social Rights: The International Labour Organization and Beyond* (Palgrave Macmillan 2013) 294, 295

[93] Joshua Aizenman and Brian Pinto, *Managing Economic Volatility and Crises: A Practitioner's Guide* (Joshua Aizenman and Brian Pinto eds, Cambridge University Press 2005) 10

[94] Monica Brito Vieira and Filipe Carreira da Silva, 'Getting rights right: Explaining social rights constitutionalization in revolutionary Portugal' (2013) 11 (4) International Journal of Constitutional Law, 898. Cécile Fabre while comparing social rights protection in European constitutions, notes that whereas Germany, United Kingdom and Austria "are silent on social rights, at the other end of the scale, the Portuguese Constitution is *very detailed*, without falling into the trap of being *too specific*"; emphasis added, see Cécile Fabre, 'Social Rights in European Constitutions' in Gráinne de Búrca, Bruno de Witte and Larissa Ogertschnig (eds), *Social Rights in Europe* (Oxford University Press 2005) 18

[95] For a critical overview of the history of the modern Greek state, see Stathis N. Kalyvas, 'The Developmental Trajectory of the Greek State' in Kevin Featherstone and A. Dimitri Sotiropoulos (eds), *The Oxford Handbook of Modern Greek Politics* (Oxford University Press 2020) 27 et seq., 28

[96] Ifigeneia Kamtsidou, 'Η «επικλησιμότητα» των κοινωνικών δικαιωμάτων και η τριπλή υποχρέωση του κράτους για την προστασία τους' (2019) 5 (31) Διοικητική Δίκη, 3

[97] Ibid; emphasis added.

[98] The Constitution of Greece 1975 (rev. 2008) Article 25 para 1, reads as follows "The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. […]"

already established social entitlements and as a bulwark against any, even partial, restriction of the content of social standards and achievements.[99]

Crucially, both Portugal and Greece, as they underwent democratization and during the early period of globalization, were governed for most of the interval between 1980 and 2000 by social democratic parties.[100] This leads us to a *third* common aspect between Greece and Portugal and its significance to the social rights discourse. The socialist, statist and centralist backdrop against which social rights have been conceptualized in the modern history of these two countries has been decisive in the way that social rights have been theoretically addressed and contested in the austerity context during the crisis years. Drawing similarities with the Hungarian legal and political situation of the late 1980s, mentioned above, and the overall discussion on the entrenchment of social rights in post-communist Hungary, social rights entitlements in Greece and Portugal have also been linked to social welfare services provided from the state post-dictatorship, which have acquired an "inherited (socialistic) status quo"[101] over time.

As a result, during the financial crisis, these two countries have risen to become leading examples that extended well beyond national borders and substantiated a series of conceptual hurdles and theoretical criticisms against social rights. Otherwise stated, Greece and Portugal and their stance on social rights exemplified a deep theoretical conundrum that touched upon the very philosophical premises and ontological structure of the liberal welfare paradigm itself. If we were to illustrate this puzzle, it could roughly be delineated along these lines: On the one hand, social rights were tied to internal political pressures for the preservation of existing public services and social benefits, which have been the product of a social democratic heritage. On the other hand, austerity has been solidified in a neoliberal agenda that targeted not only the content but essentially the justification and nature of social rights as state-provided and institutionally mediated welfare rights.[102]

Adding to that complexity, the legal tradition and theoretical influences that permeated both legal cultures constitutes another *fourth* parameter that explains the selection of Greece and Portugal as case studies for this thesis. To demonstrate that statement further, the Greek and Portuguese justice systems manifest certain interesting similarities. That is to say, both systems constitute mixed judicial review systems of diffuse control of the constitutionality of enacted acts, which according to academics, makes them

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[99] Ktistaki 483
[100] Navarro, Schmitt and Astudillo 136, 151
[101] Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court' 91
[102] For a detailed analysis of austerity as a comprehensive social project that has been tied to neoliberalism, see Part II. Chapter 3.1.i. The Washington, Post-Washington and Berlin-Washington Consensus.

comparable to the American[103] judicial review model.[104] Despite the resemblance to the American-style review model in terms of judicial design and courts architecture, the theoretical influence that has nonetheless dominated judicial reasoning and framed part of the academic discussion has been that of the German legal doctrine that faithfully adhered to a tradition of legal positivism.[105] The latter has been exemplified in the course of the produced austerity case-law, which is assessed in detail in the coming chapters.[106] There it will be examined, that Portuguese and Greek apex and lower courts have anchored the reasoning of their judgments primarily on the legal doctrine of the rule of law.

Next to the historical, political, and legal affinities, another *fifth* commonality between Greece and Portugal quickly became evident during the crisis. Bringing the discussion to a practical level, following the spiral of the global credit crunch and the serious debt and fiscal crisis at a domestic level, Greece and Portugal have turned to international creditors to prevent a national economic collapse. Out of all the countries of Southern Europe, Greece and Portugal have been the first to have resorted to external lending and to have agreed to financial assistance programs, followed by strict conditionality criteria and structural reforms.[107] As a result, both countries have showed considerable similarities in "respect of the character of the reforms, and the changes in the policy-making process."[108] Accordingly, as it is assessed later in the thesis,[109] the social impact of the austerity-adopted measures has been quite similar, while the excessive

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[103] Throughout the thesis 'America', 'United States' and the acronym 'US' are used interchangeably to connote the United States of America.

[104] Cf. for Greece, see Akritas Kaidatzis, 'Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It ' 13 Jus Politicum, 1, 5; Michael Ioannidis, 'The Judiciary' in Kevin Featherstone and A. Dimitri Sotiropoulos (eds), *The Oxford Handbook of Modern Greek Politics* (Oxford University Press 2020) 117. For Portugal, see Emilio Alfonso Garrote Campillay, 'Constitution and Judicial Review: Comparative Analysis ' in Rainer Arnold and José Ignacio Martínez-Estay (eds), *Rule of Law, Human Rights and Judicial Control of Power: Some Reflections from National and International Law* (Springer 2017) 18, 19; Gonçalo de Almeida Ribeiro, 'Judicial Review of Legislation in Portugal: Genealogy and Critique' in Francesco Biagi, Justin Orlando Frosini and Jason Mazzone (eds), *Comparative Constitutional History: Principles, Developments, Challenges* vol 1 (Brill 2020) 205

[105] Vieira and da Silva 919. For a more detailed analysis, see Part III. Chapter 6.3. iii. Comparative Reflections.

[106] See Part III. Chapter 5. Austerity Measures Before the Courts: A Case Study for Greece and Portugal.

[107] Cf. for Greece EC, *The Economic Adjustment Programme for Greece (*European Economy – Occasional Papers 61, *European Commission Directorate-General for Economic and Financial Affairs, May 2010)*; EC, *Second Economic Adjustment Programme for Greece (*European Economy – Occasional Papers 94, *European Commission Directorate-General for Economic and Financial Affairs, March 2012)*; EC, *Greece: The Third Economic Adjustment Programme (Memorandum of Understanding Between The European Commission (Acting on Behalf of the European Stability Mecanism) and the Hellenic Republic and the Bank of Greece, Athens, 19 August 2015; Brussels, 19 August 2015).* For Portugal, see EC, *The Economic Adjustment Programme for Portugal 2011-2014 (*European Economy – Occasional Papers 202, *European Commission Directorate-General for Economic and Financial Affairs, October 2012).* For a detailed discussion of the financial assistance programs and their impact on social rights, see Part II. Chapter 3.2. Austerity Impact Assessment of Social Rights Protection.

[108] Cf. Petmesidou 171; Zartaloudis 431

[109] See Part II. Chapter 3.2. Austerity Impact Assessment of Social Rights Protection.

reforms that both countries implemented constituted "a considerable effort towards welfare retrenchment."[110]

All things considered, the intricacies and particularities of both Greece and Portugal, seen from a joint historical, political, legal and factual austerity perspective make these two countries a powerful example for normative comparisons as well as for theoretical reflection on social rights. The American judicial review system, the German-influenced legal paradigm, the deep-rooted Marxist theorizations of the social welfare state coupled with a "recurring nostalgia for bygone communities"[111] and a tendency "to essentialize the post-war social model,"[112] the socialist-inspired understanding of solidarity, and the social services model bequeathed from a socialist system of granted social entitlements which have been seen as the resultant of social achievements; all of these influences separately or combined resulted in that all sorts of comparisons have been elevated from competing legal theories and ideological standpoints, while their advocates have had good reason for justifying them. As a result, these two countries have provided a fertile ground, where frameworks of social rights protection have been put to the test. Most critically, though, for the purposes of the present study, these two countries stood as real-life examples in which conceptions of social rights have become palpable and where, crucially, "the implementation of the *ethical* and *philosophical* postulate of global social justice"[113] has been once again "attempted through social rights."[114]

ii. Selection of Cases

As expected, the austerity and economic crisis have prompted inquiry as to the respective role of courts in safeguarding human rights and social rights in particular. In addressing austerity, a heightened academic interest has surrounded case-law that dealt with the establishment of the European Stability Mechanism (ESM), the legality of the Outright Monetary Transaction (OMT) programme of the European Central Bank (ECB) or more broadly, the legality of the financial aid tools.[115] In more country-based analyses,

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[110] Zartaloudis 431, 437 et seq.
[111] Cf. Roberto Frega, 'Solidarity as Social Involvement' [2019] Moral Philosophy and Politics, 24
[112] Elise Dermine, 'Social Rights Adjudication and the Future of the Welfare State' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 392
[113] Binder and others xix; emphasis added.
[114] Ibid
[115] See for instance the landmark cases handed down by the CJEU C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECLI:EU:C:2012:756 (on the validity of the decision of the EC enabling the simplified amendment of the TFEU); C-62/14 Gauweiler and Others v. Deutscher Bundestag, [2015] EU:C:2015:400 (on the purchase of government bonds on secondary markets) ; *Heinrich Weiss and Others* , C-

disputes on infringements of fundamental social rights that have been dealt with by the European Committee of Social Rights (ECSR) and the International Labour Organization (ILO) have been at the epicenter of critical commentaries, especially when juxtaposed with the jurisprudence of the European Court of Human Rights and the stance that it held.[116]

In investigating how courts have dealt with austerity measures encroaching upon social rights, the thesis singles out cases originating from Greece and Portugal. In this regard, the analysis does not engage with austerity-related jurisprudence, broadly defined, or with cases that have been assessed by supranational monitoring bodies during the critical period of the implementation of the Memoranda of Understanding on Specific Economic Policy Conditionality Programs (MoUs)[117] in the examined case countries. The austerity case law has been substantial and has lent itself to doctrinal as well as to more theoretically oriented analyses. Out of the abundant Greek and Portuguese austerity case-law, the judgments which are assessed in this research correspond to cases that were brought before apex courts, and which have been widely featured in international legal scholarship.

Together with case-law by highest courts, less known and less-discussed judgments that have been handed down by Greek national lower courts are also investigated in the present undertaking.[118] The analysis examines lower courts' jurisprudence in detail for several reasons. In the first place, it considers this case-law as a counter-paradigm to the commonly featured narrative of pro-austerity jurisprudence that is attributed to the entirety of the Greek judicial practice of the early crisis years. Furthermore, domestic lower courts are examined because their decisions and reasoning is of interest from a supranational

493/17 [2018] EU:C:2018:1000 (on the validity of the purchase of government bonds on secondary markets program (PSPP program) of the ECB in light of EU law).

116 For critical commentaries on the collective complaints brought before the European Committee of Social Rights regarding the austerity measures in Greece, selectively see Christina Deliyianni-Dimitrakou, 'Οι αποφάσεις της Ευρωπαϊκής Επιτροπής Κοινωνικών Δικαιωμάτων για τα ελληνικά μέτρα λιτότητας και η αποτελεσματικότητά τους' (*www.constitutionalism.gr Blog*, 2013); Sophia Koukoulis-Spiliotopoulos, 'Austerity v. Human Rights: Measures Condemned by the European Committee of Social Rights in the Light of EU Law' 2014 Academic Network of the European Social Charter (ANESC/RASCE), Turin Conference; Alexandra Michalopoulou, 'Η επίδραση των μνημονίων στα κοινωνικά δικαιώματα - Προοπτικές προστασίας με βάση την πρόσφατη νομολογία του Σ.Τ.Ε. και τις αποφάσεις της Ευρωπαϊκής Επιτροπής Κοινωνικών Δικαιωμάτων' (*www.constitutionalism.gr Blog*, 2016); Nikolaos A. Papadopoulos, 'Austerity Measures in Greece and Social Rights Protection under the European Social Charter: Comment on GSEE v. Greece case, Complaint No. 111/2014, European Committee of Social Rights, 5 July 2017' (2019) 10 (1) European Labour Law Journal. On the complaints brought before the Committee on Freedom of Association of the International Labour Organization on labour law violations due to the austerity measures in Greece, see *GSEE, ADEDY, GENOP-DEI-KIE, OIYE and ITUC v. Greece*, Case No 2820/2010; ILO, *365th Report of the Committee on Freedom of Association (*GB316/INS/9/1, *International Labour Office)* 784-1003

117 Hereinafter Memoranda or MoUs in plural form and Memorandum or MoU in singular form.

118 The comparative documentation of decisions handed down by First Instance Single-Judge civil courts in Greece constitutes original research performed for the purposes of the thesis at hand. The present author has acted as a legal advocate in her capacity as a licensed attorney of law in the Greek legal system in several of the cases, which were brought before judges at lower instances of adjudication.

human rights angle. That is to say, the overlooked jurisprudence of lower courts awakes an interest because lower judges employed a mixed constitutional and international human rights reasoning in their judgments, where they combined national constitutional safeguards and human rights provisions from the European Convention on Human Rights and the European Social Charter. Finally, yet importantly, lower courts are selected here because they are taken as an illustrative example of how social values and social dynamics that have been accentuated during the crisis have been situated and reflected in the issued judgments against the backdrop of austerity and the crisis.

The examination of the Greek and Portuguese case-law is not performed in the *ad modum* of a commentary that provides for an exhaustive juxtaposition of facts and arguments. In addition, the focus is neither on courts as institutions, nor on issues of domestic procedural justice in safeguarding social rights during the crisis. Throughout the present undertaking, references to 'austerity measures' or 'austerity legislation' denote the legislative acts that incorporated austerity measures mandated by the signed MoUs in Greece and Portugal, which negatively impacted social rights.[119] The cases which have been brought before courts as the direct result of the implementation of such measures are also referred to in the course of this study as 'austerity jurisprudence' or 'crisis jurisprudence.'[120]

In view of the above, the present study departs from the perspective of strict constitutionalism and does not examine whether and how courts have engaged or refrained from engaging with the question of social rights in normative terms. Nor does it analyze how questions concerning social rights have set in motion considerations about the institutional role of courts or the doctrine of the separation of powers. Instead, the examined judgments and the courts that issued them are approached modestly as few of the many sites and discursive practices of law where new and old understandings of social values and social dynamics concerning the theoretical realization of social rights became visible, and they have been theorized, contested and articulated.

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[119] On this point, see also the note made in Mariana Canotilho, Teresa Violante and Rui Lanceiro, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law' (2015) 11 (1) European Constitutional Law Review, 158. For an assessment of the effects of the MoU-adopted austerity measures in Greece and Portugal, see Part II. Chapter 3.2. Austerity Impact Assessment of Social Rights Protection.

[120] Commentators have also described the case law linked to the implementation of the MoU-dictated austerity measures, as 'crisis jurisprudence', 'case law of the crisis', or 'jurisprudence of the crisis'; see Ana Maria Guerra Martins, 'Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law' (2015) 22 (5) Maastricht Journal of European and Comparative Law, 681, 688, 689,695, 698; Ana Maria Guerra Martins and Joana de Sousa Loureiro, *Fact sheet on legal foundations for fiscal, economic, and monetary integration: Portugal (*EMU Choices: The Choice For Europe Since Maastricht; Salzburg Centre of European Union Studies*)* 1; Anna Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 2 April 2019 The London School of Economics and Political Science, London, UK GreeSE papers No132 Hellenic Observatory Papers on Greece and Southeast Europe 10

1.3. Methodological Considerations

In crafting the thesis at hand, the overall conceptual framework is theoretical and critical, comparative, and interdisciplinary. It is theoretical in the sense that it uses theory as the main site of reflection on the examined subject-matters. Moreover, it is theoretical in that it accords to theory the basic role of structuring and developing the analysis and in answering the questions posed. That is to say, the answers are not sought in the letter of the law and in the already fragmented and multi-pronged normative social rights framework that is in place. In navigating through law and exploring the conjectures of legal theory in the framework of this thesis, the analysis turns to primary sources, such as cases, statutes, and charters. Namely, a descriptive and detailed analysis of cases is composed where necessary and a commentary on the employed sources is provided. However, the analysis departs from a merely 'black letter' methodology and doctrinal research.[121] Put differently, the research conducted here is not interested in describing and providing an exposition of the legal rules and norms governing a legal category, or in identifying the consistency or the incoherence of the legal system in order.[122] The analysis does not abide by textual fidelity and attention to technicality and legal formalism. Rather, the assessment of the selected legal materials is pursued with the aim of casting light on the underlying philosophical assumptions upon which conceptions of social rights are rooted.

This is not to suggest that the present research does not acknowledge the significance that doctrinal analysis and the examination of social rights from a normative perspective could have. Besides, as it has been mentioned immediately above, the crisis and austerity developments in Europe have provided for a fertile and challenging ground for scholars to trace how different sources of law across different levels of protection were connected, and how the protection of social rights could be safeguarded. However, since

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[121] Although 'black letter law' is a term found in common law systems, it has come to be used more broadly in civil law traditions as well and in international law methodology. McLnerney-Lankford notes that 'black letter law' is the dominant model of traditional doctrinal scholarship that refers to purportedly well-established legal rules or norms that are presumably no longer subject to dispute or contestation; a 'black letter' law approach bears the characteristics of legal coherence and of an 'internal approach,' taking the perspective of an insider in the system; see Siobhán McLnerney-Lankford, 'Legal methodologies and human rights research: challenges and opportunities ' in Bård Anders Andreassen, Hans-Otto Sano and Siobhán McLnerney-Lankford (eds), *Research methods in human rights: a handbook* (Edward Elgar Publishing 2017) 41, note 13. Giltaij refers to 'black letter law' as an "ideal type of law," a positive, written set of legal norms; see Jacob Giltaij, 'Applying a natural law-method to international law' in Rossana Deplano and Nikolaos K. Tsagourias (eds), *Research methods in international law: a handbook* (Edward Elgar Publishing 2021) 150, 151

[122] Cf. for a critical assessment of a doctrinal methodology in human rights research Damian Gonzalez-Salzberg and Loveday Hodson, 'Introduction: Human rights research beyond the doctrinal approach' in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2020) 2

the focus of the present thesis is primarily theoretical, a detailed investigation and documentation of the existing scope of protection of social rights at a regional and international level, and of the development of protection doctrines and standards, would be too large a project, and yet too generic for the purposes of the specified ontological and ethical angle that the undertaking at hand wishes to venture upon.

The analysis is also theoretical in that it draws a visible line between methodology as in theory, and methodology as in method. To clarify this, methodology in law can sometimes not only be "connected to theoretical understandings and conceptual paradigms,"[123] but it can be melded with such conceptual preconceptions and assumptions, which are rarely spelled out, or even reflected upon. Thus, law "is often *reduced* to a method"[124] and legal analysis becomes a strictly methodological undertaking, where methodology stands as a synonym for theory. In other words, the researcher, upon the application of a methodology, does not engage with the fundaments of the theory that is being applied. Regrettably, such practice can lead to a blind and unproblematized replication of a methodology from whatever ideological or scientific standpoint is elevated. Doing so, however, such tactic does not provide room for researchers to ruminate over the philosophical assumptions that they embrace and it does not allow for them to assume an agential space in this regard.[125]

Bearing this in mind and despite the prominent place that methodology has in legal analysis, the research here does not take the distinction between method and methodology to be merely grammatical but rather draws attention to the theory behind a given methodological agenda.[126] That is to say, the present author considers that theoretical contemplation preceding any approach is significant before consolidating methodological patterns, which are to be followed in legal thinking and practice. In this sense, this undertaking is well-suited to critical, interdisciplinary research in that the present author is "willing to be both self-critical and critical of others."[127]

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[123] Bård Anders Andreassen, Hans-Otto Sano and Siobhán McLnerney-Lankford, 'Human rights research method' in Bård Anders Andreassen, Hans-Otto Sano and Siobhán McLnerney-Lankford (eds), *Research methods in human rights: a handbook* (Edward Elgar Publishing 2017) 1, 2

[124] Simone Glanert, 'Method?' in Giuseppe Pier Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing 2012) 61; emphasis in original.

[125] On that point, see the interesting analysis of the "ideology of method" at ibid 81

[126] On the 'grammatical' and 'substantive' distinction between methodology and method, see Sundhya Pahuja, 'Methodology: Writing about how we do research' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021) 61

[127] Cf. Malcolm Langford, 'Interdisciplinarity and multimethod research' in Bård Anders Andreassen, Hans-Otto Sano and Siobhán McLnerney-Lankford (eds), *Research methods in human rights: a handbook* (Edward Elgar Publishing 2017) 167, where the exact wording is "[…] any interdisciplinary human rights endeavour needs to be well armed with participants who are willing to be both self-critical and critical of others." On

In its unfolding, the thesis finds itself in a conversation with different theoretical approaches to law, which take the form of a list of various 'methods'[128] such as that of legal liberalism and critical legal studies,[129] as well as the subfields of socio-legal studies, law and governance, and law and economics. In this connection, it is acknowledged that these are not unified theoretical frameworks but are fields of thought that rivet in their multiple variants across the voices and disciplines within which they are substantiated. Moreover, knowledge is not considered here, "as the sum of developments in neatly demarcated spheres of technical expertise,"[130] and the afore-mentioned areas are not necessarily taken to be distinct methodologies or "firmly separate disciplines"[131] to each other. Rather, the present analysis looks at the points of convergence and overlap, especially from the angle of the underlying ontological and ethical assumptions that permeate such methods and upon which these methods are reproduced in legal scholarship.

By way of illustration, the frame that broadly outlines the analysis is critical social theory. However, the fuselage of the thesis that propels the questions builds upon the epistemic fields of ethics and social ontology as a critical discourse.[132] With that in mind, if it were to pin down the research in a methodology, this would be social ontology as a methodological and theoretical framework in a dialogue with new materialism.[133] Here, I understand new materialism to be a "new collective approach to the theory of law,"[134] as this has been delineated in legal theory, notably as an approach that is "unbound by the grand legal abstractions of pure textuality, strict normativity, universalised judgement, abstract political thinking, theoretically poor doctrinal or empirical work, and

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interdisciplinarity, method and critique, Rachel Fensham and Alexandra Heller-Nicholas cite Catherine Ayres, who notes that being an interdisciplinary researcher "requires an ethos of generous critique," where the contributions of various disciplines to our intellectual world are appreciated, even when this means directly challenging the core tenets of one's "'home' discipline"; see Rachel Fensham and Alexandra Heller-Nicholas, 'Making and assembling: Towards a conjectural paradigm for interdisciplinary research' in Celia Lury and others (eds), *Routledge Handbook of Interdisciplinary Research Methods* (Routledge 2018) 32

128 Pahuja 60, 61

129 For an overview of legal liberalism and critical studies from a liberal standpoint, see David Andrew Price, 'Taking Rights Cynically: A Review of Critical Legal Studies' (1989) 48 (2) Cambridge Law Journal. For an introduction to 'critical legal studies,' see Fleur E. Johns, 'Critical International Legal Theory ' 30 May 2018 University of New South Wales Law Research Series UNSW Law Research Paper No 18-44 (In Jeffrey L Dunoff and Mark A Pollack (eds), International Legal Theory: Foundations and Frontiers (Cambridge University Press, 2022, Forthcoming) 2 et seq.

130 Boukalas 399

131 As Outi Korhonen notes "We can hardly identify a space between disciplines, and it is questionable whether firmly separate disciplines can be meaningfully identified"; see Korhonen 345

132 Cf. Frega, 'The Social Ontology of Democracy' 159

133 For an introduction to new materialism, see Christopher N. Gamble, Joshua S. Hanan and Thomas Nail, 'What is New Materialism' (2019) 24 (6) Angelaki: Journal of Theoretical Humanities; Diana H. Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Duke University Press 2010)

134 Andreas Philippopoulos-Mihalopoulos, 'Introduction: The and of law and theory ' in Andreas Philippopoulos-Mihalopoulos (ed), *Routledge Handbook of Law and Theory* (Routledge 2018) 1

decontextualised philosophical inquiry."[135] In addition, my take on this is that there is no primacy of the material and matter over the psyche, or of structure over being. This is not to suggest that such an approach is not attentive to power structures that shape epistemological conditions of knowledge and thought. Moreover, applying this method to the examined austerity context, as one that is highly implicated with international political economy, I further take this to depart from "rational choice assumptions of self-interested utility maximization"[136] and to be inclined to approaches to political economy through a lens of "international political psychology."[137]

An impression that might occur to the reader at this point, could be the following: Social ontology, being the conceptual skeleton of the thesis, might imply that the theoretical assumptions that are sought here precede the methodology. Addressing such impression is a matter of understanding the nature of existence of physical or constructed entities, of sociality and of relationality as such and thus goes to the very core of the present endeavor. That is to say, the priority of social ontology over social scientific methodology,[138] poses as a question of whether it is through agency or through structure that realization is construed. Instead of adopting a this *or* that stance, the methodological approach taken here is one of assemblage of relations *and* structures. Critical social theory is taken in this regard, as the frame that seeks to combine "critical analysis of contextual and structural constraints, challenges and opportunities with agents' reflection on their situation."[139] Since critical social theory is taken as a boundless term, the 'social' is seen in this study as being *in movement*, as *happenin*g and as being *invented* under the kaleidoscope of ethics and social ontology, where these are understood as knowledge.[140] In other words, knowledge is considered to be a process through the assembling of the ontic and the epistemic and the compounding of methods, while method is understood as *doing*, namely "method is being and becoming"[141] through relating and being individuated.

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[135] Ibid

[136] Here I derive inspiration from the analysis of Anne van Aaken and Tomer Broude; see van Aaken and Broude 1227

[137] Ibid 1226

[138] Richard Lauer, 'Is Social Ontology Prior to Social Scientific Methodology?' (2019) 49 (3) Philosophy of the Social Sciences, 186, 187. Frega contends that ontological premises bear consequences for theoretical, methodological and normative claims; see Frega, 'The Social Ontology of Democracy' 159

[139] Bridget Anderson, Claudia Hartman and Trudie Knijn, *Report on the Conceptualisation and Articulation of Justice: Justice in Social Theory (*Report written within the Framework of Work Package 5 "Justice as Lived Experience", *ETHOS Consortium European Commission Horizon 2020 Research Project, 17 December 2018)* 21

[140] Cf. Celia Lury and Nina Wakeford, 'Introduction: A perpetual inventory' in Celia Lury and Nina Wakeford (eds), *Inventive Methods: The Happening of the Social* (Routledge 2012) 6, 7

[141] Emma Uprichard, 'Capturing and composing: Doing the epistemic and the ontic together' in Celia Lury and others (eds), *Routledge Handbook of Interdisciplinary Research Methods* (Routledge 2018) 84, 85, 87

At a level of praxis, the thesis takes a comparative approach, where appropriate, by looking at the implemented austerity reforms on the ground and by assessing case-law in the austerity context of the focus countries. The key aspect of the comparison is cross-national and cross-contextual, exploring the similarities and differences that the examined case countries have displayed in their responses to the financial and economic crisis and in how they engaged with law in this respect. That is to say, the analysis is comparative in the sense that even though it examines the case studies in their particularities, it takes these as being situated within the broader frame of the post-war European welfare state tradition and in certain occasions, it reflects on the deep-seated ethical and ontological assumptions tied to the welfare system, coming from a liberal or socialist perspective.

Drawing on from that, this thesis places emphasis on knowledge and the acquisition of knowledge as being 'situated,'[142] material and emplaced,[143] that is to say, knowledge that is non-universal and is rather circumscribed by its spatio-temporal,[144] cultural and historical context, in which "the subject and its other question themselves, each other, the world, and their relationships *indefinitely*."[145] In this regard, any method "is method-in-the-world"[146] and not only knowledge but also the articulation and reproduction of this is considered here to be "generated by a situated observer"[147] in space and time.[148] The methodological implication of this is that austerity jurisprudence and the role of courts and lawyers in this regard are approached in this research, as it has been hinted above, as being few of the several sites where social experiences and social dynamics are reflected, re-articulated, and shaped.

Lived experience is not taken in this regard as a merely descriptive task that is dependent upon empirical observation. Rather, the selective examination of real austerity situations is performed as part of a heuristic approach that enables an evaluative,

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142 The idea of 'situated' knowledge has been developed in critical studies, feminism, new materialism, and in postcolonial and decolonial approaches; see the landmark article by Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 (3) Feminist Studies. On law being situated within culture and history, see Sionaidh Douglas Scott, *Law after Modernity* (Oxford and Portland, Oregon: Hart Publishing 2013) 25, 27, 28. Situated knowledge does not imply here the social situatedness theory, with which the thesis does not engage; for an overview see Matthew Costello, 'Situatedness' in Thomas Teo (ed), *Encyclopedia of Critical Psychology* (Springer New York 2014)

143 Cf. Philippopoulos-Mihalopoulos 5, 6

144 On the spatio-temporal understanding of law and justice, see Lucy Finchett-Maddock, 'Continua of (in)justice' in Andreas Philippopoulos-Mihalopoulos (ed), *Routledge Handbook of Law and Theory* (Routledge 2018) 110 et seq. See also Outi Korhonen, *International Law Situated, The Lawyer's Stance Towards Culture, History and Community* (Brill 2000) 136 et seq., who analyzes, what he calls, "intertemporality."

145 Korhonen, *International Law Situated, The Lawyer's Stance Towards Culture, History and Community* 8, Korhonen submits the "idea of situationality," as a concept inspired from the work of Hans Georg Gadamer.

146 Glanert 70

147 Ibid 69

148 Ibid 67, 69

comparative assessment of real social phenomena.[149] Comparison, in the limits of the present undertaking, is thus not made at the level of doctrines and procedure, nor in the form of a conspectus of the normative differences or similarities of the examined jurisdictions. Rather, through a cross-border, cross-jurisdictional and trans-regional comparison, the analysis seeks to lay emphasis on the entanglements, past and present, that interweave different parts of the European continent, for the purpose of facilitating the circulation of knowledge and in an effort to highlight the ethical and ontological assumptions that ingrain such enmeshments.

Moving beyond categorical assessments of social rights, the approach accommodates fragmented analyses from across different epistemologies and sheds light onto the underlying ethical aspects of the European crisis and austerity discourse. These epistemologies broadly include legal philosophy and political theory, history and anthropology. In this way, the research seeks to foreground the contingent relationship of law and ethics and more broadly, the ontological and epistemic foundations that law and these subdisciplines share.[150] In view of this, law is not approached in its different theoretical and institutional facets as a dichotomy, with legal philosophy on the one hand and its formal delivery on the other, but rather as a continuum stretching between these elements.[151] Stated otherwise, ethical and ontological assumptions are taken to permeate and ground law, while law and ethics are so intermeshed, in that the boundaries between them are rendered invisible and hence go usually unchallenged in legal commentaries.

Mindful of the above, the present thesis stands with heavy skepticism towards deep-seated cognitive dualisms and conceptual dichotomies that beleaguer social legal theory and which seem to hold much of legal thinking captive. That is to say, the research questions long-established separations that sometimes convey the same rationale but appear in a variety of concepts. Such acute distinctions are formulated by way of rationalism or lived experience, reason or affect, embodiment or psyche, materiality or consciousness. Bringing this more closely to law, distinctions take the form of "the non-political character of human rights and of the allegedly political character of social rights,"[152] which reflects widely on the distinction between law and politics, the state and

[149] To make this point here, I draw insights from a similar argument made by Scott Veitch, Emilios Christodoulidis and Marco Goldoni, *Jurisprudence: Themes and Concepts* (3rd edn, Routledge 2018) 73
[150] See also Korhonen, 'From interdisciplinary to x-disciplinary methodology of international law' 352
[151] For a similar point on the continuum between law and legal institutions in international law, see Wayne Sandholtz and Christopher A. Whytock, 'The Politics of International Law' in Wayne Sandholtz and Christopher A. Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar 2017) 16
[152] Matthias Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 26 March 2020 Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-09 41

society, or more fundamentally on atomist versus holistic political ontologies, and essentially on the notion of individual versus the collective.[153]

Certainly, distinctions like this draw upon overarching, anti-diametrically opposite philosophical standpoints, such as those of transcendentalism versus empiricism[154] or universalism versus particularism.[155] Furthermore, these distinctions mark broad disciplinary differences between, for instance, legal on the one hand and anthropological or geographical approaches on the other. What is more, they allude to rifts within legal analysis itself, by bringing forward further separations between legal centralism and pluralism or structuralism and agency-centered analyses. The study here does not engage with these strands of thinking separately but selectively draws upon deep-seated assumptions sustained by them as the research develops. However, the study makes no appeal to universal or absolute truths and grants no primacy to any aspect of social reality over the other by way of a scalar hierarchy. Moreover, the engagement with social ontology and ethics does not suggest a transcendental and transempirical reality[156] in which to consider in moralizing terms what proper moral conduct is.

Going past binary thinking and hierarchization as a thought process is not to suggest that there are no significant discrepancies between the philosophical positions referred to above. Rather, breaking with binary thinking implies breaking with the formulation of a question in dualistic, 'either/or' terms. Dualistic framing in this respect, is deemed to embody a logic of polarization and to connote the subordination of one concept to another. Thus, it is considered methodologically counter-productive for understanding and producing knowledge.[157] Simply put, this study does not approach social rights in 'either/or' terms but rather searches after for the 'and' that hangs in the middle in a non-hierarchical, non-dichotomizing way of thinking and acting.

In this respect, the research embraces what I would call *polygonal* thinking. By uttering voices coming from seemingly disconnected fields of theory, the analysis is further

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153 Cf. Boukalas 396; Anderson, Hartman and Knijn 21; Frega, 'The Social Ontology of Democracy' 161; Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford-Portland Oregon Hart Publishing 2000) 11

154 On the Kantian distinction between empirical and transcendental truths, see Chong-Fuk Lau, 'Transcendental Concepts, Transcendental Truths and Objective Validity' (2015) 20 (3) Kantian Review, 446

155 These are highly entangled dichotomies with internal sub-dichotomies; on ethical universalism and particularism in liberal legalism, see Michael Freeman, 'Universalism, Particularism and Cosmopolitan Justice' in Tony Coates (ed), *International Justice* (Routledge 2000). From a critical, post-Marxist perspective, see Ernesto Laclau, 'Universalism, Particularism, and the Question of Identity' (1992) 61 October The MIT Press. On universalist and particularist approaches to welfare, see Nick Ellison, 'Beyond universalism and particularism: rethinking contemporary welfare theory' (1999) 19 (1) Critical Social Policy

156 Cf. Gould, *Globalizing Democracy and Human Rights* 32

157 Cf. Peter Elbow, 'The Uses of Binary Thinking' (1993) 13 (1) Journal of Advanced Composition, 51

inculcated with an implicit poetics of *polyphony*. That is to say, the thesis looks at the synergies between different sources of knowledge and ventures for the integration of "*multi-axis* thinking into all theorization and frameworks."[158] Throughout this study, the point of departure is law, understood, however, in a "non-mono-disciplinary,"[159] non-self-referential manner, and approached as a heterogenous field that draws insights from and is cross-fertilized with other disciplines. The study thus engages in an ongoing assessment of the fields it examines by questioning established conceptual frames and perspectives.

The multiple nuances of the encounter and exchange with different fields of knowledge are not brushed aside in this regard. Rather, while considering the differences between inter-/multi-/pluri-/trans-/counter-/anti-approaches to disciplinarity,[160] this research finds itself at the intersection of an inter- and trans-disciplinary approach. Transdisciplinarity is understood in this respect as creating a *unity* of intellectual frameworks beyond disciplinary confinements, while interdisciplinarity is taken as placing emphasis on the *integration* of methods, while acknowledging and keeping the disciplinary demarcations intact, towards a *synthesis*[161] of approaches under a single lens of enquiry.[162] In consideration of this semantic distinction, interdisciplinarity is not taken here as a label, but rather as a reflection of the processual map of knowledge where disciplinary engagements share the same foundations.[163]

Approaching such a highly historicized and politicized subject as social rights calls at times for historical contextualization. This seems to be particularly the case when the research is confronted with questions concerning the reformation of the examined welfare states under the implemented austerity policies while placing these changes within the

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158 K. Bailey Thomas, 'Intersectionality and Epistemic Erasure: A Caution to Decolonial Feminism' (2020) 35 (3) Hypatia, 524 note 522; emphasis added.

159 Outi Korhonen, 'Within and Beyond Interdisciplinarity in International Law and Human Rights' (2017) 28 (2) European Journal of International Law, 626

160 Ibid 629, 630

161 Cf. Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 (2) Journal of Law and Society, 164; Greta S. Bosch, 'Deconstructing Myths about Interdisciplinarity: is now the time to rethink interdisciplinarity in legal education?' (2020) 1 (1) European Journal of Legal Education, 34

162 Cf. Nikolas M. Rajkovic, 'The Transformation of International Legal Rule and the Challenge of Interdisciplinarity' 27 May 2016 Inaugural address, Tilburg University as cited in Korhonen, 'Within and Beyond Interdisciplinarity in International Law and Human Rights' 629, 630; Bosch 33, 34. For a visual representation, coming from music research, of the diffuse and entangled semantic categorization of the various disciplinary modes, see also Alexander Refsum Jensenius, 'Disciplinarities: intra, cross, multi, inter, trans' (*Arj Blog RITMO Centre for Interdisciplinary Studies in Rhythm, Time and Motion*, 2012)

163 Nikolas M. Rajkovic, 'Interdisciplinarity' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2019) 490; Conor Gearty, 'Human rights research beyond the traditional paradigm: Afterword' in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2020) 260, where Gearty notes that the strength of law and human rights study "lies in its capacity to be skeptical, expansive and Whiggish."

broader developments of the welfare system in post-war Europe. In attempting to respond to such interdisciplinary questions, the present author resorts to historians and historical-based studies. Still, this engagement is performed modestly and within the narrowed and restricted angle of the thesis, which remains an ethical and legal and not a historical one.

In espousing an interdisciplinary approach, the present researcher is aware that engaging with subject-matters that fall within the ambit of other disciplines, such as history, political science, and governance studies, or even within subdisciplines and subfields of law itself, is a highly demanding and laborious task. Proceeding on this track, the engagement with different schools of thought, be it new materialism, critical legal studies[164] or liberal legal theory, as these have historically morphed across time and context, adds more layers to the examination and makes the present undertaking even more entangled.

Undoubtedly, all branches of knowledge and areas of expertise are exceedingly dense and congested for a researcher to try and delve into them in detail before proceeding with an analysis of epistemologies in plural. Adopting an interdisciplinary approach, a researcher may slide across disciplines unaware of internal, ongoing developments[165] and uncritical of the criticisms raised from within, and thus "one risks *dilettantism* by rising above a single discipline yet failing to master the multiple disciplines covered."[166] Moreover, in the fathomless body of social rights literature, by taking an interdisciplinary stance it is easy to lose sight of the research questions and objectives one seeks to address.

These are all major, yet standard challenges, that any researcher is inexorably confronted with upon embarking on an interdisciplinary methodology. Howbeit, even though an interdisciplinary analysis may seem like "an acrobatic performance on a disciplinary tightrope,"[167] problematizing social rights at a conceptual level seems to hinge on interdisciplinarity from the very outset. Mindful of these dilemmas and brimming with "objectivity anxiety,"[168] interdisciplinarity is held here not to imply mastery of the disciplines involved and of the massif of knowledge encumbering them. Rather, researching *between* and *among* disciplines is a writing journey that I endeavor to take, in an effort to engage with other fields and traditions to the necessary extent, and in the hope that any socio-theoretic parsimonies and reductions made do not lead to distortions, inaccuracies and theoretical acrobacy and do not compromise the main philosophical and epistemological precepts of the frameworks invoked.

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164 'Critical legal studies', 'critical theory' and 'critical legal theory' are used in this study interchangeably.
165 Langford, 'Interdisciplinarity and multimethod research' 166, 167
166 Ibid 166; emphasis added.
167 Korhonen, 'From interdisciplinary to x-disciplinary methodology of international law' 346
168 Ibid 352

1.4. Structure of the Thesis

The thesis is structured in *five* parts consisting of *ten* chapters. The approach is primarily analytical and theoretical and only those parts that engage with the austerity jurisprudence build upon empirical legal analysis. Following *part one,* namely this introduction, the analysis seeks to provide in *part two* a concise characterization of *crisis* and *austerity* and the ways in which these notions are addressed throughout the present endeavor. This is clearly a very challenging and condensed terrain and therefore it is deemed useful to first explore definitions and theoretical aspects of the crisis and austerity discourse before shifting the attention to specific narratives that prevailed in interdisciplinary legal research. Accordingly, the chapters on the theorization of crisis and austerity occupy a considerable part of the analysis. This is because crisis and austerity are not taken as self-evident terminologies or self-apodeictical contextual backgrounds. In this regard, the study unpacks the meaning of the 'crisis' itself and the ways in which this has been deployed and narrated during the implementation of austerity social policies.

When general referrals to 'crisis' are made throughout the present thesis and especially against the backdrop of austerity case-law, 'crisis' is used to connote "a financial disruption of the well-functioning of markets and of distributive and re-distributive policies."[169] However, the analysis does not ascribe a narrow financial meaning to 'crisis.' Instead, it seeks to unravel how the idea of crisis is conceptualized at an abstract level and further illustrate how different crisis theories have infiltrated and shaped the social rights discourse against the background of austerity. Building on that, the analysis proceeds in explicating the examined crisis is understood here as a 'social crisis' and how this is related to the general financial crisis and to austerity. In this connection, 'social crisis' within the limits of the present undertaking is used to refer to the crisis of the meaning of the 'social' that reflects further on conceptions of social rights. Echoing the assumption that "the crises of our times expose the shortcomings in the legal conceptualization of the human condition,"[170] the thesis takes that one of these shortcomings has been the consistent lack of reflection on the ontological and ethical assumptions that inhibit our understanding of sociality. Sociality, is this connection, is considered to be part of the human condition. In turn, the ways we understand sociality and individuality are taken to inform perceptions of

[169] Cristina Fasone, 'Constitutional courts facing the Euro crisis: Italy, Portugal and Spain in a comparative perspective' EUI MWP, 2014/25 42

[170] Martha McCluskey, Hila Keren and Ronit Donyets-Kedar, 'Vulnerability Theory And The Political Economy Of Resilience' (*Law and Political Economy (LPE) Project Blog*, 2021)

what is 'social' and shape conceptions of social rights. Subsequently, the research finds that these shortcomings have become evident during the financial crisis and have been empirically exemplified in the context of Greece and Portugal.

Moving to *part three,* the analysis engages with standard research sub-questions in legal scholarship when studying social rights. At a theoretical level, the thesis inquires into the justiciability debate that surrounds social rights. In line with this, it investigates criticisms and countercriticisms in an effort to delineate the limits and contours of the justiciability debate so as to later link this with the austerity caselaw. Following that theoretical exploration, the research examines how social rights have been adjudicated before courts in Greece and Portugal and before European Courts. In light of this, the analysis proceeds to examine the particular criticisms that have been raised towards courts during the crisis and how these have been implicated with social rights considerations. To that end, the thesis scrutinizes the conceptual bases of the ethically imbued and politically charged notions of activist lawyering and judicial activism. The part concludes by inquiring into whether the cases of Portugal and Greece have been genuine examples of activist litigation and performs an overall evaluative assessment of the austerity jurisprudence.

Looking at the objections and responses to the justiciability of social rights, these ordinarily range from critiques of the nature of the rights to the nature and the role of courts in performing their adjudicating tasks. In assessing the literature, the analysis classifies the relevant criticisms into four broad categories. The first one assesses arguments that refer to the aspirational and costly character of enforcing state action to protect social rights. The second develops around the common democratic legitimacy critique that is guided by the separation of powers doctrine. The third group of arguments focuses on procedural aspects of the judicial process, namely it engages with criticisms on the institutional capacity of courts and the epistemic competency of judges to adjudicate on social rights cases. All things considered, the analysis concludes with a fourth critique, which compounds arguments that call into question the implementation stage and success rate of state enforceability of social rights-related court judgements.

Building on the analytical and empirical assessment of the austerity case law in the examined focus countries, the research moves forward in *part four* with a more focused analysis of social rights at a conceptual level. In this respect, the study sketches a panorama of standard approaches in the conceptualization of social rights. In bare outlines, the research identifies two main ways in which scholars commonly conceptualize social rights. The first one is based on the relation of social rights to costs and affirmative state action.

The second draws upon the long-established theoretical distinction between social and economic rights and civil and political rights. Next to these theoretical modes, the analysis examines the conceptualization of social rights based on the meaning of the so-called 'social acquis,' which has been at the nucleus of social rights theorizing during the crisis in the focus countries of Greece and Portugal. In all of these accounts, the study identifies a lack of scholarly engagement with the ontological and ethical premises that permeate conceptions of social rights and inform understandings of sociality. Mindful of that, this part of the thesis concludes by adding a few caveats to the examined approaches before exploring the question of social rights from the perspectives of ethics and ontology.

Following this investigation, the study modestly seeks to inquire deeper into the foundations upon which social rights are grounded and the ontological and ethical assumptions that inhibit those foundations. In so doing, this study proceeds in *part five* with assessing the notions of solidarity and vulnerability and the ways in which these are connected to social rights theory. The thesis does not enquire into the notions of dignity, liberty and citizenship, which in liberal legal thinking are conventionally taken to be the foundations upon which social rights are based.[171] Instead, the analysis focuses on solidarity and vulnerability as potential justificatory bases of social rights in recent theoretical appraisals,[172] by inquiring into the philosophical presuppositions that underpin these notions. The reference point in this inquiry, is the notion of social relations that draws upon a broader understanding of the idea of *relationality* and *sociality*.

Accordingly, the study explores how solidarity has been theorized within the context of the late Euro-crisis,[173] while it more broadly surveys on how solidarity is

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171 Cf. Mantouvalou, 'In Support of Legalisation' 98 et seq.; Paul Tiedemann, *Philosophical Foundation of Human Rights* (Springer International 2020). András Sajó singles out "dignity, equality, contractarian concerns, compassion and communitarianism," as common judicial justifications that draw on 'moral concerns' linked to the nature of social rights András Sajó, 'Possibilities of Constitutional Adjudication in Social Rights Matters' (2019) 1 Journal of Constitutional Law, 9, 10, 11

172 Cf. on solidarity, see Georg Lohmann, 'Normative Perspectives on Transnational Social Rights' in Andreas Fischer-Lescano and Kolja Möller (eds), *Transnationalisation of Social Rights* (Intersentia 2016) 58; on vulnerability, see Bryan S. Turner, *Vulnerability and Human Rights* (The Pennsylvania State University Press 2006); Fineman, 'Vulnerability and Social Justice'; Corina Heri, *Responsive Human Rights: Vulnerability and the ECtHR* (Hart Publishing 2021). A thorough engagement with relevant literature on solidarity and vulnerability is performed in Part V. Chapter 8.3. In Search of Ethical and Ontological Answers and Chapter 9.1. Vulnerability Theories and the Social Justice Discourse.

173 See, EESC, 'Speaking Points of Mrs Irini Pari Vice-Preisdent of the EESC' (*European Economic and Social Committee; Lecture at Keio University; Tokyo 26 July* 2010). Beukers, Thomas, de Witte and Kilpatrick use the term "Euro-crisis" to signify "the wide-ranging overhaul of macroeconomic law, institutions and governance triggered when the banking and financial crisis from 2007 onwards became interlinked with sovereign debt crises in euro area states."; see Thomas Beukers, Bruno de Witte and Claire Kilpatrick, 'Constitutional Change through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead' in Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 1. This term has also been used in the 'Constitutional Change through Euro-Crisis Law' EUI

conceived within a social-democratic welfarist or a liberal welfarist model. In this regard, the analysis submits that standard interpretations of solidarity build upon the philosophical legacy of Kant and Hegel and on ontological assumptions and ethical justifications that largely draw on the idea of self-reliance, reciprocity and intersubjectivity. Following the analysis of solidarity, the thesis turns to contemporary contributions that call for the need to revise these long-established ethical and ontological premises and to engage with the ideas of sociality and relationality as part of the human rights discourse.

In investigating the idea of vulnerability and its connection to social theory, the analysis engages with contributions coming broadly from three strands of literature. These are virtue ethics and liberal moral theory, historical materialism and critical approaches to law and political economy, and critical social theory scholarship focusing on relational ontology. The study critically assesses these theoretical frameworks from the standpoint of vulnerability and proceeds in the last chapter to address the question of social ontology as a question relevant to conceiving social rights. Social ontology is approached in this respect specifically from the perspective of relationality and social relations. Thereby, the study submits that social relations tend to be understood either within a neoliberal framework that prioritizes an individualistic model of relationality, centering around the idea of the isolated and self-interested individual or, seen through a social welfarist lens, social relations are reduced to a solely economic base, while the individual is considered an effect of singular structures which ontologically derives its status through the structures to which it is *subjected*. Put simply, it is submitted here that the concept of social relations is conventionally studied and theorized in legal commentaries through the prism of individualism, institutionalized materialism or through market dynamics. Following this, the study turns to the philosophical concept of 'transindividuality,' understood as the mutual constitution of individuality and collectivity. The latter serves as an overarching framework in articulating and conceptually realizing social relationality and sociality. Relationality is understood in this regard as being processual and it is distinguished from teleology and idealism.[174] Ultimately, transindividuality is employed in the social rights discourse as a way of negating basic antinomies of the individual versus the society that are found in ethical accounts and is further suggested as a way of understanding the *social* as being both individual and collective.

country-based research, as mentioned above. The thesis at hand shares this definition when 'Euro-crisis' is used throughout the analysis.

[174] On the distinction of 'relationality' from teleology and idealism, see Vittorio Morfino, *Plural temporality: Transindividuality and the Aleatory between Spinoza and Althusser* (Brill 2014) 57

1.5. Review and Contribution to the Literature

i. Reflecting on Existing Literature: A Mapping Exercise

Over the past years, a large body of literature traversing across social sciences and the humanities has emerged in an endeavor to discuss the nature, causes and repercussions of the Euro-crisis and the austerity reforms that came with it.[175] Against this background, scholarly attention has been placed on social rights, mainly as part of the broader discussion on the impact of the crisis or the role of courts. In this respect, almost every contribution addressing the crisis in one way or another, has touched upon the question of social rights. In attempting to outline the main avenues where social rights have been encountered either as a secondary subject matter of inquiry or as a point of primary focus, I proceed in what follows with a systematization and categorization of the literature that has been produced *midst* or *post* crisis. The examined scholarship does not exhibit coherence, and as social rights is such a highly convoluted study field, appeals to social rights can be found alongside a wide range of literary analyses coming from a vast array of subfields in law, social sciences, and the humanities.

Looking at the international scene, I would schematize the main ways that social rights have been addressed in the context of the European financial crisis as follows: *First,* human rights and international law scholars have inquired into the applicability of the human rights protection scheme of the EU and the Council of Europe (CoE) to the MoUs. In this connection, legal studies have engaged with case-by-case analyses and have examined social rights violations by either taking the Charter of Fundamental Rights of the European Union or the European Social Charter as a point of reference.[176] *Second*, scholarly research has focused on issues of accountability of the involved parties in the support mechanisms to financially assisted countries. In this regard, a large body of

[175] Eva Nanopoulos and Fotis Vergis, 'The Elephant in the Room: A Tale of Crisis' in Eva Nanopoulos and Fotis Vergis (eds), *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019) 1

[176] On the applicability of the CFREU, see the carefully researched and well-founded analysis by Anastasia Poulou, *Soziale Grundrechte und Europäische Finanzhilfe: Anwendbarkeit, Gerichtsschutz, Legitimation* (Tübingen: Mohr Siebeck 2017). On an assessment of the relation of austerity measures to the ESC with a focus on Greek jurisprudence, see Nikolaos A. Papadopoulos, 'Η επίδραση του Ευρωπαϊκού Κοινωνικού Χάρτη στη νομολογία των ελληνικών δικαστηρίων ' (2019) 78 (11) Επιθερεώρηση Εργατικού Δικαίου ; Nikolaos A. Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' in Claire Boost and others (eds), *Myth or Lived Reality: On the (In)Effectiveness of Human Rights* (Springer 2021). For a provision-by-provision assessment of the austerity measures compatibility with social rights in cases brought before the Hellenic Council of State and the ECSR, see ELSA, *Austerity Measures and its Implications: The Role of the European Social Charter in Maintaining Minimum Social Standards in Countries Undergoing Austerity Measures Final Report (*International Legal Research Group on Social Rights *The European Law Students' Association, July 2015)* 721-724

scholarship has been preoccupied with assessing the hybrid nature of the European financial assistance packages, such as the European Financial Stabilization Mechanism (EFSM) and the ESM, and in searching for international human rights obligations and commitments of European and international actors, which resulted from the implementation of lending packages in assisted countries.[177] Closely linked to this line of investigation, *a third* strand of literature has taken up the task of probing into the details of the financial assistance programs. In this domain of research, scholars assessed the legal nature of the conditionality criteria attached to the Memoranda and documented the consequences that these criteria entailed for the protection of social rights.[178]

Adding to the above, domestic and comparative constitutional law scholarship dashed into commenting on the social rights implications that the crisis brought about, and a vast amount of literature has been produced along these lines. In this *fourth* bundle of contributions, approaches elevated from a supranational constitutional perspective placed their attention chiefly on the European Union as an economic and social project and on the constitutionality of the budget conditionality criteria that were tied to assistance programs.[179] In the meantime, at a domestic constitutional level, assessments of the crisis

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[177] Indicatively, see Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 (4) European Law Journal, 535 et seq.; Margot E. Salomon and Olivier de Schutter, *Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010-2015 (*Legal Brief prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee), *15 June 2015)*; Mark Dawson, 'The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance' (2015) 53 (5) Journal of Common Market Studies; Arianna Vettorel, 'The European Stability Mechanism: Human Rights Concerns Without Responsibilities?' (2015) 7 (3) Perspectives on Federalism; Francesco Pennesi, 'The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?' (2018) 3 (2) European Papers; Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020); Anastasia Poulou, 'Human Rights Obligations of European Financial Assistance Mechanisms' in Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2021)

[178] Selectively, see Michael Ioannidis, 'EU Financial Assistance Conditionality After Two Pack' (2014) 74 (1) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV); Michael Ioannidis, 'Προληπτική πιστωτική στήριξη μετά το "Μνημόνιο": Μηχανισμοί, όροι και επιτήρηση στο πλαίσιο του ΕΜΣ και του ΔΝΤ' (2014) 6 Εφημερίδα Διοικητικού Δικαίου ; Antonia Baraggia, 'Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?' (2015) 4 (2) Cambridge International Law Journal; Kostas Chrysogonos, Triantafyllos Zolotas and Anastasios Pavlopoulos, 'Excessive Public Debt and Social Rights in the Eurozone Periphery: The Greek Case' (2015) 22 (4) Maastricht Journal of European and Comparative Law; Viorica Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 The Cambridge Yearbook of European Legal Studies; Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' (2017) 54 (4) Common Market Law Review; Lisa Ginsborg, 'The impact of the economic crisis on human rights in Europe and the accountability of international institutions' (2017) 1 (1) Global Campus Human Rights Journal ; Viorica Viță, *Conditionalities in Cohesion Policy: Research for REGI Committee (European Parliament, September 2018)*; Michael Blauberger and Vera van Hüllen, 'Conditionality of EU Funds: An Instrument to Enforce EU Fundamental Values?' [2020] Journal of European Integration

[179] Indicatively, see Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro–Crisis' (2013) 76 (5) Modern Law Review; Dagmar Schiek, *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (Farnham [u.a.] : Ashgate 2013); Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis:*

have largely focused on questions of constitutional reform and sovereignty.[180] In this connection, scholars have engrossed themselves in assessing the internal dynamics and developments that the crisis brought about in national constitutions. Namely, commentators focused on the elasticity or rigidity of national constitutions, on the adaptation or deflection of the constitutional text, and on the strengthening or erosion of constitutional provisions in accommodating austerity-related measures at a national legislative level.[181] In all of these accounts, social rights questions have been delt with as part of this broader constitutional discussion and in the context of the change of the character of the state from social welfare to minimal state.[182]

A Constitutional Analysis (Cambridge: Cambridge University Press 2014); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017); Herwig C.H. Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Consitution* (Edward Elgar Publishing 2019); Viorica Viță, 'In conditionality we trust: what scope for conditionality in the emerging European Economic Constitution?' in Herwig C.H. Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar Publishing 2019); Vestert Borger, *The Currency of Solidarity: Constitutional Transformation During the Euro Crisis* (Cambridge University Press 2020)

180 For criticism on the legislative process, see, selectively, Anna Tsiftsoglou, 'Η παραμόρφωση της νομοθετικής διαδικασίας την περίοδο της κρίσης: εμπειρικές παρατηρήσεις πάν στη μνημονιακή νομοθεσία ' (2018) 5 Εφημερίδα Διοικητικού Δικαίου; Afroditi Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' (2015) 4 (2) Cambridge Journal of International and Comparative Law. For a critique on constitutional developments and issues pertaining to sovereignty, see Xenophon Contiades and Alkmene Fotiadou, *Η ανθεκτικότητα του Συντάγματος: Συνταγματική αλλαγή, δικαιώματα και κυριαρχία σε συνθήκες κρίσης* (Sakkoulas Publishing Athens-Thessaloniki 2016); Afroditi Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty' in Bruno de Witte, Claire Kilpatrick and Thomas Beukers (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017); Konstantinos Giannakopoulos, 'Η συνταγματική απορρύθμιση ' (2017) 1 Εφημερίδα Διοικητικού Δικαίου ; Xenophon Contiades and Alkmene Fotiadou, 'Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case' in Georg Vanberg, Mark D. Rosen and Tom Ginsburg (eds), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019)

181 Contiadis and Fotiadou, in documenting how constitutions have responded to the financial crisis, identified four distinct reactions, namely: a constitution, when confronted with the crisis, either demonstrated constitutional *stamina* and remained intact; showed signs of *adjustment*; resorted to a stage of *submission*; or went through a constitutional *breakdown* under the strain of austerity; see Xenophon Contiades and Alkmene Fotiadou, 'How Constitutions Reacted to the Financial Crisis' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013) 31 et seq., 46 et seq.

182 For a criticism on the legislative process and constitutional implications, see selectively Tsiftsoglou, 'Η παραμόρφωση της νομοθετικής διαδικασίας την περίοδο της κρίσης: εμπειρικές παρατηρήσεις πάν στη μνημονιακή νομοθεσία '; Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?'. For a critique on the constitutional developments and constitutional issues pertaining to sovereignty, see Contiades and Fotiadou, *Η ανθεκτικότητα του Συντάγματος: Συνταγματική αλλαγή, δικαιώματα και κυριαρχία σε συνθήκες κρίσης*; Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty'; Giannakopoulos; Contiades and Fotiadou, 'Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case'. For a comparative analysis of the changes to the welfare state, see Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2021); Toomas Kotkas and Kenneth Veitch (eds), *Social Rights in the Welfare State: Origins and Transformations* (Routledge, Taylor & Francis Group 2018); Peter Taylor-Gooby, Benjamin Leruth and Heejung Chung (eds), *After Austerity: Welfare State Transformation in Europe after the Great Recession* (Oxford University Press 2017)

Fifth, while taking a more focused approach, other scholars placed exclusively their attention on the responses of national and supranational judicial and non-judicial bodies in reviewing austerity policies that have been implemented across different countries in Europe and subsequently explored the dimension of social rights protection.[183] In this regard, the role of courts and judges at a country-specific level or at the level of European Courts has been the main focal point of comparative legal analyses during austerity reforms in Europe.[184] That is to say, litigation and the courts' involvement in interpreting EU law or the domestic constitutional letter when confronted with austerity-impugned measures and in affording protection to social rights, have been put under the microscope.[185]

Arguably, the afore-mentioned studies, in addressing social rights under the constitutional and international human rights frameworks of protection, have by and large followed a doctrinal and descriptive analysis of primary and secondary legal sources. Running counter to formalistic and thoroughly normative-oriented approaches, other scholars sought to challenge the conventional wisdom of liberal democratic constitutionalism and the latter's skepticism towards the limited scope of social rights' enforceability,[186] which has been phrased in legal scholarship as "liberal orthodoxy."[187]

In this respect, the role of courts has been criticized for being limited in effectively providing social rights protection through the multi-level international and constitutional protection edifice. Reflecting on the foundations of the liberal project, scholars critically stressed that the liberal constitutional project has been chiefly oriented to "the protection of *individual liberty* and away from questions of social justice."[188] Domestic courts were

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[183] For a comparative documentation of the austerity jurisprudence in various financially assisted countries in Europe, see Gerapetritis, who documents the financial crisis case law in Germany, Poland, France, Belgium, Estonia, Ireland, Slovenia, Hungary, Latvia, Romania, Greece, Cyprus and Portugal.

[184] For a focused research on the role of apex courts and judges, taking Greece as a case study, see Eirini Tsoumani, 'Law as transcription of economic and political discourse(s): Rationality ruptures in austerity Greece' (Law and Society Association 2019 Annual Meeting Washington, D.C. May 30 - June 2, 2019 [on file with author]); Elisavet Lampropoulou, 'The Political Role of the Greek Council of State under Circumstances of Economic Emergency' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021). Amalie Frese investigates case law developments in relation to the late economic and financial crisis with a focus on CJEU and EU law in addressing social and economic rights violations and in interpreting economic inequality; see Amalie Frese, 'Judicial responses to the economic crisis in CJEU's social case law' [preliminary draft - on file with author] For an assessment of the relevant literature, see Part III. Chapter 5. Austerity Measures Before the Courts: A Case Study for Greece and Portugal, and Chapter 6.3. The Case of Portugal and Greece: Reflections on the Austerity Jurisprudence.

[185] For a comparative constitutional study of the commonalities and divergences in austerity-related jurisprudence, see Pietro Faraguna, Cristina Fasone and Giovanni Piccirilli, 'Special Issue "Constitutional Adjudication in Europe Between Unity and Pluralism"' (2018) 10 (2) Italian Journal of Public Law.

[186] Cf. O'Cinneide 259, 260, 261

[187] Ibid 264, 265. Paul O'Connell talks about a 'neo-liberal orthodoxy,' against the backdrop of neo-liberal globalization; see Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 (4) The Modern Law Review, 552

[188] O'Cinneide 261; emphasis added.

further held as interpreting "constitutional rights as *liberty interests*,"[189] portraying national constitutions as charters of negative liberties and guaranteeing, at most, procedural protection of social rights.[190] Domestic courts have thus been held in critical appraisals, either as echo chambers of the government, tacitly and implicitly approving impugned social austerity policies, or at best, as forums "providing a *valuable perspective* on the normative debates in legal doctrine,"[191] namely on debates around the separation of powers or the enforcement of international socio-economic rights provisions at a domestic level.

Departing from a court-oriented standpoint, yet being critical of courts, other contributions sought to challenge the deficit in social rights protection, before and during the crisis, by linking existing deficiencies to broader issues of political economy and governance. Addressing social rights under the broader problématique of capitalism, scholars, who adopt a historical materialist[192] or an autopoietic law and systems-analytic method to law,[193] or follow more broadly a critical legal studies approach, sought to address the social rights deficit by connecting this to the political substratum of capitalism and to neoliberalism understood as an economic project.[194]

Upon reflection, the aforementioned have been familiar and quite pedestrian approaches from a comparative constitutional and human rights law perspective. Most of

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189 O'Connell 539; emphasis added.

190 Ibid 539, 552; O'Connell develops these arguments about apex courts in Ireland, Canada, India and South Africa.

191 Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' 100; emphasis added.

192 For a brief comment on historical materialism in relation to other theories of knowledge, see Part II. Chapter 2.1.1. What is a Crisis? An Introduction.

193 The terms systems theory, and systems-analytic or socio-legal approach, are used interchangeably in this thesis to denote this strand of literature in legal theory, situated within the legal subfield of sociology of law, in the works of Niklas Luhmann, Jürgen Habermas and Claus Offe, among others, and broadly within the critical theory tradition. For an introduction to systems theory to law, see Niklas Luhmann, *Introduction to Systems Theory* (Peter Gilgen tr, Polity 2013). For autopoietic law, see Gunther Teubner (ed) *Autopoietic Law - a New Approach to Law and Society*, vol 8 (De Gruyter 1987). For a critical overview of the systems-analytic approach as part of the broader tradition of post-Marxism, see Clyde Barrow W., *Critical Theories of the State: Marxist, Neomarxist, Postmarxist* (University of Wisconsin Press 1993) 96 et seq.

194 For a selective overview of this line of argumentation, see Paul O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart 2013) 70 et seq. and especially 'IV. It's the Political Economy, Stupide'; Viljam Engström, 'The Political Economy of Austerity and Human Rights Law' Institute for Human Rights Working Paper No 1/2016; Emilios Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' (2017) 44 (1) Journal of Law and Society; Sofia A. Perez and Manos Matsaganis, 'The Political Economy of Austerity in Southern Europe' (2018) 23 (2) New Political Economy: Is the European Union Capable of integrating Diverse Models of Capitalism? Alison Jonston and Aidan Regan (Guest ed); Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018). For a dialectical, materialist analysis of the crisis legislation and jurisprudence, see also Dimitrios Kivotidis, 'Η νομοθεσία της κρίσης στην Ελλάδα: διαλεκτική ανάλυση' (2018) 1 Εφημερίδα Διοικητικού Δικαίου, 71 et seq., 76 et seq. See also Alain Supiot, *Το πνεύμα της Φιλαδέλφειας: Η κοινωνική δικαιοσύνη απέναντι στην ολοκληρωτική αγορά* (Evaggelos Aggelopoulos tr, Επιθεώρησις Εργατικού Δικαίου 2019)

the analyses have followed either a normative and doctrinal approach or criticized the violations of the existing protective schemes and the procedural inconsistencies and challenges to EU legality and the rule of law from within liberal legalism.[195] However, whether these accounts have been advanced from within the liberal legal script, pointing to the latter's inconsistencies and seeking to resolve those, or whether they have challenged the liberal legal paradigm and proposed heterodox,[196] more socially attuned approaches to it, these have failed to address or question the ethical and ontological premises upon which social rights have been conceptually grounded. In a similar fashion, contributions elevated from a historical materialist and a socio-legal standpoint have tended to focus on issues of the transformation of the social welfare state and on the relation of law and capitalism with the state. Thus, these approaches have not engaged with fundamental questions on the liberal ontological and ethical structure of the social rights paradigm.

Seen against this backdrop, while the precarious status of social rights has been acknowledged by commentators during the Euro-crisis, social rights concerns have been stowed adjacent to theory of the state analyses and have generally been approached as a side story in the margins of major debates. In other words, and to echo the sentiments of Aoife Nolan, a certain conundrum has become evident regarding the human rights scholarship of the crisis.[197] Notably, crisis commentaries have been strikingly court-oriented,[198] even though austerity measures were not the courts' response to the crisis but were the product of the executive branch's decision-making. What is more, the human rights framework and corresponding academic scholarship have been heavily state-centric[199] and "overwhelmingly concerned with what states should and should not do."[200]

At the same time, even though approaches to crisis and social rights have been interdisciplinary, these "tended to contain themselves within narrowly circumscribed

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[195] On how EU legality has been challenged during the sovereign debt crisis before the CJEU, see Claire Kilpatrick and Joanne Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2021)

[196] Colm O'Cinneide takes a critical stance towards what he calls the 'liberal constitutionalist orthodoxy' and makes the case for what he phrases "a new heterodox strand of constitutionalism," which, similar to "its social democratic predecessor […] aims to add *a social dimension* to the standard liberal mode of constitutionalism and to embed respect for SER [i.e. social and economic rights] into the functioning of the machinery of state"; emphasis added, see O'Cinneide 262, 266, 275

[197] Aoife Nolan, 'Not Fit For Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) (4) European Human Rights Law Review [SSRN copy], 1

[198] Ibid 9, 10, 13, 19

[199] Cf. Ibid, where Nolan points out the state-centric of human rights framework by setting this against specifically the Euro-crisis context; Kate Nash, *The Political Sociology of Human Rights* (Cambridge University Press 2015) 163 and Cristina Lafont, 'Neoliberal Globalization and the International Protection of Human Rights' (2018) 25 (3) Constellations, 320 criticize more broadly the state-centric framework of human rights and of social and economic rights protection in particular.

[200] Nash 163

limits, dictated by the confines of the analysts' respective fields"[201] and have been grounded on theoretical preconceptions and assumptions linked to certain positions, elevated from within particular standpoints. The bottom line is that analyses have navigated within charted territories and criticisms have been expressed by either combining a law and political economy analysis, or they have taken financial regulation and banking law as their vantage points and investigated the intersection of these legal subfields with EU law and with issues of governance at the level of the European and Monetary Union. Last but not least, at the constitutional front, especially at a domestic level of the examined jurisdictions, it has been observed that scholars have initially responded to the crisis with passion and scientific rigor, which was then gradually superseded by pragmatism and eventually led to academic fatigue. This further translated in that 'technical' and doctrinal analyses have taken the lead in trying to decode the complicated legal nature of the financial assistance programs, while the crisis and the social rights discourse have been overshadowed or cast aside due to the heavy preoccupation with technical issues.[202]

ii. Contribution to the Literature

Reflecting upon the above, this thesis develops by selectively and critically engaging with *three* large bodies of social rights literature, which I would schematically delineate in the following manner: The *first* one is standard literature on social rights,[203] as this has been steadily developing throughout the years, approaching social rights from an international human rights law and comparative constitutional law perspective. This type of scholarship concentrates mainly on issues concerning the protection of social rights under the national and international obligations of states, the justiciability of social rights, and from a standpoint of general problematization of the legal characterization of social rights as positive, cost-effective and aspirational rights. The *second* grouping of literature[204] is the one that has been sketched in the above paragraphs and is partly occupied by standard social rights dilemmas but places these within the context of austerity, the Euro-crisis and the country-specific fiscal and debt crises of the financially assisted states in the European Union. The *third* strand of literature that this study is in conversation with,[205] draws largely

[201] Nanopoulos and Vergis 1

[202] Yiannis Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* (Hart Publishing 2020) 298 et seq.; Drossos makes this observation for the Greek constitutional literature.

[203] For an assessment of such scholarship, see Part III. Chapter 4., Chapter 6.1. and 6.2., and Part IV. Chapter 7. Conceptualizing Social Rights During the Crisis.

[204] For a discussion of such scholarship, see Part III. Chapter 5. and Chapter 6.3. and Part V. 8.1.

[205] The part of this thesis that delves into selective contributions in social theory from different disciplines spreads mainly across Part II. Chapters 2 and 3 and Part V. Chapters 8, 9 and 10.

upon contributions to social theory and social rights, coming not only from legal scholarship but from political theory, critical social theory, anthropology and social philosophy encompassing ethics and social ontology as a distinctive epistemological field.

Following on from that, this study does not approach social rights through the lens of the crisis of 'Social Europe,' namely by looking at social rights as part of the social integration project of the European Union and as a constitutive element of a tentative "common welfare system."[206] It does not approach social rights by exhaustively linking these to the examined national welfare systems or by scrutinizing the relation of the social state model with the problematization of social rights. Moreover, different theories of political economy, be they neoliberal or social democratic, are not taken as a linchpin in conceiving social rights and accordingly, engagement with social rights theorizing is not elevated here from a perspective of applied politics or designated political thought.[207]

The study at hand does not aspire to make normative recommendations either. This is the "most common form of genre confusion for researchers in law,"[208] as Sundhya Pahuja observes, meaning scholarly writing is usually garbled with policy writing. Undoubtedly, when writing on topical and contested subjects, such as social rights, which involve distributional and budget analysis, one is exposed to policy questions. Regrettably so, "[w]ithin the academy the preoccupation is with policy,"[209] and policy writing has become the standard approach in social rights scholarship. This appears to be much more the case, when the question of social rights is tied to the reality of scarce public resources in the face of fiscal crises and is thus presented in the form of a riddle that calls for immediate solution and decision-making. However, this study is not a study from a policy-related perspective. Its objective is not to "to describe what should and could realistically be done,"[210] and its purpose is not to solve the problem of social rights as a budget-related problem or as a problem of a normatively deficient protective framework. Instead, the intention of this research is less one of problem-solving and much more of genuine problematization.[211]

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206 Gráinne de Búrca, 'Towards European Welfare?' in Gráinne de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press 2005) 9

207 Cf. Zachary Manfredi, 'Against 'Ideological Neutrality': On the Limits of Liberal and Neoliberal Economic and Social Human Rights' (2020) 8 (2) London Review of International Law, 310 et seq., who makes the case for "a novel socialist theory of economic and social rights."

208 Pahuja 67

209 Adam Habib, 'Political Power: Social Pacts, Human Rights, and the Development Agenda' in Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2013) 131, 132

210 Pahuja 67

211 Ibid

To elaborate a little on that thought, a stressful demand that is usually placed on researchers when grappling with policy-implicated matters, is that they are asked to provide for policy solutions under the guise of normative answers. In this connection, it is often the case that policy is conflated with normativity, and scholars are asked to provide for policy answers when it comes to questions of the effective justiciability and realization of social rights as part of the positive obligations of states. That is even more so, when normative loopholes are found or inconsistencies in the application of the letter of the law are detected. In this occasion, it might be the case that either a critical assessment of legal sources or legal methodology are taken as a synonym to a theoretical inquiry. Contrary to such reading of what theory entails, it is considered here that a theoretical inquiry is pervaded with hypotheses and assumptions that may not correspond to a legal normative framework or necessarily need to be followed by normative recommendations.

On that note, when this study engages with philosophical premises, it does so from the vantage of analysis and criticism itself and considers that the endpoint of this engagement might be recasting those assumptions or formulating different ones. That is to say, the analysis does not aspire to give doctrinal or normative conclusions but is rather preoccupied with underlying premises and hypotheses in their own standing. This is even more so, due to the long-standing assumption that social rights are distributive *in nature*, and that any attempt to theoretically justify them needs to be accompanied by a redistributive policy plan. However, it is argued here that the meaning of 'social' in social rights as standing for 'distributional', is neither a self-fulfilling prophesy nor "a 'sealed system' assumption."[212] To the contrary, before seeking urgently for normative answers and before we hastily jump into making policy plans, it is crucial to dedicate the time and intellectual labor to assess existing prevailing ethical assumptions that are either not realized at all or go undisputed, maintaining in this way a certain dogmatism. Surely it is daunting, if not disheartening, to engage in such polarizing and overworked debates and in this context, to try and break with existing, well-established theoretical frameworks and cycles of criticisms and countercriticisms. However, it is crucial, especially in times like that of the late socio-economic crisis, that we scrutinize philosophical premises and that we not only challenge the assumptions that underpin visions of our social reality but that, in cases where these are sustained by an *argument ad populum*, we formulate different ones.

[212] Langford, 'Interdisciplinarity and multimethod research' 166, 167; see also Vick 178, where Vick contends that "law, in essence, is treated as *a sealed system* which can be studied through methods unique to the 'science of the law'."; emphasis added.

In view of the above, this thesis does not ask if the institutions involved in the drafting of the conditionalities of the financial assistance plans were bound by EU law or by international treaties in protecting fundamental social rights. It does not seek for the accountability on the part of the signing parties or the extraterritorial human rights obligations of the states towards the people of financially assisted countries.[213] Moreover, it does not examine the content of social rights as these have been carved out at the intersection of austerity conditions and sanctions.[214] In addressing the abstruse question of the crisis and austerity in relation social rights, the analysis does not engage with matters that pertain to the terrain of European economic governance or to the internal politics of the examined countries of Greece and Portugal. In other words, the social crisis is not approached by looking at the Greek and Portuguese sovereign signature and by assessing, in turn, the domestic structural deficits or mismanagements in the public administrative sector of the states in question. This lack of engagement is not to imply the exoneration of the respective governments and public administrations of their accountability or absolve those responsible from their political accountability. This omission is simply because the present analysis does not grapple with policy and governance questions of that sort. Suggesting otherwise would be a misreading of this thesis and the angle that it takes.

In navigating through the existing social rights literature of the crisis, it wouldn't be an exaggeration to say that virtually all Eurocentric and North American legal scholarship is replete with analyses that look at social rights in relation to questions of constitutionalism and economics and governance. Similarly, critical accounts that seek to challenge the liberal script from a law and political economy perspective, do not seem to inspect or question liberalism in its ethical and ontological underpinnings. Instead, they interpret the social rights crisis as a crisis of neoliberalism, taking the latter merely as an economic project. While this study shares areas of concern with such critical appraisals, its focal point and approach are nonetheless different from this strand of legal literature.

Departing from the afore-mentioned approaches in social rights scholarship, the analysis here is rather interested in scrutinizing social rights conceptually from an ethics

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[213] For an analysis of the extraterritorial human rights obligations of Euro area member states and the international responsibility of signatory parties in the negotiation and conclusion of financial assistance programs to EU member states during the financial and economic crisis, see the Greece-focused analysis by Salomon and de Schutter 4 et seq., 18 et seq. For a broader analysis, including Greece and Portugal, see Jernej Letnar Cernic, 'State Obligations concerning Socio-Economic Rights in Times of the European Financial Crisis' (2015) 11 (1) International Law & Management Review, 131 et seq.

[214] Cf. Michael Adler and Lars Inge Terum, 'Austerity, conditionality and litigation in six European countries' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018) 166 et seq., where the authors explore the relationship of austerity, conditions and sanctions in the aftermath of the 2008 financial crisis in Germany, France, Italy, Spain, Sweden and the UK.

and ontology angle. In examining the conceptualization of social rights, the analysis does not delve into the multifarious historical debate of the legal status of social rights as opposed to civil and political rights. That is to say, it is beyond the scope of this thesis to provide for the historical background or to examine the historical events leading to the split of human rights into two United Nations Covenants, namely between the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[215] In this regard, this study does not provide for a historical overview of social rights as the product of "an uneasy consensus"[216] reached between the various factions of liberalism itself. Following that, it does not engage with the divisions in liberal thought and liberal legal tradition in approaching questions on social rights as opposed to civil and political rights from within the liberal script. This deliberate lack of scope could be justified here by a concentrated will of the present author to focus on often-unaddressed questions of ethics and social ontology that precede categorizations and remain to occupy our attention.

Throughout different parts of the analysis, the research challenges studies that draw on universalistic conclusions by taking large jurisdictions as a point of reference, especially that of the United States, and by generalizing in turn *ad hoc* experiences that come from a unique and particular context.[217] In this regard, the analysis seeks to move the discussion beyond metropoles and away from a model of theorization of high abstraction and of universal principles, and rather to channel this towards an understanding of situated knowledge of smaller jurisdictions and lived experiences, which are nonetheless relevant in the grand scheme of things and act as a critical propaedeutic to social research.[218]

In view of the above, this thesis ventures that legal analyses of social rights, showcase a "radical absence of ontological rigour,"[219] while the theoretical part of the discussion seems to perpetually relapse between the conceptual opposition of social structures and individual agency[220] which is neither acknowledged nor addressed and is rather taken for granted. Thus, the discussion on conceptions of social rights, let alone on

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[215] For an overview of the drafting history of social rights in international law, see Mantouvalou, 'In Support of Legalisation' 90-98. For a critical assessment, see Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press 2010) 63, 64

[216] For more see Hartley 46 et seq.

[217] Cf. on that point Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 2, 140, 141

[218] Cf. Lisa M. Given, 'Ontology' in Lisa M. Given (ed), *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications 2008) 578

[219] Frega, 'The Social Ontology of Democracy' 158. See also Emmanuel Renault, 'Critical Theory and Processual Social Ontology' (2016) 2 (1) Journal of Social Ontology, 17, who observes that in critical theory "social ontology has never really been taken seriously."

[220] Boukalas 400

the meaning of 'social,' seems to be settled before it starts. The latter has become even more obvious against the reality of the crisis and the imposed austerity measures, as elements of this exiled discussion on the conceptualization of social rights have been pressingly thrown to the fore on different occasions,[221] namely before the courts, at the level of state enforcement and protection of social rights and, crucially, at the level of the real social impact that austerity policies have had in the lives of people across borders.

At the same time, it is my understanding that conventional pathways in which the legal discourse has been carried out, appear to restrict rather than deepen the analysis on social rights. With this in mind, this study submits that what seems to be missing in the social rights discourse is an actual scrutiny of the underlying ontological structure of liberal social theory and concomitantly, an attempt to infiltrate such a line of investigation into the crisis and austerity narrative. Critically, this requires a move away from a mere theorization of the relationship between the state and the individual and calls for a reflection upon the ontological and ethical assumptions, which inhibit our understanding of social rights, whether these are actualized in a liberal or a social welfare state model.[222]

Addressing this gap in literature, this thesis takes an outlying approach by shifting the attention to questions of ethics and social ontology that are implicated in the social rights discourse and which have been brought to the fore during the crisis. By suggesting an alternative conceptualization of social rights in light of the concept of transindividuality, this study aspires to surmount theoretical limitations and cast new shades in conceiving social rights by means of social ontology. Social ontology in relation to social research, has grown in importance in light of recent scholarly contributions in law and philosophy.[223] That said, research has tended to link social ontology considerations to issues of governance and economics or placed its focus on human rights broadly. In addition, significant contributions to transindividuality have brought the concept into the limelight by relating this to issues of subjectivity and politics.[224]

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[221] Ibid 396, Boukalas refers here to the discussion of law, politics and their interrelations in relation to cause-lawyering. The phrase is used here to accommodate the discussion on social ontology and social rights.
[222] Cf. the insightful analysis in Jeanne M. Woods, 'Rights as Slogans: A Theory of Human Rights Based on African Humanism' [2003] (17) National Black Law Journal, 53, 54; Jeanne M. Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) 38 (4) Texas International Law Journal, 767
[223] Selectively, see Tony Lawson, *The Nature of Social Reality: Issues in Social Ontology* (Routledge 2019) 14 et seq.; Dan Krier and Mark P. Worrell (eds), *The Social Ontology of Capitalism* (Political Philosophy and Public Purpose Series, Palgrave Macmillan 2017); Gould, 'A Social Ontology of Human Rights'; Roberto Frega, 'Between Pragmatism and Critical Theory: Social Philosophy Today' (2014) 37 (1) Human Studies, 67 et seq.
[224] Indicatively, Étienne Balibar, *Spinoza: From Individuality to Transindividuality* (Delft: Eburon 1997); Jason Read, *The Politics of Transindividuality* (Haymarket Books 2016); Michalis Bartsides, *Διατομικότητα: Κείμενα για μια οντολογία της σχέσης* (Loukia Christidi-Mano tr, Νήσος 2014); Chiara Bottici, 'Anarchafeminism & the Ontology of the Transindividual' in Bernardo Bianchi and others (eds), *Materialism and Politics*, vol Cultural

Bringing these two strands of literature together, the novelty of the approach in the thesis at hand lies in that, as a first step, it directs attention specifically to social rights with regard to social ontology and to questions on relationality and sociality. Subsequently, this study engages with the already ongoing scholarly discussion on transindividuality, coming from theory of individuation and social philosophy. In this respect, the thesis introduces the concept of transindividuality in social rights theory and suggests this as a potential canvas on which social rights could be furnished. Weaving an understanding of transindividuality as processual individuation with social ontology as a relationally processual ontology,[225] this study suggests that conceiving *social rights* as *transindividual rights* has the potential to enrich our understanding of social rights as mutually individual and collective, on the basis of our processual relationality.

It would appear that legal theorists "have systematically eschewed ontological talk, likely because of its supposed obscurity and metaphysical leanings, but also because of its apparent irrelevance for normative theorizing."[226] By extension, an anticipated criticism towards a study that embraces a law and social ontology approach, could be that this is not law related due to a seemingly loose nexus in producing practical normative guidance. Nevertheless, in searching for the ontological assumptions and ethical justifications of the 'social' in social rights, the present author cannot stress enough her conviction that transpires through this writing - that ontological premises are "an inescapable presupposition of all normative thinking."[227] That is because social ontology informs the fundamental philosophical premises in which conceptions of social rights are rooted and thus, social ontology is inherently normative, even if this normativity is not chiseled in legal granite. In this connection, the analysis here dives in the highly fragmented and entangled discourse of social rights with the aspiration that by juxtaposing seemingly disconnected legal arguments, criticisms, judicial voices, practical facts and lived effects of austerity, it will reveal unseen correlations, shed light on the underlying geometry of knowledge that defines our conventional wisdom about social rights, and hopefully illustrate a different way of conceiving rights away from existing canonic narratives.

Inquiry, 20 (Berlin: ICI Berlin Press 2021). For a more detailed examination of the literature on transindividuality, see Part V. Chapter 10. Social Rights as Transindividual Rights.

[225] On the differences between a substantial, relational and processual social ontology, see Renault 20 et seq.

[226] Frega, 'The Social Ontology of Democracy' 158; Frega makes this point specifically about political theorists. I take that the same assertion could apply for legal theorists as well.

[227] Ibid

II. THE CRISES AND THE AUSTERITY REPLY

"Die echten Krisen sind überhaupt selten."[**]
(The real crises are truly rare.)
Jacob Burckhardt (1905)

2. Setting the Scene: A Crisis of What?

2.1. Demystifying the Crisis

2.1.1. What is a Crisis? An Introduction

Crisis is a permanent concept of history[1] and history can be interpreted as a permanent crisis,[2] wrote Reinhart Koselleck, one of the most prominent philosophers of history of the twentieth century, who identified the striking lack of an explicit theory of crisis as such,[3] and sought to provide for a conceptual, historical and semantic analysis of the notion. "Whoever opens the newspaper today comes across the term 'crisis'," [4] the historian would note in 2002. Almost twenty years later, this observation maintains its relevance, as barely a day goes by without a situation of one kind or another being referred to as a 'crisis.'

Being an ill-defined and elusive term, a concept that vaguely and imprecisely describes and is described, 'crisis' is a word that floats as an empty signifier. It is often used in a circumlocutory way but is also a hypernym that alludes to various other words. Crises today are ubiquitous and almost any event of interest can be labelled as a crisis at one point or another. When we speak of crisis, each individual can have a different thing in mind. 'Crisis' is a contested and politically-charged concept both in theoretical discourse and in

[**] Jacob Burckhardt, *Weltgeschichtliche Betrachtungen* (1905 1st edn, Verlag C.H.Beck Literatur - Sachbuch - Wissenschaft 2018) 175; translation from German to English provided by the present author.
[1] Reinhart Koselleck, 'Crisis' (2006) 67 (2) Journal of the History of Ideas, 371, 387; see also Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Samuel Presner and Others trs, Stanford University Press 2002) 240
[2] Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*
[3] Ibid 239
[4] Ibid 236

political struggle[5] and can be used to support disparate positions in a given discourse. Its amorphous and overarching nature renders this a term that can be invoked by all different interlocutors in a discourse in contexts which are contradictory to each other, i.e. to either uphold the status quo or to call for large-scale change. Crisis is thus an abstract term, susceptible to many nuances in definition. As 'crisis' appears to be a weary term that often lacks precision and rigor it suffers from fatigue and seems to exhaust and to be exhausted at its very pronouncement. And so, although it is often said that one should "never let a good crisis go to waste,"[6] the term 'crisis' first needs to be weighted assiduously before being echoed in one's words.[7]

When being confronted with the "dizzying array of crisis narratives," as Janet Roitman notes in *Anti-crisis,* all of these "proceed from the question, what went wrong?".[8] Accordingly, these narratives either delve into questioning the roots and origins of a given crisis or they center on the causes and effects of the crisis and how the crisis was dealt with, asking this from different epistemological starting points. We talk of distinct crises, we talk of situations that are alleged to be "in crisis,"[9] but none of these narratives seems to ponder over the term 'crisis' itself.[10] Crisis rather stands as a point of view or an observation, which itself is not viewed or observed like all observations[11] and serves thus as "a *blind spot* for the production of knowledge."[12]

In light of the above, the following chapter is structured as follows: I begin by briefly assessing the concept of crisis on its own merits and by looking at the original meaning of the concept and how this is theorized today from different epistemological perspectives. To that end, I outline and juxtapose the various apprehensions of the concept of 'crisis' as such. I then bring this to the context of the so-called European crisis and

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[5] Colin Hay, 'Rethinking Crisis: Narratives of the New Right and Constructions of Crisis' (1995) 8 (2) Rethinking Marxism, 64

[6] The saying "never let a good crisis go to waste" is credited to British Prime Minister Sir Winston Churchill who allegedly coined it in the mid 1940s, close to the end of World War II, although this has not been evidenced in his recorded speeches, personal notes or books. In 2008, at the onset of the US financial crisis, Illinois US Congressman Rahm Emanuel, while serving as a chief of staff to the Obama administration also used the same words by adding "what I mean by that [is] it's an opportunity to do things you could not do before," an opinion that he further reiterated during the 2020 health crisis; see in particular John Mutter, 'Opportunity From Crisis: Who Really Benefits from Post-Disaster Rebuilding Efforts' *Foreign Affairs* (18 April 2016); Emanuel Rahm, 'Opinion: Let's make sure this crisis doesn't go to waste' *The Washington Post* (25 March 2020)

[7] Koselleck, 'Crisis' 400

[8] Janet L. Roitman, *Anti-crisis* (Duke University Press 2014) 42

[9] Brian Milstein, 'Thinking Politically About Crisis: A Pragmatist Perspective' (2015) 14 (2) European Journal of Political Theory, 142

[10] Roitman 42

[11] Ibid 13

[12] Ibid; emphasis added

proceed with an exploration of the divergent conceptualizations and narratives of the latter from an institutional and an academic perspective in relevant literature.

Surely, there is a plethora of contributions across numerous fields of study, which entirely specialize in crisis theory and delving into "the vast landscape of theories about crises is akin to opening up Pandora's box."[13] To talk about crisis in such depth and with such vigor would mean to address how crisis theory is assessed in all major epistemologies, such as in realism, constructivism or critical theory. Inquiring and presenting this slew of literature here is beyond the scope and competence of this thesis and thus, I limit my focus to certain aspects of crisis theory and do not provide an exhaustive account of the scholarly discourse. Last but not least, I do not engage in depth with crisis critique in prominent political and economic theories, such as in traditional Marxism and neo-Marxism and in materialist conceptions of history, where crisis theory is a central conceptual tenant.

My aim in this chapter is rather to identify and outline some of the broad brushstrokes in crisis theory and to relate these to the different uses of crisis language when used in the specific context of the so-called European crisis.[14] To that end, I endeavor to assess how 'crisis' has been conceived and narrated in academic approaches and institutional responses so as to situate the social rights discourse within the European crisis framework. To paraphrase Roitman, this thesis raises the question, "[i]f we don't ask "What went wrong?" then what questions can we ask?".[15] The answer that I aim to give goes beyond a descriptive account of "what a crisis is" or "what went wrong?". Rather, building upon analyses that call for "an urgent need to reconstruct *crisis theorizing* today by means of a large-scale *social theory*,"[16] I venture to ask, "what *was* wrong?" by looking at social rights theories and their conceptual foundations.

To that end, in this chapter I look at conceptualizations of crisis by assessing literature from the fields of international law, socio-legal studies and law and governance. Crisis analysis is also a central subject of study in history and political theory, international relations, political science and banking and financial studies, and I partially inquire into these fields in order to examine how crisis-vocabulary deriving from these terrains have been used against the backdrop of the European crisis.

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[13] Mai'a K. Cross Davis, *The Politics of Crisis in Europe* (Cambridge University Press 2017) 22

[14] In the different context of the climate change crisis, see also Tomer Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' in Willem J. M. Genugten and Mielle K. Bulterman (eds), *Netherlands Yearbook of International Law 2013: Crisis and International Law: Decoy or Catalyst?*, vol 44 (Asser Press; Springer 2014) 114

[15] Roitman 81; the original reads: "If we don't ask "What went wrong?" then what questions do we ask?".

[16] Nancy Fraser and Rahel Jaeggi, *Capitalism: A Conversation in Critical Theory* (epub edn, Newark: Polity Press 2018) 24; emphasis added.

Looking at the term 'crisis' etymologically, the word has its roots in the Greek verb *κρίνω (krînō),*[17] which means to judge, to decide, to distinguish, but it also implies the critical capacity of one person in grasping and evaluating a given state of affairs, the shaping of an opinion and the passing of a value judgement. The verb *κρίνω (krînō)* has the same stem as the noun κρίσις *(krîsis,)* which denotes a series of actions through which preferences are expressed and decisions are made. The uses of the word were originally associated with medical contexts, where 'crisis' was deployed to indicate the turning point, worsening or not, in an acute disease or fever or at the event of a paroxysmal attack of pain or disordered function. This medical connotation of the term is found in Hippocrates' first aphorisms, which read:

> Life is short
> And the art long,
> And the right time but an instant,
> And the trial precarious,
> And the *crisis* most grievous.[18]

It appears that 'crisis' is a term in Hippocrates' medical theory, which denotes the distinctive period and defining moment in the experience of an illness that reaches a climax, an acme, after which the progression of the sickness is determined.[19] In Hippocrates's writings, crisis thus suggests the hardship in any parting of ways in life since, whatever the final outcome, crisis is *grievous* at the very moment of its appearance.[20] Moreover, a clinical crisis in terms of Hippocratic medical theory possesses a cognitive element, in the sense that crisis constitutes the critical period, during which the disease has reached a mature stage and takes its most intense form.[21]

This implied severity in meaning can also be traced in the theological origins of the term, where 'crisis', taken within the analogy of the 'Last Judgment' (*Ἡμερα της Κρίσεως -/ Hemera tis Kriseos*,) is interpreted as involving a decision which is grave and above all final.[22] Believers of Christian faith live in the expectation of the day of reckoning, which is believed

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[17] See also the latin '*cerno*', which means 'to differentiate; to separate' and the celtic-walian '*go-grynu*', which means 'to sieve; to riddle'.
[18] Richards Dickinson W., 'The First Aphorism of Hippocrates' (1961) 5 (1) Perspectives in Biology and Medicine, 63; emphasis added.
[19] Jean Clam, 'What is a Crisis?' in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing 2011) 191
[20] Dickinson W. 63
[21] Kamran I. Karimullah, 'Hippocrates Transformed: Crafting a Hippocratic Discourse of Medical Semiotics in English, 1850–1930' (2020) 7 (1) Humanities and Social Sciences Communications, 12
[22] Koselleck, 'Crisis' 371

to be certain to happen, although the timing is unknown. In this way, it poses as a constant, ongoing trial (*κρίσις-/krisis: judicium*) that will culminate in true justice being revealed.[23]

Furthermore, in classical tragedy, the dramaturgical notion of the crisis signifies "the turning point of a fateful process which, although fully objective, does not simply break in from the outside."[24] Fate in this context of theatrical climax is understood by means of conflicting norms "that destroy the identities of the characters unless they in turn manage to regain their freedom by smashing the mythical power of fate through the formation of new identities."[25]

With passing time, 'crisis' came to encompass a multitude of meanings, beyond its direct association with its medical, theological and aesthetic implications. In everyday language, when we talk about the existence of a crisis, it is customary to think of this as a temporary abnormality that disrupts the sequence or coherence of lived experience. A 'crisis' confronts us with discontinuities and forces reflection upon given past practices before we reconfigure, adjust, normalize our social experience and go on with our lives.[26]

The apocalyptic, catastrophic and chaotic dimensions of 'crisis' are also reproduced in conceptualizations of situations, which are now defined as 'mega-crises.' When we talk about mega-crises, these are no longer necessarily or exclusively linked with cataclysmic natural events and natural disasters, such as hurricanes, floods, earthquakes or with global health crises. 'Mega-crisis' is not used to denote a proportionately larger crisis, but it rather connotes "a *chaotic* world"[27] that evolves and mutates through global synergies, which are characterised by complex, unstable webs of constant, global dislocations. At the same time, from a systems-theory perspective, crisis is considered "the climactic moment of chaotic mutation or '*catastrophe*'"[28] or it is deemed to be as an intermediary and aberrant moment of *chaos*,[29] where social processes collapse upon themselves, only to come to life again after the crisis has passed.

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[23] Ibid 359, 360

[24] Jürgen Habermas, 'What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism' (1984) 51 (1/2) Social Research, 40

[25] Jürgen Habermas, *Legitimation Crisis* (Thomas McCarthy tr, 1988 1st edn, Polity Press 1992) 2

[26] Henrik Vigh, 'Crisis and Chronicity: Anthropological Perspectives on Continuous Conflict and Decline' (2008) 73 (1) Ethnos, 7; Rahel Jaeggi, 'A Wide Concept of Economy: Economy as a Social Practice and the Critique of Capitalism' in Deutscher Penelope and Lafont Cristina (eds), *Critical Theory in Critical Times: Transforming the Global Political and Economic Order* (Columbia University Press 2017) 167

[27] Patrick Lagadec, 'The Unknown Territory of Mega-Crisis: In Search of Conceptual and Strategic Breakthroughs' in Ira Helsloot, Arjen Boin and Brian Jacobs (eds), *Mega-Crises: Understanding the Prospects, Nature, Characteristics, and the Effects of Cataclysmic Events* (Charles C Thomas, Publisher 2012) 12, 13, 18; emphasis added.

[28] Clam 192; emphasis in original.

[29] On challenging this assumption that crisis is delineated as a moment of chaos, see Vigh 5 et seq.

Location and time also appear to be steady indicators in the polysemy of the concept across different disciplines and in theoretical inquiries of the term. Invoking a crisis alludes to conditions of severe rapidity, foreshortening of time and an acceleration of the sequence of historical events.[30] As Lagadec notes, crises "confront us with another *time dynamics*: [s]peed and rhythm have to be redefined, real time sets the tempo."[31] Zygmunt Bauman also underscores the temporal aspect of crisis when he notes that in the arsenal of human experience, crisis is "the *time* of deciding what way of proceeding to choose,"[32] where no trustworthy strategies seem to be left to choose from. Benjamin Authers and Hilary Charlesworth further stress that despite the different lengths and outcomes of a crisis, the latter still evokes an inescapable and critical time, in which a definitive intervention and a choice between stark alternatives must be made.[33] As for the spatial parameter of an existent crisis, Jürgen Habermas' observation is telling of how crisis is understood, when he contends that 'crisis' suggests "the notion of an objective power depriving subjects of part of their "*normal sovereignty*."[34]

Time and space are not the only hyponyms when speaking of crisis, however. 'Rupture,' 'emergency,' 'intervention,' and 'uncertainty' are steady references across disciplines in defining critical states. When speaking of a crisis of whatever nature, including an economic one, Zygmunt Bauman stresses that we firstly convey the feeling of uncertainty and secondly the impulse to intervene.[35] Similarly, Colin Hay notes that 'crisis' refers to "a moment of decisive intervention, a moment of transformation, a moment of rupture."[36] Crises go hand-in-hand with surprise and evoke an extreme sense of urgency.[37] They are correlated with critical junctures, which are characterised by a high level of contingency[38] and with instances of an intense emergency in which "fork-in-the-road, zero-sum type choices must be made,"[39] as Tomer Broude articulates.

'Crisis' is held to signify the crucial moment when a resolute change is impending, and an event triggers a fateful decision that marks a potential change in the course of

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30 Koselleck, 'Crisis' 246
31 Lagadec 13; emphasis added
32 Zygmunt Bauman, *A Chronicle of Crisis: 2011-2016* (Social Europe Edition 2017) 148; emphasis added.
33 Benjamin Authers and Hilary Charlesworth, 'The Crisis and the Quotidian in International Human Rights Law' in Willem J. M. Genugten and Mielle K. Bulterman (eds), *Netherlands Yearbook of International Law 2013: Crisis and International Law: Decoy or Catalyst?*, vol 44 (Asser Press; Springer 2014) 22; Koselleck, 'Crisis' 358
34 Habermas, 'What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism' 39; emphasis added.
35 Bauman 140
36 Hay 63
37 Lagadec
38 Brigid Laffan, 'Europe's Union in Crisis: Tested and Contested' (2016) 39 (5) West European Politics, 916
39 Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' 114

events.[40] Elsewhere, political anthropologist David Graeber contends that the "word "crisis" literally refers to *a crossroads*," that is to say, "crisis is the point where things could go either of two different ways."[41] Similarly, other scholars stress that "a crisis is not simply an event that shows the limits of what can be achieved,"[42] but it is rather an event that brings societies to the brink of a fundamental break with the present order of things and the existing way of life. Crisis thus shows the limits of what has been achieved up to the moment of its simultaneous eruption and denouement.

Despite an apparent theoretical confluence when it comes to defining what a crisis *demands* of a situation – meaning intervention and decision – there are nevertheless significant disagreements among different accounts of crisis theory in understanding what a crisis *is* in essence. On this point, there is much controversy in defining whether 'crisis' is a naturalized process or socially constructed event, a localized or universalistic notion, a permanent or temporal concept. These differences reflect a broader divide among the various epistemologies within which crisis is theorized. Across the literature different perspectives on crisis theory are also identified in the context of the Euro-crisis, as will be examined later in this chapter.[43] I suggest that those which are prevailing and of interest to this study derive from naturalism, realism, constructivism and historical materialism.[44] Of course, it is impossible to do justice to the depth, range and nuance of these theories of knowledge in just one chapter. In what follows, I settle for laying out some aspects of constructivism and historical materialism, which I find to be key to the analysis at hand.

Constructivism and realism, two contemporary theoretical approaches in conceptions of knowledge that are commonly related to the study of international relations and international political economy, are usually considered to be mutually exclusive. Constructivism also stands as an opposing theory of knowledge to that of historical materialism,[45] while the latter is also associated with realism. However, this taxonomy is open to criticism and involves controversy because the lines that separate them are not all clear. Obviously, there are important distinctions among all three, but at the same time, there are spaces where these approaches intersect and overlap.

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[40] Nanopoulos and Vergis 5
[41] David Graeber, *Debt: The First 5000 Years* (Melville House 2011) 362
[42] Cross Davis 9
[43] Mai'a Cross, in her analysis, identifies that "in the social sciences, there are at least three perspectives – systemic, behavioral, and sociological – that grapple with crises and seek to explain how and why they happen"; see ibid 26-31
[44] These concepts are usually formulated by means of specific domains; namely, we come across terminologies, such as metaphysical naturalism, methodological naturalism, naturalistic epistemology; see Robert Audi (ed) *The Cambridge Dictionary of Philosophy* (2nd edn, Cambridge University Press 1999) 596
[45] J. Samuel Barkin, *Realist Constructivism* (Cambridge University Press 2010)

Hereinafter, as I understand it a constructivist (also referred to as an idealist) approach to knowledge emphasizes the social and relational *construction* of a social reality.[46] An idealist ventures that ideas and discourses shape outcomes and give causative powers to agents and less, if none at all, to the material world. Constructivists or idealists thus put forward on the one hand, an "agent-centered"[47] understanding of crisis, which is reflective of an inter-subjective, social reality and not of an objective, material one.[48] On the other hand, materialist views of crisis focus on structural aspects and see "the material as shaping, perhaps even determining, both ideas and outcomes."[49]

Against this backdrop and in an attempt to outline the major differences in approaching crisis as a concept in the examined literature, I identify *six* distinctions in prevailing theoretical contributions to crisis theory. I will come back to these later in the analysis in order to examine how crisis has been grasped in the European context and what the implications for the social rights front have been. For now, these *six* frameworks are the following: first, a 'crisis' is natural, or it is socially constructed; second, it is extrinsic to the structure, or inherent to it; third, it is coincidental or systematic; fourth, it is ephemeral, or it is a chronic condition; fifth, a crisis is conceptualized synchronically, as part of a static system, or it is diachronically produced as a process; and lastly, it is understood as an objective condition, to which responses must adapt, or it is a contested discursive construct that generates its own responses through processes of transformation.[50]

With respect to the *first* distinction on the naturalized process or manufactured existence of a crisis, the arguments for and against are related to theories of naturalism and constructivism, a detailed assessment of which goes beyond the scope of this undertaking. For the purposes of this study, suffices to mention that the conceptualization of 'crisis' as natural and not anthropogenic understands crisis as a random and incidental phenomenon and as an observation of facts by means of a systemic, naturalized process.[51] Whereas from

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[46] Ian Hurd, 'Constructivism' in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (Oxford University Press 2008) 299

[47] Wesley W. Widmaier, Mark Blyth and Leonard Seabrooke, 'Exogenous Shocks or Endogenous Constructions? The Meanings of Wars and Crises' (2007) 51 (4) International Studies Quarterly, 750; those scholars approach materialist views of crises as exogenous shocks and juxtapose these with constructivist arguments on crisis' endogenous, social foundations.

[48] J. Samuel Barkin, 'Realist Constructivism' (2003) 5 (3) International Studies Review, 326

[49] On thin and thick constructivism, dialectical historical materialism and their dialogical relation, see David Marsh, 'Keeping Ideas in their Place: In Praise of Thin Constructivism' (2009) 44 (4) Australian Journal of Political Science, 680.

[50] Hay 65

[51] Cf. Roitman 81, 82

a constructivist viewpoint, a crisis is not considered to be a natural event, but rather a social one and thus, it "is always socially constructed and highly political."[52]

The *second* argumentative line is long documented in the history and development of critical theory, namely in the Western European Marxist tradition known as the Frankfurt School and subsequently in American pragmatism. This approach suggests that a crisis is immanent and inherent to the constellation subjected to the crisis while it is produced through dialectical processes of contradiction and transformation.[53] Crisis, which is a central theoretical pillar in critical thinking, refers, as Seyla Benhabib submits, to dissent, controversy and contradiction.[54] In turn, 'immanent critique'[55] generates contradictions in practice and conflictual processes within institutional frameworks that do not restore but rather transcend these problematic frameworks. According to this position, without conflict and tensions there is no crisis to speak of, and the contradiction informs the crisis that is experienced by social agents in the materiality of their life.[56] What creates problems and crises into a crisis, Rahel Jaeggi contends, "is the collapse of the interpretative framework or the breaking of the thread of narrative continuity."[57] The salient indications that a formation is crisis-prone are thus contradictoriness and dissension, manifested in the form of division, incoherence and stagnation. Internal symptoms of fatigue or lack of vitality can set a crisis in motion within a system, which cannot overcome this phase through its own practices and resources.[58]

That being so, contradictions do not occur coincidentally but rather systematically and for reasons that are not external to the system in crisis. Rather, they disrupt an internal framework.[59] The latter thus functions in an inherently contradictory manner and crisis is

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[52] Brigid Laffan, 'Framing the Crisis, Defining the Problems: Decoding the Euro Area Crisis' (2014) 15 (3) Perspectives on European Politics and Society, 268

[53] Rahel Jaeggi, 'Crisis, Contradiction, and the Task of a Critical Theory' in Chiara Bottici and Banu Bargu (eds), *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser* (Palgrave Macmillan 2017) 213, 214

[54] Seyla Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (Columbia University Press 1986) 19

[55] Emilios Christodoulidis, 'Strategies of Rupture' (2009) 20 (1) Law and Critique, 6. For an analysis on the notion of 'immanent critique' with respect to law, see also Emilios Christodoulidis, 'Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures' in Emilios A. Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) in particular 16-22

[56] Christodoulidis, 'Strategies of Rupture' 6. The perception of contradiction as crisis has been a key thesis in the systems-analytic approach in post-Marxist theories of the state, and in variations of such approach in legal theory. Political sociologists Claus Offe and Jürgen Habermas have been advocates of such an approach; see Claus Offe, *Contradictions of the Welfare State* (Hutchinson 1984) and Habermas, *Legitimation Crisis*.

[57] Rahel Jaeggi, *Critique of Forms of Life* (Ciaran Cronin tr, epub edn, Cambridge, Massachusetts: The Belknap Press of Harvard University Press 2018) 309

[58] Ibid 309, 317

[59] Jaeggi, 'Crisis, Contradiction, and the Task of a Critical Theory' 213, 214, 221; Rahel Jaeggi turns to the Hegelian idea of contradiction and of a crisis-driven dynamic of history to discuss crisis theory and crisis critique. Cf. also Fraser and Jaeggi 221; Jaeggi, *Critique of Forms of Life* 317

thus so deep, that crisis and structure are indiscernible, so as they eventually become one. Within this framework, talking about crisis theory focuses on criticizing capitalism as such, that is to say, it focuses on the political crisis of capitalist society over and above all other strands of crisis theorizing.[60] In other words, traditional or 'scientific' Marxist theory of crisis defines crisis by means of a rupture, namely "as an interruption in the accumulation of capital, or 'system disintegration.'"[61] 'Crisis' thus identifies with the system itself or to put it differently, class struggle, in this analytical framework, means crisis itself. [62] Such conceptualizations of 'crisis' from a critical theory perspective, fall under an ideological definition and need not to be conflated with social-scientific and etymological definitions of 'crisis' that we have assessed above.[63] This is because the popular fusion of ideological critical concepts of crisis and socio-scientific ones may lead to a kind of permanent crisis consciousness which exists independently of capitalist forces.[64] Being more inclined towards understanding crisis in a process-oriented manner, these approaches put forward a different understanding, where a crisis constitutes a *process* and rarely a distinct *event*, whereby different forces intersect across multiple domains.[65] In line with this, crisis' systatic nature is inferred out of "a process-oriented *observation,*"[66] which concentrates on the qualities of a succession of events towards the becoming of a crisis.

If we delve deeper into the highly intricate discussion on crisis theorizing, other commentators are more critical of identifying crisis with observation. For them, 'crisis' is a social construct, and to speak of a crisis is not merely to observe, but rather to create a societal decision. In this sense, 'crisis,' is seen not as an objective fact or an impartial assessment of an exogenous phenomenon, but it is rather considered to be contextual and relational.[67] As Benjamin Farrand and Marco Rizzi assert, "[w]hile structural changes are analytically observable, they are not in themselves a crisis."[68] Declaring a 'crisis' is thus "a distinction that produces meaning,"[69] and actors who engage in public discourses about

[60] Fraser and Jaeggi 62
[61] James O'Connor, 'The Meaning of Crisis' (1981) 5 (3) International Journal of Urban and Regional Research, 301; see also James O'Connor, *The Meaning of Crisis: A Theoretical Introduction* (Blackwell 1987)
[62] O'Connor, 'The Meaning of Crisis' 324
[63] Ibid
[64] Ibid
[65] Laffan, 'Europe's Union in Crisis: Tested and Contested' 916
[66] Clam 192
[67] Benjamin Farrand and Marco Rizzi, 'There Is No (Legal) Alternative: Codifying Economic Ideology Into Law' in Eva Nanopoulos and Fotis Vergis (eds), *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019) 29
[68] Ibid
[69] Roitman 82

the events they encounter and the challenges they face construct public understandings and assessments of an extant crisis as a "collective venture."[70]

Crisis framing and crisis language are decisive in that matter. It has been examined above how common connotations of crisis are defined by appealing to its literal, medical and theological meaning or to notions such as emergency, uncertainty, rupture and fate. Another common meaning of crisis is connected to failure. However, the equation of 'crisis' with 'failure' is a point of contestation between materialist and constructivist approaches in crisis theory. In particular, according to most recent critical materialist accounts, 'crisis' still denotes an intense emergency or critical condition that arises due to inherent failures of the subject at hand or due to external to those subject deficiencies.[71] On the contrary, constructivist accounts highlight that failure and crisis are relatively autonomous of one another and cannot be conflated. In line with this, it is emphasized that crises are not reflections of inherent failures, but are rather "representations, and hence 'constructions of failure'," [72] which emerge out of ideological contestation.

Another crisis discourse that has a strong hold in crisis theorizing and that is commonly encountered in European crisis narrations (as will be shown in the next section) is that crises are 'moments of truth.'[73] Crises in this sense are being depicted in narrative constructions as 'open moments,'[74] and are held as turning points in history, during which claims of truth are subverted or transgressed. Crisis as a truth-generating moment thus establishes a teleology that has an impact on those who govern and those who are being governed, while this teleology further tests existing paradigms, policies and institutional roles and rules.[75] However, "[i]f crises are moments of truth," then the question that follows is: "[W]hat and whose is the truth? Who decides that problems have turned into a serious crisis in which 'existing paradigms, policies, institutional roles and rules' are challenged?".[76]

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[70] Christian Lahusen and others, 'Political Claims and Discourse Formations: A Comparative Account on Germany and Greece in the Eurozone Crisis' (2016) 44 (3) Politics & Policy, 528; see also Laffan, 'Framing the Crisis, Defining the Problems: Decoding the Euro Area Crisis' 268

[71] Nanopoulos and Vergis 5

[72] Hay 68

[73] Cf. Roitman 3; Sonja Puntscher Riekmann, 'Europe's Moments of Truth: Wicked Crises, Good and Bad Consequences' in Ewald Nowotny and others (eds), *Structural Reforms for Growth and Cohesion: Lessons and Challenges for CESEE Countries and a Modern Europe* (Edward Elgar Publishing 2018); Francisco Panizza and George Philip (eds), *Moments of Truth: The Politics of Financial Crises in Comparative Perspective*, vol 28 (London: Routledge 2013)

[74] Laffan, 'Europe's Union in Crisis: Tested and Contested'

[75] Ibid 916. On a similar note, see Roitman 3, 65, 66

[76] Sonja Puntscher Riekmann and Fabio Wasserfallen, 'How Member States Cope with the Eurozone Crisis' in Leonardo Morlino and Emma Cecilia Sottilotta (eds), *The Politics of the Eurozone Crisis in Southern Europe: A Comparative Reappraisal* (Palgrave Macmillan 2020) 16

Against this backdrop, 'agent-centered' constructivist approaches to crisis theory elevate "persuasion"[77] as the causal mechanism in crisis framing and crisis narrative. According to such view, crises, being events open to interpretation among agents, instigate "processes of persuasion between elites, from elites to the mass public, and from the mass public to elites."[78] In a somewhat different vein, contemporary pragmatist political theory stresses that a modern conceptualization of 'crisis' understands this to be an essentially *participatory* and *reflexive* concept, in the sense that crisis "presupposes our ability to critically observe and take responsibility for our social world."[79] Framing thus is neither limited to policy makers or political actors in positions of institutional authority and decision-making, nor is it part of a self-generating circle, in which the power of interpretation derives from and is bestowed upon to elites. On the contrary, the capacity to theorize and frame a crisis is extended to all those social actors who realize the existence of a crisis and act upon it. "Nothing fully counts as a crisis,"[80] Brian Milstein argues, "until it is experienced as such."[81] The latter implies that crises which are understood as moments of dysfunction and instability are the result of the ways social actors, who are subjected to a crisis, understand themselves, and the kind of normative expectations they place on structures.[82]

Seen this way, invoking and declaring a crisis is an active, participatory and reflexive practice, which not only calls for observation, critical judgment, and interpretation, but is a call for *action*.[83] Against this backdrop, those subjected to a crisis are not passively confronted with problems but rather actively confront them.[84] From this vantage point, crises are not plainly *functionalist,* since this would run into unresolvable tensions. Instead, contradictions are not seen as merely dysfunctions and obstacles for action but are rather considered as advancing new possibilities for action.[85] Crisis thus ends up progressing from observation to critical observation, to action. Or to put this differently, using Michelle Everson apt words, "the road we are travelling is not a 'natural' one, a mere facet of an observable human reality. We can constitute, and we can engage in politics."[86]

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[77] Widmaier, Blyth and Seabrooke 749
[78] Ibid
[79] Milstein 143
[80] Fraser and Jaeggi 103
[81] Ibid
[82] Jaeggi, 'Crisis, Contradiction, and the Task of a Critical Theory' 213
[83] Milstein 143. See also Bauman 140, where he writes "[…] Describing a situation as 'critical', we mean just that: the conjunction of diagnosis and *call for action*."; emphasis added.
[84] Jaeggi, 'Crisis, Contradiction, and the Task of a Critical Theory' 220
[85] Ibid 221
[86] Michelle Everson, 'The European Crisis of Economic Liberalism: Can the Law Help?' in Eva Nanopoulos and Fotis Vergis (eds), *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019) 402

2.1.2. In Search of a Narrative: Different Conceptualizations of the European Crisis

Even while the discussion on the general developments in Europe is now placed in post-crisis terms,[87] crisis-talk is still pertinent. From politicians and policy makers to scholars coming from diverse disciplines and fields of studies, all refer to the existence of a 'crisis'. The latter is meant to encompass political, economic and socio-legal concerns, a list that is ongoing and never-ending. When speaking of *crises*, these range from demographic crises and crises geographically specified to the European Union, such as the refugee's crisis, to crises internalized within broader crises, such as regional urban crises,[88] or crises by which the European establishment is affected and which it affects in turn as part of a globalized world, such as the most recent global health crisis, the environmental crisis, the depletion of natural resources or the ever-present global food crisis.[89] Furthermore, the positioning of the crisis in the form of a narrative is also crucial for the preservation and reproduction of crisis discourse in a certain way. That is because narratives are powerful structures in themselves; they are stories, which channel attention, maintain power over public perceptions and thus have the potential to construct reality.[90] Narratives coincide in this sense with social discourses and representations, which "are supposed to reveal what a society considers as "natural," as requiring no further explanation (the so called "common sense" found in media discourses)."[91] By revealing what a society considers as "natural" narratives, we also reveal how a society considers itself and how social reality is understood, mediated and articulated within the particular narratives that a society chooses to subscribe to and the stories it chooses to tell.

In the midst of all the afore-mentioned crises, the most severe example in recent European history, which has been featured strongly in the recent crisis discourse, is the

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[87] See Majone. See also the *PLATO: The Post-Crisis Legitimacy for Europe* project, consisting of an extended network of universities, academics and doctoral students as well as professionals from the consulting, policy advice and civil society sectors. The network conducts research on the legitimacy of EU's responses with member states and other implementing authorities to the financial crisis. For more details see the PLATO's website and research objectives https://www.plato.uio.no/research/ <last accessed 11.09.2020>

[88] Cf. Frank Eckardt and Javier Ruiz Sánchez (eds), *City of Crisis: The Multiple Contestation of Southern European Cities* (Transcript Verlag 2015); Dimitris Dalakoglou, 'The Crisis before "The Crisis": Violence and Urban Neoliberalization in Athens' (2013) 39 (1 (127)) Social Justice

[89] Exemplary, Lester R. Brown, 'The Next Crisis? Food' [1973] (13) Foreign Policy; Joachim von Braun, 'The Food Crisis Isn't Over' (2008) 456 (7223) Nature. For recent accounts, see Adam Vaughan, 'Global Food Crisis Looms' (2020) 246 (3283) New Scientist; Global Network Against Food Crises and Food Security Information Network, *Global Report on Food Crises: Joint Analysis for Better Decisions (*United Nations World Food Programme, *20 April 2020)*; Michael Fakhri, 'Food as a Matter of Global Governance' (2015) 11 (2) Journal of International Law and International Relations; Anna Chadwick, 'World Hunger, the Global Food Crisis and (International) Law' (2017) 14 (1) Manchester Journal of International Economic Law

[90] Read 269, 270

[91] Christiana Constantopoulou, 'Narratives of Crisis: Myths and Realities of the Contemporary Society' [2016] (5) French Journal for Media Research, 1

one that was initially identified in the financial and fiscal sector and began around the fall of 2009.[92] Whilst the EU has experienced serial crises since the financial crisis, spanning from geopolitics and Brexit to dealing with refugee flows, recent analyses also investigate whether the European establishment has also experienced a crisis of legitimacy.[93]

It is beyond the purview of this thesis to engage in detail with the events which took place and led to the economic and financial crisis in Europe. Those events have already been meticulously traced and analyzed in the immediate aftermath of the global financial crisis.[94] Due to the production of in-depth research of late years, it is now widely accepted that the European crisis came after the raging global financial crisis that erupted in the United States between 2007 and 2009. In short, the collapse of the 'housing bubble'[95] in the speculative finance capital crisis, accompanied by the so-called 'subprime crisis'[96] in the mortgage market and the bankruptcy of Lehman Brothers have already been destabilizing the United States economy since 2009. Due to the substantial exposure that multiple financial institutions outside the United States had to the US subprime crisis, the latter has spread with "choreographed rapidity and virulence around the globe,"[97] via the channels of finance, trade, and due to the unmet expectations and lost confidence of investors and consumers towards the US. Accordingly, the US crisis has spilled over into

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[92] Laffan, 'Europe's Union in Crisis: Tested and Contested' 915

[93] Chris Lord, 'From Financial Crisis to Legitimacy Crisis?' (*Post-Crisis Democracy in Europe: Exploring the EU's Struggle for Legitimacy; The Post-Crisis Legitimacy of the European Union (PLATO) Blog Entry*, 2020)

[94] Cf. J. Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane 2018); Ashoka Mody, *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018); Roos. On the subprime investment crisis in the USA, see also Roitman.

[95] See Graham Turner, *The Credit Crunch: Housing Bubbles, Globalisation and the Worldwide Economic Crisis* (Pluto Press: In association with GFC Economics 2008); see also Roitman particularly 41-56, and her analysis on the creation of bubbles in the housing and financing sector.

[96] See M. Don Chance, 'The Subprime Crisis' in Ira Helsloot, Arjen Boin and Brian Jacobs (eds), *Mega-Crises: Understanding the Prospects, Nature, Characteristics, and the Effects of Cataclysmic Events* (Charles C Thomas, Publisher 2012) particularly 225-229, on how housing has been rendered into an investment, and how subprime mortgages originated in the USA, where they have been offered to low-income borrowers who could not obtain conventional mortgages and were thus considered as non-creditworthy debtors. Borrowing in those terms, has been followed by refinancing in order to mitigate the risk of a higher rate after the first two to three years lapsed, which was called the 'teaser period.' The rising default rates on mortgages sold in the subprime market segment did not only affect mortgagees themselves, but quickly spread through financial markets to third party investors, who sold mortgage-backed guarantees, as well as to stock markets in countries outside the United States with relatively large financial sectors such as Belgium, France, Germany, Iceland, Ireland, the Netherlands, Switzerland and the United Kingdom; see Jochen O. Mierau and Mark Mink, 'Are Stock Market Crises Contagious? The Role of Crisis Definitions' (2013) 37 (12) Journal of Banking & Finance, 4774

[97] Shalendra Sharma, *Global Financial Contagion: Building a Resilient World Economy After the Subprime Crisis* (Cambridge University Press 2013) 17, 105, where Sharma, in a rather biased account, notes the following: "The *ferociously fast-moving contagion* vividly underscores the notion that in this age of globalization *no country is an island*. Rather, in an inseparably intertwined and interdependent world, the more closely an economy is interlinked to and dependent on the global economic system, the more virulently it will feel the ripple effects, especially if the waves are emanating from *the Titanic in the system – the U.S. economy*"; emphasis added.

Europe through direct linkages,[98] thus fueling the economic and financial crisis of the Eurozone, which in turn morphed into a banking and sovereign debt crisis for different countries within the European Union.

i. Classification and Typology of Financial Crises

Before proceeding with exploring the trajectory of the crisis in Europe, it would be useful to provide for some definitions first. In general, financial crises are classified into several types, which have distinct differences but are also likely to overlap.[99] The main typologies of financial crises (which can be found with multiple names characterizing the same type) are commonly identified as follows: currency, banking, sovereign debt, external debt, inflation crises, capital market crises and crises that include stock market crashes and the breaking of other financial bubbles, such as a housing bubble, as seen above.[100]

Financial crises do not follow a unique pattern or model but they come in different forms and sizes and are an amalgam of events, which are driven by a plethora of public, private, domestic and international factors.[101] Furthermore, financial crises are widely characterized not only in economic literature, but also across other disciplines, such as in network theory and system theory,[102] by means of 'volatility,' 'contagion' and 'spillover effects.'[103] The contagion effect refers to the way in which a crisis originating in one country can have a domino effect and spread across international borders. The concepts of contagion and spillover take into consideration the impact of the crisis at a local level, as well as the chains of transmission through which the crisis is propagated at an international

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98 Carmen M. Reinhart and Kenneth S. Rogoff, 'Banking Crises: An Equal Opportunity Menace' (2013) 37 (11) Journal of Banking & Finance, 4561

99 Claessens Stijn and Kose M.Ayhan, 'Financial Crises: Explanations,Types, and Implications' in Claessens Stijn and others (eds), *Financial Crises: Causes, Consequences, and Policy Responses* (International Monetary Fund 2014) 4

100 Su Wah Hlaing and Makoto Kakinaka, 'Financial Crisis and Financial Policy Reform: Crisis Origins and Policy Dimensions' (2018) 55 European Journal of Political Economy, 225, 226; Hlaing and Kakinaka list domestic debt, external debt, inflation crises and crises that involve sudden stops in capital flows as the main typologies of financial crises, together with banking and currency crises. See also Carmen M. Reinhart and Kenneth S. Rogoff, 'From Financial Crash to Debt Crisis' (2011) 101 (5) The American Economic Review, 1702, where Reinhart and Rogoff identify these types of financial crises: external debt; total government debt, namely total public debt; government domestic debt; government foreign-currency domestic debt; central bank debt; domestic debt and hidden debt, which includes contingent liabilities of governments.

101 Stijn and M.Ayhan 3

102 See Urs Stäheli, 'Political Epidemiology and the Financial Crisis' in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing 2011) on his analysis about contagion and epidemiology in the context of the late financial crisis in Europe.

103 For the concept of volatility in financial crises, see Aizenman and Pinto. For contagion, from an international relations perspective, see Reinhart and Rogoff, 'Banking Crises: An Equal Opportunity Menace' 4561. From a socio-legal perspective, see the relation and differentiation in meaning between 'crisis' and 'contagion' and how this has been used to describe the financial crisis in the European context in Stäheli

level and thus is considered to reach systemic dimensions.[104] Consequently, the solution is believed to stand beyond the reach of one single state but it rather requires global policy coordination in the financial and fiscal sectors so as to allegedly stop or contain contagion.[105] As it is stressed in literature, however, contagion and spillover effects are not purely technical terms. To the contrary, these also refer to "the emotional response of the investors and the consumers to the radical changes on the international markets reflecting thus a strong psychological and behavioral dimension."[106]

Bringing this to the context of the crisis in Europe, in the following paragraphs I explore two lines of questioning. First, I look at how the crisis was identified and framed by means of its *origins* or *causes*, and second, I ask how the crisis was framed by means of its *type*. The framework I inquire into in this respect operates at both an institutional and at an academic level.[107] As invariably happens and as it will be shown below, the institutional response and conceptualization of the crisis has been informed or has been in sync with mainstream scholarship addressing the Euro-crisis and may have in turn influenced or led theoretical approaches to interpreting the crisis in Europe.

The framework for approaching the different types of Euro-crisis narratives which I suggest is a tentative one, and other scholars have done so by suggesting different versions. In particular, legal theorist Philomila Tsoukala has differentiated between two prevailing narratives on the causes of the European crisis, notably a moral and a structural one.[108] In more detail, within the context of the *moral narrative*, the crisis has been illustrated as the result of member states falling short of their treaty obligations due to their over-expanded, unsustainable welfare states, impacting in this way the rest of the EU countries. The *structural narrative* also highlighted the member states' own failure to abide by their obligations. However, according to this narrative, member states were also victims of the structural deficits in the very design of the Eurozone and in the design of the Euro as a currency. Tsoukala suggests that in the late years of the Euro-crisis, the *moral failing*

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[104] Reint Gropp, Marco Lo Duca and Jukka Vesala, 'Cross-Border Bank Contagion in Europe' European Central Bank Working Paper Series No 662/ July 2006 5

[105] Alessandro Ferrara, 'Curbing the Absolute Power of Disembedded Financial Markets: The Grammar of Counter-Hegemonic Resistance and the Polanyian Narrative' in Chiara Bottici and Banu Bargu (eds), *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser* (Palgrave Macmillan 2017) 176

[106] Claudiu Peptine, Dumitru Filipeanu and Claudiu Gabriel Țigănaș, 'The Contagion Effect and the Response of the Eurozone to the Sovereign Debt Problem' (2013) 5 (3) CES Working Papers, 423

[107] The term 'academic' is used here in a broad sense to encompass interdisciplinary and intersubjective Euro-crisis narratives, which are relevant to law but not all of them derive from legal analysis itself.

[108] Philomila Tsoukala, 'Narratives of the European Crisis and the Future of (Social) Europe' 48 (2) Texas International Law Journal, 242; See also on how Ireland's crisis has been narrated as 'a moral tale' "of feckless inability to self-govern" in Brendan K. O'Rourke and John Hogan, 'Frugal Comfort from Ireland: Marginal Tales from an Austere Isle' in Stephen McBride and Bryan M. Evans (eds), *The Austerity State* (University of Toronto Press 2017) 156.

narrative has taken the lead during the early stages of the crisis and continued being propagated throughout the years, even though the *structural defect narrative* has gained traction in the late years of the crisis. The lines of argument underpinning the structural and moral narratives on the one hand, or the institutional and theoretical ones on the other, which I suggest, are not distinct but rather, as it will be presented below, they intersect, overlap and complement each other.

ii. The Institutional Narrative

a. The Question of Origins

As for the question of the origins of the financial crisis, at an EU institutional level, the crisis has been framed within the context of an emergency, that is, as if it emerged naturally and yet seemingly from nowhere, disrupting the normal course and procedures of economic governance. This understanding of the crisis as endemic, namely as originating from the point at which it occurs and appearing naturally in the course of events, has been prevalent in the early Euro-crisis narrative.[109] The financial crisis has been posited as a 'wake-up call' for the purposes of safeguarding the sustainability of the existing structure, and Europe was depicted as falling off the wagon of competition, as stepping down in the global hierarchy of financial supremacy and dominance and running against the markets.[110]

The way in which the former President of the European Commission, José Manuel Barroso, framed the crisis in 2010 is indicative in this respect:

> "[t]he crisis is *a wake-up call*, the moment where we recognize that "business as usual" would consign us to a gradual decline, to *the second rank* of the new global order. This is Europe's *moment of truth*. It is the time to be bold and ambitious. […]

[109] See for instance Andreas Fischer-Lescano, 'Competencies of the Troika: Legal Limitations of the Institutions of the European Union' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart Publishing 2014) 56: "With the claim that the economic and financial crisis has created a *state of emergency*, a suspension of law is sometimes called for in the crisis. Insofar as the law stands in the way of effective crisis management, it should not be involved. An 'emergency mentality' has developed in the crisis policy."; emphasis in original. See also Gunnar Beck, 'The Rise of Unaccountable Governance in the Eurozone' in Eva Nanopoulos and Fotis Vergis (eds), *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019) 266, where it is argued that rescue packages for countries within the Eurozone were adopted by invoking provisions of the TFEU which provide for financial assistance among EU member states in the instance of 'natural disasters.'

[110] See also European Council, *The European Council in 2011 (*General Secretariat of the Council, *Luxembourg: Publications Office of the European Union, January 2012)* 7; where it is stated, regarding doubts about the implementation of the financial assistance package to Greece, that these "proved unfounded in the end: all 17 national parliaments duly approved it within three months – an impressive feat by political standards, even if it is slow by market standards!"; punctuation as stated in the original.

> To achieve a sustainable future, we must already look beyond the short term. Europe needs to get *back on track*. Then it must *stay on track*."[111]

In a similar vein, the Vice-President of the European Commission and member of the Commission responsible for Economic and Monetary Affairs and the Euro, Olli Rehn, also articulated the existence of the crisis in 2014 before the European Parliament by subscribing to the rhetoric of *emergency* and by highlighting the need to preserve the sustainability of the existing structure:

> "The purpose of macroeconomic adjustment programmes is to remedy an emergency situation in a sustainable manner. This requires taking determined action under enormous time pressure and in very difficult conditions.
>
> To restore economic confidence, programmes have a beginning and an end. Once the emergency is over, the reform process is continued under the normal procedures of economic governance."[112]

Almost ten years after Barroso's initial speech in 2010, in the briefing addressed to the Members and staff of the European Parliament in 2019, the European crisis was still depicted as a wake-up call that nobody could have expected or foreseen. "It has been a decade since the financial crisis erupted and changed the world in 2008," noted Marcin Sczepanski's, external policy analyst of the European Parliament, while he further added "[f]ew at the time *guessed* what would be its magnitude and long-term consequences."[113]

This narrative of blissful ignorance about the degree and significance of the financial crisis, followed by recourse to the language of physical necessity and natural causality in justifying the crisis of 2007-2009, is not only found at an EU institutional level. In crisis management theory, financial and economic crises have since long before been presented as "natural responses to markets and economies that engage in excesses beyond the capacity to endure long term."[114] That was also the case in the US financial crisis where, as Roitman underlines, "[n]o matter the spiraling details of finance gone amuck, the precipitous historical event in the standard narrative of the 2007–9 financial crisis has been the decline in housing prices, which was considered to *happen naturally*."[115]

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[111] Durão Manuel José Barroso, 'EUROPE 2020 A Strategy for Smart, Sustainable and Inclusive Growth' (*Communication from the Commission*, 2010); emphasis added.
[112] Olli Rehn, *Mr. Olli Rehn at the ECON Committee Hearing on the Troika Report (*ECON Committee Hearing *Strasbourg, 13 January 2014)* 3
[113] Marcin Szczepanski, *A Decade on from the Crisis: Main Responses and Remaining Challenges (*EPRS | European Parliamentary Research Service Briefing, *European Parliament, October 2019)* 1; emphasis added.
[114] Chance 235
[115] Roitman 43; emphasis added.

b. The Question of Typology

Coming now to the question of typology, at an institutional level, the route leading to the crisis has been documented as one plummeting from a financial crisis, developing later to an economic crisis, and finally erupting into a Euro-crisis, while the latter has been identified with public debt crises in the Eurozone. Following the global financial crisis, the meta-narrative that both the European Central Bank and the European Council adopted was that of a crisis of public finances or sovereign debt, by elevating Greece at the epicenter of this.[116] The 2010 annual review by the European Council is illuminating in this matter. In his retrospective account of the events that took place in 2010, former permanent President of the European Council, Herman Van Rompuy, noted the following:

> "The public debt crises within the eurozone were *an unexpected turn* in the greater and global financial and *economic roller-coaster* which began in August 2007 and reached an international height with the collapse of Lehman Brothers. Although the risk of an economic depression across the whole of Europe proved to be short-lived […], another threat came to light with the Greek government's financing problems, late in 2009. […] By the first week of May events had accelerated. It was clear that we needed to go beyond an ad hoc decision for one country and towards a systemic mechanism. The problem of *one* country became *a problem for the eurozone as a whole*, and even *a threat to the global recovery*."[117]

"Arguably,"[118] as some scholars have noted in a theological depiction of the crisis, for EU officials "the *day of reckoning* had arrived, and now was time for action."[119] On May 7th of 2010, the special summit of the sixteen Heads of State or Government of the Eurozone was scheduled to take place in order to adopt the Greek financial assistance package. As the former President of the European Council recalled in a dramatic recollection of the events, the summit "unexpectedly became," as if this was the Last Supper, "one of those decisive dinners which seem to be the secret of the Union's success."[120] "After midnight," he would add in an anguished tone, "the leaders of the sixteen eurozone countries agreed to use 'all means available' to safeguard the stability of

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[116] Brigid Laffan, 'International Actors and Agencies' in William K. Roche, Philip J. O'Connell and Andrea Prothero (eds), *Austerity and Recovery in Ireland : Europe's Poster Child and the Great Recession* (Oxford University Press 2017) 180

[117] European Council, *The European Council in 2010 (*General Secretariat of the Council, *Luxembourg: Publications Office of the European Union, January 2011)* 6; emphasis added.

[118] Sharma 157

[119] Ibid; emphasis added.

[120] Council, *The European Council in 2010* 6

the euro."[121] The prevailing interpretation of the financial crisis placed the focus on reasons endogenous to specific member states, particularly on economic and structural reasons, such as low competitiveness and growth, fiscal mismanagement, overburdened public sectors, political clientelism and nepotism.[122] These political and policy failures on behalf of specific member states, coupled with heavy external borrowing and slow-paced national economies were thus held to have led to the debt crisis within mainly Southern European countries, such as Portugal and Greece, with a focus on the latter.[123]

What followed was a story of "*misunderstanding* and *fear*,"[124] as the then President of the European Council would note at the beginning of 2012. In that story, the fear that the private sector's involvement in Greece would set a precedent for other Euro countries to follow prevailed.[125] While being "gripped with the nightmarish fear that the contagion from Greece was engulfing Spain and Italy, EU policymakers had *no time for theoretical debates*"[126] as this story unfolded. Storming into action, policy makers and markets allegedly knew that the possibility of a contagion spreading from within the Eurozone's banking sector was a real possibility,[127] and to them "the eurozone's Achilles heel remained Greece."[128]

As a result and in a manner similar to the 2007-2009 US financial crisis, the proclamation of the Greek sovereign debt crisis was followed by speculations and fear of contagion either by other highly indebted countries across the Eurozone, or by several banks in the EU, notably in France and Germany, which had a high exposure to Greece.[129] EU policy makers and sitting officials alongside executive officers at the ECB framed the Euro-crisis narrative as a sovereign debt crisis by using the language of contagion and spillovers, while at their own admission, still generally relying heavily on the speculations

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121 Ibid

122 See on that note Dimitrios Kivotidis, 'The Form and Content of the Greek Crisis Legislation' (2018) 29 (1) Law and Critique, 61

123 The countries that are implied here are Greece, Ireland, Italy, Portugal, and Spain; during the Euro-crisis these counties were usually referred to by the acronym PIIGS (Portugal, Italy, Ireland, Greece and Spain); see Mark Blyth, *Austerity: the History of a Dangerous Idea* (Oxford: Oxford University Press 2013) 3, 62 et seq., or by the acronym GIIPS (Greece, Ireland, Italy, Portugal, and Spain); see, for instance, Laffan, 'International Actors and Agencies' 180 and in William K. Roche, Philip J. O'Connell and Andrea Prothero, *Austerity and Recovery in Ireland : Europe's Poster Child and the Great Recession* (Oxford University Press 2017) xvi on the List of Abbreviations. This study prefers the GIIPS abbreviation and stands highly critical both towards the persistent use of the PIIGS acronym in scholarly accounts as well as towards the diminishing and contemptuous allusion that this abbreviation carries as far as the signifier and the signified are concerned.

124 Council, *The European Council in 2011* 7

125 Ibid

126 Sharma 157; emphasis added.

127 Ibid 152

128 Ibid 165

129 Mark Mink and Jakob de Haan, 'Contagion During the Greek Sovereign Debt Crisis' (2013) 34 Journal of International Money and Finance, 103, 112

of private rating agencies.[130] In particular, EU policy makers and institutions have strictly abided by the ratings of the so-called Big Three – namely, Standard & Poor's, Moody's and Fitch – which according to the latest report of February 2021, prepared by the the United Nations' Independent Expert on Debt and Human Rights, control over 92% of the global market.[131] Delivering a keynote lecture in October 2011 at the Bocconi University in Milan, which is widely influential in shaping European financial policies, the then Vice-President in office of the ECB,[132] Vítor Constâncio, would place this phenomenon of contagion "at the very centre"[133] of what the Euro zone was experiencing at the time. Based largely on sovereign credit ratings and countries markups the diagnosis, narrative and action plan by EU officials and institutions and by the ECB was thus contagion and how to stop it.[134]

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130 See Council, *The European Council in 2011* 55 para 15, 58 para 12 b), where it is stressed that over-reliance "on external credit ratings in the EU regulatory framework should be reduced." Cf. Council, *The European Council in 2010* 29, 32 para 15 b) on the necessity for EU's supervision of credit rating agencies; European Council, *Statement of the Heads of State or Government of the Euro Area* 3, where investigation to the influential role of rating agencies in view of the then negative speculations against sovereign debtors is urged.

131 Standard & Poor's, Moody's, and Fitch are bond credit rating businesses and investors' services; see Nauhaus Steffen, 'The Power of Opinion: More Evidence of a GIPS-Markup in Sovereign Ratings During the Euro Crisis' 4 September 2015 DIW Berlin Discussion Paper No 1501 2. See also Li Yuefen, *Debt relief, debt crisis prevention and human rights: the role of credit rating agencies; Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (*A/HRC/46/29, *UN Human Rights Council, 17 February 2021)* and Li Yuefen, *The Role of Credit Rating Agencies in Debt Relief, Debt Crisis Prevention and Human Rights (*Informal Summary Report of the Independent Expert on Debt and Human Rights presented at the 46th session of the Human Rights Council *UN Human Rights Special Procedures, 17 February 2021)* 1, where the UN Independent Expert states: "Credit rating agencies (CRA) have *an enormous influence on market expectations* and the lending decisions of *public* and *private investors*. […] Even though many reform proposals have been made, not much progress has been made thus far. In this report, the Independent Expert argues that the reform can no longer be postponed, particularly to prevent *negative impacts on human rights* of the people. […] These agencies suffer from birth defects, notably conflict of interests, biased decision-making, oligopoly, wrong business model and lack of transparency. Often, gradings are *procyclical*, which carry risks of triggering a *self-fulfilling prophecy of debt crisis*, affecting the livelihoods of the population."; emphasis added.

132 For contagion in the banking and financial sectors, see the ECB's long-documented pre- and post-crisis scholarship; Marcel Fratzscher, 'On Currency Crises and Contagion' European Central Bank Working Paper Series No 139/ April 2002; Gropp, Lo Duca and Vesala; Giovanni Covi, Mehmet Ziya Gorpe and Christoffer Kok, 'CoMap: Mapping Contagion in the Euro Area Banking Sector ' European Central Bank Working Paper Series No 2224/ January 2019; Giovanni Covi, Mattia Montagna and Gabriele Torri, 'Economic Shocks and Contagion in the Euro Area Banking Sector: A New Micro-Structural Approach' (*European Central Bank; published as part of the Financial Stability Review May 2019*, 2019)

133 Vítor Constâncio, 'Contagion and the European Debt Crisis' (*Keynote lecture by Vítor Constâncio, Vice-President of the European Central Bank at the Bocconi University/Intesa Sanpaolo Conference on "Bank Competitiveness in the Post-crisis World"; Milan, 10 October 2011*, 2011)

134 Council, *The European Council in 2011* 6-7, Stopping Contagion.

iii. The Academic Narrative

a. The Question of Origins

In the following paragraphs, I proceed from discussing the institutional response to the Euro-crisis, to how this was interpreted in academic literature across disciplines. In this interpretation, the crisis was initially characterized using the commonly invoked language of catastrophe and failure. As early as in 2010, Étienne Balibar noted "[t]his is only the beginning of the crisis. There can be little doubt that catastrophic consequences are coming."[135] The catastrophic consequences were diagnosed as affecting the employment and fiscal sector as well as the economic growth of various EU member states.[136] Despite the use of common language in describing the crisis, there has been a discrepancy in identifying the locus and the trajectory of the crisis in Europe.

Theoretical approaches to the Euro-crisis have singled out certain dimensions and interpreted this as either a legitimacy crisis of the EU, or a crisis of the legal system overall and have particularly identified an underlying and persistent *crisis of framing* in this respect. Building on that, other analyses interpreted the Euro-crisis as a crisis of the EU as a once-aspirational integration project, while other approaches located the crisis in the extended welfare state protection of some member states and focused on the reforms that needed to be implemented to encourage economic growth and sustainability.

In more detail, recent analyses examining the EU's responses to the financial crisis questioned the trajectory of the financial crisis in the EU as merely a sovereign debt crisis and raised questions about the EU's legitimacy, arguing ultimately that the Union has experienced a profound *legitimacy crisis*. Legitimacy is understood in this context of inquiry as the justified or rightful exercise of political power and in turn, a legitimacy crisis is considered to take place when a political order is not capable of providing all necessary conditions and standards for the justification of its powers and decision-making processes.[137] Against this backdrop, it was argued that the financial crisis was displaced into political systems across the Eurozone "by straining public finances and social protections in all EU member states."[138] This take on the unfolding of the crisis further criticized the existing Euro-crisis literature for having developed mainly from *within* the states and for not having addressed the question of EU's legitimacy or competency in crisis management

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[135] Étienne Balibar, 'Europe: Final Crisis? Some Theses' (2010) 13 (2) Theory & Event
[136] Szczepanski 1
[137] PLATO, 'The Post-Crisis Legitimacy of the European Union' (*PLATO Innovative Training Network (ITN) EU Horizon 2020 Marie Skłodowska-Curie Actions 2017-2020*, 2017)
[138] Lord

and resolution from a perspective *beyond* the state. In other words, these approaches challenged the core narrative of the sovereign debt crisis especially in cases where political authority and core state powers of taxing, spending and borrowing have been exercised or transferred beyond the state to bodies such as the EU and to non-elected technocrats and financial institutions, such as the International Monetary Fund (IMF), the European Central Bank (ECB), the European Banking Authority (EBA) and other authorities, which were created through intergovernmental treaties and international agreements.[139]

Along these lines, a *crisis of framing* was further identified and then found to have had direct implications for social protection schemes. In light of this, it was deemed that social protection could no longer be envisioned in the national frame since the 'modern territorial state' ceased to appear as the principal arena and agent of social protection.[140] This crisis of framing and lack of national framework is what Zygmunt Bauman has also stressed as a crucial difference when comparing the 1920s-1930s crisis with the late post credit-collapse crisis, despite the otherwise striking similarities of these two crises in terms of the soaring social inequality and high unemployment rates. In particular, in his own vivid words Bauman stressed that "[w]hile horrified by the sight of markets running wild and causing fortunes together with workplaces to evaporate and while knocking off viable businesses into bankruptcy, victims of the late 1920s stock exchange collapse had little doubt as to where to look for rescue: of course, to the *state* – to a strong state, so strong as to be able to force the course of affairs into obedience with its will".[141]

Linked to that mode of analysis, another approach that hinted to the crisis of framing was the argument that the financial crisis in Europe was preceded by a crisis of "the legal system as a whole."[142] In short, labor law scholars in Europe in particular have stressed that it was not specific legal institutions or legal instruments that fell short in addressing the implications of the financial crisis, but it was rather within the legal system itself that the crisis originated. In other words, it was stressed that there was a gradual decline of the *rule of law* before the outbreak of the crisis as well as a systematic degradation of basic legal values and legal protection in Europe's bailout agreements with certain

[139] PLATO; See also Lord
[140] Ferrara 176
[141] Bauman 141; emphasis added.
[142] Moritz Renner, 'Death by Complexity—the Financial Crisis and the Crisis of Law in World Society' in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing 2011) 93

member states while the crisis was unraveling.[143] By identifying the origins and direct implications of the crisis in the decline of the rule of law and degradation of legal values, these labor law academics lamented "the utopian fantasy of a marketplace without boundaries, […] in which relations between people and even the law can be treated as goods."[144] In this respect, they laid emphasis on the fact that the financial crisis "was a foretaste of the disastrous consequences of that utopia – a wake-up call to stop promoting "law shopping" and reinstate the rule of law."[145]

Taking this out of the specific context of the Euro-crisis, the discussion on the rise or decline of the rule of law is a much larger one and has been a focal point of assessment at an international level and through the lens of international law. In particular, the crisis of the *international rule of law* has been explored in depth by several international law scholars and political scientists,[146] who have systematically identified and documented the erosion, rejection and contestation of international law's rules and principles, the latter being understood as a value-based system.[147]

For now, going back to scholarly contributions to theorizing the Euro-crisis, other commentators have followed a starkly different path to interpreting the events that took place. Those analysts deviated from the mainstream narrative of the US financial crisis morphing into an economic crisis within European boarders and they do not subscribe to accounts that have placed the attention on EU institutions and policies or the legal system. These critics have gone so far as to suggest that the sovereign debt crisis and wave of austerity measures was not simply a crisis resulting directly from the 2007–9 US financial crisis. Instead, they suggest that the Euro-crisis stemmed from the steady and wide expansion of the social welfare state into public services within Europe alone, such as

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143 Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 (2) Oxford Journal of Legal Studies; Alain Supiot, 'A Legal Perspective on the Economic Crisis of 2008' (2010) 149 (2) International Labour Review, 152

144 Supiot, 'A Legal Perspective on the Economic Crisis of 2008' 152

145 Ibid

146 For a comprehensive, nuanced and inter-disciplinary analysis on issues concerning the role of international rule of law in the contemporary global constellation, see in particular the Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam Kolleg-Forschungsgruppe "The International Rule of Law – Rise or Decline?", which builds upon the assumption that a disproportionate crisis of international law is currently taking place in a changing terrain of global law, and examines the role of international law and the state in this context. For more information on the research group and its research agenda see https://www.kfg-intlaw.de/ <last accessed 14.06.2021>

147 Heike Krieger, Georg Nolte and Andreas Zimmermann, 'The International Rule of Law: Rise or Decline? - Approaching Current Foundational Challenges ' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), (Oxford University Press 2019) 12. See also Tiyanjana Maluwa, 'The Contestation of Value-Based Norms: Confirmation or Erosion of International Law?' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford University Press 2019) 311, 312 et seq., where Maluwa examines specific aspects of the contestation of value-based norms in international law; where they exist; in what forms; and what such contestation means or entails.

access to free education, healthcare and social welfare, coupled with the entitlements of an ageing population and the failure to fund existing services in a sustainable manner.[148]

Such views of course are neither novel nor unusual in the history of European social politics and in my view, these interpretations share potentially common ground with economic theories from before the 1980's, such as the theory of 'Eurosclerosis',[149] which was developed by some economists to describe the alleged poor economic performance in Europe between 1966 and the early 1980s. Those economists argued that this low economic performance was due to the overregulation and institutional rigidity of the European economy and labor market, and thus required cuts to regulation and the welfare state, wage equality and labor costs. Of course, as will be examined in the next chapters, economic analyses of that sort are not exhausted in theories such as 'Eurosclerosis' but they appear in different forms in a recurring and consistent pattern that is prescribed by similar economic concerns and convictions. One of these forms that particularly targets the social welfare state and its regulatory role, as well as the labor market and 'social economy'[150] is austerity in its multiple variants, which will be examined in the next chapter.

b. The Question of Typology

Moving on now from the *origin* to the *type* of crisis that took place in Europe, broadly defined, there has been an initial agreement among analysts that that the financial crisis spread, due to the inter-connectedness of the financial and economic sector, from the United States to Europe, where it has then been transformed into a banking and sovereign debt crisis within contracting member states of the Eurozone.[151] Following that, mainstream theoretical narratives, which relied on analyses coming from the fields of banking and international relation studies, depicted the Euro-crisis as having the character

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[148] Mary Dowell-Jones, 'The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity' in Eibe H. Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 84

[149] Claire Annesley, *A Political and Economic Dictionary of Western Europe* (Routledge 2014) 123; Annesley notes that term was coined by the Kiel-based German economist Herbert Giersch in the 1980s. For a comparative assessment of 'Eurosclerosis' across different European countries, see Tito Boeri and Pietro Garibaldi, 'Beyond Eurosclerosis' (2009) 24 (59) Economic Policy

[150] The thesis at hand shares a working definition of 'social economy' as provided in Quentin Liger, Marco Stefan and Jess Britton, *Social Economy (*IP/A/IMCO/2015-08 PE 578969, *European Parliament; Study commissioned by Policy Department A: Economic and Scientific Policy May 2016)* 25 et seq., where 'social economy' is understood of consisting of certain indicators; namely, it produces goods and services for both market and non-market purposes and redistributes and/or reinvests revenues and incomes; it is based on values of sustainability, solidarity, local development and inclusion; it aims at the reinforcement of social cohesion, awareness and citizenship through internal and external collaboration and collective efforts. A social economy model also gives primacy to the individual, in the sense of a plurality of individuals comprising the social basis, as well as on the primacy of social objectives over capital.

[151] Szczepanski 1; see also Tuori and Tuori 61, who submit "an economic narrative" of the Eurozone crisis.

of an international emergency and a national failure of financially assisted countries, which has been instigated by domestic institutional deficiencies. In spite of this familiar by now narrative, a generation of scholars have brought a refreshing blend of more nuanced takes on the trajectory and characterization of the crisis in Europe. In trying to illustrate these accounts, in what follows I identify *five* different narratives in relevant crisis scholarship and briefly present the major points in all five of them.

First, the Euro-crisis has been challenged for being portrayed in one-dimensional terms as a sovereign debt crisis. Into this fray of criticism have stepped international law scholars, such as Christine Kaufmann, who by taking Greece as a case study, argued that what occurred was in fact a "triplex crisis,"[152] which she then identified as a simultaneous currency, debt, and banking crisis. Similarly, other scholars took a critical stance towards sweeping accounts of the Euro-crisis as being a sovereign debt crisis *en masse* and stressed that the conditions in countries across the Eurozone were different and were not taken into consideration in their specificity and particularity. These approaches underscored that in countries such as Spain and Ireland, the underlying issues were located in the banking system, while the property-credit boom and housing price bubbles played a more prominent role in those countries rather than in Greece and Portugal for instance, where the latent issue at hand was identified in the sovereign signature.[153]

In light of the above, scholarly contributions stressed that the meta-narrative of the global financial crisis as a merely sovereign debt crisis served to mask a significant dimension of the crisis in Europe, which was that "the problem was an interlinked sovereign debt and banking crisis, a crisis of interdependence and financial integration."[154] As a result, masking the banking issue and placing the predominant focus on sovereign debt, budgetary consolidation and surveillance of financially assisted countries transformed the Euro-crisis into a crisis between Euro zone states and their peoples and placed the focus on creditors and debtors rather than on the issue of interdependence. This masking,

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[152] See Christine Kaufmann, 'The Covenants and Financial Crises' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 304-307; Kaufmann identifies the following major groups of financial crises in economic literature: (i) *foreign debt crises* followed by a *domestic public debt crisis*, which occur when a country is not willing or able to abide by its foreign debt obligations and commitments towards public and private creditors; (ii) crises that affect a country's *currency* or *balance of payments*, which concern speculative attacks on a currency by private or public investors following usually a debt crisis; (iii) *banking crises* which are related to the insolvency of private actors, such as investors or commercial banks.

[153] Cf. Laffan, 'International Actors and Agencies' 180; Mody 181, 183

[154] Laffan, 'International Actors and Agencies'180

some scholars further underlined, obscured the fact that the crisis occurred on all the above-mentioned fronts and that it was an interlinked crisis between member states.[155]

Second, interpretations of the Euro-crisis have been criticized for using a unified lens as if reflecting a unified and integrated economic, political and cultural European project. Challenging such a view, commentators writing from a global governance perspective highlighted that the European Union is a dualist political and economic establishment that is grounded on a two-speed model measuring economic and fiscal performance among North and South member states. This reality was further manifested in the dualist framing of Northern and Southern irreconcilable differences in the Euro-crisis in a similar fashion. Drawing upon that criticism, these analysts additionally held that the Euro-crisis narrative was framed along the lines of a distinct core versus periphery and North versus South dichotomy.

In this regard, it was stressed that during the Euro-crisis years, this dualist narrative has moved beyond the level of conflict and onto creating a cleavage within the European Union, implicating perceptions of power dynamics among member states and negatively impacting the European social integration project.[156] However, despite the fact that Northern and Southern tensions have existed for decades, what has been emphasized in relevant analyses was that these tensions did not cause the crisis but were rather intensified while Europe was headed to the crisis, rendering the latter as "an excuse to speak openly about them in far more harsh terms."[157]

This last point is linked to the *third* narrative I identify, namely the one challenging the Euro-crisis trajectory as having allegedly happened naturally, following up on uncontroversial facts and figures.[158] As discussed earlier, contrary to such a narrative of natural causation, several scholars have argued in general crisis theorizing and in the context of the Euro-crisis in particular, that there is nothing natural about a crisis.[159] Challenging the idea of a natural cause or source of a crisis, commentators have rather adopted a constructivist approach to crisis theory and argued that crises in the European region have a socially constructed dynamic to them and rest upon societal perceptions.

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[155] Laffan, 'Framing the Crisis, Defining the Problems: Decoding the Euro Area Crisis' 278

[156] Laffan, 'International Actors and Agencies'180; Brigid Laffan, 'Core-Periphery Dynamics in the Euro Area: From Conflict to Cleavage?' in José M. Magone, Brigid Laffan and Christian Schweiger (eds), *Core-Periphery Relations in the European Union: Power and Conflict in a Dualist Political Economy* (Routledge 2016) 20; José M. Magone, Brigid Laffan and Christian Schweiger, 'The European Union as a Dualist Political Economy: Understanding Core-Periphery Relations' in José M. Magone, Brigid Laffan and Christian Schweiger (eds), *Core-Periphery Relations in the European Union: Power and Conflict in a Dualist Political Economy* (Routledge 2016) 1

[157] Cross Davis 162

[158] Cf. Blyth 5.

[159] Boris Buden, 'What Does It Mean to Be "In Crisis"?' (*transversal texts Blog*, 2020); See also Beck 266

Arguing that events "often become construed as crises when people *perceive* them to be and define them as such,"[160] these scholars stressed that there is always an *interpretative stage* during which it is determined whether certain situations and events constitute a crisis.

In light of this, the construction of the Euro-crisis was considered to be a collective venture that cannot be fully grasped without taking into consideration the socially constructed nature of it as well as the powerful role that the media played in filtering, expediting and defining to a large extent the events that took place.[161] In other words, at the epicenter of this argument sat the *medialities* of the crisis, namely the perceptions of reality which are influenced by the media one is exposed to. Discourse on the medialities of crisis have further focused on the processes of co-production, dissemination and circulation of knowledge and representations concerning understandings and images of the crisis in the European context. The role of media in interpreting, defining and declaring a situation as a crisis is not a new point of discussion in theory. Koselleck stressed this very same aspect half a century ago, when he underscored in his influential and widely cited work 'Crisis' that "[a]bove all, it is the media which have inflated the use of the term [i.e. crisis]. On the basis of current headlines, a list of 200 different contexts was compiled in which the term crisis appears as adjective [..], as subject [..] or as defining word."[162] It is without a doubt that if we were to try today to count present or past headlines concerning the most intense phase of the Euro-crisis period between 2009 and 2015, daily references would total more than 200 entries.

In more recent analyses, political scientist Mai'a Davis Cross, in her research on crisis management and resolution, has laid particular emphasis on the role of media coverage during the European crisis and stresses that the media had a decisive role in amplifying fears and instilling a sense of integrational panic,[163] as she calls it, within European society. Integrational panic refers, according to Cross, to the social over-reaction towards a perceived threat, not to shared European values, but rather to "the common

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[160] Cross Davis 3; emphasis in original.

[161] Ibid 25; see also the special issue published in the French Journal for Media Research under the title 'Narratives of the Crisis/Récits de crise' coordinated by Christiana Constantopoulou, which records and analyzes "the myths which narrate the economic crisis in Europe and particularly in Greece and investigate the ways media and the diverse political and social discourses represent the crisis." In particular, see Constantopoulou 1

[162] Koselleck, 'Crisis' 399

[163] Cf. Cross Davis 162; Lahusen and others 529. See also Mai'a K. Cross Davis and Xinru Ma, *EU Crises and the International Media (*ARENA Cenre for European Studies University of Oslo Working Paper No 3, *June 2013)* 2, where Cross and Ma document and argue that international media was not just reporting on crises, but "it was amplifying negative perceptions and portraying relatively average obstacles to EU integration as causing seemingly existential crises for Europe."

European project of integration."[164] Societal over-reaction has also been highlighted by other commentators, who argued that this did not appear all of a sudden but was rather cultivated for a long time before the outbreak of the 2008 crisis. During what they call 'incubation period,' these scholars stress that systemic problems within capitalist societies, which were long before known but not acted upon, gradually led to profound *changes in culture* that in turn culminated in "*manic responses"*[165] during the crisis.

The crises of governance and constitutionalism, the controversy surrounding the hypertrophy of values and goals of the European project, or the skepticism surrounding the integrational nature of the project gradually developed into multiple crises in Europe which were given different names, such as 'wicked' or 'existential' crises.[166] Moving to a *fourth* type of crisis that had and continues to have a strong hold in public consciousness, the existential crisis narrative has been strongly evoked by several scholars in academic contributions as well. Appeals to an existential crisis have also been made at a policy and institutional level since the EU was understood to be going through an existential turn in its historical trajectory.

The words of former European Commissioner for Economic and Financial Affairs, Taxation and Customs, Pierre Moscovici, support this claim. As Moscovici would note in 2019 when the stability support program was completed for Greece, this drew "a symbolic line under an existential crisis"[167] that the Euro area was experiencing as a whole. It is a platitude to say that Europe is in crisis. It is much less of a platitude to define what we mean when we say that Europe is in crisis. Based on the standard public narrative, abundantly reflected in media discourses, the European crisis is equated with both the financial crisis since the fall of the Lehman Brothers in September 2008 and with the

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[164] Cross Davis 26, 31, 32; emphasis added. In her research, Cross Davis investigates why the EU has seemingly suffered numerous existential crises, and yet has repeatedly turned these episodes into opportunities for growth and innovation. In this respect, she argues that the concept of catharsis is a valuable tool for understanding why EU crises result in what she sees as more integration rather than disintegration.

[165] Mark Stein, 'A Culture of Mania: A Psychoanalytic View of the Incubation of the 2008 Credit Crisis' (2011) 18 (2) Organization, 174, 180

[166] See Puntscher Riekmann, where Riekmann discusses the problem of crisis' definitions and power of interpretation wielded by political and economic actors in the context of the financial and fiscal crisis in the EU and how this is interconnected with questions of integration and disintegration; See also Philomena Murray and Michael Longo, 'Europe's Wicked Legitimacy Crisis: The Case of Refugees' (2018) 40 (4) Journal of European Integration, where the definition of a "wicked" crisis and how this qualifies for the context of the refugees' crisis in Europe is assessed. In this respect, wicked problems are defined as laying at the "juncture where goal-formulation, problem-definition and equity issues meet […] and are characterised by a resistance to resolution."

[167] EC, *Greece begins a new chapter following the conclusion of its stability support programme* (European Commission - Press release 2018); emphasis in original.

sovereign debt crisis since the Greek state became incapable of financing its huge deficit and massive debt in late 2009.[168]

Focusing on the academic literature on the Euro-crisis as an existential crisis, several scholars have stressed that it needs to be assessed by means of five simultaneous, interconnected, and intertwined crises that were ignited by the US subprime crisis. The latter was considered to have acted as a catalytic event for turning already existing structural deficits in the socio-economic order of the European Union at economic, financial, fiscal, macroeconomic, and political levels, into different interrelated crises in Europe.[169] This manifold crisis in Europe was traced back in its contemporary history. In particular, five crises were identified, involving "the neoliberal turn of Europe in the 1970s; the subsequent financiarisation of the economies of European states; the sustained growth of public debt; the establishment of an asymmetric monetary union within the context of the EU; and the substantial failure of the attempts to clarify the nature of the EU as a polity."[170]

Following up on this analysis, the root cause of the existential crisis in Europe was partly located "in the very structure of the Union and the substantive content of European Union law."[171] Commentators such as legal scholar Agustín José Menéndez would stress that "the European Union *is* the crises,"[172] arguing subsequently that the existential crisis that the Union has gone through has challenged the present configuration of the Union as an establishment. In other words, the European Union was held throughout the recent European history to have played a significant role as an institutional body in making and in adopting certain neoliberal policies, which were then considered to have led up to the eruption of multiple crises particularly during the 2008-2015 period.

In a similar vein, and contrary to the "quest for a single cause,"[173] a number of constitutional and labor scholars alongside historians and legal philosophers have also approached the Euro-crisis in an all-encompassing, congregated framework taking aim at the neoliberal prescriptions of the present global capitalist system. In this endeavor, which

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168 Edoardo Chiti, José Agustín Menéndez and Pedro Gustavo Teixeira, *The European Rescue of the European Union (*The European Rescue of the European Union? The Existential Crisis of the European Political Project, *RECON Report No 19 ARENA Report 3/12, February 2012)* 392

169 Ibid 394-404, 453, 454, 455; See also Thomas Piketty, 'Piketty, Thomas and 14 others Our Manifesto for Europe' *The Guardian* (2 May 2014), where these commentators identify the crisis of the European Union as being an existential one, involving mainly the Eurozone countries, which were mired in a political climate of distrust, high unemployment rates and an imminent threat of deflation.

170 Chiti, Menéndez and Teixeira 392

171 Agustín José Menéndez, 'The Existential Crisis of the European Union' (2013) 14 (5) German Law Journal, 522

172 Ibid 466; emphasis in original.

173 Iannis Michos, 'The Greek crisis: a critical narrative' in Bertram Lomfeld, Alessandro Somma and Peer Zumbansen (eds), *Reshaping markets: Economic Governance, the Global Financial Crisis and Liberal Utopia* (Cambridge University Press 2016) 101

I would designate as a *fifth* distinct narrative, these commentators did not identify the causes of the Euro-crisis in one single source, such as the sovereign or banking crisis alone. Nor have they illustrated the trajectory of the crisis by describing only the facts and figures of the crisis. Instead, these critics have sought to puncture one-dimensional narratives by conferring a more holistic interpretation to the Euro-crisis as one consisting of a set of interdependent crises at an empirical, conceptual and systemic level.[174]

Consistent with materialist and critical crisis theorizing that has been discussed above, what has been claimed in this context is that the Euro-crisis has been indicative and expressive of a deeper systemic crisis that is chronic, dysfunctional, and inherent in the very dual nature of the European Union. This duality has been identified in that the European Union is a *sui generis* project of economic integration as well as a formation that internalizes the conditions and structures of the contemporary global capitalist system. What has been challenged was not the EU's particular institutional and legal architecture, but rather the conceptualization of the crisis as a merely economic phenomenon. Attention in this respect was drawn to the symbiotic fate of the European project with the broader systemic crisis of global economic theories and convictions, by which the EU has lived after the 1980s and onwards.[175] As has been assessed above, the inner contradictions of capitalism have been emphasized in crisis theory as a mechanism of cyclical and ever-ending crises, of ceaseless economic accumulation, production of debt and unequal distribution of wealth. The contradictions at the core of the neoliberal capitalist system have also been highlighted in more Eurocentric analyses, were the structural roots of the Euro-crisis were identified in a crisis of capitalism as such. Put differently, the crisis was identified in capitalism's contradictions at a global scale and its tendency in establishing an interdependency among various aspects of the capitalist system, namely by means of the production of value chains, the close interlocking of international flows of capital and the ensuring cross-sectoral transfers of trade, knowledge, and expertise.[176]

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[174] Cf. Nanopoulos and Vergis 4; Laffan, 'Europe's Union in Crisis: Tested and Contested' 915

[175] Nanopoulos and Vergis 4, 5, 9, 12

[176] See for instance Michel Husson, *A Radical strategy for Europe: From the endless bailout of Europe to taking leave from neoliberalism (*The European Rescue of the European Union? The Existential Crisis of the European Political Project, *RECON Report No 19 ARENA Report 3/12, February 2012)* 327, 335, where Husson contends that capitalism has been reproducing itself by accumulating a mountain of debt for the two decades preceding the financial crisis of 2007 at a global scale, while in Europe it has founded and driven the power balance in favor of capital by creating "neoliberal European integration." On the 'neoliberal' turn and its inner contradictions in the European Union, see Chiti, Menéndez and Teixeira 393-395; Horatia Muir Watt, Helena Alviar García and Günter Frankenberg, 'Law, Capitalism and Global Crisis: Revisi(ti)ng the Canons: Introduction' (*SciencesPo Law School, Paris, Private International Law as Global Governance Globinar*, 2020), 2

Building on these analyses, it has been stressed in relevant scholarship that already existing problems that were inherent to the European project "were revealed, magnified and aggravated by the global financial crisis of 2008."[177] Here it has been further underlined that the crisis in Europe cannot be assessed as an isolated event from the broader systemic crisis of global capitalism, but should rather be seen as a component of the latter and its systemic flaws. In investigating the multiple dimensions of the crisis in Europe, these scholars ultimately identified a multi-layered and interconnected normative and conceptual crisis as the basis of the Euro-crisis, which they in turn broke down into a crisis of identity, a crisis of democratic and political legitimacy and a crisis of the economic model and social character of the EU as an entity. Once the Euro-crisis was regarded not as coincidental but rather as symptomatic of deeper inherent issues that are connected to the very nature of the European project, it immediately emerged that what needed to be questioned was not only its allegedly pure economic and monetary character, but more fundamentally, the conceptual framework that underpinned the classification and treatment of the Euro-crisis as a 'crisis' in the first place.[178]

2.2. The European Crisis as a Social Crisis

2.2.1. "Crisis, they said":* Framing the European Crisis as a Crisis

So far, I have sought to present a brief overview of the prevailing approaches towards the notion of 'crisis' and crisis theorizing in current literature. I have further attempted to assess how the so-called Euro-crisis has been interpreted at an institutional level as well as in prevalent theoretical approaches in relevant scholarship. In what follows, I take stock of these analyses and proceed by looking into the European crisis as a social crisis. Two issues require further elaboration in this respect. The first one concerns the allusions of the framing of the recession in Europe as a crisis in the first place and as a debt and fiscal crisis in particular. The second questions what is meant by the notion of 'social crisis' within the space of the present endeavor, and how this is related to an ethical and legal reading of social rights.

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[177] Nanopoulos and Vergis 11

[178] Cf. Ibid; Nanopoulos and Vergis, 'The Inherently Undemocratic EU Democracy: Moving Beyond the 'Democratic Deficit' Debate' 150

* Here, I borrow the title by Coutinho Pedro in his article and use it slightly paraphrased compared to the original; see Luis Pedro Pereira Coutinho, '"Crisis, she said": The Portuguese Constitutional Court's Jurisprudence of Crisis - A Panoramic View' (2018) 34 JULGAR

Regarding the first issue, this thesis takes a skeptical stance on the question of whether what happened in Europe from 2008 onwards could indeed be classified as a solely fiscal and sovereign debt crisis, or if the categorization of 'crisis' has been useful at all. The skepticism expressed here is under no circumstance intended to cast doubt on the veracity or magnitude of the very tangible and far-reaching consequences brought about by crisis management policies for individuals and entire communities, but it is rather raised with respect to the content and appropriateness of the term 'crisis' as such.[179]

i. Characteristics of a Crisis

In the upcoming paragraphs, I argue that the conceptualization of the already existing situation in Europe and of the events that unfolded as constituting a crisis has been dubious and has been the chronicle of a story foretold. Having assessed how the Euro-crisis has been narrated both at an institutional level and in academic contributions, I submit a few observations on the general framing of a situation as 'crisis' and accordingly raise some critical points on the negative implications that this framing may broadly have and *has had* in the European context and in the social rights front in particular.

a. Crisis as Dualistic Thinking

To begin with, framing a situation as a 'crisis' cultivates dualistic and polarizing thinking. As it was presented above, crisis, when invoked, manifests a moment where a definitive and decisive intervention is pending and a resolute decision between utter alternatives needs to be reached. This last point hints at the existing tension that 'crisis' as a thought-process carries. That is to say, 'crisis' as a term is bound up with a disintegrating dualism and an inherent dialectic of antithetical thinking.[180] In line with this, "the reality of crisis is nothing more than the transfer of the battle of presumably polar forces into the political arena,"[181] which are formulated in moral terms. The outcome of an alleged crisis determines this process and the formation of the concept of crisis in a given framework is regularly characterized by harsh dualistic dilemmas posed in primarily moralistic terms.[182]

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[179] In the ensuing paragraphs the analysis draws upon the thinking of Tomer Broude in reflecting on crisis and its models in his paper 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' and adopts a similar critique; see in particular Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' 113 et seq.

[180] Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (translation of: Kritik und Krise published by Karl Alber, Freiburg/Munich, 1959, MIT Press 1988) 158

[181] Ibid 158, 159

[182] See also Koselleck, 'Crisis' 370

Bringing this to the European context, the fact that the events which took place from 2008 onwards were instantly characterized as a 'crisis' had considerable implications for how these events were framed and interpreted. The inherent dualism in crisis conceptualization implicated and amplified an already documented dualistic political-economic reality in the EU between North and South member states and core and periphery zones, as it has been highlighted in scholarly analyses above. Apart from the exacerbation of already existing differences, the framing of the situation in Europe as a crisis has also based discussion on a binary, polarizing thinking, where immediate, resolute decisions needed to be made, allegedly for the purpose of securing a stable and sustainable economic future for Europe as a Union.

Accordingly, the core narrative in the European context was that the global financial crisis was transformed into a sovereign debt crisis for particular member states in the Union, affecting other countries through spillovers and contagion, which were then exposed to the problematic economies at hand. In this crisis-charged political and social reality, European institutions had countries pitted against each other and encouraged competition among national economies and animosity among people, turning the European crisis into a conflict among nation states with devastating results for the lives of the Union's citizens of all countries and for social integration as a whole.[183] In other words, as Fishcher-Lescano adeptly observed, by setting national economies against each other as well as workers of southern Europe against workers of northern Europe, social issues were distorted into transnational and inter-state issues,[184] negatively implicating the EU project as a project of social integration.

b. Crisis as Fact

When framing a situation as 'crisis' it is assumed that what constitutes a crisis are uncontroversial facts beyond doubt and "ripe for picking up by analysts."[185] However, when labelling a situation as 'crisis' we have to ask ourselves whether we are engaging with the events solely from *within* a crisis narrative. If that's the case, then we need to reflect further on what other possible stories we might include or preclude when we identify one

[183] Andreas Fischer-Lescano, *Legal Opinion: Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding (Commissioned by the Chamber of Labour, the Austrian Trade Union Federation, the European Trade Union Confederation & the European Trade Union Institute 17 February 2014)* 5
[184] Ibid
[185] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 (3) The Modern Law Review, 382

particular crisis narrative and dispel another.[186] The proclamation of a crisis "is a particular judgement"[187] and thinking within a fixed, delineated crisis narrative, the crisis as such appears to be a derivative concept, a debacle declared and mired within the confinements of this debacle without looking at preexisting problems that led to it. Thus, identifying a 'crisis' and seeking to solve this while standing in a place from *within* that crisis bears an endemic contradiction, as Zygmunt Bauman observes. That is, to put it in Bauman's words, "the admission of the state of uncertainty/ignorance portends ill for the chance of selecting the right measures and prompting the affairs in the desired direction."[188]

Crisis presented as fact, assumes that crisis already exists and takes this as a point of departure. However, when crisis is portrayed as an *a priori* situation, it posits certain limitations and obviates possibilities of active or practical knowledge. A 'crisis' stands as a series of events where people find themselves entrapped in a certain predicament. That is to say the people *stay within,* while the action *lays outside*. It may be the case that by invoking a crisis, the aim is to capture the imagination of people and urge them to storm into action. However, crisis framing, as Tomer Broude notes, "even if justified by facts and accompanied by knowledge, can create indifference, even denial."[189] People drawn within the whirlwind of a crisis potboiler may feel indifferent but they may also feel to be victims, not knowing what happened while being told that they are incapable of solving it themselves. Therefore, it has been suggested, especially in the context of the Euro-crisis, that this should not have been framed as 'a crisis,' but as 'a challenge' instead.[190] The rationale behind this is that a crisis places oneself in a state of victimhood, whereas a 'challenge' renders oneself into an *active agent* that has the opportunity to right the wrongs.

c. Crisis as Inevitability

Framing a situation as 'crisis' invokes a certain kind of fatalistic and apprehensive language. The crisis model bears with it an etymological fatalism, which translates into all events being subject to fate or inevitable necessity and as such, being predetermined in a way that human beings cannot change them. As it was examined in previous paragraphs, metaphors of sickness and contagion are still used in explaining what a crisis is, followed

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186 Roitman 41. In the same spirit, see also Charlesworth 377
187 Roitman 81
188 Bauman 140
189 Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' 126
190 Angela Konert and Monika Rimmele, 'Why Turning a Crisis into a Challenge Matters' (*Interview with Prof. Dr. Kurt Biedenkopf; Schlossplatz³ Issue 7 Hertie School of Governance 2009; Asmussen, Jörg; Biedenkopf, Kurt; Kickbusch, Ilona; Loh, Johannes; Rimmele, Monika et al. (eds.)*, 2010)

by the eschatological association of 'crisis' with apocalyptic, irreversible and catastrophic outcomes.[191] This manifests that despite the linguistic evolution of the term 'crisis' and its semantic drift throughout the years, the medical and theological origins of the term are still pervasive in the way 'crisis' is grasped and construed in ever-present discourses.[192] Moreover, 'crisis' denotes an interregnum, an interim time of uncertainty, which translates into this being considered as a 'bracketed' phenomenon by means of its systasis and rhythm followed by major societal re-orderings.[193] This further connotes that as soon as a situation is identified as a crisis, it is followed by perceptions of epochal change.[194] However, when a situation is presented as a 'crisis' in the sense of sickness, disease or reckoning by weaving together medical and theological connotations of the term, this is confronted with a certain reality. That is, to use Hippocrates words in his 'Aphorisms' "[w]hat remains in diseases after the crisis is apt to produce relapses."[195] Put differently, when interpret a course of events as 'crisis,' this signifies that the alleged situation is open to resurface again and again in the future and that we tacitly acknowledge this prospect.

We may seek for a closure and resume life as it was before a crisis occurred, but by zealously rushing into declaring a situation as 'crisis,' what we are left with instead are several inconsistent narratives, none of which offers a clear-cut closure and an end in the way we imagine it. In other words, reality is rarely fashioned in such simplistic terms and socio-economic and political affairs of extended proportions, intensity and duration rarely start and end in distinct ways, in the sense of a definite beginning and an end, or by means of neat demarcations and linear developments and consequences.[196] By contrast, crises have now lost their original meaning as turning points for better or for worse. Instead crises now connote less a paroxysmal attack and more a protracted functional disorder.[197] Consequently, crises may be followed by perceptions of epochal change, but contemporary crises as protracted, intricate affairs rather evidence *the end of an epoch that never ends*.

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[191] Stäheli

[192] Koselleck, 'Crisis' 370

[193] Zygmunt Bauman, 'Times of Interregnum' (2017) 5 (1) Ethics & Global Politics, 51; Clam 192

[194] Koselleck, 'Crisis' 358

[195] Hippocrates, 'Aphorisms' (*The Internet Classics Archive translated by Francis Adams*)

[196] Ira Helsloot and others, 'The New Challenges of Mega-Crises' in Ira Helsloot, Arjen Boin and Brian Jacobs (eds), *Mega-Crises: Understanding the Prospects, Nature, Characteristics, and the Effects of Cataclysmic Events* (Charles C Thomas, Publisher 2012) 5

[197] Watt, Alviar García and Frankenberg 2. See also Carmen M. Reinhart and Kenneth S. Rogoff, 'The Aftermath of Financial Crises' (2009) 99 (2) The American Economic Review, 466, who note the following: "Broadly speaking, financial crises are *protracted affairs*. More often than not, the aftermath of severe financial crises shares three characteristics: First, asset market collapses are *deep* and *prolonged*; second, the aftermath of banking crises is associated with profound declines in output and employment; third, the real value of government debt tends to explode […]"; emphasis added.

d. Crisis as Reductionism

Framing a situation as 'crisis' leads to reductionisms. Put differently, invoking a crisis model involves singling out one particular event or series of events and simplifying highly convoluted and entangled social phenomena. This practice is sustained with the use of a "general, sanitised language that reduces the messiness of the reality,"[198] which leads to missing or obscuring the wider picture, within which an alleged crisis occurs. Crises, which are characterized by multiple concomitant and interlinked scenes across borders, present themselves with new, uncharted and unprecedented adversities, which are "unconceivable within our present mindset, and unmanageable with our usual tools."[199] Naming a situation as 'crisis' is thus a way out in using *conventional* economic terminologies of spillovers and contagion effects in *unconventional* circumstances of legal and political complexity, so as to reduce this complexity.

Besides reducing the complexity of *a crisis' consequences*, another reduction that usually takes place is reducing the complexity of *a crisis' origins* and its many *different facets*. In 1888, during the Long or Great Depression of 1873–1896, Nietzsche, according to Reinhart Koselleck "asked himself: "Why *am I* a destiny?" ("Warum ich ein Schicksal bin")"[200] to further reply "One day *my name* will be connected with the recollection of something enormous – with *a crisis* such *as never before existed on earth*, with the deepest clash of conscience, with a decision solely invoked against all that had until then been believed, demanded, hallowed. *I am not human, I am dynamite*."[201]

What this answer resulted in, according to the historian, was that Nietzsche effectively "reduced the European crisis to his own person."[202] This may be indicative of a wider tendency that we come across in crisis framing, notably the tendency that one might have in reducing the many layers and intricate aspects of a crisis to one-dimensional, personified and individually oriented answers. This may even be understandable and expected due to the personal, physical and cognitive inability of an individual to grasp and map the inter-connectedness and complexity of an extensive and pervasive webs of crises. Put differently, one may reduce a crisis to their own person because they cannot think otherwise, or because they are led not to think otherwise.

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198 Charlesworth 384
199 Lagadec 12, 13
200 Koselleck, 'Crisis' 388
201 Ibid; emphasis added.
202 Ibid

Reducing crisis to the self in an individualistic and atomistic model of political thinking is not the sole expression of reduction tendencies in crisis conceptualizations. Reducing a crisis' origin and outcomes to singular preexisting structures in a system-oriented model, is also another common pattern, which may lead to reductions in crisis framing and interpretation. Surely, the discussion on the necessity of *reductionism* or *emergence* as a thought-process or theory of knowledge is not exhausted in the above-mentioned brief observations. These rather serve as an indication of wider questions on the significance and role of reduction in relation to questions of complexity. It suffices to note as a closing remark, that situations framed as a 'crisis' can establish reductions in the sense of elliptical and not dialogical approaches to critical conditions and may thus lead to oversimplifications and impoverished conceptual frameworks at the expense of existing long-standing complexities that require more rigorous and nuanced approaches.[203]

e. Crisis as Normalcy

A situation framed as a 'crisis' is usually positioned as the *opposite* of normalcy. When we seek to understand what constitutes a 'crisis,' we usually ask ourselves what we have done wrong and subsequently look for solutions to restore a once proclaimed normalcy. However, although 'crisis' may be considered the opposite of normalcy, this may obfuscate what 'normal' is and facilitate the normalization of certain meanings and conceptions. In other words, crisis may be invoked to present to us the prospect of a seemingly abnormal, problematic future laying ahead, but this framing may conceal that this future could have been a continuing past and present that we already live in. In this respect, crisis-talk can be used as a means to normalize the already normalized. It can be instrumentalized towards formally establishing certain socio-economic conditions and determining a particular policy orientation within a society.

Crisis-talk can become a source of entrenchment of the stability of the system as a whole, which by constantly morphing, can absorb crises, even those that are seemingly terminal, like the recession in 2008.[204] As far as economic crises concerns, these, as Diane Desierto observes, are "hardly the "new" normal," since contingent upon "one's analytical and ideological horizons, one could take the view that economic crises have always been

[203] On this point, see also the analysis by Iannis Michos on the 'quest for a single cause' in interpreting the crisis in Europe, which according to Michos, has deep theological roots and offers powerful, although *archaic*, simplifications; Michos 101.
[204] On that note, see also Nancy Fraser and Bhaskar Sunkara, *The Old is Dying and the New Cannot Be Born* (epub edn, London; New York: Verso 2019) 9, 10, 44, 55

'normal'."[205] In light of the above, restoring pre-crisis normalcy is beside the point, since normalcy may be precisely the existing deficit that unfolded into a crisis in the first place.[206]

The latter has been observed by several commentators, who have written on crisis theorizing during the late US-EU financial crisis. For instance, Janet Roitman argued that the late recession should not be approached as having been caused by some kind of abnormal error, misjudgment or inherent corruption in the banking sector. Instead, as Roitman contended, certain aspects within the financial system have been thoroughly normalized during the previous decades and remain 'normal' in the post-crisis world of finance. Historical sociologist Greta Krippner has also taken crisis as a given in *Capitalizing on Crisis*, where she looked at US politics. There, Krippner illustrated how "deregulation then crisis" came before "crisis then deregulation"[207] in financial markets. To that end, Krippner further demonstrated how US state officials systematically tapped into domestic and global capital markets several decades before the crisis so as to avoid dealing with broader political dilemmas regarding the distribution and allocation of resources. As Krippner argued, US policymakers turned to finance in an attempt to extricate themselves from the socio-political problems with which they were confronted, and they did so under "the *guise* of *social crisis*, fiscal crisis, and the legitimation crisis of the state."[208]

Drawing on the US socio-political and economic reality but taking this to broader conceptual questions, historian and philosopher of economic thought, Philip Mirowski, has also analyzed how certain economic convictions were used to solve the very financial and economic crisis of 2008 that they had created. Pointing towards neoliberalism in particular, as not only a public policy approach and economic strand, but rather as an all-encompassing project with a societal and cultural underpinning, Mirowski stressed that nothing much has been changed due to the crisis in the global financial system from the situation that existed before the crisis took place.[209] Rather, Mirowski argued that neoliberals, guided by their main intellectual cluster, namely the Mont Pèlerin Society, did not let the financial crisis go to waste but rather used a series of strategies in order to cement their already existing socio-political ideas at a societal level and in everyday culture. In a similar spirit, other commentators argued that the financial and economic crisis has

[205] Diane A. Desierto, 'Austerity Measures and International Economic, Social, and Cultural Rights' in Evan J. Criddle (ed), *Human Rights in Emergencies* (Cambridge University Press 2016) 241, 242
[206] Lagadec 13, 14
[207] Cf. Roitman 82; Greta R. Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Harvard University Press 2011) 22, 58 et seq.
[208] Krippner 22; emphasis added.
[209] Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (epub edn, Verso 2013) 29, 31

provided the golden opportunity for neoliberalism to be consolidated in the post-2008 era, creating in this way an opportunity for the social welfare state to be furthered hollowed out and for social rights to be gravely impacted, as it will be examined in the next chapter.[210]

f. Crisis as Pretext

Framing a situation as a 'crisis' can be used as a pretext in political contexts. More often than not, the pronouncement of a critical situation as a crisis will be partial, misleading or false. Both the previously mentioned notions of 'crisis' and 'normalcy' are amorphous and open-ended. Being accustomed to think of the world as stable, people are prone to acknowledge a series of events with profound intensity and magnitude as a 'crisis' because they crave for this instability to end and for some kind of normalcy in their lives to be restored. A 'crisis' thus requires closure, a redemption, and it is common, as Koselleck notes, that in order to "escape their misery, the people believe everything that promises an end."[211] Finding a way out of the crisis equates in this regard to re-establishing a state of affairs before the crisis erupted. As a result, the way we view and interpret certain events as indicators of a 'crisis' sheds light on how we construct our idea of 'normalcy.'

In this connection, political, institutional and policy actors do not just respond to a crisis but crucially identify and define what a crisis is through narrative building.[212] As Heike Krieger and Georg Nolte stress, the "assertion of a crisis may even be used by some to further their political causes."[213] The concept of crisis serves as a narrative device that enables certain questions, while foreclosing others. In crisis theory this is also named as 'masking' and may have a crucial role in crisis oversight "as political actors seek to downplay the extent of the problems or keep crucial aspects of the crisis off the public agenda."[214] In light of the above, the language and manner in which a crisis is framed highlights the issues that need to be addressed and impacts the selection of the appropriate strategies and policy instruments in crisis management and crisis resolution.[215]

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[210] David J. Bailey and Saori Shibata, 'Austerity and Anti-Austerity: The Political Economy of Refusal in 'Low-Resistance' Models of Capitalism' (2019) 49 (2) British Journal of Political Science, 685
[211] Cf. Koselleck, 'Crisis'; Lagadec 13
[212] Laffan, 'Framing the Crisis, Defining the Problems: Decoding the Euro Area Crisis' 268
[213] Krieger, Nolte and Zimmermann 4
[214] Laffan, 'Framing the Crisis, Defining the Problems: Decoding the Euro Area Crisis' 268
[215] Ibid 267

g. Crisis as a Catalyst or a Decoy*

Reflecting on the above-mentioned observations, framing a situation as a crisis can act as a catalyst or a decoy, as it has been stressed in international legal scholarship, [216] meaning it can either prompt or deflect change. Broadly characterizing a situation as crisis carries all the semantic and conceptual challenges that were mentioned above and if we are not cautious and terminologically discriminate about the meaning and use of crisis-talk, this can be counter-productive for the change we wish to make happen.[217] Having said that, the events that took place during the decade 2008-2018 in the Eurozone, could be described as qualifying a 'crisis' if one adopts a broad and albeit simplistic concept of crisis as an unwanted, prolonged and overwhelming situation that causes uncertainty and is met with a general inability to respond. Even so, a critical situation that is intractable, followed by a general difficulty to manage it does not necessarily constitute a crisis.[218] Contemporary crises being protracted critical affairs rather than momentary events cannot be addressed exclusively by specialized technical organizations but rather, collective efforts, mutual aid and deliberation involving all social actors is necessary. In this regard, the use of crisis language to describe a situation which is merely an emergency, or a catastrophe can be misleading. Increasingly, crisis analysts emphasize the need to challenge conventional wisdom concerning crisis management and resolution.[219]

The same concerns apply if one takes the European situation in question to have been unforeseeable and an emergency, since the developments that took place were neither unexpected nor exceptional. Recourse to crisis-talk as a primarily sovereign debt problem in Europe was followed, as it has been stressed by many commentators, by a blind reproduction of emergency rhetoric at a supranational level, which further led to irregularities in democratic processes and to acrimony between states and constituents.[220] The fact that this in turn served as a diversion and force of polarization between member states within the European constellation affirms how necessary it is to question the

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* Here, I borrow part of the title from the collective volume Willem J. M. Genugten and Mielle K. Bulterman (eds), *Netherlands Yearbook of International Law 2013: Crisis and International Law: Decoy or Catalyst?*, vol 44 (The Netherlands Yearbook of International Law Book Series (NYIL), Asser Press; Springer 2014)

[216] Cf. Authers and Charlesworth 22; Barbara Stark, 'Introduction: The Discontents Confront Crisis' in Barbara Stark (ed), *International Law and its Discontents: Confronting Crises* (Cambridge University Press 2015) 8

[217] Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' 117

[218] Ibid 117, 118

[219] Lagadec 14

[220] Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' 135; for the purposes of raising this point here, I have paraphrased Tomer Broude's critical comments on crisis faming and the opportunities of international law assessed specifically under the lens of climate change and the framing of the latter as crisis.

excessive and unwarranted use of crisis narratives and widespread rhetoric of the state of emergency up to this day[221] and the 'emergency mentality' that surrounded the events that took place in the European context in particular.

ii. Interim Conclusive Remarks

Reflecting on the above assessments, I take that the characterization of the financial and economic developments that took place in Europe after 2008 as a 'crisis' (let alone as being primarily a sovereign debt and banking crisis) has been counter-productive in terms of understanding the actual events and in finding solutions. Being presented in eschatological and catastrophic terms, the existence of the Euro-crisis was established as a given, uncontroversial, factual reality. We could ask what this crisis was caused by, or "who did what to whom,"[222] but the fact that this was 'a crisis' went unchallenged and undisputed. 'Crisis' was thus elevated to a source of knowledge, within which the particular story of the debt crisis was generated and justified. In this respect, the overall framing of the critical situation in Europe as a 'crisis' has placed already existing tensions in polarizing and dualistic terms. It has reduced the complexity of underlying matters to one-dimensional narratives, while rendering crisis discourse into a convenient tool for the normalization of political and economic agendas.

We have seen above that while the EU "engaged in *short-term 'fire-fighting' measures* such as bailouts to save banks and help stressed sovereigns,"[223] this strategy has been justified on the basis of speculations about contagion and spillover effects among different national economies in the EU. This levelling account of events became the prevalent one, despite the arguably limited research on contagion in the context of the Euro area.[224] 'Crisis' as a signifier has been pivotal for the signified language of epidemic spreads, virulence and transmission, which is typical in financial and economic studies, as we have seen above. However, the establishment of financial crisis-talk clouded much-needed reflection and existing research, which pointed towards shared deficits among different systems across borders.

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[221] On that point see also Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 41 citing Andreas Fischer-Lescano, 'Troika in der Austerität. Rechtsbindungen der Unionsorgane beim Abschluss von Memoranda of Understanding' (2014) 47 (1) KJ Kritische Justiz, 3 et seq.
[222] Mirowski 85
[223] Szczepanski 1, 4; emphasis added.
[224] Mink and de Haan 103

That is to say, as relevant scholarship has also underscored, *co-movement* between the banking sector and national or international economic systems in extended and interrelated crises is rarely driven by contagion and spillover effects, but it is rather produced by *common fundamental factors* underlying those systems.[225] The situation was framed in a way which resorted to the common language of spillovers and contagion and adopted a monotonous rhetoric of financial crisis-talk *qua* contagion. Thus, it displaced the problem from the common European and global systemic foundations to the ways in which this problem was displayed and evolved within the globalized economic system. Therefore, in the case of Europe, the classification of the crisis as a debt crisis, followed by the immediate imperative for policy makers to storm into action, prevented the necessary stage of prior theoretical reflection and identification of broader, interlinked problematic areas, thereby failing to produce carefully mapped viable solutions.

Contrary to such one-dimensional accounts of the Euro-crisis, this thesis is rather inclined towards analyses which stress that the events in Europe were the epiphenomenon of an already existing pathogenesis and multilayered structural deficit in the European political and socio-economic project. More precisely, the study takes that the crisis and the events surrounding it, seen especially from a social rights perspective, have been symptoms of a systematic lack of engagement with underlying theoretical issues concerning the conceptualization of social rights. The way in which the situation has been painted using the loose language of crises, and then exhaustively labelled as a fiscal and sovereign debt crisis has been, according to this author, an over-simplification and generalization. Moreover, the pronouncement of the Euro-crisis is taken here to have been a defining moment in establishing socio-economic and political conditions that had already been changed and normalized during the previous decades at an international and European level. In this respect, social rights and their tormented meaning during the economic recession of the last decades is also considered to be part of a deficient basis on the ethical and ontological assumptions upon which social rights have been conceptually grounded.

In order to move past conventional one-sided narratives in protracted social affairs that are labelled as 'crisis,' what is important to discern are the commonalities and similarities among past and present large-scale, periods of change as well as the pattern of repetition in a given peak moment, namely the recurring event that a crisis reveals upon its culmination.[226] Another way to look at the discourse of 'crisis' in order to have a productive

[225] Mierau and Mink 4766
[226] Cf. Stefan-Ludwig Hoffmann, 'Repetition and Rupture' (*Aeon*, 2020); Koselleck, 'Crisis' 358

engagement in contemporary societies is by means of fragmentation, namely in the sense of a social and existential incoherence that takes the shape of both a lasting and chronic condition.[227] Differently to an interpretation of crisis *from within*, namely from a place of crisis *in* context, the analysis here opts for approaches suggesting that we gain insight into crisis as an area of research when we look at "crisis *as* context; that is, as a terrain of action and meaning rather than an aberration."[228] Such a view of crisis departs from conceptualizations of crises as momentary and isolated phenomena. Instead of being approached as singular events, critical states are understood as pervasive contexts, which are manifested throughout all structures and processes.[229] Having said that, understanding crisis as a pervasive context may elicit criticisms as to whether this constitutes a crisis in the first place. If we consider crisis to be an opportunity for change, then talking of a crisis in these terms could equated to a constant, perpetual crisis. Subsequently, the idea of a perennial crisis may be self-negating, as this could not directly threaten the stability of the system, bring about the need for a decisive intervention, or result in one.[230]

Moreover, everyday current states of affairs are already loaded with a high level of complexity and uncertainty, which is something that is *all pervasive* in contemporary multi-level governance. This is to be anticipated and not to be conflated with crisis in its etymological meaning.[231] In other words, complex and interrelated matters can be viewed as critical states faced with continuing challenges. If we do frame a situation as a 'crisis', this may lead to reductionisms, forced normalization and acceleration of processes and a blind reiteration of stereotypes revolving around the term 'crisis', which could ultimately obscure the real dimensions of a given situation. So, framing a course of events as a 'reality check'[232] or 'challenge'[233] rather than 'crisis,' may be more fruitful in easing out public pressure and in withholding social anxiety, which is constantly triggered by the ever-present use of crisis-talk in everyday language. This said, looking at crisis as context does not mean that crises are seen in holistic, homogenizing terms of uniformity and essentialism. Crises, being the contingent outcome of a complex sequence of events, when understood contextually rather need to be approached in their specificity and uniqueness

[227] Vigh 9
[228] Ibid 8
[229] Ibid
[230] Hay 63
[231] Tomer Broude, 'Complexity Rules (or: Ruling Complexity)' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford University Press 2019) 240
[232] See ibid 241, which reads "As the international rule of law faces a reality check in the 2010s, we should not consider it as being in crisis."; See also Konert and Rimmele 3
[233] See Konert and Rimmele 3

while being assessed inside the wider structures within which they are situated.[234] Bringing this to the level of social rights, this translates into understanding the crisis in social rights not as an incidental event, but as a dimension of an already inadequate framework, of not only protection but most importantly, of meaning.

In order to avoid reductionisms, another way to think of critical situations might be through a *transpersonal* and cross-regional mode of interpretation of 'crisis' that focuses on issues of structural justice that stream across everyday aspects of life and different layers of societal living.[235] Drawing upon that and in the face of contemporary multi-level social crises, international legal scholars stress the need for internationalism and solidarity across countries, regions and all people globally, while they emphasize the necessity for reinstating a robust social welfare state to guarantee and provide for social and economic security, as opposed to a stateless model of governance comprised by technocrats and specialists.[236]

As legal scholars and political philosophers have already started to stress, what needs to become tangible for social actors is that the roots of the crisis lie in the institutions and mechanisms of the political period of neoliberal ascendancy which preceded the current form of social and political organization at a European and international scale, and that these institutional formations do not have the capacity to fix the wrongdoings by themselves.[237] What these scholars suggest is that social actors need to realize their capacity and responsibility to change the current conditions. They effectively reappraise long-lived and generally agreed upon theories, prescriptions and philosophical assumptions.

"Real crises are rare,"[238] historian Jacob Burckhardt stresses, because a real crisis exists when it leads to "a fundamental change of social relations." [239] Being considered a thoroughly "historical phenomenon,"[240] the existence of crisis has been interpreted historically in relation to change in social relations, the latter being understood in the sense of social re-orderings and major shifts, subversion or demise in social formations and in the social and political order. Real crises may be rare, yet crisis-talk is ordinary. If what has

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234 Hay 68

235 On a similar point with respect to international law and the use of crisis-talk, see Charlesworth 391

236 Sundhya Pahuja and Jeremy Baskin, 'Never Waste A Crisis: A Practical Guide' (*Critical Legal Thinking: Law and the Political*, 2020)

237 Cf. Simon Deakin and Aristea Koukiadaki, 'The Sovereign Debt Crisis and the Evolution of Labour Law in Europe' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 186; Fraser and Jaeggi 224

238 Koselleck, 'Crisis' 387; where Koselleck cites historian Jacob Burckhardt (1959), according to whom "[N]ot even the English Revolution was a real crisis because it did not lead to a fundamental change of social relations." The analysis here does not reiterate these words in the spirit of Burckhardt's crisis theory framework, nor in relation to the entirety of his work, but rather it is inspired by these words for the purposes of this analysis and for the perspective on social relationality it seeks to take.

239 Ibid

240 Buden

happened in Europe in the last decade has been a socio-political crisis more than anything else, then the slow and dawning realization of the necessity to re-assess and re-configure the long-established ethical assumptions that we live by is indeed a realization "of the kind which occurs once in a generation or so."[241] Towards this endeavor and as it is presented in the following sub-section, I examine the necessity for a reappraisal of social relations not in the arena of politics and governance. That is to say, I do not approach this from a ruling-class ideology that calls for "the top-down reorganization of society"[242] and for a socio-political reordering within hierarchical societal structures. Where my focus rather lays is in approaching and re-assessing social relationality at the level of existing ontological and epistemological assumptions, which inform the ethical bases of social justice theories and thus also underpin understandings of social rights theory.

2.2.2. Social Crisis *as* in Crisis of Social Rights

In 2010, when the global financial crisis had already morphed into a deep crisis of the Eurozone,[243] the then President of the European Commission, José Manuel Barroso, was heralding the social-focused Europe 2020 initiative with the following words: "2010 must mark a *new beginning*. I want Europe to emerge stronger from the economic and financial crisis." [244] A decade later, and while the debate has already moved discussions of a post-crisis era, a new beginning beyond the economic crisis is still yet to come for Europe. Instead of a beginning, what happened was rather a vicious circle in which sovereign and bank risks fed each other, as policy analyst Marcin Szczepanski noted in late 2019, while addressing the Members and staff of the European Parliament.[245] While it was only in 2017 that the EU economy returned to a state similar to that before the crisis, Szczepanski added that the signs in 2019 were "*not so promising*."[246]

This interval period that aspires to and promises a new beginning which never eventuates alludes to Antonio Gramsci's infamous words that a "crisis consists precisely in the fact that the old is dying and the new cannot be born."[247] The historical background against which Gramsci was writing these words was the Great Depression of the 1930s

[241] Deakin and Koukiadaki 186. See also Fraser and Jaeggi 224
[242] See on that point the analysis by O'Connor, 'The Meaning of Crisis' 324
[243] Laffan, 'Europe's Union in Crisis: Tested and Contested' 915
[244] Barroso
[245] Szczepanski 1
[246] Ibid; emphasis added.
[247] Antonio Gramsci, *Prison Notebooks 1891-1937*, vol II (Joseph Buttigieg ed, Joseph Buttigieg tr, Columbia University Press 1992) Notebook 3, §34, at 32, 33, "Past and Present"

and the rise of the European far right, which was already emboldened by the Fascist power grab in Italy in 1922.[248] Gramsci referred in this respect to the interwar historical 'crisis of authority', namely the lost consensus of the ruling class and skepticism towards the old generation of leaders, theories and formulas, which reflected on a post-war rupture between the popular masses, the dominant ideology and capitalist hegemony at the time. The concept of 'interregnum' has thus been used in a Gramscian context to denote the temporal lapse and break in exchange of authority in an "otherwise monotonous continuity of government, law, and social order."[249]

Gramsci, using this concept, embraced a wider spectrum of the socio-political-legal order, while seeping deeper into the socio-cultural conditions at the time.[250] While it could be argued that his words were relevant only to a particular historical context and time, the 'interregnum' that Gramsci was referring to tailors to any *transitional* phase and interim period, during which an old order is *already* dying while a radically different new one is *not yet* able to be born.[251] After all, crisis understood as crisis of authority has been, and still is, a recurring conceptual motive throughout modern history. The concept of crisis became historically "central to the self-description of politics and economics in the period which could be called maturing modernity (1800–1900) and has become diffused since then into all systems and domains of social communication."[252]

Being a term of historiographical significance to historians such as Koselleck and Jacob Burkhardt, the concept of 'crisis' was determined by these critics to be invention of the eighteenth century, devised initially by the thinkers of the Enlightenment. These thinkers, according to Koselleck, whilst grasping the concept of 'crisis' in a single moral dimension, in fact stood at the face of a political crisis, namely a split that existed between the state and its constituents, a disjunction between political authority and its subjects which subsequently translated into a crisis of an imminent political decision.[253] The crisis of the late US-EU recession has been associated foremost with a political and authority crisis and in line with this, it has been noted that the "language of the magnificence of the

[248] Gilbert Achcar, 'Morbid Symptoms: What did Gramsci Mean and How does it Apply to Our Time?' (2018) 108 International Socialist Review
[249] Bauman, 'Times of Interregnum' 49
[250] Ibid
[251] Achcar; emphasis added by the author.
[252] Clam 192
[253] Cf. Buden; James R. Martin, 'The Theory of Storms: Jacob Burckhardt and the Concept of 'Historical Crisis'' (2010) 40 (4) Journal of European Studies, 308, 311, 323

2008 financial crisis is similar to that of the 1930s recession."[254] However, as much as these associations have been made, it has also been stressed in theory that this latest crisis differs from its historical precedents in as far as it has been lived through in the widespread "absence of any agency able to do what every 'crisis' by definition requires: [and that is to] choose the way to proceed and apply the therapy which that choice calls for."[255]

Today, scholars coming usually from the critical theory tradition appeal to this infamous Gramscian quote, so as to signal a worldwide political crisis of hegemony,[256] meaning an interconnected political, moral and cultural crisis of authority on a global scale that reflects a general, overarching 'crisis complex,'[257] in which all strands of crisis, namely the economic, ecological, social and political crises, come together. The question still remains, however, whether the old is truly dying[258] or if it is already dead, so that we can go on to determine if the situation we *were* or *still are* in, is indeed a 'crisis'. While hovering over such intricate subjects, one cannot help but wonder about the many more questions that arise along these trails of thinking. For instance, if the system *is* the crisis as such and has been since its birth, then how can it always already be dying? How can birth and death be identified as one? Where is the human being and its relationality to other human beings in these questions?[259] And if crises do not lead to vital transformations, are they then considered to be *incomplete crises* or are they *not crises at all*?[260]

As it has been alluded to in the previous paragraphs, these are enormous and entangled theoretical issues which are related to broader fundamental questions about how crisis is related to change and how change is possible, namely through constant, gradual progress *or* through instant change.[261] Apprehensions of crisis at a conceptual level are also

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254 Dikeledi A. Mokoena, 'Capitalist Crisis and Gender Inequality: Quest for Inclusive Development' in Vusi Gumede (ed), *Inclusive Development In Africa: Transformation of Global Relations* (Africa Institute of South Africa 2018) 94

255 Bauman, *A Chronicle of Crisis: 2011-2016* 150

256 Fraser and Sunkara 9, 10, 44, 55

257 Ibid 44, 46, 56; see also Fraser and Jaeggi 224

258 In a similar vein, yet in the framework of the crisis of the international rule of law, see Broude, 'Complexity Rules (or: Ruling Complexity)' 241, where Broude notes: "Gramsci wrote that 'crisis consists precisely in the fact that the old is dying and the new cannot be born'. We are not in such a condition now; in international law, the new is *being born all the time*, yet the old is *not truly dying*."; emphasis added.

259 Here that I do not refer to the *subject*, but rather to the *human being*. The discussion on subjectivity as the product of the historical process is a different discussion that this study does not engage with.

260 Martin 310, 313 et seq.; Martin writes, regarding Burckhardt's crisis theory, that a 'genuine' crisis occurs "only in the 'fusion of a fresh physical force with an old one, which, however, [survives] in a spiritual metamorphosis'."

261 Essentially what is implied here is that crisis theories are confronted with the relationship of crisis with the principle of revolution, violent dissolutions and by that, with the role of warfare and large-scale wars in accelerating historical development with great celerity. It is beyond the scope this thesis to engage with the relation of crisis, warfare and societal change. For an assessment of Burckhardt's concept of 'historical crisis' as a 'theory of storms' underpinned by the "most profound principle of the revolution," see ibid 318 et seq.

related to wider subject matters concerning social determinism and free will. In other words, the way we theorize about crisis brings forward perceptions of the subject as being either a *passive entity* ruled by historical forces beyond its control or an *active agent* capable of consciously determining their own future on however small or large a scale and of reconstructing society in such ways as to effect genuine change.[262] Moving past these huge theoretical hurdles and open-ended questions, which are impossible to tackle in the confinements of such a restricted endeavor, the thesis at hand may still take a skeptical position towards the blind usage and reiteration of the word 'crisis' and its vocabulary, but nevertheless use the rhetoric of the crisis in Europe as an actuality at least in lay terms.

Out of this entangled web of interrelated crises, the analysis will focus in the upcoming sections and chapters on the so-called 'social crisis', understood as a crisis of social rights in terms of the meaning that those rights acquired during the implementation of austerity measures in the examined countries, the most standard ways in conventionally conceiving and contesting such rights in theory and in judicial practice and the ethical and ontological assumptions inhibiting conceptions of such rights. In this respect, a few points need to be raised at the outset. Initially, what needs to be clarified is what is meant by 'social' in the general framework of the 'social crisis' discourse in the European establishment. Additionally, it is necessary to delineate how the analysis at hand understands both the daedal concepts of 'social' and the 'social crisis' and how it relates these to the social rights question. Last but not least, as this contribution focuses on social crisis through the prism of social rights theory, some preliminary remarks need to be raised.

Looking at the meaning of the 'social,' this concept is vague and dynamic by its nature and is assigned different meanings depending on different perspectives and contexts.[263] More often than not, the term 'social' is used as a nebulous construct that is not defined at all and is tied to another concept. At an EU level, the 'social' is mostly identified with the rhetoric of 'Social Europe,' which has become a shorthand way of denoting the common promise of European states in safeguarding a social model of shared, pan-European values.[264] In this behalf, the notion of the 'European social model' has been typically used to suggest "the common principles and features characterizing the

[262] On this point, see the critique raised towards Jacob Burckhardt on being guided on these issues by fundamental misgivings Wolfgang J. Mommsen, 'The Neglected (III) Jacob Burckhardt - Defender of Culture and Prophet of Doom' (1983) 18 (4) Government and Opposition, 463, 464

[263] Jotte Mulder, '(Re) Conceptualising a Social Market Economy for the EU Internal Market' (2019) 15 (2) Utrecht Law Review, 17

[264] Colm O'Cinneide, 'Austerity and the Faded Dream of a 'Social Europe" in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) 173

range of different national welfare systems in Europe,"[265] which even though they do not constitute a collective or single model they are nonetheless promoted by the European Union. These features broadly entail a robust welfare state at a national level, trust in the institutions and the public sphere, technological productivity and prosperity, and protection of the fundamental rights of the individual. That is to say, the notion of 'Social Europe' has been historically widely linked with a vision of social citizenship and the welfare state, whereby the post-war European states would undertake the responsibility and assume an active role in providing and ensuring economic welfare and social security to their citizens. Accordingly, the idea of 'Social Europe' has become a guiding notion in the sphere of employment relations and has been commonly linked with the protection of work and the social rights of workers as the cornerstone of the Union.[266]

This social model or the 'EU social acquis,'[267] as it has come to be referred to, has been reflected in the rhetorical framework of the EU treaties and in the constitutional provisions of national constitutions at a member states level. At an EU institutional level,[268] the commitment of the European social agenda is also demonstrated through particular initiatives and action plans, such as the now concluded Europe 2020 Strategy,[269] which succeeded the Lisbon Strategy, and the most recent European Pillar of Social Rights.[270]

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[265] de Búrca 2, 3

[266] Cf. Brian Bercusson and others, 'A Manifesto for Social Europe' (1997) 3 (2) European Law Journal, 193 et seq.; Nicola Countouris and Mark Freedland, 'The Myths and Realities of 'Social Europe" in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 9; A. C. L. Davies, 'How has the Court of Justice changed its management and approach towards the social acquis?' (2018) 14 (1) European Constitutional Law Review, 154

[267] For a brief history of the EU social acquis and its framework as laid down in EU primary law, see European Commission, *The EU Social Acquis (*Commission Staff Working Paper, *Strasbourg, 8 March 2016)*. See also Elise Muir, Sacha Garben and Claire Kilpatrick, *Towards a European Pillar of Social Rights: Upgrading the EU Social Acquis (*College of Europe Policy Brief No117, *January 2017)*

[268] See, for instance, the website of the Directorate-General for Employment, Social Affairs & Inclusion of the European Commission https://ec.europa.eu/social/home.jsp?langId=en, together with the set-up of a relevant 'Social Europe' page on social media in 2019, which at the time of writing is still operating and has frequent updates on issues which are considered to be of relevance to the 'Social Europe' dimension of the EU's social policy; see https://www.facebook.com/socialeurope/ <last accessed 16.04.2021>

[269] On the Europe 2020 Strategy, see Sebastiano Sabato and others, 'Europe 2020 and the fight against poverty: From target to governance' in Matteo Jessoula and Ilaria Madama (eds), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020*, vol 1 (Routledge 2018). Also Silvana Sciarra, *Solidarity and Conflict: European Social Law in Crisis* (Cambridge University Press 2018) 52 et seq.

[270] For an introduction to the European Pillar of Social Rights (EPSR), see Olivier De Schutter, *The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order (*Study prepared at the request of the Secretariat of the European Social Charter and of the CoE-FRA-ENNHRI-Equinet Platform on Economic and Social Rights, *14 November 2018)*; Zane Rasnača, 'Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking' Brussels, 2017 European Trade Union Institute ETUI Working Paper 201705 . For a positive assessment of the EPSR as a "a meaningful response to the process of building a deeper, fairer Union" and a "timely initiative"; see Susana Muñoz, 'Striking a balance between competitiveness and social fairness: What can we expect from the European Pillar of Social Rights?' in Paolo Chiocchetti and Frédéric Allemand (eds), *Competitiveness and Solidarity in the European Union: Interdisciplinary Perspectives* (London: Routledge 2018) 279, 280. In a similar vein, praising the launch of the Pillar as "timely and necessary"; see Muir, Garben and Kilpatrick. For a balanced

While the latter has been the case for the social welfarist traditions of particular European countries, at a supranational level, the principles of social justice and the rationales laying behind the 'Social Europe' byword, have been contested early on in the history of the Union. Those criticisms have related the confusion and uncertainty of the foundations of the European social model with the existence of a wider social deficit. In particular, as early as 1997, a number of legal scholars stressed that the European Union was lacking social legitimacy in what they called the "Manifesto for Social Europe."[271] They envisioned a 'Social Constitution' that would be founded on transnational solidarity and social cohesion as the cornerstones of the European Union. The absence of social and democratic legitimacy has also been highlighted by several commentators in the years to follow and especially during the Euro-crisis, including in various manifestos[272] that economist Thomas Piketty, together with many other scholars, has published. In the multiple versions of their manifesto for Europe, these analysts pointed to the lack of a social compass and social ambition in the Union, coupled with a rise in social inequality and distrust towards the EU institutions and its political culture.

To compound this criticism for lacking social policy coordination and social cohesion, the EU has also been vehemently criticized in scholarship for striking a skewed balance between economic freedoms and social objectives. This has developed in a highly contested issue, as it brought to the fore not only questions of politics, but also of constitutional and substantive EU law.[273] The conflict between social cohesion goals and market-oriented targets became evident through EU judicial developments, which marked

criticism of the EPSR, see Vladimir Bogoeski, *The EU Political Culture of Total Optimism is not Dead: Reflections on the European Pillar of Social Rights (*Josef Hien and Christian Joerges (eds) Responses of European Economic Cultures to Europe's Crisis Politics: The Example of German - Italian Discrepancies, *European University Institute, Robert Schuman Centre for Advanced Studies 2018)* 200; see also Anastasia Poulou, 'Towards A European Pillar Of Social Rights: An Opportunity Not To Be Squandered' (*Social Europe*, 2016) and Frank Hendrickx, 'What if we make the European Pillar of Social Rights legally binding? Overcoming the paradoxes of European labour law' (*Regulating for Globalization: Trade, Labor and EU Law Perspectives*, 2020), who point out the non-legally binding character of the Pillar. For a critical account, see Sara Benedi Lahuerta and Ania Zbyszewska, 'EU Equality Law after a Decade of Austerity: On the Social Pillar and its Transformative Potential' (2018) 18 (2-3) International Journal of Discrimination and the Law, 183, 184; Alan Bogg and Keith D. Ewing, 'A Tale of Two Documents: The Eclipse of the Social Democratic Constitution' in Eva Nanopoulos and Fotis Vergis (eds), *The Crisis behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019) 334, 341; also Despoina Sinou, 'Η επανεφεύρεση των κοινωνικών δικαιωμάτων στην Ευρώπη: Η επίδραση της νομολογίας της Ευρωπαϊκής Επιτροπής Κοινωνικών Δικαιωμάτων στη διαμόρφωση του Ευρωπαϊκού Πυλώνα Κοινωνικών Δικαιωμάτων της Ε.Ε. ' (2020) 79 (9) Επιθερεώρηση Εργατικού Δικαίου 1271, who argues that the paramount consideration of the Pillar is "once again - securing the market system through the so-called "labor market"."

[271] Bercusson and others

[272] See Thomas Piketty, 'Our manifesto to save Europe from itself' *The Guardian* (9 December 2018); Thomas Piketty and Antoine Vauchez, 'Manifesto for the democratization of Europe' (*Social Europe*, 2018)

[273] Sacha Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 (1) European Constitutional Law Review, 23, 24, 43

a turning point that shaped the European 'social crisis.' In particular, the majority of commentators have long stood in agreement that the Court of Justice of the European Union (CJEU) gave a clear preference to economic freedoms at the expense of fundamental social protection in a series of landmark cases of the last fifteen years.[274]

This 'social crisis' started to morph with the CJEU's case-law which has been consolidated during the Euro-crisis with the devastating impact that austerity measures have had on social rights, especially in financially assisted countries. In particular, as it has been suggested in scholarship, EU institutions together with the European Commission as its frontrunner have not suspended social concerns during the Euro-crisis but have rather oriented these towards the establishment of a new EU-based social model that would focus not on social welfare but rather on poverty reduction. This means these actors would decline to expand whatever existing systems of social protection are already in effect, preferring to reform them.[275] In addition, even the creation of an modest welfare interstate model, especially during the crisis of the last decade, has been met with skepticism and opposition.[276] Instead of 'more Europe' and an 'ever closer Union,' commentators have drawn attention in this respect, to the *displacement* or *downgrading* of the once worker-focused EU 'social acquis'[277] and to the gradual formation of a lesser or 'minor Europe,'[278] bound to the processes of integration of global capital.

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[274] The cases referred to here are the trilogy of the CJEU case-law, namely the *Laval, Viking* and *Rüffert* cases; CJEU International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECLI:EU:C:2007:772; CJEU Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECLI:EU:C:2007:809; CJEU Dirk Rüffert v Land Niedersachse, [2008] ECLI:EU:C:2008:18. Extensive literature on these cases has been produced throughout the years; see for instance Catherine Barnard, 'Viking and Laval: An Introduction' (2008) 10 Cambridge Yearbook of European Legal Studies; Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) 15 (1) European Law Journal: Review of European Law in Context; Andreas Bücker, *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Nomos Verlag 2011); Garben 33, 34; Emilios Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (2013) 14 (10) German Law Journal; M. R. Freedland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart Publishing 2016). For a carefully researched critical analysis of 'The Laval Quartet and Europe's crisis of the Social' assessing the *Laval, Viking, Ruffert* cases alongside a fourth case, i.e. the *Commission v. Luxemburg*, see also Vladimir Bogoeski, 'The Aftermath of the Laval Quartet: Emancipating labour (law) from the rationality of the internal market in the field of posting' (PhD Thesis, Hertie School 2020) 1 and citation n.3

[275] Tsoukala 243, 246, 262; see also Philomila Tsoukala, 'Euro Zone Crisis Management and the New Social Europe' (2013) 20 (1) Columbia Journal of European Law, 35, 51 et seq.

[276] Majone 162

[277] Cf. Claire Kilpatrick, 'The Displacement of Social Europe: A Productive Lens of Inquiry' (2018) 14 (1) European Constitutional Law Review; Sophie Robin-Olivier, 'Fundamental Rights as a New Frame: Displacing the Acquis' (2018) 14 (1) European Constitutional Law Review

[278] Jorge Max Hinderer, Nelli Kampouri and Margarita Tsomou, 'Greece between the "West and the Rest": towards a minor Europe' (Concept text for conference [on file with author]) 3

It becomes clear that the above presented approaches to 'social,' 'social crisis' and 'Social Europe' are interpreted mainly from an EU governance and EU policy coordination perspective. Social rights are also regularly identified with labor rights or they are assessed within the prism of social objectives and EU common values of social cohesion, integration, and societal constitutionalism. The present analysis, when it refers to the 'social,' goes past EU governance and policy analysis and by extension, does not engage with recent debates on what constitutes bad or good governance in the sense of which governing model or normative scheme is more or less effective in the protection of social rights. Further, it does not approach 'social crisis' by engaging with the discussion on 'Social Europe' in governance and social integration terms, as it has been hinted above.

What I understand by 'social' in the present endeavor rather grapples with questions of legal subjectivity, selfhood and social relationality and how these inform the ontological and ethical assumptions of legal theories of social rights. While it is now proclaimed that we not only live in a crisis but rather, more alarmingly, in an 'imaginary crisis,'[279] the latter being the result of a deficit of social imagination, it becomes all the more difficult to picture a desirable society in the future. Having in mind such claims on the existential and imaginary crisis of the social theory utopia, I look into the ontological and ethical presuppositions of social theories to reflect on the way we conceptually realize and shape our social imaginaries and manifest this in turn by means of rights and entitlements.

In the following chapters, the analysis engages with social rights theory on an empirical and conceptual level, by looking at common criticisms levelled against social rights and by addressing which of those criticisms have been highlighted and employed at a jurisprudential level during the austerity years in the focus countries of Greece and Portugal. Before doing so, however, the study devotes a considerable ectasis in addressing conceptual questions resting with the notion of austerity as a terminology and as a multilayered social policy. In this respect, the thesis critically assesses questions surrounding the political economy of austerity but does not entirely focus on a narrow assessment of its underlying economic base. Instead, the angle of this analysis rests on questions concerning the understanding of austerity within a broader framework that, according to this study, is highly implicated with political, economic, cultural and essentially ethical considerations which permeate our existence and being and the way we socially relate to each other and subsequently understand what social rights mean.

[279] Geoff Mulgan, 'The Imaginary Crisis (and how we might quicken social and public imagination)' April 2020 UCL, Demos Helsinki and Untitled 14

3. Austerity Measures in the European Social Crisis

3.1. Defining Austerity

i. The Washington, Post-Washington and Berlin-Washington Consensus

During the last decade and following the US-EU financial crisis, much ink has been spilled on the topic of austerity. 'Austerity' is an open-ended and politically charged term that has been given a wide range of meanings and this thesis does not purport to provide for an exhaustive account of the austerity debate nor to give a final definition here. Proponents of austerity have celebrated this as the optimal policy for development and stability, while critics maintained that austerity strategies precipitate a vicious cycle of recession and economic decline, which eventually causes political and societal dismantling and collapse. The chapter begins by briefly assessing the historical backstory of the concept and proceeds to map and examine the notion and its evolution.

For the analysis here, it is significant to examine this concept, as it has been associated with the deterioration of social rights protection in European countries during the late financial crisis and it has led to characterizations of Europe as 'austerity Europe.'[1] Austerity is deemed relevant for the purposes of this thesis, as it not only mediated but also shaped and continues shaping social interactions and thus, the social parameters of the continuous realization of social rights. The politics of austerity did not just worm their way into European countries, their policies and into the everyday life of European people. However, various contributions coming from economics, political science and political economy as well as from sociology, geography and anthropology studies have highlighted that many advanced Western societies have embarked on austerity programs long before the financial crisis and continued endorsing these during the crisis. Austerity became "the dispositif underlying the economy of debt"[2] that has prevailed in recent history, establishing a state of permanent austerity in a – what is now called – "Age of Austerity."[3]

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[1] See, for instance, the special section in Financial Times titled 'Austerity Europe' which traces the political and societal developments in Europe until the end of 2016; https://www.ft.com/indepth/austerity-in-europe <last accessed 12.06.2021>

[2] Elettra Stimilli, *Debt and Guilt: A Political Philosophy* (Stefania Porcelli tr, Bloomsbury Academic 2018) 2

[3] See Erik Vollmann and Wolfram Ridder, 'Neither the Devil, nor a Saint –Macroeconomic, Social, and Political Implications of Fiscal Austerity in Europe between 2001 and 2015' in Roland Sturm, Tim Griebel and Thorsten Winkelmann (eds), *Austerity: A Journey to an Unknown Territory* (Nomos Verlag 2017) 2; block capitals as stated in the original; Wolfgang Streeck and Armin Schäfer (eds), *Politics in the Age of Austerity* (Polity 2013); See also Laura-Jane Nolan and David Featherstone, 'Contentious Politics in Austere Times' (2015) 9 (6) Geography Compass, 1, and Michael Kitson, Ron Martin and Peter Tyler, 'The Geographies of Austerity' (2011) 4 (3) Cambridge Journal of Regions, Economy and Society, 292

In relevant literature, austerity schemes are usually traced back to the so-called 'Washington Consensus,'[4] a term that was employed for the first time in 1989 by economist John Williamson to describe a set of ideas on policies advocated by the Organisation for Economic Co-operation and Development (OECD) countries, which were deemed necessary to implement in most Latin American countries at the time. By 'Washington,' Williamson meant both the 'political' Washington comprising of the US Congress and the senior members of the administration, alongside the 'technocratic' Washington consisting of the international financial institutions, such as the IMF and the World Bank, together with the economic agencies of the US government, the Federal Reserve Board, and the various think tanks.[5] As Latin America was emerging from the 1980s debt crisis, views coalesced among the above mentioned bodies and institutions that these countries needed to open up their economies to trade and foreign direct investment and to stabilize and liberalize their economies.[6] According to Williamson, the 'Washington Consensus' was a term he invented in order to refer to the lowest common denominator of policy advice and suggested reforms, which were agreed upon by international financial institutions, many of which were Washington-based, and which were specifically addressed to Latin American countries in 1989.[7]

The ten initial reforms that this agenda was comprised of included the following: i) strict fiscal discipline to counter inflation; ii) reordering of public expenditure priorities; iii) tax reform to lower marginal rates and broadening of the tax base; iv) liberalization of interest rates; v) competitive exchange rates; vi) price and trade liberalization to support a more efficient distribution of resources; vii) liberalization of inward foreign direct investment flows and reduction of public investment to free up resources for the private sector; viii) privatization of state enterprises; ix) deregulation to abolish barriers to entry and exit for new firms, and x) securing property rights without excessive costs while

[4] See John Williamson, *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990)

[5] John Williamson, 'What Washington Means by Policy Reform' (*Peterson Institute for International Economics; Chapter 2 from Latin American Adjustment: How Much Has Happened? Edited by John Williamson. Published April 1990*, 2002); see also Moises Naim, 'Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' (2000) 21 (3) Third World Quarterly, 506.

[6] John Williamson, 'The Washington Consensus and Beyond' (2003) 38 (15) Economic and Political Weekly, 1475; John Williamson, 'A Short History of the Washington Consensus' (2009) 15 (1) Law and Business Review of the Americas, 7, 8

[7] John Williamson, 'The Strange History of the Washington Consensus' (2004) 27 (2) Journal of Post Keynesian Economics, 195, 196; See also Kaufmann 305, 306, where Kaufmann notes that the so-called 'Washington Consensus' was "reached by the governors of the International Monetary Fund (IMF) in 1989 and consequently applied as a condition for IMF loans."

making these available to the informal sector.[8] It is interesting to note that 'austerity' as a term, has not been explicitly used or referred to by Williamson in this record of concerted measures. In practice, though, as Joseph Stiglitz stressed, the Washington Consensus rested on three pillars, namely fiscal *austerity*, privatization, and market liberalization.[9]

By the 1990s, the Washington Consensus, which had been a version tailored to the alleged reforms needed in certain Latin countries became "a worldwide consensus,"[10] grounded in the widespread conviction that economic prosperity could be achieved by mobilizing the power of the markets. As Moises Naim notes, when John Williamson summarized what he understood to be a consensus, "he did not suspect that he was fathering one of the brand names that would come to characterize the decade."[11]

Subsequently, the 'Washington Consensus' has been used, despite different interpretations, as a synonym to market fundamentalism and for orthodox macroeconomic policies prescribed, among others, by the IMF.[12] With the passage of time, the term 'Washington Consensus' was further equated to neoliberalism and ultimately became the epitome of neoliberal policies. This is because the consensus was regarded to have captured the gist of neoliberal policy recommendations, while it guided the first phases of post-communist transition for Latin American counties and accelerated growth and liberalization for countries in Asia or Africa.[13] Despite Williamson's own repeated objection to the use of the term in this way, and his emphatic assertion that this was not ideologically charged and was in principle a geographically and historically specific term, the 'Washington Consensus' has come to denote the ideological agenda of neoliberalism "that was to be imposed on all countries at any and all times."[14] Over time, the original

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[8] Williamson, 'A Short History of the Washington Consensus' 9, 10; See also Nancy Birdsall, Augusto De la Torre and Felipe Valencia Caicedo, *The Washington Consensus: Assessing a Damaged Brand (*Policy Research Working Paper 5316, *The World Bank Office of the Chief Economist Latin America and the Caribbean Region and Center for Global Development, May 2010)* 8

[9] Joseph E. Stiglitz, *Globalization and its Discontents* (Lane 2002) 53; emphasis added.

[10] Birdsall, De la Torre and Caicedo 7

[11] Naim 506; Naim presented these thoughts a year prior to this publication, i.e. in 1999, in a paper prepared for the IMF Conference on Second Generation Reforms, which took place at the IMF Headquarters in Washington, D.C., November 8-9, 1999; the paper was published as a working draft at the IMF website and is accessible at Moises Naim, 'Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' (*International Monetary Fund*, 1999)

[12] Susanne Lütz and Matthias Kranke, 'The European Rescue of the Washington Consensus? EU and IMF lending to Central and Eastern European Countries' (2014) 21 (2) Review of International Political Economy: RIPE, 311; See also John Williamson, 'What Should the World Bank Think about the Washington Consensus?' (2000) 15 (2) The World Bank Research Observer, 251, 254; Williamson, 'A Short History of the Washington Consensus' 14.

[13] Hilary Appel and Mitchell A. Orenstein, *From Triumph to Crisis: Neoliberal Economic Reform in Postcommunist Countries* (Cambridge University Press 2018) 33, 34

[14] Williamson, 'The Washington Consensus and Beyond' 1476; See also Williamson, 'What Should the World Bank Think about the Washington Consensus?' 251, 254; Williamson, 'A Short History of the Washington Consensus' 14

geographical focus on Latin America[15] was lost and the term has been broadly conceived to encapsulate the policy attitudes of the IMF and the World Bank towards not only developing countries but also towards developed economies in transition.[16]

Despite the fact that the policies spawned by the 'Washington Consensus' were labelled as a 'consensus,' these reforms were met with reluctance and criticism. The measures were not only contested by *anti*-neoliberal voices but they were also debated by leading economists and analysts affiliated with international financial institutions, echoing confusion rather than consensus and revealing concerns about failure.[17] These were not debates, in Naim's pointed words, "between say, French deconstructionist sociologists and American mathematical economists."[18] These were rather disagreements about the efficiency and applicability of those reforms "among some of the most respected and influential individuals in the field and ones that share favorable ideological pre-dispositions towards markets, private capital and free trade and investment, while harboring a deep distrust of socialist ideas, central planning and government intervention."[19]

As a result, the 'Washington Consensus', not only as a term but also as a rendition of the set of policies recommended by international financial institutions and the US Treasury, went overtime from being heavily challenged by several analysts to being declared 'dead'[20] by World Bank officials and US high-profile economists.[21] Instead of using the 'Washington Consensus,' scholars including Williamson himself submitted that this term needed to be abandoned or replaced. Instead, what was suggested for

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[15] Throughout this study 'Latin America' or 'Americas' are used interchangeably to connote the 33 countries in Latin America and the Caribbean today, according to the United Nations; for a list of the countries in the Americas region (excluding Canada and the United States of America), see https://www.ohchr.org/en/countries/lacregion/pages/lacregionindex.aspx <last accessed 18.03.2021>

[16] Williamson, 'The Washington Consensus and Beyond' 1476

[17] See Naim, 'Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' 506-508, where Naim traces and sketches the debate among leading experts in the field of economic development and market reforms concerning the Washington Consensus, involving proponents of the consensus, who have been divided about the proposed reforms; see also Rodrik Dani, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"' (2006) 44 (4) Journal of Economic Literature, where it is assessed how the Washington Consensus reforms were criticized by proponents and critics alike for not producing the desired outcomes, bringing to the fore questions about the replacement of the consensus with other alternative policy options.

[18] Naim, 'Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' 508

[19] Ibid

[20] Helene Cooper and Charlie Savage, 'A Bit of 'I Told You So' Outside World Bank Talks' *The New York Times* (10 October 2008); see also Kevin Gallagher, 'The Death of the Washington Consensus?' *The Guardian* (London, 14 October 2008) Economic Policy: Opinion

[21] It is beyond the scope of this thesis to analyze in detail the political and ideological orientation of the IMF upon its creation and the internal divergencies and divisions throughout the course of its action with respect to the endorsement of the 'Washington Consensus' and austerity strategies, which eventually led to the resignation of Joseph Stiglitz from the position of chief economist at the World Bank.

representing this renewed Washington Consensus and the so called 'second-generation' reforms was the use of terms such as the 'Washington Consensus Plus' or the now most commonly used 'post-Washington Consensus.'[22]

The former chief economist of the World Bank from 1997 to 2000, Joseph Stiglitz, who suggested the term the 'post-Washington Consensus,' was highly critical of the initial 'Washington Consensus' reforms in becoming an end in themselves and not a means to economic growth and stability in countries where they were implemented. What he advocated instead was a strategic framework for the formulation of a new consensus and development agenda beyond the original 'Washington Consensus.' The latter was discussed and agreed upon by a different group of economists from developing and developed countries in an agreement introduced under the name "the Barcelona Development Agenda."[23] This agenda involved policy recommendations, which highlighted the role and the importance of both the state and the market being involved in national development. It further highlighted the necessity for countries to have the freedom to plan and experiment in their own policymaking, and in negotiating in international trade and labor agreements as well as in environmentally sustainable developmental policies at a national and global level.

Following the negative assessment of the 'Washington Consensus,' the concept of austerity was revived and developed in its contemporary form by the so-called 'Bocconi School,' which was a group of Italian economics graduates from the Bocconi University

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[22] Williamson, 'What Should the World Bank Think about the Washington Consensus?' 259; Joseph E. Stiglitz and Schoenfelder Lindsey, 'Challenging the Washington Consensus: An Interview with Lindsey Schoenfeld' (2003) 9 (2) The Brown Journal of World Affairs Joseph E. Stiglitz, 'Is there a Post-Washington Consensus Consensus?' in Narcís Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 49; See also Isabel Ortiz and Matthew Cummins, 'Austerity: The New Normal - A Renewed Washington Consensus 2010-24 ' 1 October 2019 Initiative for Policy Dialogue (IPD); International Confederation of Trade Unions (ITUC); Public Services International (PSI); European Network on Debt; Development (EURODAD); The Bretton Woods Project (BWP) Available at SSRN 45, 46

[23] Erlend Krogstad, 'The Post-Washington Consensus: Brand New Agenda or Old Wine in a New Bottle?' (2007) 50 (2) Challenge, 68. Joseph Stiglitz has been a fervent critic of the 'Washington Consensus' to the degree that in a debate with political economist Robert Hunter Wade, he talked about a 'Stiglitz Consensus' and noted the following: "In my general writing, I at times simplify arguments, but I try not to *oversimplify in the way that free markets advocates often do*. They say that the open markets are the solution to everything and, if left alone, the invisible hand will solve all problems. Sadly, the reason the invisible hand often appears invisible is that, quite often, it is not there. *Ideas matter* and if democracy is to function, citizens must understand the key policy issues and debates."; see E. Stiglitz Joseph and Wade Robert Hunter, 'The Stiglitz Consensus' [2004] (141) Foreign Policy; emphasis added. See also about the 'Barcelona Development Agenda' in Narcis Serra, Shari Spiegel and Joseph E. Stiglitz, 'Introduction: From the Washington Consensus Towards a New Gobal Governance' in Narcís Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 5, and Narcís Serra and Joseph E. Stiglitz, 'The Barcelona Development Agenda' in Narcís Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 57, 58

in Milan, Italy.[24] Its most prominent proponents were former Bocconi graduate Alberto Alesina together with Bocconi scholars Carmen Reinhart and Kenneth Rogoff. The 'Bocconis' or 'Bocconi Boys,' as they have been called, have put forward an 'expansionary fiscal contraction' theory.[25] Its main argument was that in times of crisis, restrictive fiscal policies based on fiscal adjustments including public spending cuts and taxes reduction, could have an expansionary effect, boosting a country's Gross Domestic Product (GDP).[26] The Bocconi School's theory on expansionary austerity was based on a "shared mathematical language,"[27] according to which economic growth needed to come from the private sector, while the state's fiscal policy should not interfere with the functioning of the market. In line with this, the Bocconi economists have come up with the 'crowding out' argument, namely the view that "government spending, whether financed by taxes or borrowing, diverts resources from productive use by the private sector."[28]

This theory had its roots in the political thought of Friedrich Hayek and stood in contrast to the Keynesian theory which holds that only countercyclical policies or expansionary policies could boost the economy during a recession. For the Bocconi scholars, austerity was "not hell on Earth,"[29] but quite the opposite. It could have a positive impact on growth, whereas for the scholars influenced by Keynes' thought, fiscal consolidation could have the opposite recessionary effects on growth. Thus, according to

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[24] Robert Skidelsky and Nicolò Fraccaroli, *Austerity vs Stimulus: The Political Future of Economic Recovery* (Springer International Publishing AG 2017) 17

[25] For a trenchant criticism of the expansionary theory and its relation to austerity, see the analysis under the bold title 'Deconstructing the "expansionary austerity" theory' at Juan Pablo Bohoslavsky, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Responsibility for complicity of international financial institutions in human rights violations in the context of retrogressive economic reforms (*A/74/178, *UN Human Rights Council, 16 July 2019)* 38 et seq.

[26] Gross Domestic Product (GDP) is the market value of all final goods and services produced from a nation in a specific time period. On the spending-based rather than tax-based fiscal adjustments, see Alberto Alesina, 'Fiscal Adjustments and the Recession' (*VoxEU– CEPR's Policy Portal Research-based Policy Analysis and Commentary by Leading Economists*, 2010); see also Alesina Alberto and Ardagna Silvia, 'The Design of Fiscal Adjustments' (2013) 27 (1) Tax Policy and the Economy.

[27] Oddný Helgadóttir, 'The Bocconi Boys Go to Brussels: Italian Economic Ideas, Professional Networks and European Austerity' (2016) 23 (3) Journal of European Public Policy, 393

[28] Skidelsky and Fraccaroli xviii, which reads as follows: "According to Sue Konzelmann, this proposition comes in two different but complementary forms. The Ricardian school derives from Robert J. Barro's (Harvard) revision of the concept of 'Ricardian equivalence'. The second school of thought is the New Classical. The claim here is that an increase in the government's deficit will raise interest rates, by reducing the total of saving available to finance private investment, and therefore increase the cost, and thus reduce the volume, of such investment." On that note and on the 'three competing schools of thought about the economics of austerity,' that is, the 'Ricardian,' 'the Neo-Classical,' and the diametrically opposed to two the previously mentioned, 'Keynesian' school of thought, see Suzanne J. Konzelmann, 'The Economics of Austerity' June 2012 BIROn - Birkbeck Institutional Research Online Working Paper Centre for Business Research, Cambridge, UK 20, 21

[29] See Alberto Alesina, Carlo Carlo Favero and Francesco Giavazzi, 'The Good and the Bad in Austerity' (*Bocconi University*, 2019)

Keynesian advocates, temporary tax cuts or a fiscal stimulus instead of austerity were deemed capable of reviving the economy in times of crisis.

Bringing this to the European context and the latest financial crisis, it has been stressed in scholarship that by establishing austerity policies as "the seemingly uncontested model in Europe,"[30] the EU has deepened the austerity logic of the IMF through the Maastricht Treaty and its various tools of governance. In line with this, analysts suggested that the EU, rather than the IMF, has gone too far in internalizing and incorporating the prescriptions of the original 'Washington Consensus' in bail-out agreements, while the IMF board and Ecofin entertained partly diverging and alternative policy proposals.[31]

The adherence to the directions given in the 'Washington Consensus' was not something, however, which happened over night. Long before the outbreak of the financial crisis, it had been suggested in theory that the EU has endorsed the 'Washington Consensus' prescriptions via its policies.[32] In view of this, another term has been introduced in economic circles to describe EU policies in its developmental and growth strategy, which culminated during the years of the crisis. Departing from the 'Washington' and 'post-Washington' Consensus, economists have phrased the set of EU austerity policies and EU's active role in formulating such policies, using a more Europe-focused vocabulary, and calling this the 'Berlin-Washington Consensus'.[33] Along these lines, it has been suggested that the EU, taking its cue from US economic policies, strived to live up to the US' economic and fiscal model, which relied chiefly on foreign external demand as opposed to domestic demand, so as to ensure economic prosperity.

Following this argument, the US has been portrayed in international analyses as a more flexible, market-oriented economy, while being juxtaposed to the narrative of European countries being overburdened by an extensive and inefficient social welfare state that has kept the economy at a low pace of growth. In light of this, the EU, while designing and implementing its economic policies, has been depicted as having been entrapped within the imaginary of the US economy, the latter being consistently portrayed at a fast-track pace of growth as opposed to the usual European narrative of quasi-stagnation. As a result, reducing governmental size, scaling down social services and public expenses and

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[30] Stimilli 131

[31] Jean-Paul Fitoussi and Francesco Saraceno, 'European Economic Governance: The Berlin–Washington Consensus' (2013) 37 (3) Cambridge Journal of Economics, 482, 483; See also Lütz and Kranke 311

[32] Jean-Paul Fitoussi and Francesco Saraceno argue that this entrenchment has been followed through EU treaties. See Fitoussi and Saraceno 479, 480, which reads: "Since the Maastricht Treaty of 1992, the institutions for economic governance of the EU embed and gave constitutional strength to that doctrine [i.e. the Washington Consensus]."

[33] This term has been coined by economists Jean-Paul Fitoussi and Francesco Saraceno; see ibid 482, 483

endorsing an (as much as possible) unchecked and unregulated market, was deemed necessary for bringing about higher growth rates.

Building on that argument, it was further stressed that by adhering to the original meaning of the 'Washington Consensus,' the latter was interpreted at an EU level based on a development model prescribed by the following set of policies: macroeconomic policies that would ensure budget and price stability; structural reforms aiming at increasing competition; free financial flows and openness to trade. These were all seen as the EU's version of austerity, as the engine for growth and therefore, as a force for integration into the global economy. Furthermore, securing an increased role for market mechanisms such as the deregulation and flexibility in the labor market, together with the privatization of public services, was made a priority in EU policies.[34]

Surely, austerity policies and social factors may be approached in such a structural framework and may have been drafted and decided upon within the confined walls of institutions. Austerity, however, and its implications for social values have not been interpreted, nor has austerity been normalized in such clear-cut, mechanical and computational way within the society. In order for contractionary measures to be consolidated within the different layers of private and public life and to foist austerity upon social relations, it has been conceived and implemented in a much more comprehensive way, as a 'social phenomenon' concept. In the attempt here to define austerity, this 'social phenomenon' idea requires further exploration as to its meaning, which has further impacted meanings of the social and interpretations of social rights during the crisis.

ii. Austerity as a 'Social Phenomenon' Concept

Among the vast literature on austerity, some theoretical accounts have approached austerity at the level of the transformation of the social into the liberal welfare state, and assessed this by asking how austerity relates to questions of social citizenship.[35] In a similar vein, others have traced the ideological and political genealogies of the term and have examined austerity under the lens of capitalism crisis and its contradictions as well as by means of the establishment of neoliberal politics and the shrinking of the social welfare state across different countries.[36]

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[34] Ibid. This will be examined in the next chapter on the impact assessment of austerity on social rights.

[35] For an analysis of the interrelation of social citizenship, austerity and the liberal welfare state with a focus on the UK, see Daniel Edmiston, Ruth Patrick and Kayleigh Garthwaite, 'Introduction: Austerity, Welfare and Social Citizenship' (2017) 16 (2) Social Policy and Society

[36] For instance Alex Callinicos, 'Contradictions of Austerity' (2012) 36 (1) Cambridge Journal of Economics; Blyth; Wolfgang Streeck, *Gekaufte Zeit: die vertagte Krise des demokratischen Kapitalismus* (Suhrkamp 2013);

Correspondingly, scholars from critical political economy and geography studies have examined the financial and economic implications of austerity and drawn attention to the gendered and 'raced' nature of austerity.[37] This literature has mapped cartographies of austere living across different parts of the world and has shed light on the interplay between gender, race and austerity. It has further highlighted the unequal and uneven manner in which austerity seeps into personal and social webs and impacts persons in their bodily and mental capacity as well as whole communities. Austerity's implications have not only been addressed in urban geography but have been a focal point in contributions coming from anthropological studies, the latter placing the attention on austerity's cultural embeddedness and impact in the society and on people's collective consciousness.[38]

Taking into consideration this assortment of approaches, I proceed in sketching how austerity is understood at a preliminary conceptual level. In the previous section, I have attempted to briefly outline the historical context and to leaf through the ideas of leading economists upon which the concept of austerity was introduced and developed in its contemporary form. In this section, I venture to assess austerity as a 'complex social phenomenon,'[39] in the sense that I take this to be not just an economic term, but an all-encompassing notion that has economic, moral, cultural, political and legal dimensions. This outlook is not exhaustive and other dimensions can be added when interpreting austerity. My intention is to rather understand and map the ways in which austerity is grasped by means of its moral, legal and political predispositions. I wish to examine its effects on everyday life which occur in such a degree that this notion cannot simply be reduced to a mere economic phenomenon. The aim for this is to connect the theoretical discussion on austerity with the implications and the impediments that the latter raises in justifying and realizing social rights at a conceptual level, especially during recurring invocations of crisis language.

Wolfgang Streeck, 'The Crisis in Context: Democratic Capitalism and its Contradictions ' in Wolfgang Streeck and Armin Schäfer (eds), *Politics in the Age of Austerity* (Polity 2013)

[37] Sawyer Phinney, 'Rethinking Geographies of Race and Austerity Urbanism' (2020) 14 (3) Geography Compass, 2, 6; Esther Hitchen, 'The 'Austerian Subject' and the Multiple Performances of Austerity' (Master of Arts in Geography, Durham University 2014) 11

[38] Cf. Theodore Powers and Theodoros Rakopoulos, 'The Anthropology of Austerity: An Introduction' [2019] (83) Focaal; Theodoros Rakopoulos, 'Afterword: Reversing the World—What Austerity Does to Time and Place' [2019] (83) Focaal

[39] Roland Sturm, Tim Griebel and Thorsten Winkelmann, 'Austerity: A Journey to an Unknown Territory' in Roland Sturm, Tim Griebel and Thorsten Winkelmann (eds), *Austerity: A Journey to an Unknown Territory* (Nomos Verlag 2017) 7

a. Austerity as an Economic Tool

In current literature, a widely cited definition of austerity draws on the fairly recent work of political scientist Mark Blyth. According to Blyth's book, *Austerity: The History of a Dangerous Idea*, austerity "is a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state's budget, debts, and deficits."[40] Austerity can be described as an instantiation of structural fiscal adjustment programs or as a budgetary policy which aims to reorganize and balance state budgets and to establish limits to public debt.[41] Austerity or fiscal consolidation programs in their current form typically involve the reduction of government budget deficits by maintaining regressive tax hikes and lowering public expenses. The motif of 'social austerity,'[42] or 'welfare austerity'[43] as it has been characterized, is pursued by privatizing state-owned enterprises and assets, by curtailing public expenditures including health services and education, by cutting social benefits such as pensions and social security schemes as well as by reducing wage and labor protection, so as to increase 'flexibility' and competitiveness in the workforce.[44]

This is a rather technical conceptualization of 'austerity,' which builds upon the policies espoused by the Washington and post-Washington Consensus and by the Bocconi School's 'expansionary fiscal contraction' theory. As was examined above, austerity in that historical context has been justified and mediated through the language of mathematical formulas, which has been reiterated by policymakers, technocrats and economists over the course of years and has been largely substantiated as a term within international financial institutions. Austerity has thus been widely framed and interpreted – and more often than not still is – as an economic phenomenon, namely as a technocratic and scientific-based project aimed at rebalancing state budgets and forestalling public debts.[45] Seen as a policy framework that is scientifically justified, austerity has been depicted as a 'rational' response to economic and development strategies and it has been portrayed as such in the context

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[40] Blyth 2, 11, 13 where Blyth notes: "In sum, austerity is *a dangerous idea* for three reasons: it doesn't work in practice, it relies on the poor paying for the mistakes of the rich, and it rests upon the absence of a rather large fallacy of composition that is all too present in the modern world."; emphasis added.
[41] Sturm, Griebel and Winkelmann 17, 18
[42] Francisco Pereira Coutinho, 'Austerity on the loose in Portugal: European Judicial Restraint in Times of Crisis' (2016) 8 (3) Perspectives on Federalism, 118
[43] Edmiston, Patrick and Garthwaite 254, 255, who have used that term while examining the relation of social citizenship to austerity and welfare reform with a focus on the UK.
[44] Kaufmann 305, 306; Julien Mercille and Enda Murphy, *Deepening Neoliberalism, Austerity, and Crisis: Europe's Treasure Ireland* (Palgrave Macmillan 2015) 58
[45] Ben T. C. Warwick, 'Debt, Austerity, and the Structural Responses of Social Rights' in *Sovereign Debt and Human Rights* (Oxford University Press 2018) 396

of recurring financial crises in different places and times in history. In this respect, austerity has tried to establish its legitimacy and appears to this date to exist under a veil of technocratic neutrality and rational and calculated strategic planning that keeps equidistance from political and ideological forces and stands beyond politics.

b. Austerity as a Moral and Political Discourse

Drawing on the previous remarks, several scholars have come to challenge the presumably neutral and apolitical nature of austerity both at the level of theory as well as at that of lived experience and everyday life. Rather, it was underlined that austerity cannot be explained "from merely an appeal to its economic dimension, but it can rather be understood from the perspective of the moral and political ideas that this concept is associated with."[46] As several analysts have already pointed out, austerity reflects a deeper foundational premise to which it is associated, namely to neoliberalism and its variants. Neoliberalism need not to be understood as a merely economic ideology, as it has been argued in the introductory part of this thesis, but rather as a comprehensive project with a moral, economic, legal and political basis and a wide-scale cultural imprint.

In a similar vein to the above, political scientist Stephen McBride has stressed that technocratic neutrality is a myth and that the concept of austerity as a rational response is both flawed and incorrect. In his research, McBride argued that austerity has both a scientific and a moral dimension, the latter being understood as being informed by the concepts of individual responsibility, self-discipline and restraint, which are deeply embedded in liberal ethics and neoliberal thinking and which, in turn, are "well established in the public consciousness of most western states."[47] Similarly, the historian of political and economic thought, Florian Schui, has demonstrated in his work *Austerity: The Great Failure*, how arguments in favor or against austerity were mainly based, and still are up to this day, on moral and political concerns that have a strong hold in the society, rather than on actual economic considerations.[48] By the same token, legal scholars, Marija Bartl and Markos Karavias in their foreword to a dedicated issue on austerity and law in Europe, have noted that it is "hard to avoid the moral, almost theological, overtones of the

[46] Florian Schui, *Austerity: The Great Failure* (Yale University Press 2014)
[47] Cf. Stephen McBride, 'Two Worlds of Austerity: Mythologies of Activation and Incentives' in Dieter Plehwe and others (eds), *Austerity: 12 Myths Exposed* (Social Europe 2019) 75, 76; Stephen McBride and Sorin Mitrea, 'Internalizing Neoliberalism and Austerity' in Stephen McBride and Bryan M. Evans (eds), *The Austerity State* (University of Toronto Press 2017) 101-105 and especially 102.
[48] Schui

concept,"[49] and stressed that austerity is usually portrayed as "a form of chastisement, of atonement for past sins, the way to financial salvation."[50] Talking in terms of citizenship, other scholars emphasized that austerity is more than just a material condition or policy orientation, but that it is rather part of a moral discourse in which reduced consumption, resilience and self-service are politicized and individualized and are taken to be elements of "good citizenship,"[51] as opposed to the ideals of interdependence and public service, which are considered as a sign of incompetence and social vulnerability.

In this respect, it has been underscored that the appeal to the ideas of 'shared sacrifice,'[52] shame and guilt[53] is the ever-present moral mantra that is used to justify and enact austerity measures. While the depletion of public resources leading to an excessive public debt and economic crisis was depicted "as the result of a collective error, to be redeemed by everyone having to make sacrifices,"[54] austerity within this moral narrative was portrayed as a political *cul de sac* with no other possibly conceivable alternative.[55] Being channeled through personal morality, austerity has been thus presented as the logical and reasoned response to a sequence of events and "has become the common sense of the

[49] Marija Bartl and Markos Karavias, 'Austerity and Law in Europe: An Introduction' (2017) 44 (1) Journal of Law and Society, 4

[50] Ibid

[51] Warwick 396; McBride and Mitrea 102

[52] Wendy Brown, 'Sacrificial Citizenship: Neoliberalism, Human Capital, and Austerity Politics' (2016) 23 (1) Constellations, 11, where it is stressed that 'shared sacrifice' "is on the lips of every politician and manager engaged in cuts, lay-offs, belt-tightening, revocation of entitlements, and every state imposing austerity measures."; See also on the idea of shared sacrifices in the austerity discourse McBride and Mitrea 102 and John Clarke and Janet Newman, 'The Alchemy of Austerity' (2012) 32 (3) Critical Social Policy, 309. In the context of the Euro-crisis, on how the use of 'sacrifice' has been used in policy documents and has been replicated in media outlets, see for instance EC, *Greece begins a new chapter following the conclusion of its stability support programme*, where Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, is quoted: "[…]*The extensive reforms Greece has carried out have laid the ground for a sustainable recovery: this must be nurtured and maintained to enable the Greek people to reap the benefits of their efforts and sacrifices.*"; emphasis in original. See also Nick Fletcher, 'Greeks must reap benefits after their sacrifices, says EU's Mosovici - as it happened' *The Guardian* (20 August 2018) Business. On the relation between debt and guilt Elettra Stimilli argues that the link between "debt" "guilt," and "sacrifice" was apparent in the EU's involvement in the crisis; Stimilli further contends that the indebtedness through the imposition of austerity politics is a condition that is continually produced and nourished; see Stimilli 115, 116, 132, 160, 161.

[53] On the relation of morality and debt, see Maurizio Lazzarato, *The making of the indebted man: an essay on the neoliberal condition* (Joshua David Jordan tr, The MIT Press 2012). For an analysis of guilt as a means to justify austerity and lace the onus for debt on the individual, see Alessandra Sciurba (ed) *Living in dignity in the 21st century Poverty and inequality in societies of human rights: The paradox of democracies* (Council of Europe 2013) 34

[54] Sciurba 10

[55] In politics, this position has been epitomized by the now often used slogan 'There Is No Alternative' (TINA), which historically is attributed to British political figure Margaret Thatcher, who served as the Prime Minister of the United Kingdom from 1979 to 1990. On the TINA argument, see Mercille and Murphy 86. For an analysis of the TINA rhetoric as this has been linked to recent policies of fiscal conservatism, liberalization, and austerity during the late financial crisis in Europe and on the use of TINA in moral terms as an instrument of 'common sense', see also Astrid Séville, 'From 'one right way' to 'one ruinous way'? Discursive shifts in 'There is no alternative'' (2017) 9 (3) European Political Science Review, 450, 453, 457

current moment."[56] In in this respect, the concept of 'common sense' entails, according to McBride and Mitrea, that the individual is the center of the society and the market is the optimal means through which personal utility can be maximized, while individual responsibility, rational calculation aimed for self-interest, and disciplined consumption are framed as practices that individuals need to excel in, while being sustained by the logic of a self-made entrepreneurialism.[57] This is deemed necessary for the purpose of the individual's personal survival primarily, and on a secondary level, for the survival of the society itself, the latter being understood as an aggregate of individuals.[58]

In other words, moral austerity translates into individual responsibility for maintaining oneself and the community all at the same time. Austerity, in this regard, does not only run down the relationship between state and citizens, but it is rather a moral economy discourse that affects all kinds of relations across all layers of social life. Austerity may be presented as a state or interstate-imposed policy but the moral basis sustaining it rolls over the responsibility from the state, the government or from institutional constellations to the individual. Thus, the *lingua franca* of austerity politics is that the onus is placed on the individual.[59] Put differently, austerity as a discourse does not only determine relations between the state and the individual, but it also shapes one's social relations as well as one's relation with oneself and one's self-perception. Austerity is thus manifested as a heightened sense of individual responsibility and individual sacrifice for the sake of the preservation of an individual-centered society.

Austerity as a moral discourse in which the individual is given responsibility and asked to demonstrate self-restraint and abstinence abides by similar, broader prescriptions of neoliberalism and market morality. The association of austerity with neoliberalism has been examined in the previous section, when the historical roots of austerity measures were traced to the 'Washington Consensus' and the latter's relation to the ideology of neoliberalism. In this connection, austerity was understood neither as a politically neutral policy nor an isolated phenomenon but rather as part of neoliberalism as a project, the

[56] Corinne Blalock makes a similar argument about neoliberalism "as a political rationality"; Corinne Blalock, 'Neoliberalism and the Crisis of Legal Theory' (2014) 77 (4) Law and Contemporary Problems, 85; see also Warwick 395

[57] McBride and Mitrea 100, 102

[58] For an analysis of societies as aggregates of individuals seen from within a monist ontology in a broader liberal theoretical framework, see Frega, 'The Social Ontology of Democracy' 161. See also Part V. 10.2. Social *qua* Relational: The Question of Social Ontology.

[59] See on that point Sciurba 34, as mentioned above.

latter being understood as a well-rounded, fully encompassing political, legal, cultural and class project that aims, among other goals, to dismantle the social welfare state.[60]

As in the case of crisis theorizing, examined in the previous chapter, conceptualizations of austerity in public discourse and theoretical analyses have also been sensationalized by appeal to verbal extremes and an all-time favorite recourse to sickness-related metaphors as well as language related to war and punishment. Put differently, austerity has been depicted as "the bitter medicine,"[61] "a violent means,"[62] "punitive"[63] as well as the "penance"[64] and "virtuous pain after the immoral party,"[65] whose bottom line was not just to bring the books into closer balance but to teach a moral lesson and "to help enforce change and reform, partly through its very shock value."[66]

Moving from the moral to the political and seeking their inherent interrelation, Jon Shefner and Cory Blad offered a layered definition of austerity that goes beyond a mere technical and descriptive explanation of this. Challenging austerity from the perspectives of critical political economy and sociology, it has been stressed that austerity "is an economic tool that always betrays political intentions."[67] What it was meant by that is that austerity is "a subset of a larger palette of neoliberal measures"[68] that serves the wider neoliberal project by weakening social welfare schemes and by eroding social protection structures. Austerity was deemed in this respect to facilitate the neoliberal plan of economic and political reorganization of the society, for the purpose of expediting market liberalization among other goals that have been enumerated above.[69]

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[60] Cf. Angelos Sepos, 'The Centre–Periphery Divide in the Eurocrisis: A Theoretical Approach' in José M. Magone, Brigid Laffan and Christian Schweiger (eds), *Core-Periphery Relations in the European Union: Power and Conflict in a Dualist Political Economy* (Routledge 2016) 48; Theodoros Rakopoulos (ed) *The Global Life of Austerity: Comparing Beyond Europe* (Berghahn Books 2018) 1; Mercille and Murphy 81

[61] Anthony Giddens, *Turbulent and Mighty Continent: What Future for Europe?* (Polity Press 2013) 60, who paints a vivid image by depicting the collective issue of austerity in purely individualized terms: "Austerity is like a bitter medicine, unpleasant to the taste and with disagreeable side-effects. Taking the medicine is vital to counteract the disease but will not produce a healthy patient unless combined with a range of other curative measures, including a large amount of self-discipline and changes in habits for the future."

[62] Nav Haq, Pablo Martínez and Corina Oprea, 'Editorial Foreword' in Nav Haq, Pablo Martínez and Corina Oprea (eds), *Austerity and Utopia* (L'Internationale Online 2020) 9

[63] Sharma 165

[64] Blyth 13

[65] Ibid

[66] Giddens 60

[67] Jon Shefner and Cory Blad, *Why Austerity Persists* (epub edn, Polity Press 2020) 34

[68] Ibid 34, 35

[69] Mercille and Murphy 58 and 81 where the authors talk about austerity "as class warfare" and as a project aiming at redistributing income upwards with the ultimate aim of maintaining or reasserting the privileged socio-economic position and political power of the highest and wealthiest classes within the society. Several scholars have raised a similar point; see for instance Shefner and Blad 34, 35, 44, who argue that austerity is pursued to the "benefit of the elites"; see also Bailey and Shibata 685.

The strong hold of austerity on collective imagination has not been, however, an abstract idea found only at a structural level. Scholars have rather argued that austerity spoke first and foremost to personal morals and conceptions of relationality. In what has been phrased as the 'alchemy of austerity,'[70] commentators argued that at the heart of austerity strategies lies an enchanting force and a false consciousness, that is, a counter-intuitive belief that fiscal constraints have the potential to lead to a prosperous life (in an always projected and displaced distant future) of increased private consumption and macro-level economic growth. Austerity's alchemy has thus been depicted as the narrative that created false hopes and projections of collective imagination about a future of individual prosperity and societal growth. Seen this way and situated under the broader ideological umbrella of neoliberalism, austerity falls under what John Quiggin has called the 'zombie economics.'[71] Austerity as a 'zombie economic idea'[72] was used to connote austerity's tendency to monopolize the attention, to perpetuate and be relied upon by states, institutions and citizens, despite the fact that its effectiveness and results have been disproven and contested time and again.

Apart from the support for austerity from political forces and institutions, austerity as a moral discourse has been endorsed in recent interdisciplinary approaches coming from arts and activism, broadly speaking. Falling within the rationale of moral austerity that is premised on individual responsibility and individual sacrifice, austerity's moral appeal has been addressed beyond a strategy for recovery. Seen within this context, the analysis here identifies two main tendencies in this respect. First, in a world of theoretically unlimited choices and abundance in available goods that stands nonetheless at the precipice of unprecedented environmental and ecological challenges, austerity acquired a positive connotation in the sense of ethical living and a personal choice "in order to prevent a system implosion."[73] Along these lines, *austerious* living or *ascesis*, have been presented as a change in lifestyle, a return to a living with less for the purpose of preserving natural resources, ceasing in this way the overburdening of the natural habitat and reducing one's ecological footprint.[74] Following that, a revamping of the term 'austerity' as a material

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[70] Clarke and Newman 302

[71] See John Quiggin, *Zombie Economics : How Dead Ideas Still Walk among Us* (Princeton University Press 2012)

[72] Blyth 10

[73] Alessandro Somma, 'The biopolitics of debt-economy: market order, ascetic and hedonistic morality' in Bertram Lomfeld, Alessandro Somma and Peer Zumbansen (eds), *Reshaping markets: Economic Governance, the Global Financial Crisis and Liberal Utopia* (Cambridge University Press 2016) 118, 119

[74] Ecological footprint, otherwise referred to as environmental footprint is, according to the Cambridge Dictionary "the effect that a person, company, activity, etc. has on the environment, for example the amount of natural resources that they use and the amount of harmful gases that they produce"; https://dictionary.cambridge.org/dictionary/english/environmental-footprint <last accessed 12.03.2021>

condition appeared in the public discourse in the sense of "luxurious poverty,"[75] the latter being understood as the "necessary *positive* re-signifying of austerity in energy and material resources, which is essential for any society to be sustainable."[76]

Drawing on the limited resources and scarcity narrative, a second reading of austerity depicted this as an inevitable material condition, to which individuals need to adapt and tailor their expectations. Put differently, in societies where there is a profound lack in goods, supplies and services or where the majority of the population does not have access to certain resources, scarcity has been normalized, and austere living has been presented to the public as the only way of living, in the face of no other alternative. The political byword of no alternative has thus been coupled with a moral realization of the same, which has led to austerity being justified at all fronts of social living. In light of the above, contemporary visions of austerity illustrate how austerity has been consciously accepted or even sought after and re-purposed in the name of a good life of austere and sustainable living. Consequently, the imaginary of limitations, restraints and scarcity has been internalized as the valorization of one's discipline, endurance, fortitude, while the suffering and sacrifice that one was asked to endure, have been portrayed as a condition eventually leading to a sense of personal contentment, gratification and self-reward.

A potential caveat to this could be that the positive re-signifying which has been presented above has not been directly associated with the financial crisis of the examined period at hand. Austere living understood as an environmentally conscious living is a theoretical prescription and novel aspiration that needs to be taken seriously. Meanwhile, however, the conceptual conflation of austere living with simple and consumption-aware living or with austerity as a social policy with legal consequences, obscures the austerity discourse from a social rights perspective, leads to theoretical confusion and gives much leeway to setbacks on already accomplished social achievements at the level of social justice. Surely, austerity seen as a matter of individualized concern and responsibility draws on larger ethical justifications of relationality. Those ethical justifications and meanings

[75] Emilio Santiago Muiño, 'Luxurious Poverty: Looking Back at a Cultural Revolution' in Nav Haq, Pablo Martínez and Corina Oprea (eds), *Austerity and Utopia* (L'Internationale Online 2020); I stand with skepticism towards such conceptualizations of austerity in the sense of "luxurious poverty." That is because, even though this representation of austere living is made in the name of anti-capitalism, sustainability and preservation of the environment, by focusing mainly on the climate change and environmental crisis debate, it nonetheless endorses the very moral framework of neoliberalism of self-responsibilization, and individual initiative, upon which austerity discourses further rely, while it further detaches the austerity problématique from broader structural and cultural considerations and systemic inequalities within the societies.
[76] Ibid 16; emphasis added.

ascribed to notions of solidarity and vulnerability, seen within the broader context of social rights conceptualizations, will be a point of contemplation latter in this thesis.

c. Austerity as Lived Experience

It has become clear by now that austerity is not just institutionally or discursively produced, and the debate around it is not simply related to academics or policy. Moving past such a narrow view, scholars especially in geography and anthropological studies have highlighted that austerity has an affective dimension, namely it is lived and felt by living beings and has far-reaching social consequences, which are pervasive in all layers of everyday life.[77] That is to say, past the cognitive element of austerity being a conscious or unconscious living choice, it has practical consequences for both those who have and haven't chosen it, in practical everyday terms. On this point, Esther Hitchen has written extensively, stressing that austerity envelops and shapes everyday moments, practices and spaces.[78] Everyday life *matters,* and austerity, past the moment that it is decided upon, has "a very particular temporality – it is cyclical and ongoing,"[79] namely, it is not a bounded event with a clear start and expiration date.

The latter has been a common rhetoric ascribed to austerity policies during the crisis. That is to say, austerity, being usually framed within broader crisis synergies and narratives, has often been portrayed as having a resolution and an end, and milestone dates linked to the achievement of certain fiscal goals have been promulgated to mark the boundaries of the implementation of austerity programs during the crisis.[80] However, the recorded social effects linked to austerity reform policies have a lasting duration and the

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[77] Hitchen 11; See also Mercille and Murphy 171

[78] Esther Hitchen, 'Living and Feeling the Austere' (2016) 87 (1) New Formations: A Journal of Culture Theory/ Politics, 103; emphasis in original; Esther Hitchen, 'The Affective Life of Austerity: Uncanny Atmospheres and Paranoid Temporalities' [2019] Social & Cultural Geography, 19, 20, 21; Hitchen in her thorough ethnographic research on austerity, calls this lived and felt experience of austerity in everyday life, as "an affective atmosphere." 'Atmosphere' is used to describe collective affects or emotions towards austerity; see Hitchen, 'The 'Austerian Subject' and the Multiple Performances of Austerity' 4, 6, 34-36

[79] Hitchen, 'The Affective Life of Austerity: Uncanny Atmospheres and Paranoid Temporalities' 19

[80] See for instance in the case of Greece and the end of bail-out and austerity programs in August 2018, the report issued by the European EC, *Greece begins a new chapter following the conclusion of its stability support programme*; See also Agence France-Presse, 'Greece emerges from eurozone bailout after years of austerity' *The Guardian* (20 August 2018), where it is stated that the milestone end of austerity-date is unlikely to be celebrated by many Greek households feeling effects of crippling debt repayments, and where Pierre Moscovici, the EU's Economic Affairs Commissioner, is quoted stating that: "[t]he reality on the ground [i.e. in Greece] remains difficult. The time for austerity is over, but the end of the programme is not the end of the road for reform." Also, on the same matter see Andrew Walker, 'Eurozone bailout programme is finally over' *BBC News* (19 August 2018) Business, where August 20th, 2018, has been heralded and portrayed not only as a milestone for Greece, but also as a milestone for the Eurozone as a whole, with the official end of Greek lending programs and the subsequent imposition of lending conditionalities and austerity-guided domestic reforms.

uncertainties generated by the implementation of austerity programs continuously re-emerge throughout everyday life. Due to this, it has been emphasized in scholarship, that austerity blurs the lines between reality and fiction. This happens by creating a constant feeling amongst people that something is theoretically unknown, since it lies ahead in the future, but which nonetheless is felt as already known. This is due to the fact that although austerity is experienced multiple times by taking different forms, it is nonetheless felt as a familiar material condition that is run by the same prescriptions and underlying logic.[81]

On the topic of austerity as a lived experience, Stuckler and Basu have come to call this the 'body economics.' The 'body economics,' as they have framed them, are the health effects of economic choices and policies, which have a huge impact on mental and bodily health. "Recessions can hurt, but austerity kills"[82] has been stressed in theory, while at a practical level the latter has been a point of major concern in austerity impact assessments, as we will see below.[83] This comes to add to what many analysts have drawn attention to, namely that austerity involves the deadliest social policies, an assumption that has become a reality in many of the countries where contractionary measures have been implemented. Building their research on medical and psychiatric findings, analysts have underlined that many countries have turned their recessions into veritable epidemics followed by lethal effects in terms of heightened suicide statistics and body counts.[84] To use the term introduced by scholars Lina Gálvez and Paula Rodríguez-Modroño, the lethal effects of austerity have been so alarming that killing by austerity or 'austericide'[85] has been introduced to denote the dire social impact and eventually deadly consequences that austerity has had for demographics of entire communities.[86]

Austerity has been presented as having a very tangible dimension in that people feel the repercussions in their bodies, in their mental and physical capacity, in their personal

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[81] Hitchen, 'The Affective Life of Austerity: Uncanny Atmospheres and Paranoid Temporalities' 4, 10, 16
[82] David Stuckler, *The Body Economic: Why Austerity Kills; Regressions, Budget Battles, and the Politics of Life and Death* (Sanjay Basu ed, Basic Books 2013) xx
[83] Ibid
[84] Mercille and Murphy 112; See also for instance Katie Allen, 'Austerity in Greece caused more than 500 male suicides, say researchers' *The Guardian* (21 April 2014), where study results demonstrate direct links between austerity policies on spending cuts and a rise in suicides during the years 2009 and 2010.
[85] Lina Gálvez and Paula Rodríguez-Modroño, 'A Gender Analysis of the Great Recession and "Austericide" in Spain' (2016) 111 Revista Crítica de Ciências Sociais, 136, 137; See also on a broader analysis at a European level, the forthcoming publication Lina Gálvez Muñoz and Paula Rodríguez-Modroño (eds), *The Feminist Economics of Austerity: Austericide in Europe* (forthcoming edn, Routledge IAFFE Advances in Feminist Economics 2021). The use of the term 'austericide' has also been used in a different manner, and in particular in the sense of self-destruction so as to connote the unsuccessful and self-destructive (to the integration and development goals pursued by the EU) policies chosen by the EU in order to cope with the US-EU financial crisis; see for instance Ana Fuentes, 'The US Fear Europe's Austericide' *The Corner* (22 November 2012).
[86] Stuckler xx

and collective potential, in their households and in their homes, in their local communities and in the wider urban environments in which they reside. In the European context, as it will be examined in more detail later in this chapter, the social consequences of austerity have been evident in employment, through cutting personnel and by endorsing labor flexibility and minimizing social protection. At a structural level, EU policies particularly targeted social security and pension schemes as well as labor market security, employment protection and collective bargaining systems through deregulation and fragmentation of labor relations. In addition, reduction in state budgets and public social expenditure was sought by tax hikes targeting middle class households, while health care, education and social welfare matters (such as child-rearing, parental protection or support through social services for the disabled, the frail elderly and children) were either seen to be relegated in the private sphere or they were measured against economic parameters, namely by means of cost-benefit, zero sum analyses and greater-lesser risk equivalence factors.[87]

d. Austerity as Law and Law's Austerity

It has been contended so far that austerity is not simply an economic model. It is not just a political tool with a distinct moral and cultural dimension either. All of the above-mentioned aspects are interwoven with each other, and law also plays a significant role in this respect. That is to say, law is crucially implicated with austerity in a dynamic and intricate relationship by performing a dual role as a sword and a shield, namely, in the sense of enabling austerity in various ways, and as a means of battling against it.[88] In this context, it has been argued that austerity has not only been facilitated and entrenched through the use of law but it has also established itself as the source of a new legal positivism and formalism, especially during the Euro-crisis.[89] The latter has been achieved through the internationalization and constitutionalization of austerity via the subjection of governmental policies to legally binding objectives at a supranational level and the incorporation of austerity targets and guidelines in national legislation.[90]

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[87] Cf. Maria Paula Meneses, Sara Araújo and Silvia Ferreira, 'Welfare, Labour and Austerity: Resistances and Alternatives through Women's Gaze' in Trudie Knijn and Dorota Lepianka (eds), *Justice and Vulnerability in Europe: An Interdisciplinary Approach* (Edward Elgar 2020) 184, 185-190; Mercille and Murphy 81

[88] Bartl and Karavias 4, 5

[89] António Casimiro Ferreira, 'The Politics of Austerity as Politics of Law' (2016) 6 (3) Oñati Socio-Legal Series 516

[90] Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 38; Robert Knox, 'Legalising the Violence of Austerity' in Whyte David and Cooper Vickie (eds), *The Violence of Austerity* (London: Pluto Press 2017) 184.

In the European Union, the constitutionalization of austerity came into being in 1992 with the conclusion of the Maastricht Treaty[91] and the establishment of the Economic and Monetary Union (EMU).[92] As Matthias Goldmann notes, following the oscillation between government interventionism and free market doctrine during the post-war era, and after an initial shift towards economic liberalization in the 1970s, "the establishment of the EMU tilted the scales in favor of austerity by elevating price stability, fiscal consolidation, the no-bailout rule, and the prohibition of funding government by printing money to the level of constitutional rules."[93] In line with the above, the supranational fiscal and monetary rules included in the Maastricht provisions provided for the avoidance of excessive government deficits coupled with a strict monitoring and sanctioning of member states in case of failure to implement policy guidelines and goals.[94]

The mapping of the process of constitutionalization of austerity in the European Union does not end with the Maastricht Treaty, though, but it rather has a long history, which has been intensified and consolidated in Europe during the tumultuous years of the late financial crisis. Over the course of years, the EU "has embedded austerity at its heart,"[95] by expanding and fortifying its legal apparatus through the embodiment of binding legal objectives and via the setting of quantitative targets within strict deadlines in an attempt to monitor balanced budgets of member states. Austerity has been entrenched through the EU's legal architecture by the use of various different mechanisms at the level of EU governance and through the adoption of a number of resolutions by the European Council. In particular, the European Council established the Stability and Growth Pact in 1998[96] for the purpose of enabling surveillance, monitoring, coordination, and enforcement of deficit and debt targets enshrined in the Maastricht Treaty. This pact was replaced by the Treaty on Stability, Coordination and Governance (TSCG),[97] or the

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91 Treaty on European Union (Treaty of Maastricht), 1992, OJ C 191

92 Robert Knox, 'Against Law-sterity' *Salvage* (13 December 2018) 49-67; Knox refers to this process of legalization and constitutionalization of austerity through law and austerity's entrenchment through legal enforcement as 'law-sterity.' See also Stephen McBride, 'Constitutionalizing Austerity: Taking the Public out of Public Policy' (2016) 7 (1) Global Policy, 7; Fitoussi and Saraceno 479, 480, 483

93 Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 28

94 See Treaty on European Union (Treaty of Maastricht), 1992, OJ C 191 Article 104c which states the following: "1. Member States shall avoid excessive government deficits. 2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. […] The reference values are specified in the Protocol on the excessive deficit procedure annexed to this Treaty." See also Knox, 'Against Law-sterity' 55, who also refers to article 104c and the complementary Protocol 'On the Excessive Deficit Procedure.'

95 Ibid 57

96 Resolution of the European Council on the Stability and Growth Pact Amsterdam, (1997) OJ C 236/1

97 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012 not published in the Official Journal.

otherwise called 'European Fiscal Compact' in 2012, and it was followed by the 'Six Pack' in 2013 and the 'Two Pack' in 2014.[98] The European Stability Mechanism (ESM),[99] which replaced the European Financial Stability Facility (EFSF) and the European Financial Stabilization Mechanism (EFSM) has also become an instrument for laying out the conditionalities upon which financial aid within a particular lending framework has been provided to Eurozone member states, for instance in the form of MoUs.

The legal entrenchment of austerity policies through legally binding treaties as well as through soft law mechanisms in the sense of policy recommendations and guidelines, has attached to these measures a technical meaning with a neutral hue. Moreover, due to the fact that austerity measures have been clothed under the language of programmatic statements and directions, this came across as if their implementation was ultimately a matter of legislative discretion and national deliberation, when in fact this has been a pre-decided policy matter at an extra-parliamentary level.[100] Being administered and bolstered at an institutional level, austerity principles were effectively rendered into an automatic and logical response to fiscal imbalances and were elevated to core legal principles that stood beyond political contestation and were insulated from popular oversight and everyday politics.[101] Furthermore, the attachment of financial aid to strict conditionality criteria and the fact that austerity measures were not brought to the level of public deliberation, led scholars to translate this as an imposition of restraints on democratic procedures,[102] or

[98] Cf. Fitoussi and Saraceno 479, 480; Stephen McBride and Sorin Mitrea, 'Austerity and Constitutionalizing Structural Reform of Labour in the European Union' (2017) 98 (1) Studies in Political Economy, 4-7; Poulou, *Soziale Grundrechte und Europäische Finanzhilfe: Anwendbarkeit, Gerichtsschutz, Legitimation* 26 et seq.; Knox, 'Against Law-sterity' 55

[99] See Treaty Establishing the European Stability Mechanism (2011) T/ESM 2012-LT/en 1

[100] In support of that argument, after a joint reading and cross-checking of the programmatic guidelines stated in the first MoU for Greece with the corresponding Greek national legislation under Law 3845/1 (implementing MoU I), which has been performed by the preset author, this comparative examination has shown that the guidelines in the MoU text have been incorporated and formulated into Greek legislation in an identical and verbatim fashion and that there has been no deviation from the MoU text; see EC, *The Economic Adjustment Programme for Greece*

[101] McBride, 'Constitutionalizing Austerity: Taking the Public out of Public Policy' 6; McBride and Mitrea, 'Austerity and Constitutionalizing Structural Reform of Labour in the European Union' 2; Knox, 'Against Law-sterity' 50, 57; Nolan and Featherstone 8, "[…] austerity has been framed and imposed as a new form of political consensus from above […] forms of austerity which are constructed as hegemonic, and often go uncontested in formal politics."

[102] McBride and Mitrea, 'Austerity and Constitutionalizing Structural Reform of Labour in the European Union' 13; Knox, 'Against Law-sterity' 57, 64.

even talk about "austeritarianism"[103] and "zero-choice democracies,"[104] that is, about "polities, in which the elected representative bodies no longer matter much."[105]

The role of law in justifying austerity went beyond legitimation and austerity was rather legalized, shifting the discussion away from issues of legitimacy to issues of legality and taking the question of politics in legal approaches to austerity out of the equation. Austerity has been operationalized through its constitutionalization at a supranational level and through the 'legalization' of ratified international agreements, which acquired a supra-legal status that was conferred to it by national constitutions in the public sphere.[106] At a domestic level, widespread rhetoric surrounding the implementation of austerity measures justified those on the basis of an alleged state of exception and economic necessity in the face of a financial, banking and fiscal crisis.[107] However, as several legal scholars have pointed out, austerity has been nothing but exceptional. Quite the opposite, this was the anticipated outcome in the current social and economic order that has been depoliticized,[108] rationalized into an objectively correct response to the crisis and established as the 'new normal'[109] behind the pretext of exception and emergency.

In support of that argument, in the case of Greece, the implementation of austerity measures has always been presented to the public as being the direct result of the legal obligations of the Greek government. These obligations have been publicly displayed as arising from Greece's supranational commitments and they have been portrayed as having

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[103] Cf. Richard Hyman, 'Austeritarianism in Europe: what options for resistance?' in David Natali and Bart Vanhercke (eds), *Social policy in the European Union: state of play 2015* vol Sixteenth annual report (European Trade Union Institute ETUI 2015) 116, 119

[104] Christian Joerges, 'What Is Left of the European Economic Constitution II? From Pyrrhic Victory to Cannae Defeat' in Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe From Weimar to the Euro* (Rowman & Littlefield International 2016) 151; Joerges is borrowing this term from Niklos Heplas contribution under the title 'Supranational Technocracy and Zero Choice Democracy: The Greek Experience', which was presented during the workshop 'Technocracy and Democracy in Times of Financial Crisis' at the University of Darmstadt, 6–7 March 2014.

[105] Ibid

[106] See Desierto 241-252; Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' 300; see also Ortiz and Cummins 8, 9, 11 and Executive Summary, where the authors stress that: "Today, austerity and the resulting agenda that minimizes public policies have become a "new normal," inflicted on 75 per cent of the world population."

[107] Marija Bartl, 'Contesting Austerity: On the Limits of EU Knowledge Governance' (2017) 44 (1) Journal of Law and Society, 167, 168

[108] Nicole Scicluna, 'Integration-through-Crisis: A New Mode of European Integration?' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021) 94

[109] Cf. Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 41, 42; Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' 300 et seq.; Bartl 151, 167, 168. See also O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' 60, 70, who links austerity to neoliberalism and argues that austerity is not exceptional, but instead a natural development of neoliberal capitalism and that the undermining of socio-economic rights is not an anomaly, but rather their necessary fate.

a de facto validity and binding character.[110] In this context, the Greek government, "under the guise of fiscal emergency"[111] and by invoking language of an emergency,[112] made extensive use of emergency decree-laws, which in the Greek legal system are called 'acts of legislative content,'[113] in order to bring austerity measures up for vote in the Greek parliament, which were prescribed in the signed MoUs. Further, this took place in emergency omnibus bills, which were admitted for voting in the form of a single article and a single provision,[114] contrary to the Greek Constitution that prohibits such practice.[115] As a result, constitutional and parliamentary procedures were circumvented and austerity measures, at least in the case of Greece, were not put under public and parliamentary scrutiny and deliberation before being transposed into national law and being put into force within domestic legislation.

The latter had gross implications at a national level, were austerity principles, having acquired an undisputed legal status, gradually lost their exceptional character and were normalized and institutionalized as part of ordinary law. This normalization and incorporation of austerity measures in national legislation has further orchestrated a profound legislative reform pertaining to human rights protection schemes and especially

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110 Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' 300

111 Tsoukala, 'Narratives of the European Crisis and the Future of (Social) Europe' 265

112 Differently to analyses such as that of Marketou and Tsoukala, Jeff King argues in his assessment of the events that "During the fundamental crises faced by Greece, Italy, Spain, Portugal and Ireland, the respective governments used the language of 'crisis', and 'emergency' and even 'national emergency' but did not suspend the operation of ordinary constitutional law nor exclude the legislature from the design of remedies and responses. These cases set an important precedent by showing that in a well-functioning democracy, even in cases of fiscal crises, we do not suspend the ordinary process of law."; see in particular King, 'Social rights and welfare reform in times of economic crisis' 218. The present author favors an appraisal of the events that doubts the well-functioning of the parliamentary and legislative processes in using the language of 'crisis' and 'emergency', at least in the Greek case.

113 Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' 180, 184, 193, 302, 303

114 Ibid 186; This practice has been criticized in legal commentaries; see Kostas Chrysogonos and Akritas Kaidatzis, *Γνωμοδότηση για τη συνταγματικότητα του σχεδίου νόμου "Έγκριση Μεσοπρόθεσμου Πλαισίου Δημοσιονομικής Στρατηγικής 2013-2016 - Επείγοντα μέτρα εφαρμογής του Ν. 4046/2012 και Μεσοπρόθεσμου Πλαισίου Δημοσιονομικής Στρατηγικής 2013-2016" (6 November 2012)* 27, 28 part D. On the constitutionality of the voting procedure on the measures, where it is noted: "It is beyond doubt that the aggregation of multiple and diverse with each other measures, which are disorderly thrown into the euphemistically 'single article' of the bill, blatantly violates article 76 para 4 of the Constitution, given that […] the discussion, preparation and voting of the measures, as provided in the constitutional provision, is omitted."; translation from Greek to English provided by the present author.

115 The Constitution of Greece 1975 (rev. 2008) Article 76 para 4 "Every Bill and every law proposal shall be debated and voted on once in principle, by article and as a whole, with the exception of the cases provided under paragraph 4 of article 72"; similarly, Article 72 para "A Bill or law proposal debated and voted in the competent standing parliamentary committee is introduced in the Plenum in one session, as specified by the Standing Orders of the Parliament, and is debated and voted in principle, by article and as a whole. […]"; https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf <last accessed 23.10.2020>

infringing upon social rights.[116] As it will be assessed in more detail in the following chapters, the reforms that have been instigated by the legalization of austerity had further implications at the level of litigation and legal protection in affected countries.

In other words, whereas parliaments were pressured to adopt and inculcate austerity measures into national legislations under strict deadlines, at the same time, national constitutional and supreme courts, in financially assisted countries, were asked to review and adjudicate upon the constitutionality of austerity measures and to provide for protection to citizens in cases where violation of human rights have taken place. Assessment of the legal status of austerity measures in national legal frameworks was thus manifold. *First*, it was presented as law in itself, the legality of which was de facto and undisputed. *Second*, it brought to the fore questions about the appropriate role of the judiciary, while it assigned to the courts the decisive role of reviewing and adjudicating upon the constitutionality of austerity measures.[117] *Third*, it implicated and cluttered understandings on the justiciability, the meaning of social rights as well as on their effective protection, since those rights were the ones that have been directly and most heavily affected by the execution of recessionary policies. Backing up this assumption, several analysts have contested the validity of austerity policies and pointed out that the restructuring of state budgets and the implementation of recovery programs have had an overall negative impact on social rights. An overview of such measures and an assessment of their social impact is scrutinized immediately below.

3.2. Austerity Impact Assessment of Social Rights Protection

It has been suggested above that many countries across the world and in the European region in particular, have been profoundly affected by the economic and financial fall-out of 2008, which led various governments to seek for approaches to mitigate the consequences. Among the recovery solutions, contractionary measures or austerity measures, as they are often called (as opposed to expansionary ones) emerged as the optimal economic and social model for coping with the crisis. Even though austerity was deemed necessary in varying degrees[118] or was seen under a more positive light by

[116] Ferreira 516; Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' 193, 300-303

[117] Sciarra 135; Ferreira 517; See also Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 30

[118] Carmen M. Reinhart and Kenneth S. Rogoff, 'Financial and Sovereign Debt Crises: Some Lessons Learned and Those Forgotten' International Monetary Fund WP/13/266 IMF Working Papers 4

some scholars,[119] the crux of the argument has been that austerity has a net-negative impact in social-related terms. In academic appraisals, the rampant adoption of austerity measures has been politically associated with neoliberal policies and has been found to be the culprit of the rapidly growing levels of inequality and poverty which have spurred within the society.[120] While the collection, documentation and critical analysis of qualitative and quantitative data at a comparative and international level around the globe is still developing, austerity has already been found to have had a major negative social impact in the countries where it has been implemented.[121]

Bringing this to Europe, as the crisis ramified over the years, statutory institutions and independent oversight bodies such as national human rights institutions, international or regional human rights bodies, UN special procedures,[122] judiciaries,[123] labour and social lawyers,[124] academics and civil society have raised alerts about social rights infringements caused by austerity and have proceeded with meticulous impact evaluations in the area of human rights and social and economic rights in particular. Arguably, austerity policies were set into effect without any prior human rights impact assessment.[125] Rather, as it has been

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119 Bailey and Shibata

120 Cf. Philip Alston and Frédéric Mégret, 'Introduction: Appraising the United Nations Human Rights Regime' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press 2020) 1

121 Nicholas Lusiani and Sergio Chaparro, *Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation (Centre for Economic and Social Rights, February 2018)* 7

122 Lumina Cephas, *Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (*A/67/304, *UN Human Rights Council, 13 August 2012)* paras 33, 35, 36, 37; the UN Independent Expert has documented the general negative cumulative effects of austerity in social and economic rights and the application of austerity measures to public social services.

123 See, at the level of the European Court of Human Rights ECtHR, *Implementing the European Convention on Human Rights in times of economic crisis (*Dialogue between judges, European Court of Human Rights Seminar 25 January 2013 *Council of Europe)*. See also the public interventions made by the Magistrats européens pour la démocratie et les libertés MEDEL, 'Declaration on Greece - Pour l'avenir Europeen du peuple Grec: justice, solidarite et dignite' (*Magistrats Europeens Pour La Democratie et Les Libertes Blog*, 2015) and by MEDEL, alongside Portuguese and Greek Supreme judges MEDEL (ed) *Austerity and Social Rights* vol International Colloquium 30th Anniversary of the Society of Greek Judges for Democracy and Liberties and Magistrats Europeens Pour La Democratie et Les Libertes, Athens, 16.03.2019 (Sakkoulas Publishing Athens-Thessaloniki 2019). At a Greek national level, see the initiative to address the social rights and austerity question raised by the Association of Greek Magistrates, EEDD, 'Συμπεράσματα Ημερίδας "Κοινωνικά και Ατομικά Δικαιώματα στη σκιά της κρίσης"' (*Association of Greek Magistrates Blog* 2015).

124 See for instance the statement dated in January 2013, under the title "Manifesto: Labour and Social Lawyers From Across Europe Call on the European Union to Respect and Promote Fundamental Social Rights in Particular in Respect of all Crisis-Related Measures," where signatories lawyers expressed "their grave concern about the measures taken and their consequences in respect of recent – and inter-related – legal, economic, and political developments in the EU"; Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *Annex 2: Manifesto for the Respect and Promotion of Fundamental Social Rights in Particular in Respect of All Crisis-related Measures* (Hart Publishing 2014) para 1 et seq., para 7

125 The analysis does not delve into the evolving literature of the so-called 'human rights impact assessment' (HRIA) as a study field and a methodological tool that is linked with the development and operationalization of the 'UN Guiding Principles on HRIAs of Economic Policy Reforms.' The latter provides a rights-based framework and a methodological guide for conducting impact assessment on the design and execution of

stressed in literature "the only focus was the central goal – reduce the budget deficit – and the human cost associated with those measures was not regarded prior to their implementation."[126] In this context, social issues such as education, child-rearing, and health care have been interpreted in primarily economic terms and in terms of the greater or lesser cost or risk posed.

At a UN level,[127] EU level,[128] and CoE level,[129] the negative impact of austerity measures on economic, social and cultural rights has been detected mainly with regards to the right to work and social security and the rights to education and public healthcare. As a concomitant to this negative impact, the rights to housing and to an adequate standard of living, the right to food and water, as well as the right of access to justice and fair trial have also faced severe setbacks.[130] Speaking in employment terms, the restrictive measures targeted mostly public workers and civil servants through downsizing personnel and

economic reform programs on human rights; see for more OHCHR, Daniel Bradlow and Tizi Merafe, *How to Make Economic Reforms Consisent with Human Rights Obligations: Guiding Principles on Human Rights Impact Assessment of Economic Reforms (*United Nations Human Rights Special Procedures *Centre for Human Rights University of Pretoria).* On this subject and on an analysis of HRIA in relation to economic and social rights considerations, see Aoife Nolan and Juan Pablo Bohoslavsky, 'Human Rights and Economic Policy Reforms' (2020) 24 (9) The International Journal of Human Rights, 1248 et seq. For a critical analysis of what a 'human rights impact assessment' consists of, see Simon Walker, 'Human Rights Impact Assessments: Emerging Practice and Challenges' in Eibe H. Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 395 et seq., where Walker contends that a "human rights impact assessment measures the impact of policies, programmes, projects and interventions on human rights." In this study, 'austerity impact assessment' is understood as an evaluation of the social effects of austerity with a focus on social rights.

[126] Jessica Morris and Laura Brito, *Right to Housing National Report - Portugal (*Working Paper written within the framework of Work Package 3 "Law as or against Justice for all", *ETHOS Consortium European Commission Horizon 2020 Research Project, November 2018)* 8

[127] At a UN level, see OHCHR, *Report on Austerity Measures and Economic and Social Rights (OHCHR)*; see also OHCHR, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights - Impact of economic reforms and austerity measures on women's human rights (*To the General Assembly at its 73rd session A/73/179, *18 July 2018).* In 2016 the UN Independent Expert paid an official visit to the European Union institutions in order to assess the impact of austerity policies on human rights; see Juan Pablo Bohoslavsky, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to institutions of the European Union (*A/HRC/34/57/Add1, *UN Human Rights Council, 28 December 2016)*

[128] At an EU level, see the comparative assessment of austerity-imposed measures in Belgium, Cyprus, Greece, Ireland, Italy, Spain and Portugal, Aleksandra Ivanković Tamamović, *The Impact of the Crisis on Fundamental Rights across Member States of the EU: Comparative Analysis (European Parliament; Study requested by the Committee on Civil Liberties, Justice and Home Affairs, February 2015)* 12 et seq.

[129] See the report CDDH, *The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe (*Feasibility Study Adopted by the Steering Committee for Human Rights (CDDH) on 11 December 2015, *Council of Europe, October 2016)*

[130] See the study conducted by Nicholas Lusiani and Ignacio Saiz, *Safeguarding Human Rights in Times of Economic Crisis (Council of Europe Commissioner for Human Rights, November 2013)* 19, 20. See also, Ginsborg 102. On the right to a fair and expeditious hearing and the right of 'access to court', see Sarah Joseph, 'Sovereign Debt and Civil/Political Rights' in Ilias Bantekas and Cephas Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press 2018) 313, 316. For an assessment of the negative impact of austerity measures on access to justice, as this has been reflected in the jurisprudence of the ECtHR, see Cliquennois Gaëtan, 'The Impact of Austerity Policies on International and European Courts and their Jurisprudence' (*EJIL:Talk! Blog of the European Journal of International Law*, 2017).

cutting social expenses, while largely hitting the construction, manufacturing and agricultural sectors.[131] Apropos of the fabric of society, the detrimental effects of such measures have been found to have adversely affected women,[132] children, elderly and young persons, disabled and neuroatypical persons, migrants and asylum seekers, and socially excluded groups of the society.[133] Especially with regards to young people and children, it has been pointed out that in the face of austerity challenges these two categories stood as "the most defenseless link in the politics of austerity."[134] In line with this, it has been largely argued that the youth has been hit the hardest by austerity measures, bringing commentators to talk of a 'lost generation.'[135]

At a structural level, austerity policies were aimed towards reformatting social and employment protection schemes and collective bargaining systems.[136] Within an austerity-based rationale, protective and security measures of workers, social benefits as well as

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131 Meneses, Araújo and Ferreira 185

132 See Borbála Juhász, *Backlash in Gender Equality and Women's and Girls' Rights (European Parliament; Study reuested by the Committee on Women's Rights and Gender Equality June 2018)* 38 et seq. Also Kate Donald and Nicholas Lusiani, *The gendered costs of austerity: Assessing the IMF's role in budget cuts which threaten women's rights (*The IMF, Gender Equality and Expenditure Policy Series; Center for Economic and Social Rights and Bretton Woods Project, *Bretton Woods Project, September 2017)*; See also Magdalena Sepúlveda Carmona and Kate Donald, 'What Does Care Have to Do with Human Rights? Analysing the Impact on Women's Rights and Gender Equality' (2014) 22 (3) Gender & Development: Care; See also on the case of Greece GNCHR, *National Commission for Human Rights Annual Report 2016 Summary in English (Greek National Commission for Human Rights)* para 54

133 OHCHR. See also Des Hogan and others, *Austerity and Human Rights in Europe: Perspectives and Viewpoints from Conferences in Brussels and Berlin 12 and 13 June 2013 (*German Institute for Human Rights; European Network of National Human Rights Institutions AISBL, *Bunter Hund, Berlin, February 2014)* 9, 10

134 Pau Marí-Klose and Francisco Javier Moreno-Fuentes, 'Age and the Politics of Austerity: The Case of Spain' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021) 333

135 Dimitris Karantinos and EKKE, *An evaluation of the social and employment aspects and challenges in Greece (*Note requested by the European Parliament's Employment and Social Affairs Committee and produced by Greek National Centre for Social Research (EKKE), *January 2014)* 8, who documents that young people were the hardest hit by the increase in unemployment rates in Greece. See also on the impact of austerity on youth employment and children's enjoyment of social rights CDDH 27 et seq. For an assessment of the measures in relation to the European Social Charter under the lens of youth unemployment in Greece, see Matina Yannakourou and Giorgos Tsatiris, 'Οι νέοι και το εργατικό δίκαιο στο πλαίσιο της δημοσιονομικής κρίσης' (2015) 74 (10) Επιθερεώρηση Εργατικού Δικαίου 1275 et seq. On Europe's 'lost generation', see on that point Lusiani and Saiz 25; see also the special section of the German Law Journal of 2014 on 'Europe and the Lost Generation' and in particular Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014) 15 (6) German Law Journal, 1146, where Poulou stresses that 'the lost generation' has been marginalized due to austerity even though it "did not have a say in the making of the decisions that contributed to the crisis and cannot therefore be held responsible for the maladministration of their economies." See also Bettina De Souza Guilherme, 'The Double Democratic Deficit' in Bettina De Souza Guilherme and others (eds), *Financial Crisis Management and Democracy: Lessons from Europe and Latin America* (Springer International Publishing 2021) 84

136 For a comparative analysis on the impact of austerity governance in Bulgaria, Italy, France, Greece, Portugal and Spain as part of the EU Commission, DG Employment, Social Affairs and Inclusion research project titled "GOCOBA," which has been carried with the cooperation by five Trade Union Research Institutes in the above-mentioned countries, namely AK Vienna, ABT Rome, IRES, ISCTE-IUL Lisbon, ISTUR Sofia, and INE-GSEE Athens, see Fernando Rocha and others (eds), *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems* (Institut de recherches économiques et sociales (ires) Fundación 1o de Mayo, Rapport November 2014).

schemes of collective bargaining and negotiated settlements were further taken to be 'rigidities' in the labor market. Subsequently, austerity policies sought to remove those rigidities so that the market would function more efficiently, while at the same time, flexibility in the labor force would counterbalance the social effects of strict monetary policies that were pursued and implemented.[137]

Austerity programs have targeted public services and social welfare protection plans and investments in public infrastructure on a wide scale.[138] As the ultimate goal was the reduction of national budgetary deficits, this was sought through internal devaluation, privatization of social services, public utilities and state-owned enterprises, and tax hikes coupled with increases of regressive taxes. In addition, deregulation and flexibilization of work, fragmentation of labor relations, minimum wage and salary cuts in the public sector have also been extensively implemented. Correspondingly, these reformative strategies swept through societies, aiming at the reduction of income and consumption and the shrinking of the state social welfare capacity.[139]

In this regard, spending and expenditure cuts and controls have been favored over tax increases and aggressive plans to roll back the social welfare model were set in motion.[140] As one would expect, the practice of spending cuts, reducing fiscal debts and rebalancing economies brought forward questions about the redistribution of public resources and budget reallocation. In the face of scarce resources and limited social budgets, however, these issues led to the intensification and deepening of social disparities and polarization of the society.[141] As a result of large-scale structural reforms[142] that targeted social protection schemes and public spending, the austerity agenda was heavily criticized for promoting the individualization and privatization of risk, the shrinking of social and collective rights and the dissolution of the societal tissue.[143]

Inequality, unemployment and pauperization to the level of extreme poverty, have all been associated with austerity in this respect.[144] In addition, Amartya Sen, in his sharp

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137 Cf. Deakin and Koukiadaki 186; McBride and Mitrea, 'Internalizing Neoliberalism and Austerity' 100

138 Kitson, Martin and Tyler 293.

139 Meneses, Araújo and Ferreira 184; Mercille and Murphy 27; See also Lusiani and Chaparro 12 et seq.

140 See EC, *The Economic Adjustment Programme for Portugal 2011-2014* 39 par.46; EC, *The Economic Adjustment Programme for Greece* 19 par.19; EC, *Second Economic Adjustment Programme for Greece* 3, 97 par.96; on expenditure controls EC, *Greece: The Third Economic Adjustment Programme* 11 par.12.14.11;Mercille and Murphy 81

141 Sturm, Griebel and Winkelmann 17, 18; Vollmann and Ridder 149.

142 Sharing the spirit of Nolan's and Bohoslavsky's remark, it is to be noted here that this study does not understand 'reform' to necessarily imply 'improvement' but rather takes this to mean amendment, change or wholesale transformation, irrespective of whether this is evaluated as positive or negative. See Nolan and Bohoslavsky 1260 note 1.

143 Meneses, Araújo and Ferreira 184

144 Manos Matsaganis, 'The Greek Crisis: Social Impact and Policy Responses' November 2013 Friedrich-Ebert-Stiftung Department of Western Europe / North America 15. See also the comprehensive report on

criticism, has pointed out that another "counterproductive consequence of the policy of imposed austerity and the resulting joblessness, has been the loss of productive power – and over time the *loss of skill* as well – resulting from continued unemployment of the young."[145] In light of the above, austerity was seen as effectively laying the grounds for the corrosion of the social welfare model in countries where it has been applied, and for the erosion of the foundations of a 'social Europe'[146] based on equity, solidarity and dignity. In that sense, austerity was condemned for resulting in lasting, intergenerational, negative consequences, which impaired EU's foundational social values together with notions of transnational solidarity and social cohesion,[147] jeopardized political stability at a national and supranational level, and for extending well beyond both the end date of the MoU assistance programs as well as the national borders of the affected countries.[148]

Turning to Greece and Portugal, as the two paradigmatic case studies in the thesis at hand, all the aforementioned implications of austerity have been encountered throughout the implementation of the MoUs in the respective countries. Over the course of eight years, Greece signed three Economic Adjustment Programs also known as Memoranda of Understanding on Specific Economic Policy Conditionality Programs (MoUs), notably the first in 2010,[149] the second in 2012[150] and the third in 2015.[151] As part

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unemployment and pauperization conducted by Tassos Giannitsis and Stavros Zografakis, *Greece: Solidarity and Adjustment in Times of Crisis (*IMK Studies, No 38, *Institut für Makroökonomie und Konjunkturforschung Macroeconomic Policy Institute Hans-Boeckler-Foundation, March 2015)* 21 et seq., 65

145 Amartya Sen, 'The Economic Consequences of Austerity' *NewStatesman* (4 June 2015); emphasis added.

146 On the profound impact of austerity on the social welfare state under the influence of the crisis, see the study by Matsaganis 20 et seq. On the erosion of the social welfare model and the advancement of 'welfare capitalism' in austerity afflicted countries of the European South in particular, see Maria Petmesidou and Ana Guillén, *Economic crisis and austerity in Southern Europe: threat or opportunity for a sustainable welfare state? (*OSE Research Paper Nr 18 *European Social Observatory, January 2015)* 23 et seq.; and also, specifically on Greece as a case study Maria Petmesidou, 'Welfare Reform in Greece: A Major Crisis, Crippling Debt Conditions and Stark Challenges Ahead' in Peter Taylor-Gooby, Benjamin Leruth and Heejung Chung (eds), *After Austerity: Welfare State Transformation in Europe after the Great Recession* (Oxford University Press 2017). For a comparative take on different austerity-laden countries in Europe and an assessment of the transformation of the social welfare model in the financial crisis, see Becker and Poulou

147 See Sophia Koukoulis-Spiliotopoulos, *Austerity measures v. Human Rights and EU foundational values (Greek National Commission for Human Rights, 8 October 2013)* paras 6,7, 36; Lusiani and Saiz 25

148 See the analysis Lusiani and Saiz 25. On austerity as a chosen policy in tackling the European economic crisis and on austerity's repercussions on the issue of social cohesion, see also CDDH 34 et seq.

149 EC, *The Economic Adjustment Programme for Greece*

150 EC, *Second Economic Adjustment Programme for Greece*

151 EC, *Greece: The Third Economic Adjustment Programme*. There have been two Supplemental Memoranda of Understanding added to the Third Economic Adjustment Program agreed with Greece in 2016 and 2017 respectively; see EC, *Supplemental Memorandum of Understanding (European Commission, 16 June 2016)* and EC, *Supplemental Memorandum of Understanding (second addendum to the Memorandum of Understanding) Between the European Commission (acting on behalf of the European Stability Mechanism) and the Hellenic Republic and the Bank of Greece (European Commission, Athens, 5 July 2017; Brussels 5 July 2017).* In Greece there has been a legal and political discussion about the existence and execution of an informal *fourth* MoU. Such program has not been agreed upon among the Greek authorities and social partners. However, on August 21st, 2018, an 'Enhanced surveillance framework for Greece' entered into force after the conclusion of the ESM stability support program for Greece on August 20th, 2018; see EC, *Commission Implementing Decision of 11.7.2018 on the activation*

of these programs, a plethora of drastic and large-scale reforms were implemented at a domestic level through the enactment of multiple national legislative acts.[152]

Similar to the austerity reasoning, examined above, the restrictive and transformative framework that was put into place in Greece was justified on the grounds of liberalizing and 'rationalizing'[153] public services, reducing public expenses and constricting the social security system. Admittedly, the policies agreed upon in the MoUs aimed at effectively solidifying the foundations of what was called the 'modern State',[154] which could be essentially described as the permanent minimizing of the state's size[155] and capacity in social services and the reduction of its "direct participation in domestic

of enhanced surveillance for Greece (European Commission), which has subsequently symbolically marked the end of the MoUs for Greece. This has been interpreted in media analyses as an atypically run fourth MoU; see Panagiotis Ioakeimidis, 'Το άτυπο τέταρτο Μνημόνιο' (*European Business*, 2018). Also Law 4472/2017 amending Law 4387/2016 and implementing the Medium-term Framework on Fiscal Strategy 2018-2021 on public pensions, labor law and social support reforms, has also been referred to as the Greek fourth MoU.

[152] The MoUs and financial assistance agreements have been incorporated into the Greek legal order as national laws, laying down the general obligations as well as the specific measures required in meeting these obligations. On an overview of the legislative acts enacting the first and second MoU in the Greek legal order, see Styliani Kaltsouni and Athina Kosma, *The Impact of the Crisis on Fundamental Rights across Member States of the EU; Country Report on Greece (European Parliament; Study requested by the Committee on Civil Liberties, Justice and Home Affairs, February 2015)* 26 et seq.. The main national legislative acts incorporating the three MoUs and containing the Medium-term Fiscal Strategies for 2012-2015/16 and for 2018-2021 have been: Law 3845/10 (Greek Government Gazette A'65/06.05.2010) (implementing MoU I); Law 3847/2010 (Greek Government Gazette A'67/11.05.2010); Law 3986/11 (Greek Government Gazette A'152/01.07.2011) (on Urgent Measures Implementation Medium-term Fiscal Strategy 2012-2015); Law 4024/2011 (Greek Government Gazette A' 226/ 27.10.2011); Law 4038/2012 (Greek Government Gazette A'14/ 02.02.2012); Law 4046/2012 (Greek Government Gazette A'28/ 14.02.2012) (implementing MoU II); Law 4093/2012 (Greek Government Gazette A' 222 /12.11.2012); Law 4127/2013 (Greek Government Gazette A'50/28.02.2013); Law 4334-4335/2015 (Greek Government Gazette A'80/16.07.2015); Law 4336/2015 (Greek Government Gazette A'94/14.08.2015) (implementing MoU III); Law 4337/2015 (Greek Government Gazette A'129/17.10.2015); Law 4339-4340/2015 (Greek Government Gazette A'133/29.10.2015); Law 4342/2015 (Greek Government Gazette A'143/09.11.2015); Law 4346/2015 (Greek Government Gazette A' 152/20.11.2015); Law 4472/17 (Greek Government Gazette A'74/19.05.2017) (on Implementation Measures for fiscal goals and reforms, Medium-term Financial Strategy Framework 2018-2021 and other provisions).

[153] 'Rationalizing' has been used extensively in examined MoU texts and in connection to the implementation of austerity measures in structural adjustment programs in European countries. Research by the present author within the respective MoU texts on what this 'rationalizing' means and on what kind of 'rationality' – philosophical or otherwise – is implied, has failed to produce any outcome as to the precise meaning and theoretical underpinnings of such a term. The study takes here that the rationality implied is a term borrowed by liberal economics and incorporated in MoU stipulations.

[154] See the part 'Conditions of the programme' referring to the ESM stability support program agreed with Greece in the European Commission's dedicated website on the 'Enhanced Surveillance framework for Greece' https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-greece_en#enhanced-surveillance-framework-for-greece <last accessed 05.06.2020> See also EC, *Greece: The Third Economic Adjustment Programme* 5, 29 et seq., where there is a reference to the 'modern State', without any definition or theoretical background of what is meant by that; capitalization kept as in the original. In Greek MoUs I and II, there is no explicit reference to the 'modern State' but appeals to the modernizing of public administration are made throughout the texts. EC, *Second Economic Adjustment Programme for Greece* 56` Annex 51., 130 par. 132.136; EC, *The Economic Adjustment Programme for Greece* 46` para 47, 53` paras 22, 65,70, 72, 75, 77

[155] EC, *Second Economic Adjustment Programme for Greece* 97 para 96

industries."[156] Against this backdrop, stringent pro-cyclical policies included guidelines to the finest detail concerning domestic labour legislation, housing, public healthcare and social security schemes,[157] thus affecting "every possible aspect of the safety net."[158]

The stark consequences of the adopted 'scarcity measures'[159] in the case of Greece have also been scrutinized and heavily criticized by international and national human rights bodies. At a UN[160] and EU institutional level[161] independent studies have scholastically documented and evaluated the impact of austerity on social and economic rights infringements in Greece. At the same time, a large group of NGOs and advisory bodies, including the International Federation of Human Rights,[162] the International Labour

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156 EC, *The Economic Adjustment Programme for Greece* 5 para 10

157 This thesis does not engage with a documentation and examination of the undertaken reforms in Greek labor law, and in the pension and social security schemes. For a detailed analysis of the labor reforms according to Law 3854/2010 see Lefki Kiosse-Pavlidou, '6 Μαΐου 2010 - 14 Φεβρουαρίου 2012: Δρόμος Ταχείας Απορρύθμισης της Εργατικής Νομοθεσίας' (2012) 71 Επιθεώρηση Εργατικού Δικαίου. For an overview of the restrictions that the 1st an 2nd MoUs brought about to Greek labor law, see Konstantina Bourazeri, *Tarifautonomie und Wirtschaftskrise: Regulierung tarifvertraglicher Arbeitsbedingungen auf der Grundlage von Memoranda of Understanding nach europäischem, deutschem und griechischem Recht* (Nomos 2019). Ioannis Katsaroumpas, 'Collective labour law in times of economic crisis: theoretical and comparative perspectives' (DPhil thesis, University of Oxford 2016), has conducted critical research with a focus on collective labor law reforms in Greece during the crisis years. For a critical presentation of the public pension reforms in relation to issues of legality, see Dafni Diliagka, *The Legality of Public Pension Reforms in Times of Financial Crisis* (Nomos Verlagsgesellschaf mbH & Co 2018). On the numerous labor and social security law changes that marked the Greek legislative and social landscape, see the report produced for the International Society for Labor and Social Security Law, ISLSSL, *Greek Young Scholars' Report for ISLSSL XI European Regional Congress 2014 (*International Society for Labour and Social Security Law (ISLSSL) *2014).* For a comparative examination of the austerity-mandated reforms in Greece and Portugal; see Martin Štefko, *Labour Law and Social Security Law at the Crossroads: Focused on International Labour Law Standards and Social Reforms* (Prague: Charles University, Faculty of Law 2016) 109` et seq., 214 et seq.

158 Tsoukala, 'Narratives of the European Crisis and the Future of (Social) Europe' 265; by 'safety net', I take that 'social safety net' implies public services and social provisions as provided in a social welfare model.

159 Veronika Bílková refers to measures resulting from an "economic crisis, political strife, armed conflicts, sanctions, and other similar factors," as 'scarcity measures'; see Veronika Bílková, 'The nature of social rights as obligations of international law: resource availability, progressive realization and the obligations to respect, protect, fulfil' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 29 et seq.

160 Lumina Cephas, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights: Mission to Greece (22 – 27 April 2013) (*A/HRC/25/50/Add1, *UN Human Rights Council, 27 March 2014)*; Juan Pablo Bohoslavsky, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights on his mission to Greece from 30 Nov. to 8 Dec. 2015 (*A/HRC/31/60/Add2, *UN Human Rights Council, 21 April 2016).* At the time of this writing, there has not been a country visit by a mandate holder to assess the situation of human rights in Portugal; for a list of countries visits and relevant reports, see https://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/CountryVisits.aspx <last accessed 12.08.2021>

161 See the country report on Greece by Kaltsouni and Kosma; Kaltsouni and Kosma have produced a detailed impact assessment of the MoU-dictated austerity measures in Greece with a particular focus on the effects of austerity, on the right to compulsory education in Greece; the right to healthcare; the right to work and pension and the relevant effects on the public entitlements and benefits scheme; the right of access and the MoU-mandated reforms to the judicial system and to legal and judicial services costs; the right to freedom of expression and assembly as well as the right to property and freedom of press.

162 The International Federation for Human Rights (FIDH) is an international human rights non-governmental organization, founded in 1922, federating 192 organizations from 117 countries, defending

Organisation,[163] the Hellenic League of Human Rights[164] and the Greek National Commission for Human Rights,[165] have issued lengthy reports on the curtailment of social rights during the MoU years. In addition, at the labor front, Greek national labor-focused organizations,[166] together with European-based ones[167] have thoroughly mapped the far-reaching labor reforms and the transformation of the domestic labor law landscape that took place in Greece as part of the wave of austerity-led policies.

The findings of such reports were unanimous in their conclusions. Social and economic rights were gravely impacted, and a strong condemnation of austerity policies followed that conjecture. Experts concurred that the adopted austerity measures had a considerable negative social impact which was evidenced in a widespread material deprivation in goods and social services,[168] a drastic decline in the disposable income of

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civil, political, economic, social and cultural rights as set out in the UDHR. On an impact assessment of austerity on human rights in Greece, see FIDH/HLHR, *Downgrading Rights: The Cost of Austerity in Greece (*International Federation Human Rights Report, *18 December 2014)* 15 et seq.

[163] See ILO, *Report on the High Level Mission to Greece (International Labour Office, Athens, 19-23 September 2011)*; see also Koukoulis-Spiliotopoulos, *Austerity measures v. Human Rights and EU foundational values* 8 et seq.

[164] The Hellenic League for Human Rights, founded in 1953, is the oldest Non-Governmental Organization for human rights protection and promotion in Greece; see for more information https://www.hlhr.gr/en/b/statute/. On a systematic recoding and assessment of the austerity impact on social rights in Greece throughout the implementation of the MoUs, see the thematic on social rights and in particular HLHR, *Τα κοινωνικά δικαιώματα είναι θεμελιώδη δικαιώματα (Hellenic League for Human Rights, 07 July 2010)*; HLHR, *Τα κοινωνικά δικαιώματα ως πρόβλημα και ως λύση (Hellenic League for Human Rights, 17 April 2013)*; HLHR, *Τα κοινωνικά δικαιώματα στη δίνη της οικονομικής κρίσης (Hellenic League for Human Rights, 25 May 2013).*

[165] The Greek National Commission for Human Rights(GNCHR) is an independent advisory body to the Greek State on human rights issues; see https://www.nchr.gr/en/gnchr.html; On social rights, see the interventions made by the GNCHR, *Σύσταση ΕΕΔΑ: Επιτακτική ανάγκη να αντιστραφεί η πορεία καταρράκωσης των ατομικών και κοινωνικών δικαιωμάτων (Greek National Commission for Human Rights, 08 December 2011)*; See also GNCHR, *GNCHR Statement on the impact of the continuing austerity measures on human rights (Greek National Commission for Human Rights, 15 July 2015)*; On labor and social security rights, in particular the Greek National Commission for Human Rights has issued an urgent statement; see GNCHR, *Urgent GNCHR Statement on Labour and Social Security Rights in Greece (Greek National Commission for Human Rights, 28 April 2017).*

[166] The National Institute of Labour and Human Resources (NILHR-EIEAD), established in 2011, which is a legal entity under private law that is supervised by the Greek Ministry of Labor and Social Affairs, has conducted research on austerity-mandated law reforms; see in particular Panagiotis Kyriakoulias, *Οι εργασιακές σχέσεις μετά το Μνημόνιο: Πανόραμα της μεταρρύθμισης της εργατικής νομοθεσίας 2010-2012 Παράρτημα (*Articles and Studies 3/2012, *National Institute of Labour & Human Resources (NILHR), March 2012).* For a general overview of the social impact of the austerity agenda in Greece see also the research produced by the Greek National Institute of Labour and Human Resources, the Observatory on Economic and Social Developments of the Labour Institute of the Greek General Confederation of Labour, and in particular the report by Christos Papatheodorou, Vlassis Missos and Stefanos Papanastasiou, *Κοινωνικές επιπτώσεις της κρίσης και των πολιτικών λιτότητας στην Ελλάδα (*Scientific Reports/13, *Observatory on Economic and Social Developments, Labour Institute, Greek General Confederation of Labour, Athens: INE-GSEE).* For a labor rights-focused research linked to the first Greek MoU, see Giannis Kouzis and others, *Οι εργασιακές σχέσεις στην Ευρώπη και στην Ελλάδα Ετήσια Έκθεση 2012 (*Scientific Reports/ 8, *Observatory on Economic and Social Developments, Labour Institute, Greek General Confederation of Labour, Athens: INE-GSEE, December 2012).*

[167] For a mapping of labor law reforms in Greece between the years 2011-2012, see Stefan Clauwaert, Zane Rasnača and Evdokia Maria Liakopoulou, *The crisis and national labour law reforms: a mapping exercise [Country report: Greece] (*ETUI, *last update 2017).* The European Trade Union Institute (ETUI) is the independent research and training center of the European Trade Union Confederation (ETUC), which brings together various European trade unions into one single European umbrella organization.

[168] The former holder of the United Nations Independent Expert on foreign debt and human rights mandate, Juan Pablo Bohoslavsky, in July 2015 and while the negotiations for the signing of the third MoU between

ordinary citizens and an excessive degradation in quality of life in both the private and public realm.[169] During the MoU years, Greece went through a drastic contraction of its national economy and an evident deterioration of social conditions that loomed through and tore apart the very fabric of the society.[170] This was specifically showcased by the unprecedented unemployment rates that were evidenced in most reports.[171] At the same time, austerity-mandated reforms were found to be directly implicated in shrinking job prospects and creating job insecurity, forcing people in this way into economic emigration.

In addition, analysts have stressed that austerity reforms resulted in a widening of the gender gap in the workforce and in public life and in aggravating phenomena of social exclusion. Another distressing finding linked austerity measures to child poverty, malnutrition and child labor and exploitation[172] and a disproportionate allocation of adjustment burdens leading to further hardship for people, who have already been struggling.[173] In line with this, on site assessments of austerity operational plans have found an overall negative effect of implemented measures in undermining the living standards of the population.[174] Linked to this point, "a new form of homelessness"[175] was marked to have made an appearance, namely young, well-educated people with professional titles were found not being capable of affording adequate housing. As a result, this new reality of austerity living was found to have led to a broad social fatigue and lack of fulfillment in life, while it was further faulted for exacerbating mental health problems, for

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Greece and its creditors were in the works, urged the European institutions, the IMF and the Greek Government "to fully assess the impact on human rights of possible new austerity measures to ensure that they do not come as a cost to human rights," drew attention to the negative impact on food and pharmaceutical supplies and expressed his concern about a possible 'humanitarian crisis' in Greece; see Juan Pablo Bohoslavsky, "'Not at the Cost of Human Rights" – UN Expert Warns Against More Austerity Measures for Greece' (*United Nations Human Rights Office of the High Commissioner*, 2015); emphasis added. The 'humanitarian crisis' in Greece has also been stressed by the Greek Ombudsman in his annual report of 2016, where it was noted: "The Ombudsman's findings confirm the transformation of the prolonged financial crisis to a broader social hardship, bearing the characteristics of a humanitarian crisis."; see Andreas I. Pottakis, *Annual Report 2016 Executive Summary (*The Greek Ombudsman Independent Authority, *2016)* 4

169 Cf. EC, *Assessment of the Social Impact of the new Stability Support Programme for Greece (*Commission Staff Working Document *)*3; Kaltsouni and Kosma 20, 21, 22

170 Kaufmann 314

171 A telltale sign of this widescale unemployment in Greece due to austerity policies, has been, as Amartya puts it, that "more than half the young people in Greece have never experienced having a job"; see Sen,

172 Cf. Hogan and others 10; Lusiani and Saiz 25

173 See on that point Kaufmann 316

174 This has been particularly emphasized by the UN Independent Expert on the effects of foreign debt in his official visit to Greece in 2016 in his findings about the impact of the MoU austerity measures Bohoslavsky, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights on his mission to Greece from 30 Nov. to 8 Dec. 2015* 60, 61, 62, 69, 76

175 Hogan and others 9. Also, on the gradual deterioration of access to housing due to the grave impact of austerity on that front in the case of Greece, see HLHR, *Δικαίωμα στη στέγη: για μια πολιτική προστασίας της κύριας κατοικίας και όχι πλειστηριασμών (Helenic League for Human Rights, 21 April 2017)*; Nikos Kourachanis, *Η στέγαση είναι ανθρώπινο δικαίωμα (Hellenic League for Human Rights, 4 November 2019)*

compromising life expectancy, and for leading to a rise in substance abuse, depression and suicides.[176]

Added to those grave repercussions, an upsurge in intolerance, xenophobia, racist violence, political polarization and rise of extreme right politics have been associated with the imposed recessionary policies.[177] Due to the gravity and rigidity of the reform strategies and as a result of the political procedures in voting and implementing voting results, political sentiments of distrust towards the government and public institutions alongside feelings of abandonment by the state were also found on the rise at a domestic level,[178] while Greek citizens also displayed "deep ambivalence"[179] towards the European social integration project overall. As the specter of destitution loomed large within Greek society, social disparities and social distress have dramatically escalated, a reality that was decried by both trade unions and employers[180] as well as by organizations representing commerce among larger and smaller size enterprises in Greece.[181]

Moving to the case of Portugal, a single Economic Adjustment Program was also agreed upon between the Portuguese government, the EU and the IMF in 2011, running until 2014.[182] As in the case of Greece, most of the austerity measures laid down to implement the Portuguese MoU concerned public expenditure cuts and reductions in

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[176] On austerity negatively impacting on life satisfaction and happiness see Kaltsouni and Kosma 21and Matsaganis 16, 17. On the exacerbation of mental health problems and the overall impact on the public healthcare system and health services, FIDH/HLHR 22 et seq. On the rise in suicides and attempted suicides, see Charles C. Branas and others, 'The impact of economic austerity and prosperity events on suicide in Greece: a 30-year interrupted time-series analysis' (2015) 5 (1) BMJ open; see also Salomon 526. This has been acknowledged in austerity impact assessments by human rights scholars, see Joseph 315; Juan Pablo Bohoslavsky, 'Guiding Principles to Assess the Human Rights Impact of Economic Reforms? ' in Ilias Bantekas and Cephas Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press 2018) 403

[177] Christos Triantafillou, 'Greece under the Economic Adjustment Programme. Internal devaluation, deconstruction of the system of collective bargaining and social impacts' in Fernando Rocha (ed), *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems* (Institut de recherches économiques et sociales (ires) Fundación 1o de Mayo, Rapport November 2014) 142; FRA, *Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary (*European Union Agency for Fundamental Rights, *Luxembourg: Publications Office of the European Union, 2013)* 9 et seq.; Kaltsouni and Kosma 139 et seq.

[178] For an analysis of the lack of public trust in public representation and state institutions see GNCHR, *GNCHR Statement on the impact of the continuing austerity measures on human rights* 2 par.2; Hogan and others 10. See also Triantafillou 141, where Triantafyllou notes that a large section of the Greek population has showed "*distaste* for the political forces that collaborated to bring the country to collapse."; emphasis added.

[179] Petmesidou and Guillén 23

[180] See the special report produced by the Hellenic Confederation of Commerce and Entrepreneurship (ESEE) on labor developments due to the first MoU, ESEE, *Ειδικό Θέμα: Οι εξελίξεις στις εργασιακές σχέσεις και στις συλλογικές διαπραγματεύσεις στην Ελλάδα και στο εμπόριο μετά το Μνημόνιο και κατά το 2012 (The Hellenic Confederation of Commerce and Entrepreneurship, 2016).* ESEE is a major non-governmental organization that represents the community of Hellenic Commerce, as well as small and medium size enterprises at both domestic and international level; see http://esee.gr/en/pii-imaste/ <last accessed 12.06.2020>

[181] Karantinos and EKKE 5

[182] EC, *The Economic Adjustment Programme for Portugal 2011-2014*

public salaries, taxation of social services, pension indexation and nominal cuts of pension benefits, as well as payment increases in the healthcare, justice and education systems.[183]

Accordingly, austerity measures implemented in Portugal had a grave impact on a series of economic and social rights, particularly those pertaining to the right to education, public healthcare, the right to work and to holidays, the right to social insurance and access to social programs, the right to access to housing and social housing in particular, and last but not least, the right to freedom of expression and assembly.[184] Similarly to Greece, the unemployment and poverty rates skyrocketed at a domestic level in Portugal as well. This led to a large economic emigration of young professionals to other countries in the pursuit of work,[185] while it placed domestic households under heavy economic hardship.[186] In this way, the Portuguese population, especially those parts of the society that had been socially challenged and excluded all along, were the first to have been heavily impacted by the measures and thus had to further endure the jarring effects.

Taken together, human rights reports have undoubtedly underlined that the implemented austerity measures have made considerable incursions into human rights and social rights in particular, and that they have been "driven more by ideology than pragmatism with emphasis being given more to flexibility than security."[187] Austerity policies and the conditionality criteria attached to them were condemned for directly thwarting a number of social and economic rights enshrined in national, EU and international law.[188] While assessing the pragmatic and real impact of austerity on the ground, experts stressed the need to look at the cumulative effect of adjustment measures,

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183 Becker 20

184 Morris and Brito 8

185 For youth unemployment and emigration in Portugal, see Kai Enno Lehmann, 'The Crisis: Its Management and Impact on Equity and Democracy in Portugal and Possible Consequences for the EU' in Bettina De Souza Guilherme and others (eds), *Financial Crisis Management and Democracy: Lessons from Europe and Latin America* (Springer International Publishing 2021) 166; Rica Heinke, 'Portugal's 'Unwanted Youth'' (*Heinrich-Böll-Stiftung*, 2016); in the case of Greece, see De Souza Guilherme 84

186 See the lengthy report on the austerity impact assessment in Portugal produced by Rodrigues Mariana Canotilho, *The Impact of the Crisis on Fundamental Rights across Member States of the EU; Country Report on Portugal (European Parliament; Study requested by the Committee on Civil Liberties, Justice and Home Affairs, February 2015)* 13 et seq.; Canotilho makes a distinction between, first, what she calls, 'active population' that includes employed people and those who are unemployed, but looking for a job, and second "those who "left" the category of the active population, due to emigration and the "discouraged," namely those who, though not employed, stopped looking for a job and are therefore left out of the official statistics."

187 Nikolaos A. Papadopoulos, 'Labor Law Reforms in Greece during the Eurozone Crisis: Here to Stay?' (Dispatch No. 14) Comparative Labor Law & Policy Journal, 7. Boukalas and Müller argue that the workforce austerity measures in Greece revealed a strategic neoliberal orientation; see Christos Boukalas and Julian Müller, 'Un-doing Labour in Greece: Memoranda, Workfare and Eurozone 'Competitiveness'' (2015) 6 (3) Global Labour Journal, 393 et seq.

188 CETIM, 'Debt and Austerity Measures Imposed on Greece Violate the Human Rights of the Greek People and International Law' (*Committee for the Abolition of Third World Debt Weblog Centre Europe - Tiers Monde* 2015)

not in a fragmented and isolated manner and under an individual-based prism, but rather in their sum under a "'whole-person' perspective."[189] In this connection, the successive manner, rigidity and velocity with which austerity policies have been adopted, incorporated and implemented in different legal orders, have all been fiercely criticized for consolidating the drastically negative social impact of austerity.[190]

The assessments themselves have not gone unchallenged, though, either. In the case of UN special procedures, critics acknowledged that a more comprehensive analysis of social rights violations and "an at least partially human rights-based analysis"[191] was put forward, as compared to previous assessments. Despite that, the reports issued were challenged for containing "ambiguous elements,"[192] while the experts involved were criticized for not assuming "a more active role in promoting the rights enshrined in the Covenant across the whole UN system."[193]

Certainly, social rights assessments amounted to a significant contribution on their own merits and in bringing awareness for social rights curtailments and challenges due to austerity policies. Meanwhile, however, most of the impact assessment reports presented above have been *outcome-focused* and doctrinal, identifying and describing the effects of austerity on social rights in mainly normative and procedural terms. Differently to such an approach, more critical appraisals have proceeded with an *objective-focused* assessment of the austerity programs. To that end, it has been stressed that the declared objective of financial stability[194] was not achieved "and indeed could not be achieved, since the approach was wrong"[195] on account of the fact that a stable budgetary and financial policy needed to rest on "a stable social framework."[196] Indicative of such an evaluation of the measures has been the report of the Greek National Commission for Human Rights in 2017, which is

[189] Lusiani and Chaparro 15 et seq.
[190] Triantafillou 115, 116
[191] Kaufmann 316
[192] Dorothea Anthony, 'The Problematic Use of Human Rights Discourse in the Greek Crisis Debate' (2016) 5 (2) European Society of International Law Reflections, 8; Anthony raises this argument regarding the visit of the UN Independent Expert in the lead-up to the Greek referendum of 2015.
[193] Kaufmann 316
[194] For Greece, see the 'Conditions of the programme' being "return to sustainable growth based on sound public finances; enhanced competitiveness; high employment and financial stability." https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-greece_en <last accessed 05.06.2020>. For Portugal see EC, *The Economic Adjustment Programme for Portugal 2011-2014* 4, 6, 49 et seq.
[195]Fischer-Lescano, 'Competencies of the Troika: Legal Limitations of the Institutions of the European Union' 76
[196] ibid

worth quoting in detail. Specifically, the Commission observed with particular concern[197] that:

> "[…] the prolonged implementation of austerity measures reverses the hierarchy of values and goals of the EU, giving priority to *fiscal and financial objectives* to the detriment of fundamental social values and disrupting the fair equilibrium between economic and social goals during the implementation of national policies of recovery from the debt crisis. As a result, it erodes the institutional foundations of the EU, as a union among the peoples of Europe based on the respect and protection of human rights, human dignity, equality and solidarity."[198]

It is also worth noting here that amid the expansive documentation of outright social rights' breaches and while institutional actors[199] and activists lamented the retrogressive effects and lack of reference to human rights and social consequences,[200] the European Commission, before signing the third financial assistance program for Greece, acknowledged the direct negative social impact of the two preceding adjustment programs. In doing so, the Commission conducted and published an assessment of the third program's social impact,[201] where it stressed, among others, the need to improve *social cohesion* through the equitable sharing of adjustment burdens among citizens[202] and by protecting the most vulnerable groups in the society, "such as the unemployed, the low-earners, the low-income pensioners and young people."[203]

Even while such objective-centered analyses referred to social values and the idea of social cohesion at a supranational level, those reviews have not been *value-focused.* That is to say, even when austerity assessments have touched upon social rights and the values attached to them, the meaning of social rights as well as the underlying concepts of dignity, solidarity or vulnerability and the very idea of the crisis, have all been taken at face value and they have not been scrutinized conceptually. Moreover, in evaluating the impact of austerity in the protection of social rights, the attention was placed primarily on the states' obligations and actions, while the realization of social rights was not sought in other fora

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197 GNCHR, *Urgent GNCHR Statement on Labour and Social Security Rights in Greece* IV.
198 Ibid para 13; emphasis added.
199 See for instance Bohoslavsky, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to institutions of the European Union* paras 62, 63, 64, 65, 66, 67, 68
200 See Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1 (2) Journal of Human Rights Practice, 281. See also ILO, *Report on the High Level Mission to Greece* paras 301, 302, 306, 307, 310, 323
201 See the assessment report EC, *Assessment of the Social Impact of the new Stability Support Programme for Greece*
202 Ibid 3
203 Ibid 6 para 2.1

within the society, where austerity has been actualized and challenged. In recognizing the range of opposition and mobilization, recent contributions emphasized the need and significance of searching and discussing alternatives to the prevailing austerity model.[204] To that end, scholars have drawn attention to the forms of contesting austerity and the impact of such dissensions in articulations of social values during the crisis.[205]

3.3. Contesting Austerity and Seeking Alternatives

Faced with stern and continued austerity measures, international and national human right institutions and civil and non-governmental organizations laid down specific criteria and instructions for states to take into consideration when applying austerity-mandated policies.[206] In particular, scholars and human rights bodies stressed that austerity strategies ought to be prescribed by the existence of a compelling state interest, they needed to demonstrate the necessity, reasonableness, temporariness and proportionality of these measures as well as the exhaustion of alternative and less restrictive measures, while they should be able to secure the safeguarding of the minimum core content of impugned rights.[207] Moreover, it was emphasized that contractionary policies ought to factor in and guarantee the participation of affected persons and social groups, and were required to further justify the non-discriminatory nature of selected measures.[208]

Not looking for improvements at the level of application and execution, other approaches have profusely contested austerity as a policy orientation and as an economic, legal and political tool. To that end, alternatives to austerity logic and practice have been suggested. Critical political economists have emphasized in this respect that an alternative to austerity would require "considerably more than a different policy mix,"[209] and that at the very least, "profound institutional transformations would be necessary."[210] Legal scholars have also stressed the necessity for more checks, balances and safeguards regarding the implementation of austerity measures by drawing attention to the lived

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[204] Bailey and Shibata 685
[205] See on that point ibid 684. Also Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Oñati International Series in Law and Society, Hart Publishing 2021)
[206] OHCHR 12 et seq.; GNCHR, *Σύσταση ΕΕΔΑ: Επιτακτική ανάγκη να αντιστραφεί η πορεία καταρράκωσης των ατομικών και κοινωνικών δικαιωμάτων*
[207] See Katerina Housos, 'Austerity and Human Rights Law: Towards a Rights-Based Approach to Austerity Policy, a Case Study of Greece' (2015) 39 (2) Fordham International Law Journal, 438, 444 et seq.
[208] OHCHR 12 et seq. Some of these criteria and instructions are to be found in the Portuguese and Greek crisis case-law; see Part III. 5. Austerity Measures Before the Courts: A Case Study for Greece and Portugal.
[209] Callinicos 75
[210] Ibid

dimension of austerity as a politically and legally relevant matter.[211] While observing that EU institutions "have no insight into the issues affecting the lives of European workers, pensioners, small savers and students, who are in the same social situation"[212] analysts emphasized that "EU institutions should develop a *feeling* for the social circumstances of citizens of the Union,"[213] and improve the lives of the Union's citizens in this direction.

At the level of everyday lived experience, austerity policies, which have been framed and imposed as having a *de facto* political consensus and popular vote of confidence, have been vehemently challenged in diverse ways and through different venues. Demonstrations, the so-called 'Occupy' movements, local grassroots movements and assemblies, all represented modalities of contestation and mobilization.[214] Additionally, as it is addressed in further detail later in this thesis,[215] austerity measures have been contested through litigation before apex and first instance courts in financially assisted countries.

The discourse on the implementation and contestation of austerity measures has not been limited to Europe, however. As has already been mentioned, austerity has been a global policy with a long history that has been adopted and shaped and has had a lasting effect on various different countries. In this context, denouncing austerity strategies and searching for new alternative models has been a point of debate, not only at a grassroots level but also at an institutional level, by international institutions, such as the World Bank and the IMF, while it has been a point of deliberation at the United Nations.[216]

Following the late US-EU financial crisis of 2008 and while standing on the onset of new challenges, there has been an international coordinated effort to consider alternative strategies to the 'Washington' and 'post-Washington' consensus and to their prescriptions of austerity. Towards that end, the international community has envisioned and agreed upon the '2030 Agenda for Sustainable Development,'[217] adopted by the United Nations in September 2015, elsewhere referred to as the 'UN Consensus Development for All Agenda.'[218] The latter has been endorsed by the EU and its member states in 2017,

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[211] Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' 41, 42; Fischer-Lescano, *Legal Opinion: Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* 5

[212] Fischer-Lescano, *Legal Opinion: Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* 5; emphasis added.

[213] Ibid; emphasis added.

[214] Nolan and Featherstone 8

[215] See Part III. 6. Social Rights Litigation and Adjudication During the Crisis: A Critical Appraisal.

[216] Ortiz and Cummins 24, 29

[217] See UN, *Transforming our World: the 2030 Agenda for Sustainable Development (*UN 2030 Agenda for Sustainable Development *United Nations Resolution adopted by the General Assembly on 25 September 2015, 21 October 2015)*

[218] See the thorough study produced by social and economic development advisor and former Director at the ILO and UNICEF, Isabel Ortiz, together with human capital economist Matthew Cummins, which they

when the 'European Consensus on Development'[219] was agreed upon, framing in this way the implementation of the 2030 UN Agenda and taking due account of the framework provided by the Lisbon Treaty. Regarding the issues addressed in these dockets, both the UN and EU agendas encompassed targets ranging from social inclusion and protection, jobs-rich economic growth as well as sustainable public economic and social development, together with an adequate regulation and expansion of governments' fiscal space.[220]

By building on national and international dialogues with trade unions, workers, employers and representatives of the civil society, alongside parliamentary representatives, these strategies purported to ensure that the new policies would be inclusive of all citizens. They further confirmed that they would promote and safeguard political stability and social cohesion as well as equity and equality of all persons, both in their capacity as human beings and as citizens. In addition, among the goals and objectives enlisted in these new UN and EU developmental agendas, there has been an explicit prioritization given to securing and promoting human rights protection.[221] As it has been stated in the EU Consensus, the Union and its member states were committed to "implement *a rights-based approach* to development cooperation, encompassing *all* human rights."[222]

The human rights angle and growth orientation are hardly new concepts. As we have already seen, the ever-present debate on the 'Washington Consensus' and its variations, which was drawn out for years, was built on a broad divergence of opinions between recessionary or growth politics, contractionary or expansionary models and fiscal recession or stimulus policies. In addition, chief economists such as Joseph Stiglitz and Paul Krugman as well as highly influential economic and moral thinkers such as Amartya Sen, have many a time rejected recession and openly defended economic growth models.[223] Following that, as Kerry Rittich has pointed out, "one of the most significant events in the field of development has been the effort to incorporate *social concerns* into the *mainstream*

published in 2019, where they refer to the 'UN Consensus Development for All' and map out a comparative analysis by juxtaposing this UN agenda to the Washington Consensus; Ortiz and Cummins 48, 49

[219] See European Commission, *The New European Consensus on Development 'Our World, Our Dignity, Our Future' (*Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission, *07 June 2017)* and European Commission, European Parliament and Malta EU2017, *Joint public statement: Adoption of the new European Consensus on Development* (European Commission 2017)

[220] Ortiz and Cummins 48, 49; See also Isabel Ortiz and Matthew Cummins, 'The Insanity of Austerity' (*Project Syndicate*, 2019)

[221] Cf. Ortiz and Cummins, 'Austerity: The New Normal - A Renewed Washington Consensus 2010-24 ' 48, 49; Callinicos 75; Nolan and Featherstone 6, 7, 8

[222] Commission, *The New European Consensus on Development 'Our World, Our Dignity, Our Future'* 7`para.16, 13` par. 33, 33 par. 64

[223] Sen,

agenda of market reform and economic development."[224] Consequently, a social dimension has been introduced in a series of additions and improvements in the developmental and adjustment agendas of international financial institutions.[225]

In addition, during the late crisis years, the austerity mantra and the fiscal-focused approach of adjustment and developmental programs in Europe have encountered hefty criticism and social pressure by civil society and social actors. This has been followed by a call for social rights parameters to be introduced into the policy-making of public and private financial and non-financial institutions and for those institutions to assume their responsibilities and act upon their obligations.[226] In that context, international financial institutions and governing bodies have started morphing their objectives towards a more socially-inclusive direction,[227] while pledging their commitment to the axioms of accountability, transparency and the rule of law, as well as to human rights standards.

Doubtlessly, human rights and social considerations have not come under the radar of financial and governing institutions during the crisis years and in view of austerity's contestation at a ground level. Long before that and already since the 1990s, as legal historian Jessica Whyte has illustrated in her research, the once human-rights averse World Bank has marked its shift to rights-based approaches while arguing that "through its lending programme, it had always been promoting human rights."[228] At the same time, even though the IMF has been seen as operating in greater isolation from human rights concerns when compared to the World Bank, it did acknowledge the social impact of its objectives and promulgated the greater social good for the general public from a macroeconomic perspective.[229] This social awareness has been welcomed in recent analyses where scholars endorsed the long-awaited replacement of the Washington Consensus, with what has been phrased the 'Lagarde Concord.'[230] Stemming from IMF higher circles, this position encapsulated the conviction "that growth and social rights are two sides of one and the same coin and that the latter need to be an inclusive part of policy-making."[231]

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[224] Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social' in Alvaro Santos and David M. Trubek (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 203; emphasis added.
[225] Ibid
[226] See Goldmann, 'Financial institutions and Social rights: From the Washington Consensus to the Lagarde Concord?'
[227] On the third adjustment program in Greece, see EC, *Assessment of the Social Impact of the new Stability Support Programme for Greece*
[228] Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* 154
[229] Engström 13, 14
[230] Goldmann, 'Financial institutions and Social rights: From the Washington Consensus to the Lagarde Concord?'
[231] Ibid 442,458, 463

Needless to say, such positions elicit strong criticism on their merits, since growth, social rights and human rights for that matter are open-ended concepts in terms of both definition and philosophical justification. Put differently, the values, interests and objectives that underpin notions of growth and social rights from the perspective of financial institutions differ from that of a - let's say - social welfare perspective. That is because, in the case of financial institutions, economic considerations will trump social ones, even if the first are voiced in the language or in the name of the second. To phrase this differently, what seems questionable is the political economy and ethical prescriptions underlying adjustment policies, whether they are framed as *austerity* or *growth*. Drawing on that, it has been stressed in literature, that even if financial and non-financial institutions have embraced a language of human and social rights at the face of the crisis and within the austerity context, this has been driven primarily by economic considerations[232] and has often been informed by an individualistic ethos and an aggregate utility calculus.

The latter of course has been a point of scholarly attention and is part of a much larger discussion on the trajectories of human rights and political currents of neoliberalism[233] or social welfarism that have historically dominated the political and legal discourse. Not being convinced by either austerity models or growth alternatives, voices coming from postcolonial and decolonial approaches to law, development and social justice, have also challenged not only austerity principles but any growth rationale, and they have rather opted for *de-growth* initiatives.[234] Within this context, human-rights approaches to austerity or growth options have all been considered as hollow and aspirational pronouncements that have been reiterated for years under different names and strategies. The 'post-Washington Consensus' and any improved option of this have been met with reluctance and have been characterized as "an old wine in a new bottle."[235] Despite the fact that these policies have acknowledged the necessity of safeguarding and enhancing human rights, they have been criticized for maintaining nonetheless a market-based approach, serving in this way the market-centered interests represented in them.[236]

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[232] On a criticism of the relationship between international financial institutions, with a focus on the IMF, and human rights considerations, see the analysis by Engström 14, 15.

[233] Cf. selectively Moyn, *Not Enough: Human Rights in an Unequal World* ; see also Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism*

[234] See Corinna Dengler and Lisa Marie Seebacher, 'What About the Global South? Towards a Feminist Decolonial Degrowth Approach' (2019) 157 Ecological Economics; Katharina Richter, 'Struggling for Another Life: The Ontology of Degrowth' (2020) 15 Transtext(e)s Transcultures. For a critique of de-growth movements see Fraser and Jaeggi 255, 256, where Nancy Fraser argues that both 'growth' and 'de-growth' are not useful categories to capture the real questions underlying the development discourse and that we need terms that are not framed in exclusively quantitative terms, such as "growing" versus "not growing."

[235] Krogstad 84

[236] Engström 14, 15

Coming to the end of this chapter, it is safe to say that on the cusp of the severe retrogressive social effects that took place during the crisis, it is imperative that we do not simply settle for a change in vocabulary but that we run the extra mile to painstakingly investigate what this vocabulary actually stands for. After all, if there is one thing that this thesis has sought to demonstrate so far, it is that we may all speak in the same words, but we may all mean different things, whether this is the language of crisis, austerity, growth or social rights. Despite that discouraging acumen, though, what we could agree on is that in programmatic statements and adjustment programs, social rights have *yet* to be conceptually realized,[237] while their progressive realization on the ground has been perpetually pushed into an unspecified future. As a result, policies aiming at austerity or growth and sustainability may have endorsed social rights protection, but they are still positioned as not being capable of leading to the direct fulfillment of such rights. That is to say, while these programs may have not denied the significance of social rights, they have nevertheless consistently considered these as part of a *macroeconomic* plan of gradual realization that has always been and still is budget-related and state-dependent.[238] Taking its cue from this last observation, the analysis proceeds with an examination of cases, before the examined financially assisted countries of Greece and Portugal, which have been directly linked to the implementation of the presented above austerity policies.

[237] See the UN Preamble, which reads: "The 17 Sustainable Development Goals and 169 targets which we are announcing today demonstrate the scale and ambition of this new universal Agenda. They seek to build on the Millennium Development Goals and *complete what they did not achieve*. They *seek to realize* the human rights of all and to achieve gender equality and the empowerment of all women and girls."; emphasis added.
[238] On the macroeconomic aspect determining social rights assessment, see EC, *Assessment of the Social Impact of the new Stability Support Programme for Greece* 20, where the EC notes: "A stable macroeconomic and policy environment is *a pre-condition* for increasing living standards and improving social conditions."; emphasis added. Engström alerts that "the stronger the insistence on human rights considerations to be introduced into IMF policymaking, the more clearly the IMF would transform into a human rights interpreter [while] macroeconomic policies would become *an inherent element* of defining the content of rights"; Engström 15

III. SOCIAL RIGHTS AND JUSTICIABILITY DURING THE CRISIS

4. Are Social Rights Justiciable?

4.1. Exploring Justiciability

Legal scholarship has been preoccupied for decades with questions on the justiciability or not of social, economic and cultural rights.[1] Generally, questions pertaining to the justiciability of rights ask whether a particular right vests an entitlement in the individual to vindicate this before a court of law; whether it enforces specific obligations on behalf of the state; and whether such enforcement can be assessed through the undertaking of judicial or quasi-judicial proceedings.

Justiciability[2] in lay knowledge is usually identified with enforceability overall. This results in a great deal of confusion, since enforceability is surely related to justiciability, yet these two notions are still distinct from each other.[3] It is also often used as another word for judicial review or for judicial restraint as such. Invoking justiciability begets questions on thorny and long-standing fundamental theoretical debates, such as the relation of law and politics, the distinction between policy and principle or the differentiation between the notions of government and state. The discussion on justiciability is further interwoven with the labyrinthine subject matters of democratic and political legitimacy, governance and constitutionalism,[4] to such an extent that it may be difficult to draw a line between where the discussion on justiciability begins and where it ends, and what it actually entails.

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[1] The analysis does not engage with the doctrine of non-justiciable disputes in international law or the discussion on the division of disputes between states into justiciable or non-justiciable. For a critical assessment of the concept see Hersch Lauterpacht, 'The Doctrine of Non-Justiciable Disputes in International Law' [1928] (24) Economica, 315, which reads: "[T]he term "justiciability" may be used in a double sense: it may either mean *suitability for judicial settlement*, irrespective of an obligation to submit a particular dispute to a legal decision, or it may express the fact that a state has *agreed*, in advance or ad hoc, *to recognise the jurisdiction of an international court* in regard to a particular dispute."; emphasis added.

[2] In the following paragraphs, the thesis refers to justiciability of social and economic rights, with a focus on the first bundle of those rights, i.e. social rights, by using interchangeably the terms 'justiciability' or 'adjudication' or 'judicial enforcement' of such rights.

[3] Cf. Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press 2009) 109

[4] As Joseph Weiler notes with regard to 'legitimacy': "Legitimacy is a notoriously underspecified concept in social science and political theory."; J. H. H. Weiler, 'United in Fear – The Loss of Heimat and the Crises of Europe' in Lina Papadopoulou, Ingolf Pernice and Joseph H. H. Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis: Dimitris Tsatsos in memoriam* (Nomos Verlag 2017) 359. Similarly, all of these concepts, namely legitimacy, governance and constitutionalism, are underspecified and vaguely framed terms that this thesis does not endeavor to provide definitions for.

As justiciability claims usually fall under the rubric of judicial review,[5] arguments situated at either end of those debates can also be nestled together and further touch upon questions of judicial deference and judicial activism.[6] Most recent critiques also implicate justiciability with concerns on follow-up administrative compliance and state enforceability in effectively protecting and fulfilling social rights.

Of course, all of the above-mentioned highly intricate issues are tied to the broader legal traditions, jurisdictions and historical backgrounds in which they originated and developed, and to the conventional wisdom that followed them. They are also implicated in the distinction between the traditions of common and civil law and the respective reliance on court precedent or the separation of powers doctrine. Justiciability is also frequently addressed within broader studies of judicial and constitutional reasoning and is linked to the different approaches that the judiciary adopts according to the jurisdiction and legal tradition within which they adjudicate.[7]

In short, concerns about justiciability are usually concerns about over-reaching *courts* or over-reaching *states*, which usually are to be found in the Anglo-American and in the Latin-American, South African and European-based literature accordingly. Looking at the US-based constitutional discourse, the expansion of judicial review and judicial outreach has been met with continuing systematic skepticism for being the product of a strategic interplay among hegemonic political and judicial elites on the one hand and influential economic stakeholders on the other.[8] Conversely, commentators discussing South Africa, Latin America or Europe are generally more concerned with questions of judicial abdication and executive overreach.[9] This has been especially true in Europe during the Euro-crisis years, as we will explore later in this thesis, as the adjudication of social rights cases in austerity-led European countries has brought the role of courts back

[5] Greg Jones, 'Proper Judicial Activism' (2001) 14 Regent University Law Review, 143; see also Malcolm Langford, 'Why Judicial Review?' (2015) (1) Oslo Law Review

[6] See Part III. Chapter 6.2. Judicial Activism or Judicial Deference During the Crisis: A Theoretical Inquiry.

[7] For an analysis of the different approaches of constitutional reasoning see Arthur Dyevre and András Jakab, 'Foreword: Understanding Constitutional Reasoning' (2013) 14 (8) German Law Journal, where Dyevre and Jakab identify and contrast four approaches to the study of constitutional reasoning, namely the analytical-conceptual; the decision-making; the political communication; and the normative approach.

[8] US-based constitutional scholar Ran Hirschl has written extensively on the phenomenon of judicial overpower in constitutional settings and in American politics; see for instance Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007); Ran Hirschl, 'Juristocracy' — Political, not Juridical' (2004) 13 (3) The good Society - PEGS (Organization); See also the widely cited work Jeremy Waldron, 'The Core of the Case Against Judicial Review' 115 (6) The Yale Law Journal and the work of Duncan Kennedy, *A critique of adjudication : (fin de siècle)* (2nd print. edn, Harvard University Press 1998), on whether law is political in character and how judicial lawmaking affects politics in the US context.

[9] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press 2012) 231; Gretchen Helmke and Julio Ríos Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011)

into the limelight. Accordingly, this has sparked a debate on whether judges are capable and competent to review governmental policy decisions and to hold other branches accountable when trepidations in parliamentary procedures have not only made their appearance but have arguably become a common practice.

The chapter at hand, within its limits, does not intend and could not possibly hope to deal adequately with the controversial and colossal issues raised by the concepts of legitimacy, constitutionalism or constitutional governance. Libraries have already been filled with critical commentaries on those subjects matters and, in any case, this is not the angle that this chapter here aims to cover. The analysis at hand is not normative either and it does not join the ongoing constitutional debate on the legitimacy of courts or the lack thereof in assessing austerity-driven legislation with widescale social policy implications.[10] Rather, the purpose of this section is to outline the most widely incurred objections to the justiciability of social rights *per se,* so as to relate this in the following chapters to the austerity jurisprudence during the crisis years. What is of relevance here is to record the most common and prevalent objections and responses to the adjudication of social rights, so as to later assess how the justiciability discourse has been employed in the crisis case-law, and which of the criticisms have been used in this respect.

Before doing so, however, what requires some further clarification is how the notion of 'justiciability' is broadly understood and how it is taken within the confines of the present endeavor. Defining justiciability as a term is as formidable and complex a task, as is delineating the meaning of social rights as such. That is because justiciability, as it has been stressed in theory, it is "a *contingent* and *fluid* notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its *changing* character and *evolving* capability."[11]

Searching for a definition in the ample literature on the subject, one cannot seem to find a unified description either. Jeff King notes that "the idea of justiciability is a commonly employed concept for demarcating judicial restraint."[12] Craig Scott and Patrick Macklem broadly understand by the term 'justiciability' as "the extent to which a matter is

[10] On that point and in the context of the Portuguese Constitutional Court, see Teresa Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' in António Costa Pinto and Conceição Pequito Teixeira (eds), *Political Institutions and Democracy in Portugal: Assessing the Impact of the Eurocrisis* (Springer International Publishing 2019) 122

[11] Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 (1) University of Pennsylvania Law Review, 17; emphasis added.

[12] King, *Judging Social Rights* 129

suitable for judicial determination,"[13] meaning the "ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfill a person's right."[14] Understanding justiciability in terms of suitability as well, Dominic McGoldrick also points out that an issue "is considered to be justiciable in a particular forum if it is capable of being decided in that legal forum and it is considered appropriate to do so."[15] In that sense, the question of whether a dispute is suitable or not suitable for judicial determination prescribes whether or not it is justiciable.[16]

Martin Scheinin further identifies various different conceptions of the notion of 'justiciability'. In particular, he suggests that justiciability is defined by means of its relation to a number of factors: first, to the various international or domestic *sources* of law; second, to the *composite normative framework* and processes through which socio-economic claims are litigated before a court; third, to the core *elements* and *substance* of economic and social rights and lastly, to the relation of such rights to civil and political rights within an *integrated* approach of rights.[17] Justiciability can also be characterized, according to Scheinin, by virtue of two additional conditions, notably based on the *states' obligations* to respect, protect and fulfil human rights as well as on the finding of a proper *remedy* for the violation of a certain socio-economic right. This last distinction is connected to the differentiation of justiciability when looked at from either an international or a domestic perspective. At an international level justiciability concerns the substantive interpretation of treaty norms and provisions on socio-economic rights implementation through treaty-based mechanisms. Whereas justiciability at a domestic level is understood to seek for an adequate remedial framework, usually through constitutional law, so as to compensate for the grievances suffered due to the encroachment of social rights.[18]

Despite the different nuances in meaning which are suggested by some scholars, others take a skeptical stance towards the term 'justiciability' all together. That is to say, due to the generally ambiguous content of the term and its unduly broad usage, 'justiciability' is considered to be an inappropriate term for addressing questions of judicial

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[13] Scott and Macklem 17; emphasis added.
[14] Ibid; emphasis added.
[15] Dominic McGoldrick, 'The Boundaries of Justiciability ' (2010) 59 (4) The International and Comparative Law Quarterly, 983
[16] Ibid
[17] Martin Scheinin, 'Justiciability and the Indivisibility of Human Rights' in John Squires, Malcolm Langford and Bret Thiele (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (University of New South Wales Press 2005) 18, 19. For an analysis of the 'integrated approach,' see Part IV. Chapter 7.2.i. The Interdependence and Indivisibility Thesis.
[18] Ibid 20

interference or restraint regarding social rights.[19] In this regard, it has been submitted in theory, for instance, that 'justiciability' can act as a deceptive term due to its legalistic overtone, since it can "convey the impression that what *is* or *is not* justiciable inheres in the judicial function and is written in stone."[20] However, as Craig Scott and Patrick Macklem have underlined, in fact the reverse is true, namely "not only is justiciability variable from context to context, but its content varies over time."[21]

Drawing on these observations, the present analysis does not approach 'justiciability' as an exclusively judicially deference-related question, nor as a definitive answer to the constantly evolving question on the nature, concept and enforceability of social rights. Surely, despite the superfluous employment of the term and its blind reiteration in the social rights debate, the significance and relevance of justiciability as a term is acknowledged here, especially by reference to the crisis-related jurisprudence and to the question of the nature and meaning of social rights that will be scrutinized later on. Nevertheless, justiciability is regarded here neither as a concept nor as a principle, but merely as "a category of argument into which a number of specific arguments fit."[22]

Having said that, the necessity to discern among the various shades of the justiciability discourse is deemed necessary. On this issue, I share the view that justiciability is not only wrongly equated with the broad concept of enforceability, but that it is also conflated with the notions of judicialization and judicialism and for that it needs to be distinguished.[23] Starting with the notion of enforceability, the present analysis differentiates between *state enforceability* and *judicial enforceability* when referring to social rights cases. Judicial enforceability connotes in this respect the implementation of social rights-related claims on the basis of the judicial decision-making process.[24]

Moving on to judicialization, the latter is understood mainly in constitutional scholarship, where it is encountered as "the reliance on courts and judicial means for

[19] See for instance King, *Judging Social Rights* 131, 132
[20] Scott and Macklem 17; emphasis added.
[21] Ibid
[22] McGoldrick 983
[23] J. K. Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6 (4) The International Journal of Human Rights, 36. See also CESCR, *General Comment No 9: The Domestic Application of the Covenant (*UN Committee on Economic, Social and Cultural Rights; E/C12/1998/24, *3 December 1998)* 4 para.10, where the Committee makes a distinction between 'justiciability,' which refers to those matters which are appropriately resolved by the courts, and 'norms which are self-executing,' which are capable of being applied by courts without further elaboration. Dominic McGoldrick also points out that occasionally 'jurisdiction' and 'justiciability' appear to be used interchangeably, in the sense of the admissibility of cases; see in particular McGoldrick 983.
[24] Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) 46

addressing core *moral* predicaments, public policy questions, and political controversies."[25] Moreover, this term implies the handing over of the ultimate decision-making authority to the courts and the elevating of judges to primary decision-makers in social matters. Judges are seen in this respect to be those who flesh out the content of generalized social rights through judgments, with the purpose of then imposing such content on executive agencies, and with the anticipation that this practice will bring about certain policy consequences.[26]

Lastly, another widespread misconception has been justiciability being identified with judicialism. To tell the difference, we need to distinguish between justiciability and judicialism, in the sense that judicialism may entail justiciability, but not all justiciability is judicial.[27] In other words, judicialism is directed to the court system as such, while justiciability essentially inheres in the idea of review, however this in itself does not presuppose or exclude court processes.[28] Therefore, while reflecting on the cases that do not or cannot reach a court of law, rights do not necessarily have to be brought before a court, judicial process need not be activated and adjudication does not have to be linked to certain policy outcomes in order for rights to be justiciable.[29] Rather, the justiciability of rights echoes the ability and potentiality of a right to be subject to a court hearing and is not necessarily tied to the actual trial proceeding. This distinction is to be kept in mind later in this thesis, when we will venture for a justification and meaning of social rights past a budget and state-centered understanding of such rights.

For the time being, and while resuming with the justiciability discourse, this has been at the forefront of strenuous and extensive academic debates, especially when looking at it from the perspective of social and economic rights. In this respect, justiciability has been dealt with as a generic term that not only indicates the ability of a court to evaluate

[25]Ran Hirschl, 'The Judicialization of Politics ' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press 2011); emphasis added. See also Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Oxford: Hart Publishing 2011) 55

[26] Judicialization usually refers to the so-called 'judicialization of politics.' The analysis here does not engage with that concept or with questions on what constitutes 'legitimate judicial politics' in times of so-called 'mega-politics'. For an overview of the debate, see Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 (1) Annual Review of Political Science. See also the various contributions on judicial politics at Christine Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019); Malcolm Langford, 'Judicial Politics and Social Rights' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019)

[27] Mapulanga-Hulston 37

[28] Ibid

[29] Ibid; See also Boyle 11

and adjudicate upon socio-economic claims, but also touches upon broader questions on the nature and realization of socio-economic rights at the levels of theory and practice.[30]

In view of this, early contributions have focused on the taxonomy of the obligations of the states to respect, protect and fulfil social rights as enumerated in ICESCR.[31] With time, a more nuanced understanding of social rights justiciability developed as complementary principles and doctrines have been substantiated and shaped through policy and judicial practice.[32] However, all such analyses of social rights' adjudication have been predicated on a strict idea of state enforceability. The latter, as it has already been stressed, does not presuppose judicial enforceability, while the potential of social rights as enforceable rights is not a synonym for their recognition as justiciable entitlements. In other words, the conceptual and practical realization of social rights goes beyond the concept of justiciability. Rather, as it has been stressed in theory, towards the fulfillment of such rights, justiciability is rather merely one step in a long process.[33] Seen that way, justiciability and the different means of achieving this are complementary to the general respect-protect-fulfil axis and aid the reinforcement of a comprehensive and robust model of substantive and procedural enforcement of social rights.[34]

Social rights justiciability discourse has also been frequently viewed through the lens of the constitutionalization of such rights and has been equated with the constitutionalization debate.[35] However, as much as these discourses share common

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[30] Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 766; See also Mirja A. Trilsch, *Die Justiziabilität Wirtschaftlicher, Sozialer und Kultureller Rechte im Innerstaatlichen Recht* (Springer 2012) 509, where Trilsch argues that "[T]he question of their [i.e. social and economic rights] justiciability cannot be answered at an *abstract level*. Instead, justiciability is *understood not as a prerequisite* for the application of economic and social rights, but as the *result* of a *rights challenge* for which a legal solution can be found based on the applicable methodology."; emphasis added.

[31] Cf. Boyle 11; Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 12, 13 et seq. For a critical assessment of this taxonomy, see Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 484 et seq.

[32] Cf. the analysis on concretizing the scope and nature of obligations imposed upon the member states of the ICESCR, see Yuval Shany, 'Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights' in Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 82 et seq. On the interpretative texts to the protection of ESCR, namely on the Limburg Principles on the implementation of the ICESCR; the Maastricht Guidelines on Violations of ESCR; the Bangalore Declaration and Plan of Action regarding ESCR; see Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2011) 449 et seq.

[33] Eze Onyekpere Esq, 'Justiciable Constitutionalisation of Economic, Social and Cultural Rights - A Framework for Action' Nigeria, 2018 Centre for Social Justice Working Paper 4

[34] See also Boyle 198

[35] Cf. O'Cinneide, 'The Constitutionalization of Social and Economic Rights'; Cécile Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Clarendon Press 2000); Boyle 198. For an argument in favor of the constitutionalization of labour rights, see Nicole Busby and Rebecca Zahn, 'The EU and the

ground, they need to be differentiated or at least be acknowledged in their subtleties and points of convergence and divergence. Moreover, constitutionalization of socio-economic rights needs to be examined in its different layers and approaches. Constitutional legal scholarship has been saturated with debates challenging the constitutionalization of social rights and analyses over analyses have been devoted to doctrinal issues as well as to the different internal controversies on the philosophical justifications of social rights within the liberal script and whether these prescriptions give rise to constitutional guarantees.[36]

If we were to briefly inquire into the constitutional justiciability scholarship here, I would contend that this has followed mainly two lines of questioning. First, scholars have pondered over the necessity for and the extent as to which social rights should be subjected to constitutional regulation. The latter has been scrutinized by means of either the incorporation of social rights provisions into domestic constitutional laws or via the constitutional interpretation of such rights by the judiciary.[37] Second, it has been investigated whether a court of law can adjudicate with constitutional propriety on a social right matter that is brought before it, or whether the judiciary is overstepping its constitutional role if and in doing so.[38] To rephrase this, the constitutionalization of social rights through judicial enforcement has been approached in literature either in connection to the *model* of justiciability or by inquiring into the *role* of judicial review as such.

In what follows, the analysis provides an overview of the criticisms and countercriticisms raised towards the justiciability of social rights from mainly a state-centric, constitutional and domestic-to-the-states perspective and less from an international law outlook. Arguments typically marshaled at cross-purposes are manifold,

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ECHR: Collective and Non-discrimination Labour Rights at a Crossroad?' (2014) 30 (2) International Journal of Comparative Labour Law and Industrial Relations 154 et seq.

[36] This has been an in-depth point of deliberation in liberal constitutional legal thinking that does not fall within the scope of inquiry of this thesis. For an introduction to the discussion in the American liberal constitutional theory, see, indicatively, Frank I. Michelman, 'Socioeconomic Rights in Constitutional Law: Explaining America Away' (2008) 6 (3-4) International Journal of Constitutional Law

[37] Selectively, for the defense of the constitutionalization of social rights from the vantage point of American constitutional law, see Frank I. Michelman, 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 1 (1) International Journal of Constitutional Law and Frank I. Michelman, 'Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions' in Helena Alviar García, Karl E. Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical inquiries* (Routledge 2015). See also Frank I. Michelman, 'Legitimacy, The Social Turn and Constitutional Review: What Political Liberalism Suggests' (2015) 98 (3) KritV, CritQ, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law, where Michelman discusses the 'social turn.' For a European-focused take on the debate; see Boguslaw Banaszak, 'Constitutionalisation of Social Human Rights – necessity or luxury?' (2012) 66 (1) Persona y Derecho 21 et seq.

[38] See also Paul Anthony McDermott, 'The Separation of Powers and the Doctrine of Non-Justiciability' (2000) 35 Irish Jurist, where McDermott investigates the doctrine of powers within the Irish legal system and engages with broader criticisms on the justiciability of social and economic rights.

entangled and closely imbricated, while among the different lines of criticism there is also considerable overlap and cross-fertilization. Moreover, objections to justiciability usually follow a tiered approach, which makes it difficult to designate exactly where one argument ends and where another one begins, since most of these objections draw on the same foundational premises of liberal thinking and liberal legal tradition. As much as it may be a platitude to call social rights non-justiciable in this day and age, it may also seem mundane to reproduce a theoretical debate endorsing or opposing such objections. This debate, however, appears to be going in circles, urging us in this way to investigate not only the criticisms themselves but also the underlying theoretical assumptions that sustain them.

In a nutshell, traditional objections to the justiciability of social and economic rights have been based on the following general assumptions: *first*, building upon the liberal distinction between positive and negative rights, social and economic rights are considered to be inherently and naturally different from civil and political rights respectively; *second*, courts are not taken to be the proper forum for assuming responsibility to respond and determine the allocation and prioritization of public resources, while it is considered illegitimate for the judiciary to intrude into the sphere of social and economic policy decisions; *third*, it is accepted that courts or other decision-making bodies lack the institutional capacity and expertise to properly adjudicate on social and economic rights.[39] The analysis proceeds with a detailed examination of these arguments and of the relevant responses to such arguments. The exploration of this debate will be useful when we later delve into the theoretical premises that inhibit long-standing understandings of social rights, based on which these rights derive their justiciable or non-justiciable status.

4.2. The Case Against Justiciability

The debate against the justiciability of social rights[40] has been developed around *three* main arches, which are informed by the same propositions but range in the framings and phrasings that these have taken in scholarship. The standard discourse includes particular concerns about the *nature* of social and economic rights and their supposedly conceptual and normative difference to civil and political rights, *legitimacy* considerations

[39] Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal ' 16 July 2009 NYU Centre for Human Rights and Global Justice Working Paper Series No15 8

[40] The objections examined here are targeted to social and economic rights jointly. For brevity, the following analysis refers only to social rights but it follows that these criticisms concern economic rights as well.

regarding the adjudication of socio-economic rights, and lastly, objections towards the *institutional capacity* of judges to adjudicate on such rights.[41]

In the vast literature addressing the topic in comparative constitutional law and in human rights scholarship, relevant criticisms are found under different names, even though these are underpinned by the same rationale. For instance, Colm O'Cinneide classifies related objections under the tripartite *interderminacy*, *polycentricity* or *depoliticization* critique, while James Rooney identifies the three primary arguments as "the argument from *democracy*, the argument from *effectiveness*, and the argument of *constitutional necessity*."[42] Accordingly, these correspond to claims against the vague and non-binding character of socio-economic rights, the budget-dependent and complex considerations following them and lastly, the extending role of courts beyond traditional tasks.[43]

In a similar vein, Craig Scott and Patrick Macklem point out "the *legitimacy* dimension and the *institutional competence* dimension,"[44] raised against the adjudication and inclusion of social rights in a written bill of rights, whereas Deval Desai distinguishes between what she calls *practical* and *normative* objections.[45] These objections relate correspondingly with the lack of capacity and competency of the judiciary to engage with budget-dependent tasks, which the legislature and executive are rather considered as competent and authorized to undertake. Jeff King also proclaims the concepts of *democratic legitimacy*, *polycentricity*, *expertise* and *flexibility* to be common objections, but also delves into demystifying and refining these notions so as to advance a judicial model of social rights adjudication based exactly on the above-mentioned four principles.[46]

Looking at the caselaw of the European Court of Human Rights (ECtHR) and the relevant criticisms voiced towards the justiciability of social rights in this respect, Heike

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41 Cf. Nolan, Porter and Langford; Eric C. Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 (2) Columbia Human Rights Law Review, 344 et seq.

42 Rooney 16; emphasis added.

43 Andreas Fischer-Lescano and Kolja Möller, list as objections against the 'transnational social rights' the 'vagueness', 'progressive realization', 'resource dependence' and 'judicial enforceability' of such rights; see Andreas Fischer-Lescano and Kolja Möller, 'The Struggle for Transnational Social Rights' in Andreas Fischer-Lescano and Kolja Möller (eds), *Transnationalisation of Social Rights* (Intersentia 2016) 31 et seq. Vasiliki Saranti in assessing the objections to the justiciability of social rights with a focus on Greece during the crisis years, discerns between "the policy argument," "the effective remedy argument," "the violations approach" and "the evolving role of courts in a democratic society"; see Vasiliki Saranti, 'Interpretation of Economic, Social and Cultural Rights by Human Rights Bodies in Times of Economic Distress. The Case of Greece' (2017) 12 (1) Nordicum-Mediterraneum Icelandic E-Journal of Nordic and Meditrranean Sudies, 4, 5, 6

44 Scott and Macklem 20 et seq.

45 Deval Desai, '"Courting" Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights' (2009) 4 (1) Interdisciplinary Journal of Human Rights Law, 28

46 Whereas King writes about the English legal tradition, I take that many of the points he raises are of relevance to the broader discourse on social rights adjudication; see King, *Judging Social Rights* 189 et seq.

Krieger also highlights both "the *domestic* principles of *democracy* and the *separation of powers*,"[47] and the "principle of *consensus* under *international law*"[48] on behalf of the contracting member states to the European Convention on Human Rights (ECHR). In my understanding, Krieger points in this way towards a staggered and intricate discussion on the justiciability of social rights, that involves criticisms and countercriticisms coming from both national and supranational perspectives which usually go unaddressed in standard recitals of the justiciability debate.

In a most recent account of such criticisms, Katie Boyle argues in her meticulous research, that the justiciability problématique should be assessed as coming in *two distinct waves*, which she further classifies into, a *pre-* and *post-jurisprudence* criticism.[49] In more detail, Boyle understands the first critical wave as the critique raised against the justiciable nature and enforceability of social and economic rights at an entry level, namely before such claims even reach the light of a courtroom. Under this scheme, Boyle sub-categorizes this set into what she calls the '*anti-democratic critique,*' the '*indeterminacy critique*' and the '*incapacity critique.*'[50] As far as the second wave is concerned, this argumentation challenges the justiciability of socio-economic rights *after* a given court has been confronted with social rights claims. Related to that line of argumentation, the *pro-hegemonic* critique,[51] as Boyle phrases it, warns of the potential inefficiencies and risks that may arise due to the reliance exerted to the judicial branch, while the latter is further criticized for being an elite-driven power.[52] By combining insights from all the above-mentioned contributions, the present analysis proceeds in the following paragraphs with an exploration of those criticisms, by classifying them into *four* broad categories: first, the critique on the nature of social rights; second, the legitimacy critique; third, the institutional critique and fourth, what we will call the post-critique of social rights justiciability.

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[47] See in particular Heike Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemein- europäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?' (2014) 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), 193, where Krieger writes "Diese Kritik beruft sich auf das *völkerrechtliche Konsensprinzip* ebenso wie auf *innerstaatliche Grundsätze von Demokratie* und *Gewaltenteilung*."; emphasis added. The translation from German to English of the text "*innerstaatliche Grundsätze von Demokratie* und *Gewaltenteilung*" to "the domestic principles of democracy and the separation of powers," has been made by the present author.

[48] Ibid; the original German text reads as follows "*völkerrechtliche Konsensprinzip.*" The translation from German to English has been made by the present author; emphasis added.

[49] Boyle provides for a thorough and careful documentation and classification of what she calls the first and second wave critiques in the assessment of not only the outcomes of the judgments but throughout what she calls the "adjudication journey". She further proceeds with an examination of the responses voiced against them; see in particular Boyle 12, 19-22 , Table 11.11.

[50] Ibid 12 et seq.

[51] Ibid 12, 16, 17, 38

[52] Ibid 12, 17, 36

i. The Critique on Social Rights Nature

According to the most ordinary and repetitive objection raised against the justiciability of social rights, these are presumed to be conceptually different to civil and political rights, meaning they are positive, costly, and abstract, as opposed to civil and political rights, "which are said to be negative, cost-free and concrete."[53] Along these lines, social rights are considered to be "not real,"[54] "non-rights,"[55] "not authentic,"[56] and "under-enforced,"[57] in the sense that it is not for judges to give effect to their full scope. Moreover, it has been suggested that social rights ought not to count as "rights in any conventional sense"[58] and that they should be understood as merely 'rights on paper'[59] displaying a purely programmatic character. Under this light, it is taken that it is not possible to combine social and economic rights with civil and political rights into one set of rights due to lack of conceptual compatibility and consistency. Building on that, it has been further stressed that socio-economic rights do not only compete with civil and political rights, but that they effectively also "compete against each other or are inherently incompatible based on issues of *incompossibility*."[60]

Based on the aforesaid allegedly fundamental divide between positive and negative rights, social and economic rights are considered to give rise to positive obligations, while civil and political rights may impose negative ones.[61] This is because social rights require affirmative state action in effectively safeguarding and facilitating their realization in practical terms. The above claim is raised to the point that social and economic rights are

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[53] Mantouvalou, 'In Support of Legalisation' 109

[54] On that point see Manfred Nowak, 'Social rights in international law: categorization versus indivisibility' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 9

[55] See Ioana Cismas, 'The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights' in Eibe H. Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 460

[56] Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 765 Wood presents but does not endorse this kind of criticism, where social rights are considered to be 'not authentic' in the normative sense.

[57] On the discussion of that argument see Dimitrios Kyritsis, *Where Our Protection Lies: Separation Of Powers And Constitutional Review* (Oxford University Press 2017) 190

[58] Helen Hershkoff and Stephen Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' (2011) 115 (4) Penn State law review, 931

[59] Cf. Francesco Ferraro, 'The social dimension of fundamental rights in times of crisis' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018) 208, where Ferraro scrutinizes and counter-argues such argument.

[60] Boyle 8; emphasis added.

[61] See also Part VI. Chapter 7.1.i. The Negative versus Positive Distinction: The Discontinuity Thesis.

usually referred to as 'rights to goods and services,'[62] as opposed to 'liberty rights,'[63] which are held to correspond to civil and political rights. Building on such an assumption, social rights are criticized for imposing excessive burdens on the allocation of state resources and for requiring inordinate public finances for their normative realization.

Those budget requirements are further implicated with definitional concerns. According to the standard narrative, social rights are criticized to this day for being too "vaguely worded,"[64] hindering in this way the job of judges in that they cannot reach informed and legitimate decisions on the violations of such rights.[65] In this connection, social rights are additionally attributed a high level of semantic indeterminacy.[66] Meaning to say, social rights are afflicted by a lack of an explicit definition and they deemed to showcase a high level of conceptual versatility, as opposed to the alleged concrete content of civil and political rights. The implication of this is that due to the lack of specificity and fluidity, social rights are taken as logistically difficult to budget and estimate in advance.

In addition, the argument goes, by virtue of their indeterminacy, social rights are surmised to give rise to imperfect obligations and to not offer binding standards for their implementation. That is to say, social rights are held neither to entail a specific duty-bearer nor to avoid imposing definite and distinct duties upon state institutions or other public or private actors.[67] Rather, in the eyes of those critics, the discourse on socio-economic rights is unable "to establish *what* exactly must be done *by whom* to satisfy the universal human interest in obtaining access to education, healthcare, housing and other social goods."[68] Therefore, due to the indeterminate character of such rights, judges have too much leeway or no guidance at all in interpreting and enforcing them.[69]

Linked to their indeterminate character, another challenge that social rights are said to naturally pose is that their content is considered to be mutable and ever-changing. This is because social rights are taken to be innately dependent on the construction of societal values and to the conditions of social existence. In this regard, social rights are understood

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[62] Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 (2) International Affairs 430. Colm O'Cinneide notes that social and economic rights "provide a benchmark to review the *adequacy* of state provision of *basic social goods*"; emphasis added, see Colm O'Cinneide, 'The Political and Legal Activation of Socio-Economic Rights' (*IACL-AIDC Blog*, 2020)

[63] O'Neill 430

[64] For an overview of such criticisms see OHCHR, 'Key Concepts on ESCRs - Can Economic, Social and Cultural Rights be Litigated at Courts?' (*United Nations Human Rights Office of the High Commissioner*, 2021), where the above-mentioned criticisms are briefly outlined and disaffirmed.

[65] Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 771

[66] For a countercriticism to the semantic indeterminacy objection, see Ferraro 207 et seq., 209, 210

[67] O'Neill 428, 429

[68] See O'Cinneide, 'The Constitutionalization of Social and Economic Rights' 259; emphasis added.

[69] Ibid

to not constitute solid and unaltered rights in time (as for instance civil and political rights are taken to be) but rather they are seen as rights whose content and meaning changes over time as societal values change. Put another way, societal values, by being contested and indistinct and by affecting various actors in innumerable ways, are taken to reflect on the indeterminate status of social rights in return.[70] As a result, critics consider social rights to be merely 'aspirational' and "utopian goals,"[71] which are useful rhetorically but have no practical implications of any kind for the state or for the international community. In other words, social rights are held to bring forward simply programmatic policy guidelines for the executive and legislative branches to consider, counter to the binding norms that civil and political rights are tied to, and which judges ought to faithfully follow.[72]

ii. The Legitimacy Critique

The second critique that is examined herein, revolves around concerns about justiciability seen from the perspective of democratic and political legitimacy and the liberal doctrine on the separation of powers within the political regime of liberal democracy.[73] In scholarly contributions, the legitimacy objection is encountered in various terms. It is what Boyle phrases as the "anti-democratic critique,"[74] what Desai describes as the "democratic deficit"[75] critique, what Krieger assesses as the "domestic principle of democracy,"[76] or what Rooney calls the "argument from democracy."[77]

In more detail, according to this line of criticism, entrenchment of social rights is inextricably linked to governmental policies and state actions, which are in turn dependent on a constellation of highly complex macrolevel budget-related and resource-allocating

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[70] Liu Goodwin, 'Rethinking Constitutional Welfare Rights' (2008) 61 (2) Stanford Law Review, 253, 254

[71] See Amaya Úbeda de Torres, 'Justiciability and social rights' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 46, who explores this classic line of criticism in relation to the ICESCR and the ICCPR in particular.

[72] Cf. Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 4 Erasmus Law Review, 379; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 (2) European Labour Law Journal, 161; Henry J. Steiner, Philip Alston and Ryan Goodman (eds), *Innternational Human Rights: The Successor to nternational Human Rights in Context* (3rd edn, Oxford University Press 2013) 285. Ferraro, debunks the 'programmatic' character of social rights criticism; see Ferraro 207 et seq.

[73] It is not the aim of this chapter to address the merits of the doctrine of the separation of powers. The inquiry here looks at this doctrine within the restricted framework of the justiciability of social rights.

[74] Boyle 12

[75] Desai 28

[76] Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemein-europäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?' 188, 193, 194, 196, 200, 205, 210 in the original text it is stated as "Grundsätze von Demokratie" or "Demokratieprinzip". Translation from German to English provided by the present author.

[77] Rooney 16

considerations.[78] On a theoretical level, this critical appraisal is embroiled in wider discussions on the distinction between principle and policy that draws upon Ronald Dworkin's relevant work and classification.[79] The argument advanced in this respect is that courts decide cases based on principle and that policy matters are better left for democratically accountable bodies. With socio-economic claims being often formulated as issues of policy rather than principle, it follows that courts are viewed as an inappropriate forum to decide upon such claims and thus, these matters are directed to the political branches which are considered to be suitable to regulate accordingly.[80]

Forging ahead to practical concerns, reservations about the courts' legitimacy are substantiated by deliberations on state resources and public funds. Back in 1978, Lon Fuller, in his now widely cited paper *The Forms and Limits of Adjudication*, argued that adjudication over the allocation of economic resources exhibits too strong a polycentricity and fluidity, in the sense that this has the potential to affect many interconnected societal actors and to have a wide impact on common life.[81] Polycentricity[82] as explained in this regard, involves multiple decision centers and affects various parties that extent beyond the walls of a courtroom. Furthermore, when it comes to polycentric matters, it has been argued that cause and effect connections may not be easily grasped or trailed, increasing the probability of judicial error and of unintended public policy consequences.[83] In this sense, the judiciary is criticized for having neither the capacity nor the competency to have a holistic overview of the wide implications of a certain public policy, since the latter is dependent upon a vast number of interconnected variables and figures. When confronted

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[78] Cf. Anastasia Poulou, 'Μέτρα Λιτότητας και Χάρτης Θεμελιωδών Δικαιωμάτων της ΕΕ: Η Δικαστική Προστασία των Κοινωνικών Δικαιωμάτων σε Εποχές Κρίσης' (2014) 62 Revue Hellénique des Droits de l'Homme, 867; O'Cinneide, 'The Constitutionalization of Social and Economic Rights' 259

[79] See Ronald Dworkin, *Taking Rights Seriously* (6th print. edn, Harvard University Press 1979) 22 et seq., 82, 83, where Dworkin distinguishes between arguments of principle and arguments of policy and argues that the justification of a legislative program of any complexity requires ordinarily both sorts of argument; "*Arguments of policy* justify a political decision by showing that the decision *advances* or *protects* some collective goal of the community as a whole. […] *Arguments of principle* justify a political decision by showing that the decision *respects* or *secures* some individual or group right."; emphasis added.

[80] O'Cinneide, 'The Constitutionalization of Social and Economic Rights' 259

[81] Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 (2) Harvard Law Review, 397, 401; Poulou, 'Μέτρα Λιτότητας και Χάρτης Θεμελιωδών Δικαιωμάτων της ΕΕ: Η Δικαστική Προστασία των Κοινωνικών Δικαιωμάτων σε Εποχές Κρίσης' 867. Jeff King critically approaches, deciphers and re-purposes Lon Fuller's concept of polycentricity towards an understanding of the latter as *a property* of legal issues and *not an area* of decision-making, such as in resource allocation or public funds planning. King is critical of Fuller's use of polycentricity and elsewhere he explicitly refers to Fuller's picture of the judicial process in English public law as being flawed and inaccurate; see King, *Judging Social Rights* 189` et seq., 203 et seq.

[82] The concept of polycentricity was originally introduced and developed by Michael Polanyi; see Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders*, vol 11 (Routledge 1951)

[83] See the analysis by Paul D. Aligica and Vlad Tarko, 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2012) 25 (2) Governance: An International Journal of Policy, Administration, and Institutions, 239, 240, where Aligica and Tarko provide an overview of the development and employment of the concept of 'polycentricity' in political theory and in legal and governance studies.

with large scale issues of macro-policy, judges are thus commonly seen as being ill-equipped to fully comprehend, assess and eventually determine budget-related matters, due to their restricted expertise and limited ability to grasp societal matters, which are implicated with political considerations at a macrolevel.[84]

Essentially, the long-standing legitimacy argument hinges on the claim that it is illegitimate to empower the judiciary to determine cost-sensitive and resource intensive matters of complex social policy. The reason is that judges, it is said, lack the power of the public purse.[85] In other words, critics argue that unelected judges cannot be the arbiter of polycentric disputes that require state expenditure upon finite public resources, which elected governmental officials are rather democratically legitimatized to decide upon. The point is that the distribution of public funds does not only concern the state in an abstract sense but, as Jeff King has pointedly noted, resource allocation "by definition implicates the interests of nearly everyone, because we nearly all pay in and take out of the public system."[86] What is more, in everyday life and in the public conscience, general state resources are usually identified with taxpayers' money[87] and in turn, disbursement of public funds is not only a highly socially-relevant matter, but it is also a deeply personally-sensitive one that is usually carried out in an emotionally-charged atmosphere, where political emotions[88] can be aggravated in times of political turmoil and economic uncertainty and thus need to be taken seriously.

Buttressing this point are concerns that the majority of the constituents contribute to the public capital through their taxes and hence, for the expenditure of those public levies, they expect to hold their elected representatives accountable when and if needed, as opposed to a few unelected judicial authorities that they cannot call to account. Thus, the argument follows, the most appropriate decision-maker for matters related to the apportionment of public resources is the representative legislature. In this respect, the judiciary's role is considered at best to be one of oversight,[89] while the legislature and

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[84] King, *Judging Social Rights* 130

[85] See Ruth Ginsburg Bader, 'Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation' (1979) 28 Cleveland State Law Review, 301

[86] King, *Judging Social Rights* 5

[87] See also the conclusive remarks on McDermott 303

[88] On the concept of 'political emotions' see Paul Nesbitt-Larking, 'Ideology, Society and the State: Global Political Psychology in Retrospect' in Paul Nesbitt-Larking and others (eds), *The Palgrave Handbook of Global Political Psychology* (Palgrave Macmillan UK 2014) 433, as cited in Krieger, 'Cynicism as an Analytical Lense for International Law? Concluding Observations' 356, where according to Nesbitt-Larking, political emotions are '"lasting effective predispositions' which both support and are supported by the wider norms of a society and then play a role in the development of both *political culture* and the *authoritative allocation of resources*"; emphasis added.

[89] See also Desai 28

executive are deemed the competent bodies to engage with questions of budgetary allocation and costing exercises as well as with tasks related to the designing and running of welfare state programs.

Building on the aforementioned arguments, critics further point towards the principle of the separation of powers and its incompatibility with the justiciability of socio-economic rights.[90] O'Cinneide frames this objection as the "depoliticization critique."[91] The latter calls into question the judiciary's degree of interference with the legislature and the executive power when adjudicating upon social and economic rights. This position rests upon the contention that if social rights are vindicated by courts, then the judiciary might impinge on the legislative and executive powers and distort the balance among the different branches "in that more power will flow to the judiciary."[92] To sustain this argument, critics underline that the judiciary cannot and ought not to step into policy matters or to veto parliamentary decisions, and that the legislative branch provides sufficient political accountability in safeguarding that the branches of the government abide by their human rights commitments at a domestic and international level.

This imbalance among the different branches further translates, according to this criticism, in that political decision-making is circumvented and thus, the courts assume political responsibility for shaping social conditions. The latter, it could be argued, sequentially "reduces democratic accountability for protective functions and it fosters the individual's reluctance to use democratic political means instead of judicial ones"[93] in order to seek and achieve social protection. In substance, if we were to summarize the above distinction, it could be said that the doctrine is concerned "with identifying those claims which may be legitimately advanced before a court and those which must be advanced in parliament through the political process."[94]

Depoliticization as a critique is not only levelled at the depoliticization of the portfolio of political institutions and against the compromised balance among the different political branches, but it also extends into depoliticization taking place within the polity.

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[90] See Aoife Nolan, 'Ireland: The Separation of Powers Doctrine vs. Socio-economic Rights?' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 309, where Nolan, while assessing the separation of powers of doctrine from an Irish case-law perspective, makes more generalized remarks on the "rigid and conservative view of the separation of powers doctrine."

[91] O'Cinneide, 'The Constitutionalization of Social and Economic Rights' 259

[92] Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 Irish Jurist, 189; Hogan makes this observation in relation to the justiciability of socio-economic rights in Irish judicial culture, but it is used here in its applicability to the social rights discourse more broadly.

[93] Krieger, 'The Protective Function of the State in the United States and Europe: A Right to State Protection? – Comment' 189

[94] McDermott

To put it differently, critics coming from different bands of the debate lament either the *depoliticization of institutions* or they bemoan the *depoliticization of people*. Skeptics of the rights discourse in general argue in this respect that the adjudication and legalization of rights "depoliticizes people"[95] by minimizing their interest and engagement in participatory mechanisms, democratic political processes and ordinary politics all together. In this narrative, as Malcolm Langford vividly observes "human rights are simply a *handmaiden* to political neo-liberalism, as both restrict the legitimate space for political activism and provide an overly *controlled* outlet for expressing frustration with democratic capitalism."[96] Such debates over the justiciability of social rights, or rights for that matter, take place in the long shadow of well-established and deep-seated doubts about the rights discourse and the role of courts in general, which draw upon larger ideological rifts between the liberal and social democratic state, historical lineages and legal traditions.

Accordingly, the argument advanced by human rights critics is that social justice matters are the product of an ideological ferment resulting from widespread political deliberations and social struggles, which take place across the many layers and among the various different actors of society. In this respect, it is emphasized that political pressure is forged and exerted by the collective political capital through a plurality of voices and opinions, and not through the voice of a single judge or a restricted number of judges. Thus, this rationale unfolds, social matters are not to be ceded to some unelected judges but are rather to be shaped and demanded through the political process and are better left in the political arena where they belong.

Another reading of this critique is that social rights cases that do actually reach the courtrooms are criticized for not aligning with broader social movements' demands. If they do, it is then said that such cases are either not endorsed on a grassroots level or they do not elicit social mobilization and civic engagement. At times of course, when immediate action is deemed necessary, it may be the case that courts are employed by activists as the preferable forum so as to exert political pressure. Courts may also be preferred occasionally due to the peoples' desire for a 'quick fix'[97] and for a speedy delivery of solutions, while being driven by a general impatience towards political processes that may take a long time.

However, what is stressed by human rights skeptics identifying by and large with a critical legal school of thought, is that social rights are basically incarnated and materialized

[95] Virginia Mantouvalou recites and rebuffs such criticism on the depoliticization of people; see Mantouvalou, 'In Support of Legalisation' 108, 109
[96] Langford, 'Introduction: Civil Society and Socio-Economic Rights' 16; emphasis added.
[97] Gearty, 'Against Judicial Enforcement' 33 et seq., 60

through social victories. That is to say, social demands are taken as the political product of limitless public deliberations that happen within public fora, and not within the bounded limits of judicial talks or the reach of a courtroom's rigid walls. Moving forward with the analysis, these arguments are linked to an additional critique that dwells on aspects of the judicial procedure. More specifically, the criticism assessed immediately below engages with the character of the courts as *institutions*, together with the character of the participating parties in the judicial process, be it judges or litigants, as *persons*.

iii. The Institutional Critique

The third bundle of oppositional arguments draws upon the above analyzed legitimacy objection yet targets more specifically the courts as institutions, the institutional capacity of judges to adjudicate socio-economic rights, as well as the judicial procedure overall. Judges, it is assumed in this context, lack the information, necessary expertise, skills or experience which are required in order for them to make informed and well-rounded decisions on social rights cases. Let alone when it comes to budget-related public matters, it is submitted that the bench does not meet the necessary requirements with regard to training, appropriate qualification and knowledge in order "to decide whether funds have been spent the way they should have."[98] Judges are also criticized for being ideologically tilted towards either conservative or liberal views and for expressing political preferences or oppositions under the guise of an impersonal judicial authority.[99]

What is highlighted in this regard, is mainly the difficulty on behalf of the judiciary to gather and evaluate relevant factual information and to remain politically unbiased in their judgment. Judges do not have, according to this view, neither the tools[100] nor the information outlets to acquire such knowledge, while they are required to assess and factor in their decision-making "staggering issues of strategy, priority and timing."[101] Thus, the argument follows, if courts ask governments to distribute scarce resources in particular

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[98] Cécile Fabre, 'Constitutionalising Social Rights' (1998) 6 (3) The Journal of Political Philosophy, 281

[99] For an overview of such arguments, see Nolan, Porter and Langford and David Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institute 1977). See also Kári Hólmar Ragnarsson, 'The Counter-majoritarian Difficulty in a Neoliberal World: Socio-economic Rights and Deference in Post-2008 Austerity Cases' (2019) 8 (3) Global Constitutionalism, 608, where Ragnarsson addresses "arguments to the effect that courts may be *ideologically opposed to taking on the role* or they may lack necessary institutional capacity and expertise."; emphasis added.

[100] Cass R. Sunstein, 'Social and Economic Rights? Lessons from South Africa' John M Olin Program in Law and Economics Working Paper No 124 3

[101] See Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (Yale University Press 2004) 84 et seq. as cited in Kyritsis 190

ways, they "find themselves in an impossible *managerial* position"[102] by being entangled with the administration of public funds and social policy programs. However, since the remedial actions available to the judiciary are limited, especially the ones related to the fiscal impact of the decisions made, this is seen as rendering the judges' task a particularly challenging one. This is because social rights judgements that do not follow through may roil the credibility of the courts and discredit the judicial enterprise as a whole.[103]

Faced with the novelty and magnitude of such undertaking and while contemplating the wide-scale implications of their judgments, it is countenanced that magistrates may not only be considered as unauthorized and incompetent to decide upon ostensibly distributive justice issues, but they themselves might be reluctant[104] to embark on such a heavy and politically charged task. That is to say, judges may find themselves being in "the exceptionally uncomfortable position, without having neither the direct democratic legitimacy nor the public pulpit to defend their views,"[105] to handle tensions that occur from protecting individual rights on the one hand and from trying to preserve the state's fiscal balance on the other, which is deemed to be in the general interest of the public. Judges may also be hesitant in the event that so-called 'test-cases' or 'representation cases' reach the courtroom, that is, cases that may raise issues of wider social significance in times of political pressure. This can be the case due to "the self-evident lack of fit between the narrow realm of such litigation and the broader issue that they are being asked covertly to deal with in such proceedings."[106] In addition, skeptics contend that judges deciding upon highly significant socio-economic cases may lead to "a flood of litigation,"[107] for which the courts may neither be prepared for, by means of institutional infrastructure, nor willing to deal with, by means of political will.

Surely, in the two-way street of a judicial process, judges may be suspicious towards social rights cases, but the general public may also lack the required trust and support towards judicial institutions as well. Besides, as it has been suggested above, the most

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[102] Sunstein 3. See also Fuller 404, where Fuller repeatedly uses the idea of managerialism and managerial duties to describe the duties of the arbitrator/ adjudicator of a legal dispute that involves highly polycentric matters. I take here, that the idea of the judge as a "manager," of the claimants as "clients" and the objective of the dispute's resolution as being "efficiency," has implications for understandings of social rights, in the sense that these are seen as strictly regulating economic-implicated relations and not relations that are embedded in a full spectrum of social and economic activities and practices. This point is also addressed in Part III. Chapter 6.3.2. Social Rights as Poverty Management Rights.

[103] Cf. Christiansen 353; Sunstein 3

[104] McDermott 282

[105] See Stergios Kofinis, 'Μια υπεράσπιση της επεκτατικής ισότητας σε καιρό οικονομικής κρίσης - και ταυτόχρονα μια αφορμή συζήτησης για το μέλλον της' [2017] (2) Εφημερίδα Διοικητικού Δικαίου, 264

[106] Gearty, 'Against Judicial Enforcement' 59

[107] Boyle 16

significant social matters are considered to fall within the rubric of the political sphere, and therefore the public may not be keen to entrust their hopes and labors with the judicial system during times of ongoing political instability or socio-economic distress. This has especially been the case in civil law traditions and social welfare states, where historically, despite the independence that judges have enjoyed, a series of factors such as the prevalence of a conservative legal philosophy and the bureaucratic mind-set rooted in those legal cultures, coupled with the over-reliance on the executive branch, have all prevented judges from protecting social and economic rights and have thus impacted the way that judicial power has been established in public conscience.[108] Last but not least, skepticism on behalf of the people may also appear in the form of questioning the synthesis of the judicial bench. That is to say, in cases of an all-male, all-white, middle and upper-class ensemble of judges, the bench might be seen as not being representative and inclusive of the broader composition of a given society, which in most cases is comprised of different social classes, ethnic and cultural backgrounds and minority groups.

Drawing on these reservations about the composition and background of the sitting magistrates, concerns are also voiced in common law traditions and are linked to a lack of confidence expressed towards judges. In particular, in the US legal culture, which relies heavily on judicial resolutions, distrust towards judges has been expressed in the sense that judges are viewed as an elite, counter-majoritarian group, who are neither relatable nor held accountable towards the rest of the society. Judges in these legal contexts are usually held in public conscience as holding political power similar to political actors. Judges are thus considered as governing entities and as constituting part of the government,[109] to the point that they have been referred to as a "juristocracy,"[110] or as "aristocratic jitters"[111] or as a "government of judges."[112] in various critiques. In other words, reservations expressed against this background are levelled at the passage of

[108] This has been particularly the case with the judicial system in different jurisdictions in Latin America; for an analysis of specific examples see Gretchen Helmke and Julio Ríos-Figueroa, 'Introduction' in Gretchen Helmke and Julio Rios-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011) 2

[109] See also Christoph Möllers, 'Why There Is No Governing with Judges' 30 September 2014

[110] Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, where Hirschl is highly critical of the phenomenon of governing with judges, the latter being understood as a bourgeois political elite that protects and advances individual rights at the expense of political process. Hirschl explores this phenomenon in the context of the legal tradition of the United States. For an analysis from Europe's constitutional courts and the changing role of judges in this respect, see also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

[111] Lawrence G. Sager, 'Courting Disaster' (2005) 73 (4) Fordham Law Review, 1370

[112] The phrase "government of judges" is attributed to Lyon-based law Professor, Édouard Lambert, in his 1921 treatise; see Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois (Government by Judges and the Struggle Against Social Legislation in The United States)* (Giard & Cie. Paris 1921).

political power from a democratically elected government of representatives to a democratically unaccountable so-called "*gouvernement des judges*."[113]

Institutional criticism is not exhausted on the judges, however, but rather also extends all the way to the plaintiffs and to the cases that are brought before a court of law. Against this backdrop, criticisms revolve around the sample of the cases or the number of plaintiffs that may bring a claim, the total which may seem insufficient or not representative of wider societal conditions. Even if a case is considered relevant for the wider public interest, critics argue that this limitation on cases still maintains a strong emphasis on the particular claimants who can be seen by the court. Or as Conor Gearty puts it, the individual, as opposed to the society, "is inherent in the whole idea of justiciability."[114] In this vein, individual cases within the adversarial model of judicial proceedings may not seem well-equipped to deal with the plight that "thousands of invisible claimants"[115] have to bear. Cases pending before a court are criticized in this regard for being too focused on the individual issue at hand or too restricted on their spatio-temporal aspects in order for them to reflect on the wider issues of broad-scale social policies. The cases brought before a judicatory may thus display an absence of diversity or representativeness, or a lack of relevance to issues of larger social significance. In this sense, social cases dealt at the level of courts are taken as a randomly picked sample of individual cases, and not as an indicative segment of broadly framed social issues that is relevant to the wider societal web.

Surely, in the case that a judicial outcome entrenches social rights claims, critics may acknowledge this. However, within the limits of such criticism, judgements like this are only considered to be coincidental and not considered capable of generating widescale structural change. What is more, social rights cases that do actually reach a courtroom are criticized for being "heavily tilted toward middle class and upper income groups rather than poor plaintiffs."[116] That is to say, plaintiffs seeking a judicial arm are more often than not middle- and upper-class citizens, who "are more likely to know their rights and to be able to navigate the expense and intricacies of the legal system."[117]

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[113] See Möllers, 'Why There Is No Governing with Judges' 1, where Möllers comments that the conception of judges as governing entities is made explicit in the title of Édouard Lambert's French monograph of 1921, on the early United States Supreme Court (as cited above). See also Ary Jorge Aguiar Nogueira, 'State of the Art Research in the Judicialization of Politics' (2020) 11 (3) Beijing Law Review

[114] Gearty, 'Against Judicial Enforcement' 58

[115] Ibid

[116] David E. Landau, 'The Reality of Social Rights Enforcement' (2012) 53 (1) Harvard International Law Journal, 200

[117] Ibid

Reflecting on that criticism it is no novelty that the justice system is often questioned for being too costly or too drawn out to the extent that it ends up being an either unaffordable or unpopular choice for interested parties. This can especially be the case for low-income people, who face stiff obstacles when seeking justice under the law, for they cannot afford legal representation as they either lack the means or are blocked *en masse* from bringing or defending a civil action before a court.[118] For this, the justiciability of social rights has been doubted in practice for not only relying on an unelected body of judges, but for effectively giving voice to and ultimately benefiting the already empowered and privileged middle and upper layers of the society as opposed to the marginalized people and those social groups who are most in need.[119]

The aforementioned criticism is particularly shared by scholars who come from a law and political economy perspective, seen under the broader lens of critical legal studies.[120] Commentators of this legal and political school of thought do not only criticize courts in their limited potential and output but they further highlight the deficiencies of the courts system in its very institutional design. Courts are seen in this respect as being stratified and dependent upon that very stratification in shaping and interpreting law towards the preservation and prolongment of the status quo.[121] In support of this, higher or lower courts are taken to enjoy more or less resources respectively, according to their

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[118] For a study conducted in the US, but whose findings can be of relevance for the broader discourse on the inefficiency of legal protection for low income people, see Helen Hershkoff and Stephen Loffredo, *Getting by: Economic Rights and Legal Protections for People with Low Income* (Oxford University Press 2019), and in particular chapter 9 'Access to Justice: Enforcing Rights and Securing Protection'. For an overview of the socio-economic rights judicial enforceability debate with a focus on Brazil and Colombia, see Amy Kapczynski, 'The Right to Medicines in an Age of Neoliberalism.' (2019) 10 (1) Humanity: An International Journal of Human Rights, Humanitarianism, and Development, 80 et seq. See also Octávio Luiz Motta Ferraz, 'The right to health in the courts of Brazil: Worsening health inequities?' December 2009 Health and Human Rights 11/2 and Octávio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil ' (2011) 89 Texas Law Review, 1662 et seq., who argues against the substantive role that courts could have in judging socio-economic cases in Brazil, where there is a highly unequal distribution of wealth among social classes. In Europe, András Sajó has defended a similar position regarding the role of the Hungarian Constitutional Court and contended that the political systems "have been middle-class oriented to the detriment of the poor"; Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court' 91. In the same vein, Akritas Kaidatzis criticized courts in the face of judicial developments in Greece during the crisis years; see Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018'. For more on this debate, see Part IV. Chapter 7. Social Rights Litigation and Adjudication During the Crisis: A Critical Appraisal.

[119] See also Möllers, 'Why There Is No Governing with Judges' 17, 18, where the argument that constitutional review has an inherent political agenda is discussed. Notably, judicial review is addressed as being implicated not only in terms of the social classes that judges regularly represent, but also in the sense that the judicial model is designed to serve and protect proprietors and already empowered individuals against the majoritarian political process to such an extent that "[t]hrough a court procedure that restrains the democratic process *those who have will be given more*"; emphasis added.

[120] See for instance the recently initiated Law and Political Economy Project https://lpeproject.org/, and in particular the blog's symposium on 'Courts and Capitalism' <last accessed 07.09.2021>

[121] See Kathryn A. Sabbeth, 'Market-Based Law Development' (*Law and Political Economy (LPE) Project Blog*, 2021), who notes "The courts are stratified, and this stratification shapes the development of law."

hierarchical status. Moreover, supreme courts are deemed to be less accessible, due to the fact that reaching apex courts requires a long and stringent process that usually takes a lot of time and resources, neither of which people in dire need can generally afford.

As a result, the criticism follows, higher and lower courts are usually faced with less or more heavily burdened dockets respectively. This, in turn, raises concerns as to whether injustices occurring at a ground level can actually make all their way up to a court and whether these matters are given enough diligence when they do actually reach a courtroom.[122] In close proximity to the above, intra-court relations and hierarchies within the judicial body, collegial dynamics between judges, influence exerted by public opinion or even the very geographical location of courts (their relative location to a state's central administrative and decision-making bodies), all seem to be points of concern. [123] Put simply, all of the abovementioned factors stand as potential challenges to the competence of courts in dealing effectively with social rights cases which are tried before them.

iv. The *Post*-Critique

In the remaining part of this chapter, the analysis proceeds to the last set of arguments contesting the justiciability of social rights, which I encapsulate here in what I call the *post*-critique. It has been made obvious by now that all the above-mentioned criticisms are intertwined and mutually reinforcing, and that there is significant overlap between the different criticisms.[124] Similarly, this most recent critique that is brought to the forefront by some scholars, strongly resembles the criticisms against the institutional capacity and legitimacy of courts when deciding upon social cases. However, and to be more precise, the post-critique arguments concern the *post-adjudication* and *post-judgment* phase of litigation. What is of interest in this regard is the reviewing of the compliance ratio, the broader social impact of the cases as well as the actual steps taken towards the effective protection and reinforcement of social rights after the issuance of the relevant judgements.[125] Justiciability in this respect is taken to refer to the review mechanism that

[122]Jo Dixon and Carroll Seron, 'Stratification in the Legal Profession: Sex, Sector, and Salary' (1995) 29 (3) Law & Society Review; see on the same point Sabbeth

[123] Dia Anagnostou, 'Judicial Activism in the Name of the Nation: Reneging on the Integration of Immigrants in Greece' (2016) 43 (4) Journal of Law and Society, 600, 614

[124] O'Cinneide, 'The Constitutionalization of Social and Economic Rights' 260

[125] Cf. Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017) where several scholars shed light on the degree and causes of compliance with judgments on economic, social and cultural rights and engage with policy discussions from a comparative and international law perspective.

evaluates the compliance with legal doctrines and can thus be characterized as "an accountability mechanism within a human rights implementation framework."[126]

As there is by now a large body of jurisprudence on socio-economic cases from various jurisdictions around the globe, critics turn to this volume of judgements to follow up on their implementation and on the practical entrenchment of social rights on the ground. From this standpoint, few objections are raised to the aforesaid. That is to say, nowadays as many courts around the globe have already adjudicated in favor of an enhanced protection of social rights, skeptics take stock of the progress and the measures undertaken towards that direction. Against this backdrop, most recent charges to the justiciability of social rights often point at either the *minimal* or *total absence* of compliance with issued judgments on the part of public authorities and civil actors, or they condemn the *few steps* taken toward compliance, which, instead of reversing unjust social policies are rather condemned for actually keeping social disparities and levels of inequality intact.

Put simply, at the epicenter of such criticism sit various positions that range from the minimum or complete lack of implementation and compliance to the undesired outcomes resulting from the steps taken. It can be recalled above that some critics object to social rights justiciability by arguing that those who get to have their voice heard are usually those who are able to afford the high-priced judicial process in the first place. Building on that, and similarly to the institutional critique presented above, critics underscore that even when social rights are adjudicated in a robust manner, the beneficiaries of such judgements do not come from the 'margins of society'[127] but rather it is the middle and upper classes that reap the benefits, resulting in what Malcolm Langford calls as a "*distributive inequality*."[128] Next to this critique, Langford also voices his concern about the *diffuse impact* of social rights jurisprudence. In this regard, he contends that, as real-life experience suggests, institutional or private respondents who are called to implement social rights decisions, usually resist or maintain the position that they are unable to comply with certain orders, thereby annulling the judgements. Considering the larger institutional criticism of courts, Langford continues that even in those instances when a judgment is implemented, "legal remedies may do little to dislodge unjust policies; inflect public and elite opinion; and disturb the maldistribution of power and resources."[129]

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[126] Boyle 46
[127] Langford, 'Judicial Politics and Social Rights' 67
[128] Ibid
[129] Ibid

Other critics target the judicial practice of constitutionalizing social rights in judicial reasonings. Drawing on such reservations, these scholars go on to argue that the enhanced protection of social rights through their constitutionalization "exposes other rights to unnecessary jeopardy, for it creates the possibility—and some might say the *inevitability*—that elected branches will *fail* to respect such rights and so encourage overall disrespect for constitutional limits."[130] In line with this, skeptics of justiciability who predetermine and inveigh institutions for failing to follow through with social rights judgements, alert that this tactic might be threatening not only for constitutionally protected fundamental rights but for all rights, including civil and political rights.[131]

Overall, it could be argued that many of the objections that have already been interposed regarding the institutional incapacity of courts, are employed and reiterated in the post-adjudication critique. As I see it however, the qualitative difference is that these objections are no longer generally addressed at a pre-adjudicative level based on some speculative assumptions. Instead, due to the hard evidence that now exists, these reservations take an instantiated form through concrete instances and are empirically affirmed at a post-adjudicative level. That is to say, criticisms on the insufficient implementation of social rights judgements could and are usually read together with institutional criticisms, which have been scrutinized in detail above. Looking at these objections, which are usually posed from a critical legal studies angle, it could be argued that what essentially lies underneath such critiques is the recurring affirmation that courts, and accordingly the judgements issued by them, have limited transformative force and are thus not the forums where political and social change can take place.

Of course, assertions like that raise questions as to what is meant here by 'transformation' or political and social 'change'. The question of political and social change seems to be at the heart of the justiciability discourse, seen at least from the perspective of a critical legal systems-analysis, in the same way that this has been at the core of crisis theory and has recurred as a core question on issues pertaining to the judicial interpretation of social rights during the MoU years. At the moment, we will put a pin on this thought and will return to it in the following chapters. For now, we can summarize that all of the above criticisms have elicited strong counterarguments to their specifics and to the general philosophical assumptions underlying conceptions of social rights.

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[130] Hershkoff and Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' 932; emphasis added.
[131] Ibid

"What lies at the heart of the justiciability debate is the *redistributive* nature of the remedial measures,"[132] Jeanne Woods has shrewdly observed. Having that in mind, when critics oppose justiciability as not being capable of bringing about change, they refer in my view, to large-scale transformative changes in the political and social redistribution of wealth. The question of change in those terms, however, is not a question under the light of which this thesis approaches the social rights discourse. Instead, the analysis departs from a reading of social rights under an exclusively structural and systems-oriented lens. In what follows, we proceed with an exploration of arguments in favor of the justiciability of social rights. These will be of relevance when we come back to the question of the nature of social rights and as we are faced throughout the thesis with a recurring pattern of questions underlying this issue. Namely, the question of structural social change or the lack thereof, and the question of the non-changing ethical assumptions, in which conceptions of social rights seem to be rooted, and yet, which continue to go unaddressed.

4.3. The Case in Favor of Justiciability

For decades, academics and grassroots activists have challenged the skepticism and marginalization with which the justiciability of social and economic rights has been met. All of the above-mentioned objections have received boisterous countercriticism and have been debunked over the years. It could be argued that in one way or another, validity could be credited to a certain degree to some of the concerns expressed above. For instance, criticism about the inaccessible and unaffordable aspect of the judicial process or about the impediments to access to justice that socially excluded groups and poverty-stricken people experience, have been empirically proven to hold true. The latter has especially been the case in the context of austerity-hit countries in Europe where, as was examined earlier,[133] measures imposing extra costs or procedural requirements to legal and judicial services have been found to have affected the judicial system's quality and performance, as well as the right to access to justice for a significant portion of the population.[134]

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[132] Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 767; emphasis added.
[133] See Part II. Chapter 3.2. Austerity Impact Assessment of Social Rights Protection
[134] Cf. Kaltsouni and Kosma 117; Canotilho 44 et seq.; Ivanković Tamamović 97 et seq. Dias and Gomes argue that MoU-imposed cuts on running costs, court closures, concentration of services and fewer human resources, based on a new model of territorial organization, which were all part of the judicial reform process in Portugal, have been carried out within a context "of outside, international pressure" and have reduced citizens' rights of access to the courts and to litigation; see João Paulo Dias and Conceição Gomes, 'Judicial Reforms 'Under Pressure': The New Map/Organisation of the Portuguese Judicial System' (2018) 14 (1) Utrecht Law Review, 176, 179 et seq. The increasing costs to access to justice during the crisis and the comprehensive structural reforms of the Portuguese justice system, have also been acknowledged by the

However, objections like this are not to be taken at face value. Rather, it is my view that such concerns on the basis of the nature of social rights are misplaced and misleading. If courts are unable to effectively adjudicate on social rights because they are inaccessible, unaffordable or overburdened, this is on legislatures and on courts' institutional and conceptual design and does not warrant social rights being blamed for being non-justiciable by default. After all, as it has been recently argued, courts in their institutional presence should be understood not only as forums that provide guarantee functions and adjudicative services, but they should be seen as "*services* themselves that governments must provide to individuals."[135] That is to say, it has been suggested that courts, as much as they adjudge on social rights, are also a social right in their own capacity.[136]

Moving to the remaining counter criticisms, a blanket repudiation of social rights adjudication based on some allegedly *inherent* non-justiciability of such rights, is widely considered nowadays to be an outdated standpoint, at least in international law. On the contrary, the recognition of the justiciability of social rights has been heralded as "growing and becoming stronger by the day."[137] Alongside persistent community-based efforts and scholarly contributions vouching for the legal actionability of social rights, judicial practice has also been conducive in this respect. The question now, according to commentators, is not *whether* to judicially enforce social rights but rather *how* to do so.[138] The UN Office of the High Commissioner for Human Rights (OHCHR) leaves no room for hesitation on whether economic, social and cultural rights can be litigated in a courtroom either. Backed up by a number of courts judgements on cases concerning such rights, the OHCHR has been quite explicit in stressing that *as it is* with all human rights, judicial enforcement of socio-economic and cultural rights is *fundamental*.[139] To that end, existing judicial practice from different jurisdictions is taken to be indicative that economic, social and cultural rights "can be subject to judicial enforcement."[140]

United Nations Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul; see OHCHR, *Portugal must ensure justice is accessible to all, UN rights expert warns (Lisbon, 3 February 2015)*

[135] Judith Resnik, 'Courts and Economic and Social Rights/Courts as Economic and Social Rights' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019) 259; emphasis kept as in the original.

[136] Ibid 260, 261, 262 et seq. Resnik argues in favor of "courts *as* economic and social rights" (emphasis kept as in the original) from a perspective of a social welfare state and in opposition to the privatization of justice.

[137] Kristin Henrard, 'Introduction: The Justiciability of ESC Rights and the Interdependence of All Fundamental Rights' (2009) 2 (4) Erasmus Law Review, 377, as cited in O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' 60

[138] Boyle 22. For a similar point, see Resnik 267, where Resnik breaks down the question to "how much" and "how to" and argues that the question at stake is "not over *whether* but rather *how much* a state can afford, and how *to allocate* investments in a portfolio of services […]"

[139] OHCHR, 'Key Concepts on ESCRs - Can Economic, Social and Cultural Rights be Litigated at Courts?'

[140] Ibid

The reality on the ground has not only been emphasized at an international policy level but it has also been assessed at an academic level.[141] In this connection, a plethora of jurisdictions around the globe have already provided examples that "it is possible for questions raised by individuals and groups to be examined by courts and expert bodies without *undue interference* in the policy setting roles of executive and legislative powers."[142] The discourse on the legal recognition of social and economic rights has thus been "*activated,"*[143] not only through the progressive configuration and formation of international and domestic legal principles and doctrines, but it has also been set in motion and shaped through concrete and fleshed-out examples of social and economic rights case-law.

Regarding the dichotomization of rights into two separate bands, the UN Committee on Economic, Social and Cultural Rights (CESCR) has already deplored "the adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, *beyond* the reach of the courts,"[144] as being "*arbitrary* and *incompatible* with the principle that the two sets of human rights are indivisible and interdependent."[145] In addition, the Committee has condemned the non-justiciability of social rights by stressing that this discrepancy between the two set of rights in relation to judicial remedies "is not warranted either by the *nature* of the rights or by the relevant Covenant provisions."[146]

This de-categorization of rights is not a single phenomenon on the international plane but is rather found among a wealth of international human rights bodies and tribunals that have discredited such allegations on the non-justiciable nature of social rights. By way of illustration, even while the above-mentioned proclamation was made in 1998, almost ten years later and during the drafting of the Optional Protocol to the ICESCR (OP-ICESCR) the same position was reiterated and explicitly endorsed by the former OHCHR, Louise Arbour. In a series of statements made, the High Commissioner emphasized that "there is nothing *inherently non-justiciable* about economic, social and cultural rights."[147] The fact that questions on the justiciability of such rights bear a large

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[141] Cf. Langford, Rodríguez-Garavito and Rossi, where a thorough comparative analysis is conducted on social rights judgements and their respective level of implementation, covering various jurisdictions, ranging from Costa Rica, Argentina and Brazil, to Canada, United States, India and South Africa, among others.
[142] Louise Arbour, *Statement by Ms. Louise Arbour UN High Commissioner for Human Rights to the Open-Ended Working Group established by the Commission on Human Rights to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (*Address by UN High Commissioner for Human Rights to the Second Session of of the Open-Ended Working Group *14 January 2005)*; emphasis added. See Part III. Chapter 5. Austerity Measures Before the Courts: A Case Study for Greece and Portugal.
[143] Colm O'Cinneide, 'The Marginalization of Socio-Economic Rights' (*IACL-AIDC Blog*, 2020)
[144] CESCR 4 para 10; emphasis added.
[145] Ibid; emphasis added.
[146] Ibid; emphasis added.
[147] Louise Arbour, *High Commissioner Backs Work on Mechanism to Consider Complaints of Breaches of Economic, Social and Cultural Rights (*Address by Ms Louise Arbour, UN High Commissioner for Human Rights to the

political component, the High Commissioner underscored, does not mean that these rights fall outside of the judiciary's scope. The reduction of such rights to mere aspirations, luxury goods or state policy goals was criticized, while the assumption that a healthy market can automatically ensure the enjoyment of such rights, was held to be problematic.[148] Rather, recognition of the status of social rights as justiciable entitlements, and accountability on the part of states, were deemed "crucial to honouring the *political*, *moral* and *legal* commitments undertaken by States when the international bill of rights was adopted."[149]

The stance that all rights are interdependent and interrelated advanced by the CESCR, has also been supported by legal commentators, who condoned the indivisibility and interdependence of economic, social and cultural rights on the one hand and civil and political rights on the other by taking various approaches in their defense line. In painting a vivid picture, Mónica Feria-Tinta stressed that judging rights "is no longer a matter of *perfectly dissecting* and *distinguishing* the inseparable: "here is the right to life and here the right to health" or "here is freedom from torture" and here "the right not to be starved."[150] To that end and while interpreting social rights, scholars have developed various approaches both at an academician and doctrinal level, such as the permeability and intersectionality theses, among others, which have all put forward understandings of rights as being indivisible and interdependent.[151] Being essentially implicated with budget-related considerations, scholars have also refuted the argument that judging social rights cases can have a destabilizing effect in the separation of powers doctrine. In their rebuttal, commentators have taken issue with the wide-spread presumption that courts decide in principle, while legislatures are suited for matters of policy.[152]

In view of this, critics countered the argument that it is illegitimate for unelected judges to mandate on the allocation of public revenues, questioning the validity of the principle/policy dichotomy, under which democratically elected officials are supposed to deal with issues of principle as opposed to courts, which are limited to policy matters. In

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Fourth Session of the Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *16 July 2007)*; emphasis added.

148 Louise Arbour, *Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the Third Session of the Open-Ended WG OP ICESCR (*Address by UN High Commissioner for Human Rights to the Third Session of of the Open-Ended Working Group *6 February 2006)*

149 Arbour, *Statement by Ms. Louise Arbour UN High Commissioner for Human Rights to the Open-Ended Working Group established by the Commission on Human Rights to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*; emphasis added.

150 Mónica Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 (2) Human Rights Quarterly, 435; emphasis added.

151 For a detailed analysis, see Part V. Chapter 7.2.i. The Interdependence and Indivisibility Thesis.

152 Kyritsis objects Ronald Dworkin's principle/policy distinction; see Dimitrios Kyritsis, 'Principles, Policies and the Power of Courts' (2007) 20 (2) The Canadian Journal of Law and Jurisprudence, 397

their refuting argument, critics casted doubt on whether such clear-cut division between principle and policy could be sustained in practice. Furthermore, they stressed that this sort of distinction "proposes a rigid, conceptual allocation of decision-making functions between courts and legislatures,"[153] which in real life cases does not seem to exist. In their rejoinder, analysts emphasized that it not only rights, but also courts and legislatures, which are premised on an interdependent relationship that "is far more *interactive* than the common understanding sometimes seems to suggest."[154] In light of this, it has been underscored that while courts may not possess the power to adjudicate on government coffers, rest assured "[n]o court system can operate in a budgetary vacuum,"[155] either.

Advocates of justiciability moved further in counteracting criticisms based on budgetary concerns. As alluded to in the foregoing paragraphs, the budgetary objection could be read in two ways. Seen from the perspective of their nature, social rights are criticized for having budgetary implications due to their cost-inducive character. Seen from the angle of judicial practice, judges are criticized for not being authorized to adjudicate on budgetary-implicated mattes, under the category of which, social rights allegedly fall. In line with this, it has already been examined how budgetary considerations are deemed the sole province of political branches and how judges are required to refrain from getting involved in budget-related policies. The first contention will be assessed later in this study.[156] Concerning the second criticism, it could be counterposed, that contemplating budgetary and non-budgetary issues does not have a distinct separation line. Drawing upon the argument that social policies do not follow rigid and unrealistic policy/principle dichotomies, it has been confuted that budget and resource allocation considerations constitute a far more complex task among different branches that cannot be reduced in flat out distinctions and budgetary segmentations of social policy that do not exist in reality.

This has also been made clear by the CESCR, which in General Comment No 9[157] underlined that although resource-allocative matters should generally be left to the political authorities rather than the courts, and even while the respective competences of the various political branches must be respected, it is nonetheless "appropriate to acknowledge that courts are generally *already* involved in a considerable range of matters which have important resource implications."[158] Thus, the Committee implied that, looking at cases on

[153] King, *Judging Social Rights* 125
[154] Kyritsis, 'Principles, Policies and the Power of Courts' 397; emphasis added.
[155] Holmes and Sunstein 45
[156] For a critique on these approaches, see Part IV. Chapter 7.1. The Relation of Rights with Costs.
[157] See bibliography General Comment No 9 CESCR
[158] Ibid 4 para. 10

the ground, the reality has shown that budget consequences are attached not only to socio-economic rights but to all rights which are brought before a court and that resource parameters are not a black and white question for a judge to decide upon.

Drawing on that analysis, counter-critics further addressed the idea that courts can effectively compromise large-scale social policies and democratically decided upon action plans. In their recrimination, scholars held that courts are proven in practice to be ineffective in responding to broader systemic problems and in modifying generally settled norms and policy regulations on the basis of their judgments alone. In the sections to follow, this argument will be examined when we inquire further to the stance that national domestic courts held when asked to adjudicate upon social rights cases in the midst of financial and fiscal crises. There it will be argued that while cases exist in which court decisions spark an interbranch political and public dialogue and may be taken into consideration by the executive or the legislative powers when drafting or reforming legislative texts,[159] this is still a decision for the political authorities to take and not for the judicial bench to act upon. Put another way, courts do not hear or determine broad social policies, general guidelines, or moot issues, namely issues that are purely hypothetical in nature and are not based on actual, real facts. Quite the opposite, it has been stressed in literature that when courts do get involved in social rights cases, their interventions are measured and cautious, and courts adjudicate on specific social matters by evaluating the pragmatic and restricted basis upon which these matters are justified.[160]

Courts thus arrive at decisions in a circumscribed number of cases, while they generally deliver orders with a narrow remedy with limited real impact for the involved parties. Even on occasions when courts might issue a more general order, this is often by means of a general requirement, leaving to the policy makers, in this way, the room to manage and design the actual framework for implementation.[161] Surely, court decisions of wider social interest may have a symbolic impact for the public conscience, but in real, practical terms these judgements cannot impact state and government public budgets because they are not involved in the administration or management of such public funds. Thus, the latitude within which judges can navigate, even when they decide upon highly

[159] Here I refer to case-law produced by lower Greek courts, during the implementation period of MoU-mandated austerity measures in Greece. Those judgements were linked to legislative reforms at a later stage. For more on this, see Part III. Chapter 5.1. iii. Lower Courts and the Austerity Measure of Labor Reserve.
[160] McDermott 297, 298
[161] Daniel M. Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in Daniel M. Brinks and Varun Gauri (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) 329

intricate policy-related matters, is constrained within the reach of the competencies and tools that courts already possess. To use the words of Helfer and Slaughter "[t]he *scope* and *gravity* of the disputes presented to courts is partially within the control of courts themselves and partially within the control of the states that establish them."[162]

Reversing the above angle, courts have also been criticized, not for creating change but rather for *not* creating change. Further elaborated, it has been presented above that social rights jurisprudence has been criticized for being too case-specific or too narrow to generate any meaningful large-scale social change, especially for the socially excluded and the poorer parts of the society. In their riposte, supporters of justiciability have argued that attention to the particular, concrete, material practices together with consideration of the marginalized population units and of the tangible conditions of their exclusion, is what makes social rights infringements justiciable, precisely due to the fact that social disparities are mediated through particular contexts.[163] Thus, in deciphering relevant objections, advocates of social rights justiciability emphasized that the empirical and spatial parameters are significant, regardless of their scale and magnitude. In this connection, it has been further stressed that empirical and situated factors do not take away from the meaning or the impact that judicial enforcement of social rights can have on a smaller or larger group. Rather, the acknowledgement of the geographical and lived dimension has been found to reaffirm the fact that there is no homogenizing and unified experience of the enjoyment of such rights and that particularities and structural inequalities need to be taken into consideration on the basis of their context and situated knowledge.[164]

In light of the above, commentators voiced their concerns about the potential majoritarian bias, neglect or violation of such rights by the democratic majority in fashioning legislative and policy regulations.[165] In this respect, it was submitted that judges ought to ensure and rebalance, if necessary, the legislative focus so as to assure that the perspectives of socially marginalized groups are included and that protection of such groups is provided.[166] In doing so, it was held that judges determining social rights cases

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[162] Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 (2) The Yale Law Journal, 330; emphasis added.

[163] Jean Carmalt, 'Neoliberal Geographies and the Justiciability of Economic and Social Rights' in Gillian MacNaughton and Diane F. Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press 2018) 305

[164] For an analysis of economic and social rights protection on the ground as these have been actualized in different countries around the globe, see Gillian MacNaughton and Diane F. Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press 2018); Helena Alviar García, Karl E. Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical inquiries* (Routledge 2015)

[165] Scott and Macklem 17; See also David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford University Press 2008) 123, 124

[166] Fabre, 'Constitutionalising Social Rights' 284; See also King, *Judging Social Rights* 153, 181 et seq.; Boyle 21

ought not to be taken as overstepping their appointed role in principle, for merely embarking on such task. Instead, it was counterpoised that judges are expected to hold other political branches accountable and this is what they are anticipated to do when judging on social rights too.[167]

Bound up with the criticism on the limited potential of courts for social change, skeptics vilified social rights judgements for allegedly serving the already privileged classes of the society. As we have seen above, such critics, being leery of social rights and of the entire human rights edifice, have called into question the practice of bringing social claims before courts on the grounds that this practice *depoliticizes people* and compromises the political process. However, as one would expect, such arguments have not been met without doubt either. Rather, advocates of social rights legalization have found such criticisms to be "deeply misleading"[168] and profoundly mistaken. What has been submitted instead was that social rights debates do in fact have the potential to mobilize "rather than lead to *apathy*, to motivate individuals and encourage them to engage with questions that they might otherwise only see as an optional matter, rather than an urgent political duty."[169] In addition, and cutting against the "fatalism"[170] in current social rights scholarship, which purports that court rulings always preserve and foster the interests of the *haut monde*, recent studies have suggested instead that decisions on behalf of higher-income groups can sometimes serve as a strategy and a vehicle to help increase, rather than crowd out, the possibility of a pro-poor, transformative social rights agenda.

Moving along to the criticism that courts lack the expertise or tools to adjudicate upon social-rights cases, proponents of legalization stressed that judges, when being called to decide upon a wide range of intersubjective matters, more often than not rely on other professionals and their scientific expertise, as is sometimes warranted in complex technical or medical cases. With this in mind, it has been counter-submitted that if courts are capable of evaluating and drawing conclusions in cases that include highly technical and specialist knowledge, then the presumption that they are unable to do so in social rights cases, due to lack of relevant expertise, cannot be sustained. To endorse this argument, supporters have countervailed that when it comes to polycentric, economic-related and value-laden policy matters, judges can seek for outside expertise if needed by appointing an *amicus*

[167] See, Part III. Chapter 6. Social Rights Litigation and Adjudication During the Crisis: A Critical Appraisal.
[168] Mantouvalou, 'In Support of Legalisation' 108
[169] Ibid 108, 109
[170] David Landau and Rosalind Dixon, 'Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (Cambrige University Press 2019) 113

curiae, that is, a 'friend of the court' such as advisory bodies or individual accredited experts, who can assist judges in evaluating large amounts of evidence and technical information.[171]

Within this framework, it has been further suggested that courts can pursue an incremental approach in assessing social cases. Judicial incrementalism, as Jeff King has vigorously stressed, means that judges interpret and process hugely complex data and information, not in a holistic but rather in a fragmented way. In this way, by narrowing down the scope and set of relevant variables, judges are held to create better epistemic conditions that do not inhibit the realization of social and economic rights.[172] Finally, yet importantly, concerning the 'lack of proof' criticism in complex and polycentric social rights cases, scholars rebuffed such accusations by arguing that the combination of the courts and the legislation provides enough qualification mechanisms and that, in any case, the involved parties are required to also provide sufficient and precise information so as to allow courts to respond in a complete and accurate manner. Otherwise, the cases are dismissed as impermissible at a procedural level and are not further assessed on merits.

Inevitably, the prolific scholarship and complex spectrum of arguments and counterarguments, presented above, have been somewhat condensed and synopsized for the purposes of this study. However, the aim of this chapter has been to make an introduction to the existing dense corpus of social rights justiciability scholarship in order to demonstrate that issues on the judicial and state enforcement and on the conceptualization of social rights have been controversial and intricate with no explicit demarcations in place. Throughout the rest of the thesis, we shall return to some of these controversies, as we take a more concentrated approach to the austerity jurisprudence of the crisis years in financially assisted countries of the European South and as we attempt to extrapolate this information to a wider context concerning social rights theory.

At the beginning of this chapter, it has been said that defining justifiability or assessing the justiciability debate in all its scope is a formidable task. Coming to an end, this premonition still holds. That is to say, there are many more and heavier layers to the aforementioned criticisms and countercriticisms that require further scrutiny, but which have remained nonetheless outside of the conventional perimeter of justiciability analyses. These layers take us to foundational theoretical differences traversing the frameworks from which these positions depart, and touch upon fundamental questions about how crisis, change, individuality or sociality are perceived in each one of these frameworks. These

[171] Cf. Boyle 16; Nolan, Porter and Langford 17
[172] King, *Judging Social Rights* 289

layers constantly interact with the very concept of social rights to the extent that, as it will be examined later, the justiciability and the meaning of social rights are meshed into one concept. A glimpse of this mazelike layering of justiciability has been caught in the preceding pages, where it has been shown that, depending on the beholders' position, courts can either be criticized *for* generating or *failing* to generate social change.

In concluding this chapter and as we continue with the analysis, what needs to be borne in mind are precisely all those evident and less evident layers to the arguments and counterarguments presented above and the philosophical assumptions upon which these criticisms are essentially built. To briefly summarize, I would argue here that analyses in favor of the justiciability of social rights, which have endorsed the lived experience and contextual dimension of rights, have been usually found at the intersection of law and anthropology and critical social theory which in recent years have been explored in known as post-colonial and de-colonial approaches to law. These approaches, I would venture to add, have been developed from theoretical frameworks of a spatiotemporally situated knowledge and historical and cultural specificity, as opposed to ideal theories.[173] On the other hand, criticisms levelled against justiciability, made on the basis of the courts' inability to serve the poor and socially excluded parts of the society, have generally been sustained by critical legal scholars, who have advocated at a political level in favor of the social welfare state. The latter has been performed at the level of legal theory from a socio-legal and systems-analytic methodological angle, while commentators of that school of thought have been widely led, in approaching the subject-matter of social rights, by different versions of the philosophical ideas of universalism, idealism and rationalism.

Mindful of those subtleties, the thesis embarks in the ensuing chapters on a more focused examination of such criticisms as these have directly or indirectly been exerted in the crisis jurisprudence of austerity-stricken countries of South Europe. The afore-mentioned examination will help us navigate understandings of social rights that have been employed during the Euro-crisis and in post-crisis commentaries. The presented justiciability debate herein will also be of use when, later in the analysis, we weave together academic criticisms and countercriticisms to social rights justiciability with their concrete application during the crisis, as well as when we reflect on conceptualizations of social rights and on the ethics that inform such conceptualizations.

[173] On the distinction between cultural particularism and universalism, see also Part I. Chapter 1.5. Methodological Considerations.

5. Austerity Measures Before the Courts: A Case Study for Greece and Portugal

In the following paragraphs, the analysis turns to the jurisprudence itself. In investigating how courts have dealt with austerity measures encroaching upon social rights,[1] the thesis takes Greece and Portugal as two particularly illustrative case studies. Case law abounds, as several austerity-related cases have been brought before supranational and national tribunals as well as monitoring bodies during the critical period of the implementation of the MoUs in the examined case countries. However, this chapter aims neither to offer an exhaustive account of the austerity and MoU-related cases nor to provide for a detailed commentary of the facts of such cases and the rationale of the corresponding judgments. Surely, the review systems as well as the interpretative approaches and reasoning of the judiciary "varied from court to court, jurisdiction to jurisdiction, and over time."[2] Mindful of this, I do not wish to claim here that the selected case law offers an exhaustive and complete picture of the judicial reality of the crisis years in the examined countries. Yet, the jurisprudence scrutinized immediately hereafter, aside from the normatively interesting legal observations that it provides, serves significantly as a *mise en scène*, where not only legal doctrines and norms but also the values and justifications underlying them have been highlighted, put to test, and sculpted. For that, I take that the significance of these judgments does not simply draw on their rationale, but it falls back on the widescale debates that these judgments sparked at the level of social theory.

5.1. The Domestic Approach

1. Greece

i. Brief Overview of the Greek Judicial Power and Review System

Before proceeding with assessing the selected austerity-related jurisprudence in Greece, it would be helpful to provide here a brief introduction to the judicial power and judicial review system in the Greek legal order. In short, the Greek legal system is situated within the civil law tradition, is characterized by a strong positivist liberal tradition, while it is built around the *summa divisio* principle of public and private law.[3]

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[1] In this chapter, the use of the term 'social rights' concerns mainly labor rights, social security and pension rights within the context of the examined case law.

[2] Aoife Nolan, 'Constitutional Social Rights Litigation and Adjudication in a Time of COVID-19' (*IACL-AIDC Blog*, 2020)

[3] For an analysis of the Greek judiciary, see also Ioannidis, 'The Judiciary' 117

The judicial system of Greece consists of three jurisdictions, notably the civil, criminal and administrative jurisdiction, which, in turn, are organized in three instances.[4] These are, the lower courts of First Instance,[5] the higher Appellate Courts and the three Supreme Courts of Greece. The three highest courts of Greece are the Supreme Civil and Criminal Court of Greece (Άρειος Πάγος), the Hellenic Council of State or Greek Council of State (Συμβούλιο της Επικρατείας ή Ανώτατο Διοικητικό Δικαστήριο της Ελλάδας),[6] and the Hellenic Court of Audit (Ελεγκτικό Συνέδριο). The Hellenic Council of State is the Supreme Administrative Court of Greece and "has general jurisdiction over the petition for the annulment of administrative acts, according to the French model of the Conseil d' État, in the first and last degree."[7] The Hellenic Court of Audit is the state's Supreme Financial Court and has a remit to audit the use of public expenditures by the state and by regional government authorities.[8]

The Greek legal order does not have a centralized constitutional review model,[9] meaning it lacks a Constitutional Court that is exclusively empowered to declare a statute of ordinary law unconstitutional. Instead, the judicial review model manifests a *diffuse*, *incidental* and *in concreto* character. The latter has been described in legal scholarship as "an original version of a mixed system that combines elements of both strong-form and weak-form review."[10] Essentially, that means that courts at all instances are vested with the

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[4] For a summary of the judicial system in the Greek state, see also the official data provided at https://www.mfa.gr/missionsabroad/en/about-greece/government-and-politics/judicial-power.html <last accessed 12.07.2020>

[5] Civil courts are divided into: District Civil Courts (*Ειρηνοδικείο*); Courts of First Instance with Several Judges (*Πολυμελές Πρωτοδικείο*); One-Member Courts of First Instance (*Μονομελές Πρωτοδικείο*); the Courts of Appeal (*Εφετείο*); see for an overview https://e-justice.europa.eu/content_ordinary_courts-18-el-maximizeMS-en.do?member=1 <last accessed 21.07.2021>

[6] In the Court's official website, it is referred to in the English language as 'The Hellenic Council of State' http://www.adjustice.gr/webcenter/portal/SteEn/Home?_afrLoop=6840327706926346#!%40%40%3F_afrLoop%3D6840327706926346%26centerWidth%3D100%2525%26showHeader%3Dtrue%26_adf.ctrl-state%3D19lsrtpy4c_4. The present thesis uses this as the official denomination of the court. Hereinafter Hellenic Council of State or Council of State.

[7] Xenophon Contiades and Ioannis A. Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013) 201

[8] See the official data at the Hellenic Court of Audit https://www.elsyn.gr/en/node/1213 <last accessed 21.07.2021>

[9] The dominant judicial review model in continental Europe is considered to be the so-called 'Austrian' or 'Kelsenian' model of constitutional review, whose main features are a centralized model of constitutionality review with the existence of a Constitutional Court at a national jurisdiction level, the abstract review and the erga omnes effects of the decisions on the unconstitutionality of a statute. For an introduction to the various models of constitutional control, see Garrote Campillay 8 et seq.; Tania Groppi, *The Relationship Between Constitutional Courts, Legislators and Judicial Power in the European System of Judicial Review: Towards a Deentralised System as An Alternative to Judicial Activism (*Conference on "Judicial Activism and Restraint Theory and Practice of Constitutional Rights" Batumi, Georgia 13-14 July 2010, *European Commission For Democracy Through Law (Venice Commission), 7 July 2010)* 2, 3

[10] Kaidatzis, 'Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It ' 11, 17

capacity to judicially review the constitutionality of a statute, while they can also review its compatibility with supranational legislation and international law. Judgments have, as it has remarked in theory, "at least formally, only an *inter pares* effect, and the constitutional question is posed in the course of ordinary litigation, since there is no legal means targeting specifically and directly the unconstitutionality of a norm itself."[11] In the occasion that an ordinary court finds that a law is contrary to the Greek Constitution, it can set this aside and not apply it in the case pending before it, yet it has no competence to annul this law.[12]

Notwithstanding, the Supreme Civil and Criminal Court of Greece and the Hellenic Council of State are usually entrusted with interpreting the Greek Constitution and with invalidating statutory provisions, which are found to be unconstitutional. That is say, there are mechanisms allowing for the concentration of the constitutionality control within the Council of State's Plenum, even though the latter can only declare the unconstitutionality of a norm and cannot annul it.[13] Nevertheless, "its judgments have a wider effect than this rule reveals."[14]

ii. Judicial Asymmetries within a Symmetric Crisis: The Passive and Active Phase of the Apex Courts

This section does not touch upon the voluminous case law that has been produced by Greek highest and lower courts and which, in one way or another, relates to the perils of the crisis and the austerity reforms implemented as part of the signed MoU agreements.[15] Arguably, the body of austerity jurisprudence is ample, albeit in relevant legal

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[11] Lina Papadopoulou, *Fact sheet on legal foundations for fiscal, economic, and monetary integration: Greece (*EMU Choices: The Choice For Europe Since Maastricht; Salzburg Centre of European Union Studies *)*1

[12] Ibid

[13] Ibid

[14] Ibid

[15] Among the considerable case law that has been produced throughout the critical period of 2010-2018, commentators have focused on a number of key judgments, including but not limited to: *Hellenic Council of State* Decisions No 353/ 2012 (Plenum) (on the 1st MoU); No 1285–6/2012 (Plenum) (on pension reductions introduced by Law 3863/2010) ; No 1972/2012 (on surtax on properties with an electricity connection); 1685/2013 (on surtax upon personal income tax for 2010); 3354/2013 (on temporary pre-pension applying to public servants); No 2307/2014 (on the 2nd MoU); on a critical analysis of the Hellenic Council of State's Decision No 2307/2014 on the 2nd MoU see Michalopoulou; No 1901/2014 (on the application for cancellation of the joint ministerial order of the Greek Ministry of Finance (KYA)02/2013 mandating the abolition of the public broadcasting under the name Hellenic Broadcasting Corporation (ERT SA), on violation of freedom of expression and information and on collective redundancies); No 1116-1117/2014 (on Private Sector Involvement 'PSI' cases and property damages suffered by bondholders); see also Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 8, 9; No 734/2016 (on retirement bonuses); No 1902/2014 (on the transfer of public real estate assets to a privately operating fund under the name Hellenic Republic Asset Development Fund); No 1906/2014 (on privatization schemes of public services companies; privatization of the state-owned Athens water supply company); No 2192/2014 (on salary cuts applying to military and public security servants); No. 3169/2014 (on temporary pre-pension applying to vocational trainers); No 3404–3405/2014 (on salary cuts applying to special scientific staff of

commentaries, however the evaluation of the amplitude and intensity of the austerity case law material varies. For instance, a legal study dated in 2016 recorded that more than a hundred and thirty judgments concerning the vexed question of rights protection during the economic crisis have been issued by the Greek Council of State alone.[16] Commentaries like this could indicate the judicial reality that the implementation of the MoUs has ignited. Bakavou paints a different picture, though, that it is worthy of quoting in detail here. Occasioned by the early judgments of the Supreme Courts in Greece, which are examined below, she writes:

> "[i]nterestingly, as time passed, *fewer* cases were brought before the courts, due to the high cost of litigation and the 'financial crisis case law' of the Greek courts, which more often than not upheld the legality of the contested act on grounds of the public interest to avoid default, given the 'dire financial straits' and 'extraordinary emergency' that befell the Hellenic Republic. Consequently, *it was felt* that the courts were *powerless* to prevent the erosion of the welfare state."[17]

Certainly, observations like this, which are usually sustained by assumptions and rough estimates, need to be substantiated by empirical data and studies on the litigation culture of one's jurisdiction and the ratio and number of cases admitted *prior*, in the *midst*, and *post* the crisis years, among other factors. At the face of it, it may seem that "backlash consciousness"[18] of judicial attitude may have indeed discouraged litigants from bringing their cases at higher instances of justice. At the same time, however, it is my view that the

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independent authorities); No 532/2015 (on real estate tax); No 2287–2290/2015 (Plenum) (on pensions cuts applied to the public sector); on those decisions see the commentaries George Karavokyris, 'Η "κρίση-μη" πολιτικότητα του ελέγχου της συνταγματικότητας των νόμων: Σκέψεις με αφορμή τις ΟλΣΕ 2287-90/2015 ' (2016) 68 Revue Hellénique des Droits de l'Homme and Patrina Paparrigopoulou-Pechlivanidi, 'Περικοπές κύριων και επικουρικών συντάξεων-Αντισυνταγματικότητα διατάξεων ' (2015) 7 Θεωρία και Πράξη Διοικητικού Δικαίου; No 479/2018 (Plenum) (on university professors); No 431/2018 (Plenum) (2018) (on wage reductions applied to doctors of the national healthcare system); *Hellenic Court of Audit* Decisions No 4327/2014 (on judges' pensions); No 4707/2015 (on wage reductions applied to the armed forces); *Supreme Civil and Criminal Court of Greece* Decision No 11/2017 (on the Greek KTEL (Association of Bus Operators) staff and the conditions for the dismissal of regular or temporary staff); for an elaborate analysis of the case seeKonstantina Bourazeri, 'Διαχείριση της κρίσης μέσω Μνημονίων Συνεννόησης: Με αφορμή την υπ'αρι. 11/2017 απόφαση της Ολομέλειας του Αρείου Πάγου' (2017) 76 (9) Review of Employment Law . For a detailed documentation and analysis of many of the above-mentioned cases Gerapetritis 128; Nikolaos A. Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' (2020) 26 (2) European Public Law 427, 428.

[16] See E. Galani, M. Nanou and Ap. Papathomas, 'Επισκόπηση Νομολογίας για τα Θεμελιώδη δικαιώματα στην Οικονομική κρίση ' (2016) 8–9/2015 Θεωρία και Πράξη Διοικητικού Δικαίου as cited in Markakis 261

[17] Maria Bakavou, 'Salus Rei Publicae Suprema Lex Esto? Welfare State Reforms Before the Greek Courts' in Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press USA - OSO 2021) 166; emphasis added.

[18] Bakavou contends that backlash consciousness has been an important feature of the judicial attitude towards judicial dilemmas posed by the financial crisis, a reality that, according to Bakavou, has been obvious in the Greek and Portuguese case law; see ibid 166 note 188

bulk of case law produced by lower courts, which is examined in the ensuing paragraphs, shows that people may have still sought to safeguard their rights through lower courts, despite the discouraging first reaction of highest courts.

For a fact, the ruling that has been given most prominence in early commentaries has been the first MoU-related judgment[19] that the Council of State handed down in 2012.[20] However, going past a restrictive assessment of this judgment alone, the analysis here is rather interested in two things. *First*, to outline an overview of the most notable decisions of the Greek crisis jurisprudence, seen from the angle of social rights protection. *Second*, to sketch the chronicle of judicial adjudication during the crisis years and highlight how this has been divided into an initial passive phase, followed by a more active one. This relatively descriptive part will be of use later on, when we engage with conceptual issues on rights advocacy and judicial activism and as we undertake a more in-depth assessment of the cases and their relation to an understanding of social rights as *social ethics*.

Starting from the second point of inquiry, several commentators have already pointed out that the highest courts in Greece, with a particular focus on the Council of State, have showed inconsistency or, in the words of the former UN Independent Expert, Juan Pablo Bohoslavsky, they have manifested a strong "disjuncture"[21] with early approaches on the austerity measures. More specifically, apex courts were criticized for responding rather asymmetrically to the reviewed austerity measures, which have been symmetrically imposed nationwide.[22] Specialists have generally been unanimous in distinguishing different periods in the judiciary's response to the measures mandated during the MoU crisis, even though there have been differences when pinpointing the

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[19] Hellenic Council of State (Plenum) Decision No 668/2012 on the constitutionality of Law 3845/2010 according to which the 1st MoU was enacted (application date 26.07.2010; publication date 20.02.2012); hereinafter Decision No 668/2012 or first MoU decision.

[20] Cf. Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Bruno de Witte, Claire Kilpatrick and Thomas Beukers (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 286, 297; Markakis 261

[21] Bohoslavsky, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights on his mission to Greece from 30 Nov. to 8 Dec. 2015* 14 para 50, 51, where it is noted with regards to Greece in particular: "Several laws implementing austerity measures were challenged in court. While courts followed a more *cautious* approach initially, more recent judgments mark a *stronger disjuncture*."; emphasis added.

[22] As a side note here, despite what the bold title of this section suggests, the symmetric imposition of the measures does not necessarily presuppose that the intensity of the crisis has been symmetric in a strict sense, spread evenly across the country or at a simultaneous pace. Since the usual discourse surrounding this crisis is placed in nationwide and state-centric terms, this thesis necessarily follows this conventional paradigm and does not engage with the variations and particularities that concern intrastate comparisons, be it urban, decentralized, regional or other. However, the present author acknowledges that the economic crisis, seen from an inland and intrastate perspective, is a much more delicate and intricate discussion that needs to take into consideration the qualitatively uneven and timely different appearance and development of the socio-economic effects of the crisis in urban, suburban and peripheral regions of the country.

exact timeframes. Delving into the specifics, most scholars have discerned *two* judicial phases in the judiciary's stance. Namely, an initial phase of judicial deference extending from 2010 to 2014, followed by a more proactive posture from 2015 onwards, during which a distinct jurisprudential turn has been identified.[23] Other commentators[24] have detected three judicial waves, which roughly corresponded "to the three adjustment programs, agreed in May 2010, March 2012, and July 2015, respectively."[25] In singling out these phases, the identified periods have corresponded to an initial period of judicial deference stretching from 2010 to 2012, which has been succeeded by a second stage of moderate contestation spanning from 2012 to 2014, and which eventually culminated in a third juncture of "judicial activism"[26] covering the years from 2015 to 2018.

In assessing the shifts in judicial attitude, researchers have attributed the differences in the stance of the highest courts to various causes. For instance, Akritas Kaidatzis has argued that changes in judicial attitudes have seemed to coincide with electoral cycles in Greece, since in both the election years of 2012 and 2015, the anti-austerity public sentiment was on the rise, leading one to assume that courts might have aligned themselves with popular belief.[27] Placing their focus on both institutional and political factors, other commentators have suggested that the different phases were the result of the incidental constitutionality review system of the Greek judicial model, coupled with a variety of other non-institutional factors.

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[23] Marketou identifies a passive first phase extending from 2010 to 2014 and a more active one from 2014 to date; see Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty' 195, 196. Tsiftsoglou identifies a passive period from 2010 to 2014, and a second more active one from 2014 up to date; see Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective'. In a similar vein, Gerapetritis talks about a first phase of the economic crisis from 2010-2015, when the Council of State consistently upheld the constitutionality of austerity measures, followed by a turning point for the case law in 2015 and the Council's jurisprudence; see Gerapetritis 130. Bakavou also singles out two judicial phases of the Council of the State, namely a period between 2012-2014, when the court upheld the austerity measures, and a second one from 2015 onwards that signified "a shift from the previously established case-law"; see Bakavou 171 et seq. See also the precis of the contribution in the edited volume as written in the online version of the publication, which is not included in the printed version of the essay but is to be found under the following link https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198851776.001.0001/oso-9780198851776-chapter-6 <last accessed 12.07.2021>. Papadopoulos also identifies a shift in the Council of State's reasoning regarding austerity measures Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 428

[24] Akritas Kaidatzis, 'Socio-economic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' August 2020 Populist Constitutionalism Working Papers No 2 15; Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283

[25] Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283

[26] Ibid 284 et seq.

[27] Ibid 283

In elaborating on that thought, analysts stressed that the courts' composition and different presidencies at the time of each hearing, together with the very timing of the proceedings and the nature of the disputes, have all influenced the courts' positions towards the impugned measures.[28] Concerning the content of the cases and while looking at the Greek domestic jurisprudence comparatively, scholars have contended that stricter scrutiny has often been applied in the review of state expenditures. The latter was identified to include reductions in pensions and special or regular payroll cuts in high-paid categories of public officials, such as judges, military personnel, and university professors.[29] On the contrary, scholars observed that government measures aiming at increasing state revenues through tax reforms have been reviewed with much more leniency by the judiciary. In this way, it was held that the judiciary granted plenty more leeway to the executive to discriminately apply its social reform policies between government revenue and government spending.[30]

a. The Trial of the Memorandum

During the early years of the crisis in Greece, the Hellenic Council of State[31] was called upon to decide on the constitutionality of austerity measures, prescribed by the first financial assistance package handed to Greece,[32] which mainly touched upon salary and pensions cuts in the public sector, among other socially relevant issues. On July 26, 2010, the Confederation of Public-Sector Trade Unions (ADEDY) alongside thirty other professional organizations, legal entities and natural persons, lodged an application before the Council of State against the Greek Ministers of Finance, Labor and Social Security. A few months later, in November 2010, the Council of State in full plenary session comprising 54 judges, tried what would later become one of its most featured cases in legal

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[28] Anna Tsiftsoglou, 'Beyond Crisis: Constitutional Change in Greece after the Memoranda' (*LSE Greece@LSE*, 2017)

[29] Stylianos-Ioannis Koutnatzis and Georgios Dimitropoulos, ' I-CONnect Symposium on "The Euro-Crisis Ten Years Later: A Constitutional Appraisal"–Part III–Crisis and Tax Reforms in Greece: Towards Judicial Empowerment as a Means to Overcome Administrative Deficiencies' (*International Journal of Constitutional Law Blog*, 2019)

[30] Tsiftsoglou and Koutnatzis have strongly criticized the highest courts for manifesting a different approach between the review of state expenditures and state revenues. They held that this approach has been untenable on constitutional grounds and that constitutional limitations should apply with equal strength with respect to both state expenditures and state revenues; see Anna Tsiftsoglou and Stylianos-Ioannis Koutnatzis, 'Financial Crisis and Judicial Asymmetries: The Case of Greece' (Paper presented in the 4th ICON-S- International Society of Public Law Conference, 'Courts, Power, Public Law', University of Copenhagen Faculty of Law, July 5-7, 2017 [on file with author])

[31] Council of State or Council hereafter.

[32] See EC, *The Economic Adjustment Programme for Greece*

scholarship at a domestic level[33] but also outside the narrow national borders and at an international level.[34]

In what has been called the "Trial of the Memorandum,"[35] the petitioners requested the annulment of multiple administrative acts providing for cuts in wages and pension reductions in the public sector as well as for the discontinuation of the current holiday allowance. All of these reforms were stipulated in Law 3845/2010 which has been annexed into national legislation and ratified the first Greek MoU.[36] As part of their defense line, plaintiffs argued that the contested acts were in breach of their statutory rights, as enshrined in the Greek Constitution and in ratified international treaties.[37] In addition, applicants put forward the claim that the legislature has failed to consider, before taking such grave reform measures, the alternative of adopting less onerous ones.[38] Finally, yet importantly, applicants requested that the Council apply for a preliminary ruling from the CJEU on the question of whether the measures taken by the Greek Government in application of the MoU conformed with EU primary law.[39]

The delivery of the judgment did not come until fifteen months later, when in February 20, 2012, the Court[40] rejected the motion for the annulment of the secondary legislation implementing the first MoU in Greece.[41] In its momentous *Decision No*

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[33] An initial study conducted in the online Greek legal database NOMOS produced an outcome of 249 cases in lower and higher courts in Greece that are relevant or refer in their rationale to Council of State Decision No 668/2012: source https://lawdb.intrasoftnet.com <last accessed 12.07.2021>

[34] Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' 286, 297; Markakis 261

[35] See Panagiotis Pikrammenos, 'Δημόσιο Δίκαιο σε Ἐκτακτες Συνθήκες από την Οπτική της Ακυρωτικής Διοικητικής Διαδικασίας' (2012) 71 Επιθερεώρηση Εργατικού Δικαίου 385

[36] Explanatory Preamble to Law 3845/2010 (Greek Government Gazette A'65/06.05.2010) (on Measures for the application of the support mechanism for the Greek economy by Euro area member states and the IMF). See the content of Law 3845/2010 in Greek under the official website https://www.minfin.gr/en/nomoi/-/asset_publisher/R70RHvx4EwU1/content/nomos-3845?inheritRedirect=false <last accessed 16.07.2021>. For an English partial translation of Law 3845/2010, see ILO NATLEX Database of national labor, social security and related human rights legislation https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=84784 <last accessed 16.07.2021>. For an overview of Law 3845/2010 and the measures taken towards the implementation of the first Greek MoU, see also EC, *Communication from the Commission to the Council. Follow-up to the Council Decision of 10 May 2010 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 (*COM(2010) 439 final, *European Commission, 19 August 2010)* 3, 9, 11

[37] Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 425

[38] Hellenic Council of State Decision (Plenum) No 668/2012 para 35, rejecting that claim raised by the plaintiffs.

[39] Nikolaos Gavalas, 'Το Μνημόνιο μεταξύ Σφύρας και Ἀκμονος: Από το ΣτΕ στο Ε.Δ.Δ.Α ' (2013) 72 (12) Επιθερεώρηση Εργατικού Δικαίου 756 par. 753, 760 para 716

[40] Unless otherwise specified, 'Court' refers to the Hellenic Council of State in this section.

[41] Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283

668/2012,[42] the Plenum of the Hellenic Council of State rejected all grounds *in toto* and *ratione materiae*, while it held that the measures under review were constitutional. Interestingly enough, the Council of State not only refrained from addressing the request for a preliminary ruling by the CJEU,[43] but it completely disregarded this without providing any justification whatsoever. In a nutshell, the Council determined that the contested measures were justified on the basis of a pressing and urgent need, while they were dictated by an overriding public interest rationale that would secure the recovery of the country at a macrolevel. In reviewing the measures, the Council applied weak judicial scrutiny and gave strongly deferred to the legislature and the executive.

The Council's landmark decision, being the first judgment issued by the highest court in a country subject to a MoU program during the late financial crisis, featured as a 'key judgment'[44] in legal commentaries assessing constitutional developments in Greece from then on. No less significantly, this judgment also set the tone in comparative inter-court and cross-judicial analyses during the crisis years. This has been especially the case with the jurisprudence produced by the Portuguese Constitutional Court, which handed down its first MoU-related judgment only a few months later, in July 2012.

In a quite detailed judgment, extending over 129 pages[45] and including an unusual number of dissenting opinions, the Council started from a detailed historical assessment of the national economy's trajectory. In the course of its reasoning, the Court went on to cite in great lengths the Explanatory Report to the national legislation incorporating the MoU,[46] while stressing the notion of 'public interest' in times of a severe national budgetary crisis. In its reasoning, the Council stated that the MoU did not constitute an international treaty[47] since it did not transfer "to international organizations responsibilities that, according to the Constitution, are exercised by Greek State authorities."[48] In this connection, the Council ruled that while the first MoU may have been a product of international cooperation, the measures provided in the relevant national statute were

[42] Hellenic Council of State (Plenum) Decision No 668/2012 on the constitutionality of Law 3845/2010.
[43] Richard Bellamy, *Rethinking Liberalism* (London: Pinter 2000) 71; see also in Christodoulidis, 'The European Court of Justice and "Total Market" Thinking'
[44] Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' 286, 297
[45] Gerapetritis 129; Kaidatzis, 'Socio-economic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 16
[46] Law 3845/2010 (Greek Government Gazette A'65/06.05.2010)
[47] Gerapetritis 129; Bakavou 169
[48] Hellenic Council of State Decision No 668/2012 (Plenum) (20 February 2012), para 27. This translation is not an official translation provided by the court in question. Translation of the original text from Greek to English has been provided by the present author and capitalization kept as in the original text of the judgment. Text in the Greek language reads as follows: "[…] εφ' όσον με αυτήν δεν μεταβιβάζονται σε όργανα διεθνών οργανισμών αρμοδιότητες που, κατά το Σύνταγμα, ασκούνται από όργανα της Ελληνικής Πολιτείας."

merely the Greek government's choice and political agenda in framing the state's national policy program.

Therefore, the Council, as it has been interestingly observed in theory, "ruled that the Greek legislators *took ownership* of the policies introduced to handle the financial crisis effects as the state was obliged to *honour* the bilateral state agreements."[49] This particular anxiety has been reflected throughout the corpus of the judgment, as the measures were presented to be prescribed by "unprecedented adverse economic conditions and the biggest fiscal crisis of the last decades, which has shaken the credibility of the Country; has caused great difficulties in trying to meet the country's borrowing needs and has posed a serious threat to the National Economy."[50] Following on from this, the Council channelled the concept of emergency indirectly through the cause of public interest by implicitly resorting to the concept of exceptional circumstances.[51] In this context, the Council held that the austerity measures had been mandated by an urgent social need for the purposes of addressing a severe budgetary and financial crisis.[52] Remarkably, the Council has further justified this on the basis of the budgetary discipline that the country was required to manifest, not only for the preservation of its own fiscal balance but for the stability of the Eurozone in its entirety.[53]

The Council further ruled that the contested measures would indeed have a significant financial impact on the state budget and would become an unreasonable burden on the public finances to the detriment of the desired financial recovery and sustainability of the economy. Even though both the Greek Constitution and the ECHR included social protection clauses, it was underlined that these did not rule out the possibility of cuts in the face of a pressing necessity, such as in the case of a grave financial situation, and as long as the burdens were fairly distributed among citizens. To that end, the Council applied a proportionality test, on the basis of which it concluded that the measures were mandated by "the 'compelling public interest of consolidation of public finances' (or 'financial public

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[49] Bakavou; emphasis added.

[50] Hellenic Council of State Decision No 668/2012 (Plenum) (20 February 2012), citing an excerpt taken by the Explanatory Preamble to Law 3845/2010 (Greek Government Gazette A'65/06.05.2010). This translation is not an official translation provided by the court in question. Translation of the text from Greek to English has been provided by the present author and capitalization kept as in the original text of the judgment. Text in the original Greek language reads as follows: "[…] αντιμετώπιση των πρωτόγνωρων δυσμενών οικονομικών συνθηκών και της μεγαλύτερης δημοσιονομικής κρίσης των τελευταίων δεκαετιών, η οποία έχει κλονίσει την αξιοπιστία της Χώρας, έχει προκαλέσει μεγάλες δυσκολίες στην προσπάθεια κάλυψης των δανειακών αναγκών της και απειλούν σοβαρά την Εθνική Οικονομία."

[51] On that point see also the analysis at Christina Akrivopoulou, 'Facing l' etat d' exception: the Greek crisis jurisprudence' (2014) 2 (3) International Journal of Human Rights and Constitutional Studies, 284

[52] Hellenic Council of State Decision No 668/2012 (Plenum) (20 February 2012), paras 35, 38

[53] Ibid, para 35

interest')."[54] In the name of the paramount public interest, the Council proceeded in this regard with "the *'en bloc'* treatment of all measures"[55] and thus lowered the bar of justification for the legislator, who was not requested to demonstrate that each measure individually has been necessary, but was rather required to merely show that the whole programme, to which all measures have been part of, was actually necessary.[56]

Along these lines, the impugned measures were deemed necessary for the restoration of the economy and were taken to be exceptional and temporary.[57] In assessing necessity, the Council did not compare the specific measures adopted with other possible alternatives, but rather rolled over the burden of proof to the plaintiffs. In this respect, applicants were held responsible for establishing the link between the contested austerity reforms and the deterioration of their living conditions and for manifesting how these measures affected their life quality in real time. As a result, the adoption of the challenged policies was considered justified in preventing the country from wallowing into "the biggest fiscal crisis of the last decades,"[58] and from collapsing into state insolvency.[59]

Moving along, the Council found that the disputed measures were conformed with the Greek Constitution and with Article 1 of the First Protocol to the ECHR.[60] In more detail, the Council, upon inquiring into the continuality of the measures at issue, found that there had been no breach of the principles of equality and equality before public charges.[61] Regarding the constitutional right to property as stipulated in Article 17 and the principle of proportionality, as safeguarded under Article 25 para 1 of the Greek Constitution, the Court arrived at the conclusion that there has been no violation of such provisions either. Finally, yet importantly, while assessing any possible encroachment of the right to a dignified life, the Council found that the applicants did not establish any link

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[54] Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 426

[55] Ioannis Katsaroumpas, 'De-Constitutionalising Collective Labour Rights: The Case of Greece' 47 (4) Industrial Law Journal, 484; emphasis added.

[56] Ibid

[57] Gerapetritis 129

[58] Hellenic Council of State Decision No 668/2012 (Plenum) (20 February 2012), para 10, citing the Explanatory Preamble to Law 3845/2010 (Greek Government Gazette A'65/06.05.2010)

[59] Markakis 221, 222

[60] Four judges dissented at this point. Cf. Francesco Martucci, 'Non-EU Legal Instruments (EFSF, ESM, AND Fiscal Compact)' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (Oxford University Press 2020) 314 par.312.355; Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 426

[61] Hellenic Council of State Decision No 668/2012 (Plenum) (20 February 2012), paras 35, 37, 38, 40. Article 4 paras 1 and 5 of the Greek Constitution read respectively: "1. All Greeks are equal before the law. […] 4. Greek citizens contribute without distinction to public charges in proportion to their means."

of causation between the adopted measures and the deterioration of their standard of living. One should mention here, though, that eight judges dissented on this position, arguing that only one category of the population has been targeted by the measures, while no counterweight measures were provided for their protection.[62]

b. The Judicial Turn

After the delivery of the *first MoU decision,* the Hellenic Council of State consistently upheld the constitutionality of statutory pension cuts as prescribed by MoU national legislation, despite a moderate, gradual shift, which commentators have identified. This initial turn was first detected in 2014, when the Council declared specific salary reductions and retroactive pension cuts that targeted the police and armed forces to be unconstitutional.[63] Differently to that modest tendency, the Council of State in plenary session, handed down a series of judgments in 2015, where it declared certain cuts in salaries and primary and supplementary pensions which were mandated in the second adjustment program for Greece to be unconstitutional.[64]

In the course of *Decisions Nos 2287-2290/2015*, the Court held that if the state is unable to provide adequate funding to state-owned insurers and ensure their viability by other means due to highly adverse fiscal conditions, it is possible for the legislator to intervene in order to reduce pensions according to relevant constitutional provisions.[65] In its reasoning, the Court stressed that the scope of this reduction is not unlimited but is rather conditioned by the constitutional safeguard of equality to public charges and the "duty of social and national solidarity,"[66] together with the principle of proportionality. The Council further stressed that pensioners had to endure reductions only to the extent that these did not violate the constitutional core of the right to social security. Simply put,

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[62] Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 426

[63] See Hellenic Council of State Decisions Nos 2192-2196/2014 and Nos 4741/2014. See also the analysis Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283, 284

[64] Bohoslavsky, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights on his mission to Greece from 30 Nov. to 8 Dec. 2015* 14 para 50, 51

[65] The constitutional provision that the Council of State referred to here has been Article 22 para 5 of the Constitution of Greece 1975 (rev. 2008), which reads as follows: "The State shall care for the social security of the working people, as specified by law."

[66] As prescribed in Article 25 para 4 of the Constitution of Greece 1975 (rev. 2008), which reads as follows: "The State has the right to claim of all citizens to fulfil the duty of social and national solidarity."

the Court acknowledged that a level of social benefits should be maintained, in the sense that this level ought to be enough to allow pensioners to live a life in dignity.

Consistent with the above grounds, the Council underscored that the legislator ought to have conducted a specific, thorough and scientifically substantiated study before proceeding with the intended pension and benefits cuts. In light of this, the Court held that the precondition of a comprehensive justification could only be succumbed if there were an immediate threat of collapse of the country's economy, which would render the specific measures an urgent action of last resort aiming to prevent the state's financial default.[67] To that end and while juxtaposing previous cuts against new measures, which imposed further reductions, the Council ruled that successive cuts of main and auxiliary pensions up to the year 2011 did not violate the constitutional principles of proportionality and legitimate trust, while the limitations of property rights as enshrined in Article 1 of the First Protocol to the ECHR, were not held to be disproportional.[68] By contrast, the Court determined that the cuts provided by national legislative acts[69] implementing MoU-instructed reforms had been enacted without any prior preparatory work or thorough study preceding the measures. For this reason, the Council held that the supplementary and consecutive recessive measures disturbed the fair balance between the public interest and the property rights of the affected retirees.[70]

The rulings were met with much interest in academic and legal circles. The reason behind this is that until that time, the Council of State would require the aggrieved persons to demonstrate the magnitude of the losses incurred and the detrimental effect of those adopted measures on their living conditions. However, in the course of *Decisions Nos 2287-2290/2015*, the Council, while deliberating on social insurance reforms and public pension cuts attached to the financial adjustment programs, paid particular attention to the cumulative effect of the adopted measures. In this regard, the Court reversed the burden of proof and placed it on the state, which was requested to prove that the impugned measures would not compromise the standard of dignified living of the affected civil

[67] Hellenic Council of State (Plenum) Decision No 2287/2015
[68] Contiades and Tassopoulos 208
[69] Law 4051/2012 (Greek Government Gazette A' 40/29.02.2012) (on Regulations concerning Retirement and other Urgent Arrangements for the Implementation of the Memorandum of Understanding of Law 4046/2012) and Law 4093/2012 (Greek Government Gazette A' 222 /12.12.0212) (on the Approval of the Medium-Term Fiscal Strategy Framework 2013-2016 - Urgent Measures for the Implementation of Law 4046/2012 and the Medium-Term Fiscal Strategy Framework 2013-2016).
[70] As this is stipulated in Article 1 on the 'Protection of property' of the First Protocol to the ECHR; see Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9

servants and public pensioners. In doing so, the Council held that "the responsibility to contain the public deficit rested *primarily* with the legislation and enactment of appropriate measures and not with the citizens' participation in contributing to public charges."[71] As a result, these four judgments handed down by the Council of State marked an outstanding reversal of the previous pattern of austerity jurisprudence and a turning point in the judicial reasoning of highest courts in Greece during the MoU years.[72]

iii. Lower Courts and the Austerity Measure of Labor Reserve

It has been examined above that during the early years of the crisis, and while the Greek economy was sinking into deep recession, the highest courts initially demonstrated signs of self-restraint. In what follows, I turn to the jurisprudence of lower courts[73] and investigate how courts at lower instances reacted to the austerity measures during those first MoU years. My argument here is two-fold. First, during the critical period between 2012 and 2014, when the attention was placed on the austerity judgments of highest courts, there were significant judicial developments[74] at a national level, which were directly implicated in the protection of social rights from a human rights perspective. One such development was the case law concerning the measure of 'labor reserve,'[75] an austerity-mandated measure that "had serious consequences for a fair percentage of the Greek public sector workforce."[76] Second, at the same time that highest courts were declaring austerity measures constitutional, lower courts appeared to be more sympathetic to litigants, who sought for protection against the dire consequences generated by contractionary adjustment programs.

In more detail, the present section examines the active role of lower courts during the passive first phase manifested by highest courts. Against this background, during the years 2013 and 2014, Single-Judge Civil Courts of First Instance (Μονομελές Πρωτοδικείο)

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[71] Bakavou 171; emphasis added.

[72] See also the Court of Audit Decisions No 4327/2014; No 7412/2015; No 1277/2018, where the Court of Audit found that pension cuts applied to national health system physicians and civil servants were unconstitutional. Ibid; Gerapetritis 130; Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 285

[73] Unless otherwise specified, 'lower courts' refers to 'Greek lower courts' in this section.

[74] The analysis here considers legislative acts, which have been passed in the Greek legal order during the period 2012-2015. It also considers case law from ordinary Greek courts for the period 2013-2014.

[75] The significance of the 'labor reserve' scheme has also been acknowledged and documented as part of the broader austerity-driven measure of involuntary mobility at a comparative assessment level among austerity-affected countries in the EU; see in particular Ivanković Tamamović 69

[76] Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' 106

handed down a number of judgments[77] while adjudicating upon the austerity measure of 'labor reserve' that was put into effect by the Greek state as part of the financial assistance obligations. The measure targeted state employees in the 'public and wider public sector' under private law contracts of indefinite duration, who were in turn accorded a status of mandatory mobility, re-assignment, or suspension.[78] Concerning the specifics of the measure, staff in labor reserve was paid at 75 percent of their basic wage for as long as they remained in this status, which was set at 12 months, after which they were dismissed without compensation. Following this act, additional legislation[79] was adopted, which rendered more contracted staff positions redundant. The supplementary legislation targeted all employees on private, open-ended contracts, who were working as school guards in public schools, as well as all permanent posts of state officials, who were serving in municipal police positions across the country, and all employees, who acted as permanent staff at the secondary level of technical education. That is to say, the austerity policy aimed at staff members covering 50 specialties in total, which were all nominally eliminated. According to the mandated reforms, the remuneration of the staff was set to 75 percent of their former salary, while the duration of the labor reserve status was set at

[77] Contrary to such observation, Akritas Kaidatzis notes that during 2010-2014, there were only few "sporadic judgments by lower courts" that found the austerity measures which were prescribed by the first MoU unconstitutional; see Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283. The validity of this claim is not substantiated by any proof and thus, such estimation is deemed here to be arbitrary. On the contrary, it is submitted in this section that judgments issued by lower courts during the first passive phase of highest courts have been systematic and significant in number and in the social impact that they generated. This position has been supported in theory as well; see Matina Yannakourou, 'Austerity Measures Reducing Wage and Labour Costs Before the Greek Courts: A Case-law Analysis' (2014) 11 (2) Irish Employment Law Journal, 38, 41, 42; Giulia Ciliberto, 'The Challenges of Redressing Violations of Economic and Social Rights in the Aftermath of the Eurozone Sovereign Debt Crisis' (2021) 11 (1) Goettingen Journal of International Law, 47, 48

[78] Prior to the examined legislation, the labor reserve measure was introduced in the Greek legal order with Law 3986/2011 (Greek Government Gazette A'152/01.07.2011) (on Urgent Measures Implementation Medium-Term Fiscal Strategy 2012-2015); available at https://www.minfin.gr/en/nomoi/-/asset_publisher/R70RHvx4EwU1/content/url-node-6681?inheritRedirect=false <last accessed 18.06.2021>). According to this act, employees in state-owned enterprises were paid 60% of their basic salary. Later, Law 4024/2011 extended the scope of the application to cover employees in the public sector. See Law 4024/2011 (Greek Government Gazette A' 226/ 27.10.2011) (on issues of retirement pensions of the national unified wage system - grading system, employment reserves and other provisions concerning the Medium-Term Fiscal Strategy Framework 2012-2015); see also ILO NATLEX Database of national labour, social security and related human rights legislation https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=89634&p_country=GRC&p_count=700&p_classification=12&p_classcount=27 <last accessed 11.08.2021>. This was a pre-retirement scheme; see subparagraph Z.4 of Article 1 of Law 4093/2012 (Greek Government Gazette A'222/ 12.11.2012). See also Aristea Koukiadaki, *Can Austerity Measures be Challenged in Supranational Courts? The Cases of Greece and Portugal (*ETUC Working Papers*)* 29; the significant difference between the legislation enacted in 2012 (and after) and the legislation enacted in 2011, is that the employees placed in labor reserve during the first stage (i.e. Law 3986/2011) were able to retire on full pension at the end of the labor-reserve period. However, those employees placed on labor reserve in the time framework that is examined here, namely from 2012 onwards, were dismissed after the end of the labor reserve period.

[79] Law 4172/2013 (Greek Government Gazette A'167/ 23.07.2013), Articles 80, 81 and 82

8 months. Those who were not transferred or re-assigned to other posts within this time limit were subsequently dismissed. It is noteworthy that the abolition of posts has been made in the relevant legislation by invoking the public interest argument. Moreover, the suppression of the contracted staff posts was only estimated by a rough percentage, while the workforce was placed in 'mandatory availability'[80] to their employer, based on random criteria, without prior qualitative assessment reports accompanying the relevant acts.[81]

The purpose of the adopted measures has been to serve the structural social policies and adjustments in the public sector that the Greek government was required to undertake as part of its commitments to the first assistance package. In line with this, it was anticipated and scheduled that the overall government employment pool would be reduced by at least 150,000 employees in the period 2011–15, a condition that had been set in advance in the country's loan agreements. Within this designated time frame, almost half of the initial goal was reached, namely around 80,000 employees from the public and wider public sector were dismissed. Furthermore, the number of public servants in Greece fell by more than 12% to just under 567,000 from a previous 647,000 employees between the years 2011 and 2015.[82] The Greek government expressed its commitment to "furlough enough redundant public employees into the labor reserve by end-2012 to achieve 15,000 mandatory separations (i.e. once their time in the labor reserve has been exhausted)"[83] and to augment the labor reserve scheme annually. Over the year 2012, 2000 redundant employees were transferred to labor reserve, while there was an additional commitment to transfer 27,000 staff to a new mobility scheme by 2015.[84] By March 2014, 11,400 employees of the public sector were dismissed, instead of the biennium 2013-2014 target of 15,000 layoffs. Prior to that, 3635 employees were let go, instead of the initial goal of 4000 'mandatory removals' that Greece had to carry out in order to qualify for a second loan agreement with its creditors.[85]

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[80] The term 'mandatory availability has been interchangeably to the term 'labor reserve' in legal practice.
[81] See Decision No 117/2014 First Instance Court of Preveza
[82] Penny Georgiadou, *Greece: Reducing the Number of Public Servants – Latest Developments (Eurofound, 23 June 2016)*
[83] See GovGR, *Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding (*Government of Greece, *9 March 2012)* 7, 59
[84] IMF, *IMF Country Report No. 13/20 (*International Monetary Fund *January 2013)*
[85] Nikos Tsitsas, 'Το σχέδιο για τις απολύσεις στο Δημόσιο: 11.400 απολύσεις το 2014' *Ethnos* (Athens, 17 January 2014); See also Joris Melman, 'The Netherlands Doesn't Understand Southern Europe's Pain' (*Post-Crisis Democracy in Europe: Exploring the EU's Struggle for Legitimacy; The Post-Crisis Legitimacy of the European Union (PLATO) Blog Entry*, 2020), where according to the PLATO source, "in July 2013, Eurogroup President Jeroen Dijsselbloem held back a tranche of a few billion euros because Athens had only met 21 of the 22 "milestones". The one missed objective: 4,200 officials had to be fired, while the Greek layoff list had only 4,120 names."

Following these acts, which have been put into effect at a domestic level, a number of public employees collectively brought individual actions in one single application, in order to challenge the labor reserve measure, before lower courts and against the administrative bodies that issued the mobility and suspension orders. In that framework, some of these employees initially asked for immediate relief, while others preferred to wait for the main hearing. Accordingly, the majority of lower courts provided immediate temporary protection through interim proceedings, prohibiting the application of the measure. While the majority of judges allowed for immediate relief, a minority did not accept the applications and thus, the measure of labor reserve was set in motion for a portion of employees. However, a large number of public servants were granted the interim protection that they requested. That is to say, successful claimants have not been placed under the status of labor reserve and have consequently not been suspended from their working positions. Schematically, out of about forty actions and applications for interim measures, which have been documented covering a period of two years (2013 – 2014),[86] in only eight of them, the measure has been found in conformity with the Greek Constitution,[87] while three of the cases were dismissed on admissibility grounds.[88]

Looking more closely into the decisions, in most of the proceedings for interim measures,[89] lower courts declared that the mandatory availability plan was in violation of the Greek Constitution, the ECHR and the ESC. Judges have found in this regard, that the vexed measure of 'labor reserve' infringed upon a number of provisions as provided in the Greek Constitution, namely on the right to a decent living, the right to property, the principles of proportionality and equality to public charges, and the right to work.[90] In a handful of cases, judges underlined that the impugned measure encroached on specific

[86] As documented in the online Greek legal database NOMOS, available at https://lawdb.intrasoftnet.com/ <last accessed 25.06.2021>

[87] See Decisions on interim measures No 387/2013 First Instance Court of Xanthi; No 1705/2014 First Instance Court of Thessaloniki; No 5026/2014 First Instance Court of Thessaloniki; No 186/2014 First Instance Court of Ioannina; No 324/ 2014 First Instance Court of Kavala; see also Decisions No 729/2013 Administrative Court of Appeals of Athens; No 215/2014 Basement Court of Patras; No 1845/2014 Administrative Court of First Instance of Thessaloniki.

[88] See Decisions No 67/2013 First Instance Court of the Aegean; No 298/2013 First Instance Court of Alexandroupolis; No 1705/2014 First Instance Court of Thessaloniki.

[89] See Decisions on interim measures No 37/2013 First Instance Court of Chios; No 90/2013 First Instance Court of Xanthi; No 1759/2013 First Instance Court of Athens; No 63/2013 First Instance Court of Mesologgi; No 4916/2013 First Instance Court of Thessaloniki; No 494/2013 and No 202/2014 First Instance Court of Patras; No 2700/2013 First Instance Court of Piraeus; No 13915/2013 and No 13917/2013 and No 7809/2014 First Instance Court of Athens.

[90] See Decisions No 09/2014 First Instance Court of Xanthi; No 324/2014 First Instance Court of Kavala; No 333/2014 First Instance Court of Chios; No 46/2014 First Instance Court of Orestiada; No 1240/2014 and No 1951/2014 First Instance Court of Athens. The constitutional provisions were the right to a decent living (Article 2 para 1); the equality to public charges principle (Article 4 para 5); the right to property (Article 17); the principle of proportionality (Article 25 para 1); the right to work (Article 22 para 1)

provisions of the ECHR, and more specifically on the right to property.[91] Finally, yet importantly, in a few instances it has further been stressed that the measure violated several provisions of the ESC, including the right to work and the right to the fair remuneration of workers that would secure a decent standard of living for them and their families.[92] On a few occasions, litigants argued that constitutional provisions on the proper procedure of passing a given legislation had also been violated. To that end, litigants raised the claim that the principles of legality and proper incorporation of the contested measures in domestic legislation had been infringed.[93] In responding to such claims, judges have ruled that the relevant austerity legislation violated the rule of law and the principles of legality and good administration as enshrined in the Greek Constitution.[94]

In developing their rationale, judges went further to stress that the 'labor reserve' measure essentially constituted "a *sui generis* dismissal procedure."[95] At a more theoretical level, judges found that the austerity measure of the mandatory placement of employees in labor reserve encroached on the claimants' human dignity, while it did not ensure their personal and professional development. In support of that claim, judges pointed out that the lawmaker acted in a flattening and levelling way, violating the constitutionally protected right to a life in dignity, the principles of respect and protection of the value of the human being as well as the principle of equality.[96] The issued judgments acted as a catapult in their affront on the adopted social policy of the government and the negative social impact of the impugned austerity measures. To that end and in a rather pungent manner, judges have placed particular emphasis on the affected human life and stressed the following:

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[91] See ECHR Article 1 Protocol 1; See also Claire Kilpatrick and Bruno (eds.) de Witte, 'Editors' Introduction' 2014 EUI Department of Law Research Paper No. 2014/05 Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges 8

[92] See ESC Articles 1 and 4 para 1

[93] The Constitution of Greece 1975 (rev. 2008), Chapter 5 on the Legislative Function of the Parliament, Articles 72, 74 and 76, can be found in an official translation in English provided by the Hellenic Parliament, under the following link http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf <last accessed 26.05.2019>

[94] See Decision No 09/2014 First Instance Court of Xanthi, on the unconstitutionality of labor reserve, on the basis that this measure violated the principles of proportionality, equality and meritocracy in public administration, in conjunction with the rule of law and the principles of legality and good governance.

[95] See Decision No 117/2014 First Instance Court of Preveza; See also Yannakourou 41

[96] The Constitution of Greece 1975 (rev. 2008), Article 2, para 1 of the Basic Provisions on the Form of Government reads as follows: "Respect and protection of the value of the human being constitute the primary obligations of the State." available at http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf <last accessed 26.05.2019>

> "[i.e. the lawmaker] violates human dignity, because, irrespective of the effectiveness and the suitability of the measure [i.e. the labor reserve measure], behind numbers specific individuals do exist, whose life is drastically overturned. Those individuals are *sacrificed* for the sake of the economic goals set by the given Government towards the reduction of state spending. And whereas those economic goals are proclaimed as overriding public interests, *in fact* what they do is that they put human beings on the brink while they *transform* them into the *means* for achieving the desired economic goal."[97]

The public reception of these decisions at a domestic level has been significant, despite the language barrier and limited attention in academic commentaries meaning that they have been somewhat overlooked at an international level. Nonetheless, lower courts' rulings were hailed by media and public opinion and created political friction.[98] One after the other, those rulings created a domino effect before lower instances of justice. The judgments not only stood as material evidence of the unconstitutionality of the austerity measures, but they also reflected in symbolic terms, the detachment of the reform programs from social reality. That is, a reality that has been characterized by deep social anxiety, social unrest and strong oppositional political sentiments towards the implementation of such severe and large-scale austerity reforms.[99]

At the same time, it could be argued that a two-speed category was created among citizens, namely on the one side there were those who were affected by the relevant legislation, while on the other side there were those who were protected by lower courts. Put differently, employees whose legal actions and applications for interim relief were successfully heard before First Instance Courts, managed to maintain, and secure their posts and suffered no reduction of their wages. The rest, who did not exercise their right to interim protection and have not filed a lawsuit, were immediately affected by the austerity policies as they were either forced to retire or they accepted being placed in reserve, an option that would gradually and eventually lead to their dismissal.

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[97] Excerpt taken from Decision No 117/2014 First Instance Court of Preveza, which was published on 17.03.2014. Translation of the text from Greek to English provided by the present author with added interpunction and separation of sentences where needed to convey the original meaning while maintaining the flow in the English language; capitalization kept as in the original and emphasis added. This translation is not an official translation provided by the court in question. The same rationale that was developed in this decision, has been also reiterated in Decision No 33/2014 First Instance Court of Chios; see 10th and 11th sheet of the judgment, publication date 18.11.2014. The original text in Greek reads as follows: "Προσβάλλει [ο νομοθέτης] την ανθρώπινη αξιοπρέπεια, διότι, ανεξαρτήτως της αποτελεσματικότητας και της προσφορότητας του μέτρου, πίσω από τους αριθμούς υπάρχουν συγκεκριμένα πρόσωπα, των οποίων η ζωή ανατρέπεται άρδην και τα οποία θυσιάζονται, χάριν των οικονομικών στοχεύσεων της εκάστοτε Κυβέρνησης και της περιστολής των κρατικών δαπανών, που αναγορεύονται σε σκοπούς υπέρτερου δημοσίου συμφέροντος, θέτοντας στο περιθώριο τον άνθρωπο ή μετατρέποντας αυτόν σε μέσο προς επίτευξη του επιδιωκόμενου σκοπού."

[98] Aftodioikisi, 'Χίος: Επιστροφή οριστικά των ΙΔΑΧ ΔΕ, πρόστιμο στο δήμο εάν δεν τους δεχθεί' *Αυτοδιοίκηση*

[99] Cf. FIDH/HLHR 5, 9, 12, 38

The story of the labor reserve scheme did not end there, however. Following the change of government in January 2015, the provisions on labor reserve were repealed and all sectors, departments, and specialties which have been previously annulled were re-established anew. In particular, in March 2015, that is, only one and a half months after the Deputy Minister of Interior and Administrative Reconstruction came into office, a Draft Bill (Σχέδιο Νόμου) on the repeal of the labor reserve measure was put into public deliberation under the striking title "restoration of injustices."[100] Following that, a new law was put into effect in May 2015, reinstating all dismissed personnel in their previous positions, a development that effectively translated into 3900 employees returning to their previously held posts.[101]

The role of lower courts in protecting the rights of employees has been decisive in various ways. Had they not initiated interim proceedings, these employees would have immediately suffered drastic wage reductions or and they would have eventually lost their jobs. Moreover, with a new government taking over in 2015, the contribution of lower courts has also been recognized in legislation[102] that was enacted to repeal the 'labor reserve' provisions and to re-establish the posts that the affected employees formerly held. Consequently, a large number of employees who had been placed on labor reserve returned to their positions and maintained their initial salaries. Arguably, the adoption of this new law seemed inevitable, since many employees kept their positions due to the judicial protection granted to them, while others, who did not take any legal action, were dismissed on the basis of the labor reserve legislation. Since the civil courts of First Instance invalidated the labor reserve measure *en masse*, it would be safe to say that the adoption of the subsequent legislation was not only the product of political commitment by the then new established government, but it was directly linked to the preceding judgments issued by the civil courts of First Instance.[103]

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[100] Act 4325/2015 (Greek Government Gazette A 47/11/05/2015) "Democratization of the Administration - Fighting Bureaucracy and eGovernance. Restoration of Injustices and Other Provisions" Articles 17, 18, 19, 21 and in particular Chapter 4 "Restoration of injustices, staff reset and mobility", available at http://minfin.gr/web/guest/nomiko-plaisio1/-/asset_publisher/VonrJHbeXk5J/content/nomos-4325?inheritRedirect=false <last accessed 19.07.2021>

[101] Aftodioikisi, 'Και με τη βούλα της Βουλής οι επαναπροσλήψεις στο Δημόσιο – 157 «ναι» από ΣΥΡΙΖΑ, ΑΝΕΛ στο νομοσχέδιο Κατρούγκαλου' *Αυτοδιοίκηση* (5 May 2015)

[102] Alexandra Karetsou and Marianthi Kaliviotou, *Report by the Scientific Council of the Hellenic Parliament on the Draft Bill "Democratization of the Administration - Fighting Bureaucracy and eGovernance - Restoration of Injustices and other Provisions" (*Hellenic Parliament Scientific Service, *30 April 2015)* para 7. a, 14; For an overview of the the Scientific Service of the Hellenic Parliament see https://www.hellenicparliament.gr/en/Dioikitiki-Organosi/Ypiresies/Epistimoniki-Ypiresia/ <last accessed 19.07.2021>

[103] On that point, see also Yannakourou 42

2. Portugal

i. Brief Overview of the Portuguese Judicial Power and Review System

Having assessed judicial developments in the case study of Greece, I now turn to Portugal and few of the most powerful examples of its austerity case law. Before doing so, a short introduction to the architecture of the court system and the reviewing model of the Portuguese legal system is deemed helpful for the purposes of this analysis.

The Constitution of the Portuguese Republic, which is a pure civil law system,[104] provides for the Portuguese Constitutional Court (*Tribunal Constitucional)*, the Supreme Court of Justice (*Supremo Tribunal de Justiça*), the Court of Auditors, (*Tribunal de Contas*), the Administrative Supreme Court (*Supremo Tribunal Administrativo*).[105] The Constitution further stipulates judicial courts and administrative and fiscal courts of first and second instance. In establishing the architectural design of national courts, the constitutional letter draws a distinction between an administrative and fiscal and a civil jurisdiction, the latter being divided into twenty-three court districts called *comarcas.*[106] The hierarchy of the so-called judicial courts, which have a general jurisdiction in civil and criminal matters, from the highest to the lowest ranks, are the Supreme Court of Justice, the Appellate Courts (*Tribunais da Relação*), and the District Courts (*Tribunais Judicial de Comarca*). The Supreme Court of Justice "is the highest entity in the judicial court hierarchy and has jurisdiction over all Portuguese territory."[107]

As in the case of Greece, the Portuguese judicial system manifests elements of "a mixed system of constitutional justice,"[108] to wit, one that possesses a relatively recently established Constitutional Court[109] but maintains, nonetheless, a system of *diffuse* and *abstract* control rather than a centralized judicial model of constitutional review. Effectively

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[104] Jung, Hirschl and Rosevear

[105] For a brief overview of the Portuguese judicial system, see also https://e-justice.europa.eu/16/EN/national_justice_systems?PORTUGAL&member=1 <last accessed 12.07.2021>

[106] Patrícia Branco, 'The Geographies of Justice in Portugal: Redefining the Judiciary's Territories' 15 (4) International Journal of Law in Context, 445

[107] Dias and Gomes 178

[108] de Almeida Ribeiro 205, where Ribeiro notes that the Portuguese system of constitutional justice is placed "in a peculiar middle ground between the monist or diffuse model, epitomized by American-style judicial review, and the dualist or concentrated model, the dominant one in Europe." Also Garrote Campillay 18, 19

[109] The Portuguese Constitutional Court was established in 1982; see the detailed analysis of the historical and political events leading to the founding of the Tribunal, see Maria Lúcia Amaral and Ravi Afonso Pereira, 'The Portuguese Consitutional Court' in Armin Bogdandy, Peter von Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press 2020) 685 et seq.; see also Garrote Campillay 17. Gonçalo de Almeida Ribeiro notes that the Portuguese Constitutional Court was "established in 1983, following the first revision (in 1982) of the Constitution of the Portuguese Republic of 1976"; for a critical appraisal of the Portuguese system of judicial review, see de Almeida Ribeiro 220 et seq.

this means that ordinary courts at lower instances can also review the constitutionality of enacted laws and invalidate legislative acts, provided that these are found to be unconstitutional.[110] The institutional design of abstract review allows for a broad framework of constitutional review, at an *a priori* or *a posteriori* level. Simply put, an *a priori* review takes place before a legislative act is put into effect, while a request for an *a posteriori* constitutional review can be advanced before the Portuguese Constitutional Court at any time by institutional actors, such as the President of the Portuguese Republic, the President of the Parliament, the Prime Minister, the Ombudsperson or by members of the Parliament, among other parliamentary bodies.[111]

ii. The Portuguese Constitutional Court and the Crisis Jurisprudence

The Portuguese Constitutional Court (*Tribunal Constitucional)*[112] produced a considerable body of case law[113] in the course of the implementation of the Portuguese financial assistance program, while the country was being tormented by a deep economic recession that had far-reaching socio-economic consequences. There is no doubt that the cases that gathered most international attention were those addressing the four State Budget Laws of Portugal in the period of 2011 to 2014.[114]

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[110] Violante 123, 124

[111] Teresa Violante, 'Constitutional Adjudication as a Forum for Contesting Austerity: The Case of Portugal' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021) 176, 177; Violante provides a description of the position of the Portuguese Constitutional Court in the Portuguese political system. See Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 123, 124, where Violante notes that the Constitutional Court "[…] comprises thirteen judges. Ten of them are elected in parliament by a two-thirds majority that requires an agreement from the two main parties, PS (Socialist Party) and PSD (Social Democratic Party). The remaining three judges are co-opted by their peers."

[112] The analysis uses the English translation 'Portuguese Constitutional Court' as it is stated on the Court's official website https://www.tribunalconstitucional.pt/tc/en/home.html <last accessed 10.04.2021>. Hereinafter Portuguese Constitutional Court or Tribunal.

[113] For a description of the austerity legislation and a selection of the relevant case law produced during the period 2010-2015 by the Portuguese Constitutional Court, see the detailed commentary by Canotilho, Violante and Lanceiro and Gerapetritis, who single out in particular the following cases adjudicated by the Portuguese Constitutional Court, namely, Ruling No 399/2010 (on surtax on personal income tax for 2010); No 396/2011 (on salary cuts in Budget Law for 2011); No 353/2012 (on suspension of the thirteenth and fourteenth salary in the public sector as provided in Budget Law for 2012); No 187/2013 (on the suspension of holiday payments in the public sector and imposition of burdens on unemployment benefits in Budget Law for 2013); No 474/2013 (on the requalification process for public service workers and causes for dismissal); No 602/2013 (on amendments to the Labour Code); No 160/2013 (on statutory increase of working hours in the public sector); No 794/2013 (on the prevision of 40-hour work week); No 862/2013 (on the statute governing the retirement of public sector staff); No 413/2014 (on salary cuts in public sector, taxation upon social benefits and suspension of public sector pension supplements in Budget Law for 2014); No 574/2014 (on statutory public sector pay cuts for 2014-2018); No 575/2014 (on pensions special sustainability contribution); No 745/2014 (on contributions increase by public servants for the national health care system).

[114] See Becker 14 citing the Portuguese Constitutional Court Ruling No 396/2011 (on State Budget for 2011); No 353/2012 (on State Budget for 2012); No 187/2013 (on State Budget for 2013); Nos 413/2014 and 572/2014 (on State Budget for 2014)

Admittedly, the judgments issued by the Portuguese Constitutional Court were lengthier than usual for the Court's[115] standards and quite complex argumentatively.[116] The analysis here does not intend to provide a detailed description of the cases, but only seeks to offer a blueprint of exemplary austerity judgments and highlight how these were implicated with consideration for social rights and social and legal values. It can be recalled from earlier in this thesis[117] that the measures adopted in Portugal to meet the goals and requirements set by the first and only Portuguese MoU[118] chiefly targeted public servants and pensioners. Contractionary measures concerned mainly cuts in wages, social benefits and allowances, raising of the retirement age, pension indexation and the introduction of caps on health, education and housing allowances.[119] On the social rights front, the areas which were mostly affected by the financial assistance package were social security schemes together with the education and health care sector, where the downsizing of state hospitals and health centers, cutbacks in operational costs and the rationalization of the national healthcare system were given first priority as part of the structural social policies.[120]

Accordingly, several of those measures were brought before the Portuguese Constitutional Court, which was called upon to decide on their constitutionality, even before the economic adjustment program has been put in place at the time in Portugal. Against this background, the Tribunal's performance has been neither one-dimensional nor monophasic, but it rather displayed different stages of an initially moderate and later more vigorous activity. Arguably, a popular belief that has characterized the Court's posthumous reputation regarding the crisis, is that the Tribunal displayed a newfangled, highly politicized and reactive approach to the measures. The reality of the Court's judicial posture, though, has been far more complex and nuanced than mere judicial activism, as has been commonly and unreflectively presented to be the case.[121]

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[115] Unless otherwise specified, 'Court' refers to the Portuguese Constitutional Court in this section.

[116] Canotilho, Violante and Lanceiro 159; Yiannis Drossos, 'Η κρίση της οικονομίας και η κρίση του δικαστή' (2015) 1 Εφημερίδα Διοικητικού Δικαίου 19

[117] See Part II. Chapter 3.2. Austerity Impact Assessment of Social Rights Protection.

[118] See EC, *The Economic Adjustment Programme for Portugal 2011-2014*

[119] José Carlos Vieira de Andrade, João Carlos Loureiro and Suzana Tavares da Silva, 'Legal Changes and Constitutional Adjudication in Portuguese Social Law in Consequence of the European Financial Crisis' in Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2020); Becker 20

[120] Miguel de Brito Nogueira, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis ' 2014 EUI Department of Law Research Paper No. 2014/05 Kilpatrick, Claire and Witte, Bruno de (eds) Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges 68; Miguel de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' [2014] (Nos 1-2) European Journal of Social Law, 89 et seq.

[121] See also Part III. Chapters 6.2 and 6.3

In particular, and similarly to the Greek apex courts, the Portuguese Constitutional Court has displayed different levels of flexibility and tolerance towards the legislature's regulatory actions throughout the MoU years.[122] In particular, Pedro Coutinho identifies what he calls, a first 'tolerant phase', ranging from 2010-2011, followed by a second 'semi-tolerant phase' in 2012, which led to a last phase from 2012 onwards, when it seemed that "the *patience* of the TC [i.e. *Tribunal Constitucional*] for austerity measures had *run out*, as it considered a great number of proposed measures to be in violation of the Constitution."[123] Such assessments of course, are open for debate and other commentators have held that the Tribunal did not display different intensity levels in evaluating the measures, but rather "travelled a *coherent* path in its assessment of the constitutionality of the norms that have been brought before it."[124] In any case, before proceeding with an assessment of the Tribunal's stance and an exploration of the different interpretations of its posture *vis-à-vis* austerity measures, it is significant that we get acquainted with the relevant jurisprudence and highlight the socially-implicated aspects of the Tribunal's austerity jurisprudence.

[122] Coutinho 78; Julgar is a Portuguese-based journal established by the *Association of Portuguese Judges (Associação Sindical dos Juízes Portugueses)*.
[123] Ibid 77, 78
[124] Manuela Baptista Lopes, 'The role of the Constitutional Court of Portugal in the present economic crisis situation ' Strasbourg, 8 July 2014 European Commission for Democracy through Law (Venice Commission) in cooperation with the Constitutional Court of Georgia 13th meeting of the Joint Council on Constitutional Justice Mini-Conference on "The Role of Constitutional Courts in Economic Crises" Batumi, Georgia 26/27 June 2014 5; emphasis added. It is noteworthy here, though, that Lopes makes this remark only in 2014, that is, at the early stages of the austerity jurisprudence produced by the Portuguese Constitutional Court, compared to the analysis of Coutinho of 2018, where three judicial phases are identified. Tsiftsoglou submits that the Portuguese Constitutional Court developed "a more coherent 'crisis jurisprudence' overall"; see Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 9, 10.

a. The *pre*-Memorandum Jurisprudence

Referring to the judgments as such, commentators have initially focused their attention on *Ruling*[125] *No 396/2011*[126] issued by the Portuguese Constitutional Court, whereupon the Court dealt with the annual state budgetary plan for the year 2011, which pre-dated Portugal's bailout program.[127] That is to say, at the time that the Tribunal heard and handed down its judgment, the Portuguese government had not yet agreed to the financial aid program and thus the budget considerations heard before the Tribunal concerned essentially *pre*-Memorandum administrative actions that included salary reductions for public sector workers.

In its corresponding judgment, the Tribunal held that this first wave of cuts to civil servants' salaries, as laid down in the 2011 State Budget, did not contradict the principle of equality in the discharge of public burdens, nor did it give rise to an unjustifiable and unequal treatment among citizens.[128] In its reasoning, the Tribunal acknowledged that Portugal was "crossing *a conjuncture of absolute exceptionality*, from the point of view of financial management of public resources."[129] In light of this, the Court clarified that reductions in salaries were not prohibited as long as these were balanced and justified, while it further added that under the economic and financial pressure the country was facing, the contested cuts were not deemed arbitrary. It is worth noting here that the Tribunal, while indirectly addressing the legislature, stated *obiter dicta* that the imposition of *taxes* instead of *public expenditure* cuts, could have been a more "equality-friendly"[130] measure in reviving the languishing Portuguese economy. Thus, even though the Tribunal upheld the State Budget Law for 2011 and its intended budget cuts in the public sector, it nonetheless sounded a note of warning to the legislature for reconsidering estimates of socio-economic impact in future budgetary planning.

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[125] The thesis follows here the phrasing of judgments as 'rulings' that the Portuguese Constitutional Court uses in the official translated summaries of the cases in the English language; see https://www.tribunalconstitucional.pt/tc/en/acordaos/ <last accessed 04.04.2021>.

[126] The judgment can be found in Portuguese on the official website of the Portuguese Constitutional Court; see in particular Tribunal Constitucional, Acórdão No 396/2011 (Plenum), available at https://www.tribunalconstitucional.pt/tc/acordaos/20110396.html <last accessed 04.04. 2021>.

[127] Teresa Violante also assesses Ruling No 399/2010, on the general increase of income taxation rates, together with Ruling No 396/2011, as constituting part of the austerity case law which took place before the bailout; see Teresa Violante and Patrícia André, 'The Constitutional Performance of Austerity in Portugal' in Georg Vanberg, Mark D. Rosen and Tom Ginsburg (eds), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019) 233, 234

[128] de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' 97, 98

[129] Coutinho 78 citing Ruling No 396/2011; emphasis added.

[130] Ibid 82,83

b. Distribution of Sacrifices

Following the judgment on the annual State Budget for 2011, the Portuguese Constitutional Court was called a few months later to adjudicate on the budgetary planning for 2012, which was the first budget scheme to have been brought before justice after the signing of Portugal's single financial assistance program. Subsequently, the Tribunal delivered its *Ruling No 353/2012*[131] on July 5, 2012, that is, almost four months after the Hellenic Council of State handed down its judgment on the first Greek MoU, in February 20, 2012. The Portuguese MoU ruling became one of the most highly featured judgments during the crisis years in Portugal and across borders and went on to be characterized as "one of the most controversial in Portuguese constitutional history."[132] That is to say, the Tribunal's ruling on the Portuguese MoU has been used as a benchmark in comparing judicial responses to the implemented austerity measures in financially assisted countries, especially when juxtaposed with the Greek judicial reaction. Due to the various historical and social similarities between the two countries, the almost simultaneous implementation of the financial assistance programs and the congruence of the addressed social matters, these two first judgments issued by the Supreme Courts of Greece and Portugal have been commonly juxtaposed and comparatively assessed.

The review of the State Budget Law for 2012[133] was specifically requested by a group of members of the Portuguese Parliament, while the official party line of the Socialist Party did not subscribe to the request, and in fact stood against it.[134] Upon closer inspection, the Tribunal stated that the appeal to the "extremely serious economic/ financial situation,"[135] could not "serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the state based on *the rule of law*."[136] Instead, the Court boldly ascertained that despite "the crisis context, the

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[131] The judgment can be found in Portuguese at the official website of the Portuguese Constitutional Court; see in particular Tribunal Constitucional, Acórdão No 353/2012 (Plenum), delivered on 5 July 2012, available at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 09.04.2021>. For an official summary of the judgment in English, see https://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html <last accessed 09.04.2021>.

[132] Martinho Lucas Pires, 'Private versus Public or State versus Europe? A Portuguese Constitutional Tale' (2013) 1 MJIL Emerging Scholarship Project, 102; See also Coutinho 81

[133] Capitalization kept as in the official translation of Ruling No 353/2012, available at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 09.04. 2021>.

[134] Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 127, 128

[135] See https://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html <last accessed 16.04.2021>.

[136] See the English summary of the Ruling No 353/3012 https://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html <last accessed 16.04.2021>; emphasis added. See also Tribunal Constitucional, Acórdão No 353/2012 25.º para 5; available in Portuguese at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 16 April 2021>. See

normative autonomy of the Constitution prevented an alleged superiority of economic and financial goals over fundamental constitutional provisions."[137]

To corroborate its reasoning, the Tribunal inquired into the additional pay cuts for public workers, which were foreseen in the 2012 State Budget, and declared on this matter that the suspension of holiday allowances and bonuses were unconstitutional. Throughout its reasoning, the Tribunal explicitly grounded the unconstitutionality of the impugned measures on the violation of the *principle of the Rule of Law* (princípio do Estado de Direito), the principle of equality and the right to social security.[138] In more detail, the Court held that the suspensions in question would shrink the affected citizens' annual income, producing a heavy blow to the citizens' economic stability.[139] In accordance with that, the Tribunal declared that the imposed burdens were not equally distributed among citizens, and that in any case, the degree of "sacrifice"[140] among those who were affected by the measures and those who were not, ought to have been equitative, time-constrained and within certain limits.[141] In this respect, the Court understood the principle of equality not only within the tangible and measurable terms of the "just distribution of public costs,"[142] but read this principle in non-quantitative terms as the "*distribution* of *sacrifices*."[143]

In this connection, the Tribunal found that the differences in treatment among workers in the public and private sector could not be justified and have been so evident that they could not be overlooked.[144] In line with this, the Tribunal pointed out that the Portuguese government could have achieved the same results of reducing the public deficit by spreading the burdens more evenly, equitably and in an apportioned fashion among

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also Claire Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry (*EUI Working Paper LAW 2015/34, *European Univerity Institute, 2015)* 12

[137] Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 127, 128

[138] See Tribunal Constitucional, Acórdão No 353/2012 Relatório and paras 19, 20; available in Portuguese at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 09.04.2021>

[139] Pires 104

[140] The rhetoric of 'sacrifice' has been explicitly and repeatedly used throughout the judgment's reasoning; see Tribunal Constitucional, Acórdão No 353/2012 Relatório and paras 4, 5; available in Portuguese at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 09.04. 2021>

[141] Pires 104. See also Lopes 5, who frames these limits as 'sacrificial limits'. In the original judgment, the wording in Portuguese is "limites do sacrifício," which translates in English into "limits of sacrifice"; see in particular Tribunal Constitucional, Acórdão No 353/2012, Relatório paras 1 and 11, and Tribunal Constitucional, Acórdão No 353/2012 Artigo 25.º para 5; available in Portuguese at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 9.04.2021>.

[142] See the English summary of the Ruling No 353/3012 https://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html <last accessed 09 April 2021>

[143] See ibid; where the wording "distribution of sacrifices" is not used in the English summary of the judgment yet is referred to as a keyword to the official translation of the ruling. The wording "distribution of sacrifices" is not referred to in the original text of Ruling No 353/2012 in Portuguese; see https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 09.04.2021>

[144]de Brito Nogueira, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis ' 73

citizens, without having to severely overload certain units of the population beyond their means, such as the categories of public servants and pensioners. Building on that, the Portuguese Supreme Judges stressed that the impugned measures have been adopted for efficacy-related reasons, which "were not valid enough,"[145] to justify such large differences in treatment among citizens. After assessing the measures under a proportionality review, the bench concluded that these reforms were in breach of the principle of 'equal proportionality'[146] and by virtue of that, the measures were held to be unconstitutional.[147]

However, in an apparently unexpected turn of events the Portuguese Constructional Court suspended the effects of its ruling and did not apply these to the suspension of holiday allowances and bonus payments concerning the budgetary year of 2012. The reason for that was that the annual budget was considered to be already well underway for more than six months at the time that the Court's judgment was issued.[148] This ordinance was taken as a prudent and pragmatic move on behalf of the Tribunal in order to secure the seamless and unobstructed execution of the yearly budget at that point. It was thus deemed that the Portuguese Constitutional Judges, "probably bearing in mind the international and the European financial constraints negotiated by the Portuguese government,"[149] did not wish to jeopardize Portugal's financial assistance agreement with its international counterparts.[150] At the same time, though, commentators have underlined that the declaration of the unconstitutionality of the adopted measures "signaled a red line that the legislature should not cross."[151]

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[145] See the English summary of the Ruling No 353/2012 as provided in https://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html <last accessed 16.04.2021>

[146] Vieira de Andrade, Loureiro and Tavares da Silva 225, 233

[147] Ibid 225; Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 127, 128

[148] Catherine Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 178. Guerra Martins 683, notes that the suspension of the ruling's effects was permitted by Article 282 para 4 of the Constitution of the Portuguese Republic.

[149] Antonia Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' in Richard Albert and Yaniv Roznai (eds), *Constitutionalism Under Extreme Conditions: Law, Emergency, Exception* (Springer 2020) 183

[150] See also on that point the analysis at Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' 178

[151] Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 127, 128; Pires 105. Baraggia frames this as a 'warning' issued by the Portuguese Constitutional Court towards the legislature; see Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' 183.

c. The Phase of Judicial Intolerance

In the aftermath of the first MoU-related judgment of 2012, the Portuguese Constitutional Court followed a similar rationale in its decisions concerning the State Budget Law for the years 2013 and 2014. Yet, these judgments have been characterized in legal scholarship as marking a "more 'activist' approach"[152] on behalf of the Court. In particular, in the subsequent *Rulings Nos 187/2013*[153] and *862/2013,*[154] the Tribunal held that cutbacks in pension allowances and public sector wages, as laid down in the budgetary plan for 2013 and the statute stipulating the retirement of public sector staff, would create large social disparities and would establish conditions of unjust treatment between public and private workers. For that, the Court proceeded in declaring the challenged norms to be unconstitutional.[155] Following a similar path, the Tribunal reiterated its rationale in both *Rulings Nos 413/2014*[156] and *572/2014*,[157] which concerned the outlining of the State Budget for the year 2014. In its grounds of judgment, the Tribunal, after considering the principles of fair and equal share of public burdens among citizens, maintained its position that the new designated salary reductions for workers of the public sector were excessive and disproportionate and hence, declared those to be unconstitutional.[158]

In the course of its judgments, the Court resorted once again to the legal yardsticks of the rule of law together with the "the principle of equality with regard to public costs and the *principle of fiscal justice.*"[159] The Tribunal may have thus, once again, employed a

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[152] Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' 183

[153] For an extended version of the summary in English of Ruling No 187/2013 (Plenum), delivered on 5 April 2013, see the official website of the Portuguese Constitutional Court https://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html <last accessed 12.04.2021>

[154] For an extended version of the summary in English of Ruling 862/2013 (Plenum), delivered on 19 December 2013, see the official website of the Portuguese Constitutional Court https://www.tribunalconstitucional.pt/tc/en/acordaos/20130862.html <last accessed 12.04.2021>

[155] Roberto Cisotta and Daniel Gallo, 'The Portuguese Constitutional Court case law on austerity measures: a reappraisal' March 2014 EMW Publishing LUISS Guido Carli Department of Law Working paper n04-2014 9; de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' 97

[156] For a summary of Ruling No 413/2014 (Plenum) in English, see the official website of the Portuguese Constitutional Court https://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html <last accessed 12.04.2021>

[157] For a summary of the Ruling No 572/2014 (Plenum) in English, see the official website of the Portuguese Constitutional Court https://www.tribunalconstitucional.pt/tc/en/acordaos/20140572s.html <last accessed 12.04.2021>

[158] de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' 98

[159] See the English summary of Ruling No 187/2013 at https://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html <last accessed 14.04.2021>; emphasis added. The "principle of fiscal justice" is not explicitly referred in Rulings Nos 862/2013; 413/2014 and 572/2014. In the original text of the Ruling No 187/2013 in Portuguese this is referred to as "princípio da justiça fiscal"; see Ruling No 187/2013 paras 111, 112 https://www.tribunalconstitucional.pt/tc/acordaos/20130187.html <last accessed 14.04.2021>

similar reasoning to its previous MoU-related jurisprudence. However, there have been some distinct differences in these cases. Notably, it can be recalled that the Tribunal in its early MoU judgments, chose to issue warnings and recommendations to the legislature and refrained from effectuating its judgments. Be that as it may, the Court did not defer the immediate ramifications of its rulings this time,[160] but rather proceeded with the effects that should follow the declaration of the measures as unconstitutional. What is more remarkable, as Antonia Baraggia has noted, is that in these late judgments "the state of emergency argument *disappeared* from the Court's reasoning, making the Court's scrutiny stricter towards any limitation or reduction of constitutional rights."[161] The significance of those decisions has not been limited to issues of doctrinal interest, however. Rather, the Court's explicit reference to social rights in *Ruling No 862/2013* provides insights into the way social rights have been conceptualized during the crisis. In this connection, it is worth quoting the ruling's rationale in detail:

> "On the alleged violation of the principle of protection *against reverses* in fundamental social rights, the Court emphasised that purely forbidding *going backwards* in social terms is *impracticable*, because it would presuppose the idea that the *available resources* are *always going to grow*. It may be necessary to lower levels of essential benefits in order to maintain the *essential core* of the social right in question. From this perspective, guaranteeing the *minimum content* of the right to a pension may itself *mean* reducing the amount of that pension."[162]

The Tribunal's reasoning offers a great summary of several points of reflection on the conceptualization of social rights that have been particularly highlighted during the MoU years in financially assisted countries of Southern Europe.[163] In accomplishing three different ends at once, the Portuguese Constitutional Court seemed to have addressed three major subject matters in the theoretical discourse of social rights that align with the conceptual angle of the present thesis. In particular, the Court hinted at the standard argument elevated in the context of post-dictatorship social welfare states, such as in

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[160] Cf. the analysis on the idea of 'judicial deferral' Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' Feburary 2016 New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper No 16-01 4, 5; Dixon and Issacharoff frame the idea of 'judicial deferral' as "the strategy of severing the assertion of judicial authority from its immediate ramifications […] especially as a tool that may be used by courts to increase the effectiveness of constitutional limits on the actions of powerful political actors."

[161] Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' 183; emphasis added.

[162] See the English summary of Ruling No 862/2013 https://www.tribunalconstitucional.pt/tc/en/acordaos/20130862.html <last accessed 12.04.2021>

[163] For an extended version of the summary in English of Ruling No 862/2013, see the official website of the Portuguese Constitutional Court https://www.tribunalconstitucional.pt/tc/en/acordaos/20130862.html <last accessed 12.04.2021>

Portugal and Greece, namely that social rights are the product of wide-scale societal struggles and social victories cannot fall back and rather constitute an established national 'social acquis'. Linking this to the available state resources argument, the Court held that this would be an impractical commitment on the part of the government.

The reason for that was, to my reading, that *progressive* was not held to mean *increasing*, and the Court underscored that public resources can always be restricted. Thus, the Court concluded that recourse to the minimum core content of a social entitlement does not imply an absolute rule of no regression.[164] What the Tribunal insinuated instead, in my view, is that a minimum core content guarantees the nominal value of the right and not a sufficient amount to its fulfillment, which can be reduced according to the state's available resources.[165] In the ensuing chapters, we shall return to these aspects of the social rights discourse, when we delve deeper to conceptual understandings of social rights. For now, the analysis proceeds with an examination of austerity cases concerning austerity measures taken in Greece and Portugal, which were brought before the Courts of Europe.

5.2. The Supranational Approach

Greek and Portuguese crisis litigation during the first years of the implementation of the financial assistance programs before supranational courts in Europe was not especially productive.[166] Concerning both the Greek and Portuguese cases which have been brought before the Court of Justice of the European Union[167] and the European Court of Human Rights,[168] both the Luxembourg and Strasbourg Courts declined to go into the merits and refrained from exercising substantial judicial scrutiny regarding the conditions attached to the disputed assistance packages.[169]

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[164] A similar reasoning has been developed by the Portuguese Constitutional Court in Ruling No 794/2013; see on that point Violante and André 244, 245

[165] A similar rationale can be found in the austerity jurisprudence of the Hellenic Council of State, during its allegedly moderate judicial phase; see in particular Hellenic Council of State Decisions Nos 3404–3405/2014, where the Council of State held "that a salary of *a certain amount* was not guaranteed, as the system of remuneration depends on the various and specific financial, social and political circumstances […]"; emphasis added. See also the analysis of Gerapetritis 129

[166] The thesis does not assess the cases of Mamatas and others v Greece, App nos 63066/14, 64297/14 and 66106/2014 (ECtHR, 16 July 2016); Case C-64/16Associação Sindical dos Juízes Portugueses, (CJEU, 27 February 2018). For a critical commentary of the recent CJEU case law for Portugal, see Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 (3) European Constitutional Law Review.

[167] CJEU or Court of Justice or Luxembourg Court in this section.

[168] ECtHR or Strasbourg Court in this section.

[169] Cf. Tsiftsoglou, 'Beyond Crisis: Constitutional Change in Greece after the Memoranda'; Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' 993

1. Greece

With regards to Greece, both the European Court of Human Rights and the Courts of the European Union handed a wide margin of discretion to the legislature during the MoU years and have either deferred to national authorities or declined to review the measures altogether. In *ADEDY v Council of the European Union*,[170] two civil servants together with the Confederation of Public-Sector Trade Unions (ADEDY), brought an action for annulment of Council Decisions before the General Court of the European Union.[171] The General Court did not accept that the criterion of 'direct concern', which the plaintiffs raised, was met.[172] The reason being, according to the Court, that the contested clauses in the legislative bill were not sufficiently determinate, in the sense that specific details of the proposed reductions, the manner in which these would be implemented and the categories of civil servants who would eventually be affected by the cutbacks, had not been provided.[173] In line with this, the General Court (GC) held that the means of achieving budgetary savings in the public sector with the aim of reducing the excessive fiscal deficit remained in the discretion of the Greek state.[174] Subsequently, the GC declined to go into the merits and deferred to the Greek authorities, thus it dismissed the action as inadmissible.[175]

The General Court's decision came before the landmark judgment of the Hellenic Council of State *Decision No 668/2012* which was examined above.[176] Following the Council of State's and the General Court's rulings, two out of the more than thirty petitioners, namely, Ioanna Koufaki together with the Confederation of Public-Sector Trade Unions (ADEDY), took the matter to a supranational level again, but this time, they

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[170] Case T-541/10 ADEDY and others v Council (GC, 27 November 2012); Case T-215/11 ADEDY and others v Council (GC, 27 November 2012)

[171] General Court or GC hereinafter in this section.

[172] Bakavou 166; Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 350; Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 (3) European Constitutional Law Review, 416, 417. Pablo Martín Rodríguez, "A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis" (2016) [Cambridge University Press] 12 (2) European Constitutional Law Review, 278, who notes that the discharge of the 'direct concern' claim raised by the applicants, has been done by the General Court in "a disconcerting way."

[173] Case T-541/10 ADEDY and others v Council (GC, 27 November 2012), para 70. See also Fischer-Lescano, *Legal Opinion: Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* 32, 54-55; Daniel Sarmiento and Moritz Hartmann, 'European Monetary Union and the Courts' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (Oxford University Press 2020) 555 paras 19.137, 19.138

[174] Case T-541/10 ADEDY and others v Council (GC, 27 November 2012), para 84; Case T-215/11 ADEDY and others v Council (GC, 27 November 2012), paras 81, 84, 97

[175] Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* 211

[176] See also Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 425

brought their cases before the European Court of Human Rights.[177] In their requests, the applicants argued that the reductions in remuneration, benefits, bonuses and retirement pensions of public servants, as laid down by the first MoU in Greece, "amounted to deprivation of possessions"[178] within the sphere of protection of Article 1 Protocol 1 of the ECHR. In the joint examination of their petitions, [179] the ECtHR declared the applications inadmissible on the grounds that they have been "manifestly ill-founded."[180]

In the course of its reasoning, the ECtHR relied heavily on excerpts taken from the Explanatory Preamble accompanying the domestic statute, and adhered almost entirely to the findings by the Council of State in its *Decision No 668/2012*.[181] To that end, the Strasbourg Court declared that the adoption of the impugned measures were prescribed in view of the general fiscal interest of the Greek state and were justified by virtue of "an exceptional crisis without precedent in recent Greek history."[182] In doing so, the ECtHR implicitly embraced the economic emergency rhetoric that has been invoked by the Council of State in its rationale, subscribing in this way to an informalized emergency practice at a supranational level and endorsing the legality of the contested measures.[183]

In light of the above, the ECtHR restated that the notion of 'public interest' in the context of the Greek crisis, was necessarily extensive, and hence the Court[184] recognized a wide margin of discretion to the national lawmaker in implementing its social and economic policies for consolidating the state's finances.[185] In achieving the goal of balancing state expenditure and revenue, the Court underlined that "national authorities

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[177] Ioanna Koufaki has not been one of the two civil servants that brought their case before the General Court of the European Union. The two civil servants that filed an application together with ADEDY before the General Court "also happened to be the President and the General Secretary of ADEDY."; see on that point the analysis at Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* 211

[178] Koufaki and ADEDY v Greece, App nos 57665/12 and 57658/12 (ECtHR, 7 May 2013), paras 22, 34; the ECtHR noted that the restrictions introduced by the impugned legislation ought "not be considered as a "deprivation of possessions" as the applicants claim, but rather as interference with the *right to the peaceful enjoyment of possessions* […]"; emphasis added.

[179] Koufaki and ADEDY v Greece, App nos 57665/12 and 57658/12 (ECtHR, 7 May 2013); see also Koukoulis-Spiliotopoulos, 'Austerity v. Human Rights: Measures Condemned by the European Committee of Social Rights in the Light of EU Law' 2 par. 6; Koufaki case hereinafter.

[180] Koufaki and ADEDY v Greece, App nos 57665/12 and 57658/12 (ECtHR, 7 May 2013), para 49

[181] Ibid, paras 36, 37; the Court refers here to the Explanatory Report accompanying Law 3845/2010 (Greek Government Gazette A'65/06.05.2010). See also Andreas Dimopoulos, 'Constitutional Review of Austerity Measures in the Eurozone Crisis ' 3 September 2013 10; Ioanna Pervou, 'Human Rights in Times of Crisis: The Greek Cases before the ECtHR, or the Polarisation of a Democratic Society' (2016) 5 (1) Cambridge Journal of International and Comparative Law, 117

[182] Koufaki and ADEDY v Greece, App nos 57665/12 and 57658/12 (ECtHR, 7 May 2013), para 37

[183] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 329; see also the analysis at Chrysanthi Tsolaki, 'Austerity at What Cost? A Comparative Analysis of the Protective Standards of Economic, Social and Cultural Rights During Economic Crisis' (Dissertation, Global Campus Europe: EMA 2019) 64, 65

[184] Unless otherwise specified, 'Court' refers to the European Court of Human Rights in this section.

[185] Koufaki and ADEDY v Greece, App Nos 57665/12; 57658/12 (ECtHR, 7 May 2013), paras 39, 43, 44

are *in principle* better placed than the international judge to choose the *most appropriate means* of achieving this and will respect their judgment unless it is manifestly without reasonable foundation."[186] Thus, the Strasbourg Court made it clear that it was not in its competency to evaluate whether political powers have chosen the optimal means or if they could have considered different means instead.

As grounds for its decision, the ECtHR further acknowledged that in "the particular climate of economic hardship,"[187] the acute resource constraints which existed at a domestic Greek level did not expose the applicants to subsistence difficulties, nor did they impose excessive burdens on them.[188] The Strasbourg Court in the *Koufaki case* did not take into consideration the number of people who were represented by the trade union and were potentially affected by the implemented cuts in public spending. The counterargument, in the Court's defense, has been that the application brought by ADEDY suffered from a rather abstract and weak argumentation, since ADEDY filed an individual petition on behalf of *all* its members, that is, in the name of both high and low income earners.[189] Thereby, ADEDY failed to name or identify the affected individuals and did not provide an approximated account of the extent and the magnitude of the damage that these people suffered in qualitative or quantitative terms.

The ECtHR found accordingly that the applicants had not invoked in a particular and precise manner how their living standard has deteriorated and how their personal welfare has been compromised.[190] The Court thus held that the cuts were not disproportionate and incompatible with Article 1 of Protocol 1 of the ECHR, and that those in the lowest income segments have been sufficiently protected. Before concluding, I shall make a brief remark on this last argumentative line of the Court, as I believe it is noteworthy for two reasons. First, as with domestic interpretations of salary and pension cutbacks, the Strasbourg Court did not recognize that there is "a right to 'sufficient' salary or pension of an established subsistence level."[191] Rather, the Court acknowledged that the

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[186] Ibid, para 31

[187] This wording is not found in the English translation of the judgment, but it is included in the Information Note on the Court's case-law No 163 on the case of Koufaki and ADEDY v Greece, App Nos 57665/12 and 57658/12 (ECtHR, 7 May 2013)

[188] Bakavou 166; Sarmiento and Hartmann 555 paras 19.137, 19.138

[189] Koukiadaki 33. I take here that 'high' and 'low', being relative terms, have been considered as such in this framework, compared to income standards in the Greek public sector at the time of their assessment.

[190] This unsuccessful line of defense has been criticized by various scholars; see Gavalas 59, 758, para 758; Pervou 118, 119. By contrast, in the cases brought before lower courts, which have been examined above, there has been ample data provided on the harmful consequences of austerity measures on the well-being, professional capabilities and personal development of each claimant.

[191] Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 11. On the connection of the right to property and subsistence that has been overlooked by the ECtHR, see also Pervou 138

legislator had the discretion and latitude to adjust salaries and pensions as it saw fit and to a lesser amount, if necessary, as long as the principle of proportionality was respected. Second, as it has been submitted in theory, this line of argumentation by the Strasbourg Court suggested that protection against deprivation of property, in the particular context of austerity at least, did not extend beyond the protection against poverty.[192] The latter is of significant interest in the theoretical implications that it carries, and will be further inquired into later when we return to an assessment of social rights *qua* poverty management rights during the MoU years in Greece.[193]

2. Portugal

Turning to Portugal it can be recalled that the Portuguese Constitutional Court abstained systematically from engaging in a judicial dialogue with the CJEU. Meanwhile, however, ordinary lower courts referred various questions to the Luxembourg Court, asking the Court to review the link of austerity reforms in Portugal with EU law and with the Charter of Fundamental Rights of the EU. The basis of such a referral was that the undertaken reforms were considered to be the product of the negotiations of the Portuguese government with EU institutions and thus the question of applicability of EU law was held to remain open at the time.[194] The first case, *Sindicato dos Bancários do Norte and Others v. BPN - Banco Português de Negócios*,[195] referred to pre-Memorandum cutbacks stipulated by the 2011 State Budget of Portugal, while the second, *Sindicato Nacional dos Profissionals de Seguros e Afins v. Fidelidade Mundial*,[196] related to the 2012 State Budget, which was the first governmental budget plan that was approved after the signing of the financial assistance programme for Portugal.[197]

In both instances, the Court of Justice declared that it had no competence to respond and dodged questions of substance on constitutional and human rights links to the financial adjustment programs. The CJEU stated that the reference had been

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[192] Eva Brems, 'Protecting Fundamental Rights During Financial Crisis: Supranational Adjudication in the Council of Europe' in Georg Vanberg, Mark D. Rosen and Tom Ginsburg (eds), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019) 171

[193] See Part III. Chapter 6.3.2. Social Rights as Poverty Management Rights.

[194] Cf. Alicia Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis' in Mark Dawson, Henrik Enderlein and Christian Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2015) 120, 126; Bonelli and Claes 624, 625

[195] Case C-128/12 Sindicato dos Bancários do Norte and Others v. BPN - Banco Português de Negócios, SA, CJEU Case (CJEU, 7 March 2013)

[196] Case C-264/12 Sindicato Nacional dos Profissionals de Seguros e Afins v. Fidelidade Mundial, (CJEU, 26 June 2014)

[197] On the chronological distinction between the proceedings of the two cases, namely being pre- and post-signing of the Portuguese MoU, see also Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis' 121

inadequately drafted, since it failed to establish any links between the national reforms and the EU conditionality criteria in the assistance programs. For that reason, the Luxemburg Court held that the adopted domestic austerity measures did not constitute part of a European assistance program, and hence refused to assess the cases on their merits.[198]

Looking at the Portuguese austerity jurisprudence, this deferential approach at a supranational level was not restricted to the Court of Justice. Similarly, the ECtHR also found austerity-related applications to be manifestly ill-founded and dismissed them at the admissibility level.[199] More precisely, the jointly discussed cases, *Da Conceição Mateus v Portugal and Santos Januário v Portugal*, concerned payment cuts of public sector pensions, as these have been mandated by the Portuguese governmental spending plan for 2012, after the signing of the Portuguese MoU. The applicants complained about the impact that the reduction of their pensions had on their financial situation and living conditions.

In its corresponding decision, the Strasbourg Court followed the same rationale and essentially repeated the grounds that it had developed in the *Koufaki case*.[200] Reckoning on *Decision 353/2012* of the Portuguese Constitutional Court, concerning the first post-MoU governmental budget, the ECtHR stated that a reduction of pensions was allowed, since this served the public interest and given that "a fair balance has been struck between the *general interest of the community* and the protection of the person's individual rights.[201] On par with the *Koufaki case*, the Strasbourg Court[202] abstained from taking a stand on whether the legislature had selected the best solution available. It did, however, explicitly acknowledge the necessity of the adopted policies. To that end, the Court stated in particular, that the cuts "were intended to reduce public spending and were part of a broader programme designed by the national authorities and their EU and IMF counterparts to allow Portugal to secure the necessary *short-term liquidity* to the State budget with a view to achieving *medium-term economic recovery*."[203] The Court, thus, made use of a quite specific economic wording in describing the Portuguese's government political

198 Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' 1172; Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' 177, 178

199 Da Conceição Mateus v Portugal and Santos Januário v Portugal, App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013)

200 Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* 266, 340

201 Da Conceição Mateus v Portugal and Santos Januário v Portugal, App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013), paras 23, 27

202 Unless otherwise specified, 'Court' refers to the European Court of Human Rights in the ensuing paragraphs.

203 Da Conceição Mateus v Portugal and Santos Januário v Portugal, App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013), para 25; emphasis added.

strategy and financial plan in the latter's macro-economic effort to competitively re-enter the financial markets.

In line with this, the Court underlined the "transitory"[204] character of the measures and justified the magnitude of the assistance program by stressing, in a rather impressive wording, that "the economic crisis which was *asphyxiating* the Portuguese economy at the material time and its effect on the State budget balance were exceptional in nature."[205] Regarding the reductions at stake, the Court further held that "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,"[206] the applicants did not bear a disproportionate and excessive burden. Therefore, the ECtHR found once again the application to be "manifestly ill-founded,"[207] and declared the case inadmissible.

On reflection, the highest courts in Greece and Portugal have been criticized for not bringing the legality of the austerity measures in Europe to their courts, where it should have been questioned, according to some commentators.[208] At the same time, however, the CJEU and the ECtHR have also been heavily disapproved of in academic scholarship[209] for consistently denying jurisdiction and for demonstrating a timid and dispirited approach. In that vein, European Courts have been widely criticized for being "extremely reserved"[210] in their austerity policy judgments and for displaying formalism,[211] while their reluctance to judicially review the MoUs has been lamented for being "a missed opportunity."[212] Despite the fact that the crisis in Europe was seen as a widescale "constitutional moment,"[213] capable of extending the national borders of the financially assisted states and

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[204] Ibid, para 26

[205] Ibid, para 25; emphasis added. Picking up on that striking wording, Drossos talks about a "judicial asphyxia"; Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* 213, 214

[206] Da Conceição Mateus v Portugal and Santos Januário v Portugal, App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013), para 29

[207] Ibid, para 30; See also Bonelli and Claes 623

[208] Pires 107

[209] Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' 1172-1173; Bonelli and Claes 624, 625

[210] Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (Nomos Verlag 2014) 56 Fischer-Lescano makes that claim here specifically for the ECtHR.

[211] Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis' 121; Carlos Aymerich, 'Challenging Austerity before European Courts' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021) 110

[212] Scicluna 90

[213] Maria Dicosola, Cristina Fasone and Irene Spigno, 'Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis' (2015) 16 (6) German Law Journal, 1323. On the theory of 'constitutional moment' , as conceived and developed by Bruce Ackerman in US constitutional theory, and as a broader discussion on constitutional change, namely as those transformative events occurring outside the formal limits established by the constitutional text, see Antonia Baraggia, 'Constitutional Moment' July 2020 Oxford Constitutional Law Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]

in a position to provide "an input for a more active use of the preliminary reference procedure,"[214] the Supreme Courts, in Portugal and Greece at least, were held to be doing "the constitutional legwork, not the Court of Justice."[215]

Commentators have also been quite adamant in their criticism of European Courts in their consistent refusal to substantially scrutinize the cases before them on the basis of possible human rights violations. Looking at Strasbourg, scholars have lamented the deferential approach of the Court, which has been echoed in the examined austerity-related cases. To that end, analysts questioned the language and practice of the wide discretion granted to national authorities, as signaling an abdication of rights protection and as consciously ignoring the actual, negative, humanitarian aspects of the economic crisis in countries where austerity measures had been imposed.[216]

Turning their attention to Luxembourg, other specialists highlighted the pertinence of human rights with the assistance programs in Greece and Portugal, and thoroughly challenged the repeated denial of the Court of Justice to assess the compatibility of the conditions attached to the implemented MoU measures with fundamental rights.[217] In this vein, it has been emphasized that the Court of Justice did not only refrain from scrutinizing possible links of human rights European Union law with the policy-induced measures, but no less significantly abstained from taking "a clear stance on the conformity of austerity measures with fundamental *social values* of the Union."[218] The lack of commitment of the Court of Justice in upholding the Union's proclaimed social values has not been the Court's only blemish, however. The degradation of core *legal values* of the EU edifice, namely the commitment to the rule of law and legal certainty, has been at the focal point of attention for commentators who dealt with questions of EU judicial review of the assistance programs.[219] To that end, the deferential stance that the Courts of the Union have

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[214] Dicosola, Fasone and Spigno 1323. In assessing the implementation of austerity programs in financially assisted countries from an EU judicial perspective, Claire Kilpatrick stressed that preliminary references on the interpretation of EU law in relation to assistance programs can act as 'strategic litigation choices' and reduce, in this way, the margin of maneuver displayed by the CJEU; see Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' 397, 419

[215] Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' 179

[216] Pervou 138; Ragnarsson 614, 615

[217] Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis' 115, 126, 132; Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' 993. Francisco Pereira Coutinho in his evaluation of the CJEU's stance in evading to review the measures noted that "[…] in a situation of financial and economic emergency, the Court could *not have stayed dormant* when questioned with possible breaches of *fundamental rights* based on legislation clearly stemming from EU law sources."; emphasis added, see Coutinho 120

[218] Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' 1173; emphasis added.

[219] Cf. Coutinho 120; Martín Rodríguez 277 et seq.; Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 347

continuously exhibited, received hefty criticism. In this context, scholars emphasized that EU Courts fell short of fulfilling the legitimate expectations that individuals placed on them and of safeguarding the principle of legal certainty.[220] In this way, academics underscored that the review of the assistance programs in question has not been undertaken properly, and as a result of this, problems surrounding the rule of law have been created.[221]

To sum up, the Court of Justice has been criticized for refraining to substantially address the issues brought before its chambers, whether these have been raised through direct annulment actions, or posed via preliminary references from national courts, asking for the validity of EU sources and the linkage of the latter with the contested assistance packages. In the first case, the Court's blind deferral to the expanded powers of national authorities has been seen as tacitly accepting the measures, and as endorsing "a sort of a *légalité élargie*,"[222] at a substantive and procedural level, by adhering to the overriding and abstract general interest of the state. In the second case, the Court's refusal to examine the legality of the MoUs in the light of EU law was held to be problematic in both procedural and substantive terms because it gave to "a challenged system the imprimatur of the rule of law by identifying that rule with the rule of law."[223] Taking all of the above into consideration, the analysis continues in the succeeding chapters with a theoretical analysis of the highly embattled, yet habitually used, notions of cause-lawyering, strategic litigation, and judicial activism, before it resumes a more thorough assessment of the austerity jurisprudence in the examined case studies of Greece and Portugal.

[220] Martín Rodríguez 277 et seq.
[221] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 332
[222] Martín Rodríguez 269
[223] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 347

6. Social Rights Litigation and Adjudication During the Crisis: A Critical Appraisal

6.1. Social Rights Lawyering in the Crisis

Earlier in the analysis, it was shown that arguments against the justiciability of social rights have been elevated on the basis of institutional factors, among others. The institutional configuration of the legal system, namely the accessibility of courts, the judicial proceedings, and the political orientation of adjudicators, has been part of such criticism.[1] Judicial processes have been criticized along these lines for being complex, inflexible, and unaffordable, as well as for being designed to accommodate the already privileged. They have been condemned for not giving voice to the poor and marginalized proportions of the general populace, whose personal resources may not stretch far enough to recruit lawyers and reach the courts.[2] Judicial systems have also been criticized for placing a heavy burden of requirements on the litigants while exhibiting outdated methods of fact-gathering and tangled bureaucratic processes, which may overwhelm potential claimants in their effort to turn to a lawyer and seek justice before a court.

In that line of criticism, the role of lawyers has been implicated to the extent that lawyers have regularly been portrayed as promoting and guiding the law "in favor of those who can hire them."[3] That is to say, lawyers have come to be perceived as "*a resource* available primarily to those with capital, according to the degree of capital possessed."[4] Lawyers have thus been depicted as an elite and professional monopoly, a cloistered group which, together with judges, preserve and uphold the status quo. In this context, interested claimants have also been commonly understood as those who know what their rights are, how to work their way through the legal system and how to hire lawyers to represent them in claiming those rights.[5] Affirming this criticism, the legal profession has not only been

[1] Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-legal Review' (2009) 6 (11) Sur - International Journal on Human Rights, 95

[2] See for instance Ferraz 1663; Motta Ferraz has systematically expressed his views against the litigation of social rights and specifically of the right to health, especially in the context of Latin American countries and in the case of Brazil in particular.

[3] Sabbeth

[4] Ibid; emphasis added.

[5] Mark V. Tushnet, 'The Inadequacy of Judicial Enforcement of Constitutional Rights Provisions to Rectify Economic Inequality, and the Inevitability of the Attempt' in Lokendra Malik and others (eds), *Judicial Review: Process, Powers, and Problems (Essays in Honour of Upendra Baxi)* (Cambridge University Press 2020) 15; Tushnet makes this remark with respect to access to medication in the specific context of Colombia. In that connection, he notes the following: "Initial studies suggested that members of the middle class secured judicial enforcement of their right to medications while poor people did not. The explanation was that middle-class people *knew how to hire* lawyers and *work through* the legal system, whereas poor people had more

criticized for perpetuating the already existing political and social hierarchies in society, but also for being constructed upon those very hierarchies and thus being a stratified profession.[6] Turning to the austerity discourse, the discussion about lawyers has also regenerated cyclical arguments and counter-arguments that we have seen being raised against courts. Specifically, investing lawyers with the task of tackling nationwide political decisions, which themselves touch upon high-end budgetary considerations, has been considered as an ill-fated tactic, in the same way that courts were taken to be unsuitable to address austerity-implicated social policies.

Reflecting upon all of the above criticisms towards courts and lawyers and having examined few of the most high-profile austerity cases in Greece and Portugal, the analysis proceeds in this chapter with a theoretical assessment of social rights advocacy. To do so, the thesis inquires into the role of involved lawyers during the crisis years, seen through the prism of their ethical mandate and apropos of their positioning towards voicing societal values. To limit the examination of crisis jurisprudence to the courts without taking lawyers into consideration, would be, for present purposes, an epistemological reduction that would narrow down the ways in which we seek to understand how social rights have been conceptualized during the crisis. Examining the role of lawyers can provide insights into the relational and value-based aspect of social rights claims, beyond the lens of a strictly state-dependent or individualistic vision of social theory.

Ordinarily, in civil law as much as in common law traditions, the *consensus gentium* for those who practice law as a vocation, is that their professional responsibility and code of conduct expects of them to be zealous, yet neutral, advocates of their representatives' interests and that their role is passive until retained by a client with a requested claim.[7] In this framework, litigation is considered to be, at least on paper, the act or practice of engaging in legal proceedings, which involves the interested parties as well as the attorneys

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difficulty doing so."; emphasis added. In a similar vein, Motta Ferraz fiercely opposed socio-economic rights litigation in Brazil, because in his respect, those who end up benefiting from this type of litigation are a small minority, who are able to use the court system to their advantage in the first place. In this connection, Ferraz brought forward the argument of the separation of the general population between those few individual litigants and the majority of *non-litigants*, or to use his own poignant words, "[a]s the Brazilian experience indicates, when courts succumb to the pressure (or incentives) to "give teeth" to constitutional norms that recognize social rights, they end up transforming a collective and intractable issue of resource allocation among the numerous *competing needs* of the population into a *bilateral dispute* between *single*, *needy individuals* and a *recalcitrant, stingy, and corrupt state*."; emphasis added, see Ferraz 1662, 1663; see also Ferraz

[6] In the context of modern America, see the analysis of lawyers as a stratified profession in Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford University Press 1977) 40 et seq. For an analysis of the stratification of the legal profession within its professional ranks against the US backdrop, see Dixon and Seron

[7] See also on that point Margareth Etienne, 'The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers' (2005) 95 (4) Journal of Criminal Law & Criminology 1196

that represent them. This is of course, even for the most enthusiastic positivists, a rather sterile and insulated portrayal of the role of litigation and lawyers within the justice system. Drawing on the ever-debated relationship between law and politics, social rights scholars have come to put forward a different take on what litigation constitutes. That is to say, tapping into the deep-rooted entanglement of law and politics, they stress that litigation is "*a political act*"[8] that can have multiple consequences for policy, public politics and political perceptions, and hence it is important that legal practitioners are oriented towards securing compliance and maximizing broader social impacts.[9]

Within the bounds of this section, lawyering[10] is taken to broadly connote the practice of law by a legal professional and does not stand as a synonym to cause-lawyering. Starting from the latter, the analysis explores the meaning of cause-lawyering as it has originated in its intellectual place of birth, namely in the United States, and as it has developed within the particular American framework of conceiving and protecting social rights. In that connection, it is acknowledged here that cause lawyering in its present form carries a certain definitional vagueness and potential for adaptiveness. Paradoxically, despite its ambiguity, cause-lawyering is taken to bear a conceptual rigidity, which translates in the attachment of the term with institutional politics. Thus, when manifested within liberal juridico-political contexts at any jurisdiction and in any form, it is considered to be offensive,[11] similarly to judicial activism, because it challenges and seemingly threatens the authority and vantage of liberal legalism.

Building on the aforementioned, the analysis unfolds in the second half of the section as follows. First, it looks at how the role of lawyers has been perceived at a European level and in the context of the examined case studies of Greece and Portugal *pre*-crisis and *midst*- crisis, in the face of the MoU-mandated austerity policies. Second, it probes whether the exhibited legal practice in social rights cases during the crisis years could be classified as falling under the cause-lawyering and strategic litigation typology. Third, it questions the outright dismissal of the role of lawyers in the advancement of social rights claims and highlights the way lawyers sought to protect social rights through an

[8] Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi, 'Introduction: From Jurisprudence to Compliance' in César Rodríguez-Garavito, Julieta Rossi and Malcolm Langford (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017) 35; emphasis added. Cf. Etienne 1199 citing Austin Sarat and Stuart A. Scheingold, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford Law and Politics 2005) 2, where it is noted that "legal practice is a deeply moral and political activity."

[9] Langford, Rodríguez-Garavito and Rossi, 'Introduction: From Jurisprudence to Compliance' 35

[10] Joachim Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 (3) Cambridge Law Journal, 550

[11] Boukalas 401

appeal to social and legal values. The chapter concludes with a suggestion for a processual theory of the legal profession that surpasses the challenges of the highly politicized and mono-semantic cause-lawyering discourse and rather focuses on an understanding of social rights advocacy as standing at the interface of structures and social interactions.

i. Cause Lawyering and the American Paradigm

The interest in the role of lawyers and the systematic documentation of their activities and strategies has started to develop in legal studies from early on. Arguably, this interest has originated and heightened in common law traditions, and specifically against the backdrop of the American legal experience, "because of the significant role of lawyers in the U.S. court system."[12] In this context, advocacy on social rights, among other social causes, has attracted the interest of commentators, who started using terms such as 'cause-lawyering' and 'strategic litigation'[13] to signify a socially-sensitive legal practice as a distinct type of advocacy that departed from a conventional understanding of practicing law.

With time, cause lawyering and strategic litigation have become established terms in social rights advocacy within the confinements of the United States legal culture. The debate has not been exhausted in that particular judicial vernacular, however, and in relevant literature, activist lawyers and legal practitioners pursuing strategic litigation are found under a variety of appellations.[14] To name a few, legal practitioners are called, in this context, "radical lawyers, critical lawyers, public interest lawyers, poverty lawyers, socially conscious lawyers, visionary lawyers,"[15] while the very legal practice has been termed, among others, as "social movement lawyering,"[16] or simply "movement lawyering,"[17]

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[12] Sabbeth

[13] See Alexander Graser and Christian Helmrich (eds), *Strategic Litigation: Begriff und Praxis* (Nomos 2019). For a critical account of strategic use of litigation by private entities as a tool for influencing public policy and calibrating the relationship between public and private interests, see also Eva Nanopoulos and Rumiana Yotova, "Repackaging' Plain Packaging in Europe: Strategic Litigation and Public Interest Considerations' (2016) 19 (1) Journal of International Economic Law.

[14] The analysis here acknowledges the nuances and subtleties among the various different types of lawyering as these have been analysed, formulated and refined throughout years of laborious and scholastic research, especially in American literature. However, for reasons of analytic coherence, in the present thesis, I do not differentiate among the different types and uses of 'cause lawyering', 'strategic litigation', 'movement lawyering' or 'activist lawyering' and use these framings interchangeably throughout this chapter.

[15] Cf. Etienne 1197; Robert et al. Borosage, 'Comment: The New Public Interest Lawyers' (1970) 79 (6) The Yale Law Journal. Trubek introduced the term 'critical lawyers' and 'critical legal practice' to refer to lawyers who sought "to empower oppressed groups and individuals," initiating in this way "a trajectory of change towards a more just society"; see Louise G. Trubek, 'Critical Lawyering: Toward a New Public Interest Practice' (1991) 1 Public Interest Law Journal 50

[16] Austin Sarat and Stuart A. Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006)

[17] Scott L. Cummings, 'Movement Lawyering' (2020) 27 (1) Indiana Journal of Global Legal Studies, 1654 et seq.

"progressive lawyering,"[18] "community lawyering"[19] or in a more polemic tone as "rebellious lawyering."[20] Certainly, the emergence and evolution of these terms invites long and in-depth analyses, and there are subtleties and intricacies among these framings that relate to US domestic politics, which are beyond the focus of the thesis at hand. Conceptual and nominative variations among the different types of law practice also stem from the different intellectual and ideological origins upon which these practices have been grounded. Namely, these are either premised on legal liberalism or they deviate from the liberal norm and are inspired by critical studies in its various manifestations.[21]

In the grand scheme of things, cause-lawyering has been linked to the historical positioning and development of social rights protection within the American legal order. Customarily, economic, social and cultural rights have either been shielded under the bulwark of the First Amendment to the United States Constitution and via constitutional litigation,[22] or they have been indirectly addressed through guarantees on civil and political rights. Treaties matter, and the fact remains that the United States signed the Covenant on Economic, Social and Cultural Rights in 1977,[23] only for its ratification to remain dormant

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[18] Corey S. Shdaimah, *Negotiating Justice: Progressive Lawyering, Low-Income Clients, and the Quest for Social Change* (New York University Press 2009)

[19] On the use of this term and the context in which this has been framed, see Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992). Also Chris Jochnick, 'Poverty and human rights: can courts, lawyers and activists make a difference?' (*openDemocracy*, 2014).

[20] Jochnick

[21] See Luz E. Herrera and Louise G. Trubek, 'The Emerging Legal Architecture for Social Justice' (2020) 44 NYU Review of Law & Social Change 373 for a summarizing chart on some of the key differences between the social justice law practices that draw upon critical studies, critical race theory, and traditional public interest law approaches, which strive for equal access to social justice, but whose legal arguments are informed, nonetheless, by legal liberalism and stay within the latter's conceptual range and theoretical framework.

[22] Cf. K. Jayanth Krishnan, 'Lawyering for a Cause and Experiences from Abroad' (2006) 94 (2) California Law Review, 578, who underlines the key significance of constitutional litigation to cause-lawyering.

[23] The date of signing the International Covenant on Economic, Social, and Cultural Rights (ICESCR) by the United States is stated in different sources to be 1977 or 1978 or 1979. Philip Alston marks that the ICESCR was signed by the United States in 1978, see Philip Alston, 'Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States' in William F. Schulz (ed), *The Future of Human Rights: US Policy for a New Era* (University of Pennsylvania Press 2008). In Philip Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 (2) The American Journal of International Law, 365, Alston also remarks with respect to the ICESCR that this has been sent to "the U.S. Senate in 1978 for its advice and consent" by President Carter. Similarly, MacNaughton and McGill note that "In 1977, President Jimmy Carter signed the two international human rights treaties implementing the Declaration-the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) but transmitted both treaties the next year to the U.S. Senate for advice and consent with substantial "reservations, understandings and declarations.""; See Gillian MacNaughton and Mariah McGill, 'Economic and Social Rights in the United States: Implementation Without Ratification' (2011) 4 (2) Northeastern University Law Journal 367. Differently, AI, *Human rights for human dignity: A primer on economic, social and cultural rights (*Amnesty International Publications*)* 28, where it is noted that "although the USA was involved in the negotiations of the ICESCR, and proposed some of its key provisions, it has only signed the treaty (in 1979), but not ratified it."

since then.[24] This has been the outcome of a series of factors, the "narrow understanding of human rights that is limited to civil and political rights"[25] being one of them. Effectively, this normative reality bore its imprint in the way that social rights have come to be understood, not only at a doctrinal level but also at a ground level within the American society, where social issues have been mediated in law through identity politics and liberty rights.

Due to this ambivalent and, at times, hostile[26] stance of the United States towards economic and social rights, attention has gradually shifted towards lawyers as facilitators and frontrunners in vindicating and entrenching such rights in domestic institutional fora. Subsequently, another distinction has sprung up in the American context, notably between 'political lawyering' and 'cause lawyering'. Political lawyering has been employed in this connection to connote the legal struggles and the contribution of lawyers in guarding political liberalism and strengthening civil and political rights. Political lawyering has thus been related with the advocacy of the rights to freedom of speech, thought and religion or freedom of movement and association, while striving to ensure judicial independence and procedural justice.[27] Concurrently, engagement with cause lawyering dwelled on social and economic rights, and more specifically on "land rights, peasant movements, welfare claims, the rights of labor and women, and even the rights and welfare of animals."[28]

Against this backdrop, lawyering in the American context has acquired the status of a project, beyond lawyers alone. Lawyering as a *project* has developed into a joint effort, bringing together strategic advocacy, community organizing, lobbying, media strategies, direct action and interdisciplinary collaboration with NGOs and human rights activists.[29] In addition, the legal practice of cause lawyering has been expedited by procedural provisions in domestic procedural law, which allowed for class actions or other aggregate litigation options, while it has been sustained by an overall underlying legal culture of pro bono work and legal clinics.[30]

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[24] Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' 366

[25] Zehra F Kabasakal Arat, 'The Commission on the Status of Women' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (2nd edn, Oxford University Press 2020) 281

[26] Cf. MacNaughton and McGill 366; Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Oxford: Hart Publishing 2011) 176

[27] Cf. Randall Peerenboom, 'Searching for political liberalism in all the wrong places: The legal profession in China as the leading edge of political reform?' in Yves Dezalay and Bryant Garth (eds), *Lawyers and the Rule of Law in an Era of Globalization* (Routledge 2011) 247; Sida Liu, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' (2013) 38 (3) Law & Social Inquiry, 673

[28] Peerenboom 247

[29] Herrera and Trubek 390

[30] Ibid 362, 363, where Trubek explains pro bono work along these lines: "In pro bono work, lawyers donate their time by providing legal counsel to nonprofit organizations and social justice clients and causes."

In such a setting, and while deviating from a lawyers-focused approach, commentators have opted for the term 'cause lawyering' over 'cause lawyers'[31] in order to connote the *mutual*, *coordinated* and *integrated* effort undertaken by advocates, activists and the civil society.[32] In this vein, cause-lawyering has been used as an overarching term to signify the professional, political, social, and cultural practices engaged in by various legal and social actors in mobilizing the law for the purposes of curbing social injustices and fighting economic strife. In light of the above, cause lawyering has morphed into a type of social practice that has been committed to utilizing legal means with the purpose of not only supporting social movements and struggles, but of essentially *moving* the law to new directions and of transforming the political and social establishment by initiating new legislation on social rights matters.[33] Advocating for social causes through lawsuits in the American justice system has thus "become an important source of legal change."[34]

Through this prism, strategic lawyering has been approached as a potential and a medium within the contours of social mobilization and within the multilayered architecture of human rights protection with an emphasis on social rights. By bridging the gap of political and civil rights with economic, social and cultural rights in the American human rights framework, cause-lawyering came to signify a conscious and deliberate political and activist use of the legal profession. In other words, cause-lawyering signaled how to be an activist and represent activists, how to legally articulate a social problem within an existing legal system, and how to strive to change that system to correct persistent social injustices.

As a result, cause-lawyering and strategic litigation became identified with using the legal means to *create* both *law* and significant social and political *change*.[35] The question of law making and of social transformation has been a fundamental issue and a recurring pattern that we seem to ultimately return to in our quest for the meaning and justification of social rights in the contemporary discussions addressing them. It is a question that we have come across when assessing crisis theory and when looking at the justiciability debate of social rights. And it is a question that will trouble us again later when we look into judicial activism. However, as it has already been stressed, the present thesis does not

[31] Anna-Maria Marshall and Daniel Crocker Hale, 'Cause Lawyering' (2014) 10 (1) Annual Review of Law and Social Science, 303
[32] Cummings 1695 et seq.; See also Marshall and Hale 303
[33] Austin Sarat and Stuart A. Scheingold, *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001) 254-255; see also Joanne Conaghan, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2005) 505
[34] Scott Baker and Gary Biglaiser, 'A Model of Cause Lawyering' (2014) 43 (1) The Journal of Legal Studies, 37
[35] Cf. Etienne 1196; Borosage 1069, 1070

grapple with the question of political change, the ways this can be achieved and the role that lawyers and courts perform towards that end. Rather, the analysis here deviates from an understanding of the legal profession seen through the prism of how this could potentially marshal widescale political change in the sense of societal reordering among different classes. After all, as it has been argued on different occasions throughout the present analysis, this author understands such terms to fluctuate within the epistemological limits and ethical premises of liberal legalism, within which they are conceived.

This analysis approaches the concept of lawyering modestly as a means of accentuating social concerns before the law, and as a medium of bringing to the fore existent yet underutilized or neglected avenues for the conceptual realization of social rights through a combined national and international framework of protection. If we were to talk about how change is implicated in the analysis at hand, then social rights lawyering is approached here not as a question of change at the level of governance or from the perspective of normative legal standards, but rather as a question of change at the level of understanding interactions, structures and social ethics from a view form the ground.

In the course of time, and despite the specific legal and political context of the United States with which cause-lawyering has been traditionally linked and within which it has developed, the term has surpassed its geographical origins and borders and has been used across different countries and jurisdictions.[36] In the ensuing paragraphs, the analysis proceeds to examine how cause-lawyering and strategic litigation have been introduced at a European level *pre*-crisis, and how these terms became visible as part of a broader discussion on the mobilization and contestation of austerity measures during the crisis.

[36] Dia Anagnostou, 'Law and Rights' Claiming on behalf of Minorities in the Multi-level European System' in Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-level European System* (Hart Publishing 2014) 1. Cause-lawyering has been utilized in other contexts, such as in countries in transitional justice, as a general tool for advancing gender-related issues. See, indicatively, Susana de Matos Viegas and Rui Feijó (eds), *Transformations in Independent Timor-Leste: Dynamics of Social and Cultural Cohabitations* (Routledge 2017); Sara Niner (ed) *Women and the Politics of Gender in Post-Conflict Timor-Leste: Between Heaven and Earth* (Routledge 2016), where it is documented how gender perspectives have been addressed in an activist fashion through human rights initiatives supported by lawyers, resulting in law and policy changes in the area of women's rights and in the aid of poor individuals and marginalized societal groups.

ii. Lawyers in the Face of the Crisis

Social rights, 'anti-crisis mobilization'[37] and contestation of austerity measures[38] have attracted wide attention in the context of the financial and economic crisis in Europe and in relation to the implemented fiscal adjustment programs in financially assisted countries. The forms and forums of challenging austerity in Southern European countries were manifold and included institutional as well as extra-institutional channels for contestation. Austerity reforms and contractionary social policies were disputed by oppositional parliamentary politics, trade unions, grassroots activists, social protest movements, and extra-parliamentary political formations as well as by academics, experts, non-mainstream media outlets, intellectuals and artists.[39] In this connection, research on the various avenues of mobilization remained fragmented with a particular focus placed on grassroots social movements in non-legal analyses or with a court-oriented and institutional lens applied in legal analyses.[40] That is to say, in approaching austerity litigation, legal examinations have been restricted to the role of the judiciary, while the role of lawyers in contesting austerity has remained out of the scope of thorough observation and critique. Rather, lawyers appear to have been addressed sporadically and incidentally, as a tangential discussion, while the main focus remained on courts and judges.[41]

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[37] Claire Kilpatrick and Bruno de Witte, 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone' (2014) 7 Sieps Swedish Institute for European Policy Studies, 4. See also Claire Kilpatrick, 'Taking the Measure of Changing Labour Mobilization at the International Labour Organisation in the Wake of the EU Sovereign Debt Crisis' (2019) 68 (3) International and Comparative Law Quarterly, 665, 685 et seq.; Kilpatrick argues that the International Labour Organization (ILO) acted as a rights mobilization structure during the debt crisis in European financially assisted countries and notes the following regarding mobilization: "Mobilization means the purposeful use of legal norms and institutions by social movements and civil society groups to advance identified policy goals. It can be contrasted with the use of legal norms and institutions by individuals or entities to settle disputes affecting them."

[38] See for instance the collective work by Farahat and Arzoz

[39] Marí-Klose and Moreno-Fuentes 333; Anuscheh Farahat and Xabier Arzoz, 'Contestation and Integration in Times of Crisis: The Law and the Challenge of Austerity' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021) 4; Nav Haq, Pablo Martínez and Corina Oprea (eds), *Austerity and Utopia* (L'Internationale Online 2020). See also on the various forms of political contestation of austerity in Europe during the crisis Oscar Berglund, 'Contesting Actually Existing Austerity' (2017) 23 (6) New Political Economy

[40] From a social movements' perspective, see Beltrán Roca Martinez, Emma Martín Díaz and Ibán Díaz-Parra (eds), *Challenging Austerity: Radical Left and Social Movements in the South of Europe* (Routledge 2018). However, in this analysis there is no reference made to the possible interaction of legal practitioners or judicial bodies with social and political movements in jointly contesting austerity. From a legal point of reference, see also Farahat and Arzoz, *Contesting Austerity: A Socio-Legal Inquiry*, where in the volume's various contributions, the focus is placed on courts rather than lawyers. Claire Kilpatrick and Bruno de Witte assessed "mobilization choices" during the Euro-crisis, by focusing on unions and civil society groups and the specific avenues that these took in legally addressing the challenges that they faced in the protection of fundamental rights; see Kilpatrick and de Witte 4, 5 et seq.

[41] Cf. Anne Engelhardt, 'Judicial Crisis in Portugal: The Constitution in relation to the State, Social and Labor Movements' (2017) 8 (1) Revista Direito e Práxis, 674, 696 et seq., where Engelhardt looks at the links between social movements in Portugal and the Portuguese Constitutional Court, during the MoU years.

In addition, scholarly research documenting the different modes of contestation has not assessed in an interdisciplinary manner, whether mobilization initiatives have been mutual, coordinated and systematic, or how the role of lawyers in advancing social rights has been implicated in this respect. That is to say, there has not been any substantial documentation of the defensive line or use of legal norms and techniques that lawyers have employed while representing austerity cases and while navigating at a domestic level through the intricate national and supranational architecture of social rights protection.[42] The result of this lack of engagement with the role of lawyers has been two-fold, in my estimation. First, litigation overall has been either sweepingly dismissed, as per usual, following the common argument that lawyers and courts represent and preserve the status quo, read in conjunction with the argument that social advances cannot be a product of litigation but they are rather the product of political deliberation.[43] Second, in the absence of an appropriate vocabulary to describe the role of lawyers in austerity litigation from a country-based perspective in Europe, the American-inspired terms of cause-lawyering and strategic litigation have made their appearance in the social rights mobilization discourse.

Before moving forward, what is meant and *not* meant here by 'lawyers,' calls for clarification. When referring to lawyers in the context of the austerity jurisprudence, lawyers are not taken to be a unified, coherent body of legal specialists, who have been the only ones capable of decoding the austerity measures. Arguably, even while the real authorship of the MoUs in both Portugal and Greece is still an enigma,[44] it is common knowledge that the lengthy and highly technical texts prescribing the austerity measures in country-specific structural reform programs have been drafted under the advice of a small coterie of economists, financial experts and legal professionals.[45] Lawyers have been

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[42] Anagnostou raises the point that there is a lack of country-based or comparative studies that explore how rights litigation and legal mobilization develops at a domestic level in tandem with a multiplicity of norms and judicial venues beyond the state, how rights litigation and legal mobilization at the supranational and international level is thoroughly mediated and distinctly shaped by legal, judicial, social and political factors at the national level, and how litigation and legal action are connected to and influence broader social goals and the political strategies of social movements at a national and European level; see Anagnostou, 'Law and Rights' Claiming on behalf of Minorities in the Multi-level European System' 20, 21,

[43] Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 276; Kaidatzis' argumentation is characteristic of this line of reasoning; the author notes in relation to the austerity jurisprudence in Greece during the MoU years: "Litigation is arguably not the most effective way to fight austerity. Despite the judicialisation boom of recent decades, it is mainly through politics rather than in courtrooms that unpopular public policies are overturned."

[44] On that point see also de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' 90, where de Brito poignantly remarks: "It is said in Portugal that the real authorship of the MoU is a very well-kept secret."

[45] On February 11, 2014, in the context of 'Current Questions', which is part of the Parliamentary Control of the Hellenic Parliament, a series of questions on the authorship of the first MoU in Greece and the role of the financial advisory and asset management firm 'Lazard' in this regard, have been raised by a Member of the Parliament to the Minister of Finance, serving at the time. After thorough research conducted by the

involved in this respect, along with economists, in formulating the adjustment programs and austerity policies.

The compartmentalization and monopolizing of knowledge, however, did not happen overnight. As it has been stressed in theory, a long time in the making, international financial institutions have gradually shaped the global economy as "an arena of technical and legal expertise, better left to economists and lawyers"[46] rather than to ordinary politics. Under this light, the role of lawyers has largely been portrayed as implicitly endorsing and normalizing the austerity regime and the existing political state of affairs, and as being an unaffordable option for most citizens.[47]

Moreover, the highly convoluted and technical language in which austerity policies have been drawn up, has elevated lawyers to an expertocratic level and has rendered these as the only medium through which to respond to such policies and has thus crowded out other possible venues of deliberation.[48] As a result, lawyers in the austerity discourse have been identified to a large extent with those few who understood the international and supranational overtones of the austerity measures, as well as with those who stood positively inclined towards the measures and tacitly validated them. The content of austerity measures was thus seen as an area of latent wisdom distilled from the expertise of a clannish group of lawyers.

Needless to say, the reality of the situation has been much more complicated than this. The truth of the matter is that in the framework of the Euro-crisis, it has been stressed that even specialized lawyers or national judges were unable "to reconstruct the legal map of bailout measures so as properly to frame questions of constitutionality or fundamental

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present author, no answer has been found to the questions asked on the authorship of the Greek MoU and the role of financial and law firms; see the relevant 'Current Question' available in Greek at https://www.hellenicparliament.gr/UserFiles/c0d5184d-7550-4265-8e0b-078e1bc7375a/8343823.pdf <last accessed 11.10.2020>. On the role of Lazard and other privatization advisory bodies during the crisis in Greece and Portugal, see also Sol Trumbo Vila and Matthijs Peters, *The Privatising Industry in Europe (February 2016)* 4, 14, 18 et seq.; Anousha Sakoui and Kerin Hope, 'Lazard to advise Greece on finances' *Financial Times* (5 May 2010); Sol Trumbo Vila and Matthijs Peters, *The Bail Out Business: Who profits from bank rescues in the EU? (*Transnational Institute *February 2017)* 4, 23 et seq.

[46] Scicluna 94. Scicluna refers here to the IMF and the World Bank and uses "rather than politicians"; this has been rephrased, because 'politics' connotes, to my view, a bottom-up understanding of the political process compared to 'politicians', which alludes to an up-bottom connotation of political deliberation.

[47] In literature it has generally gone unnoticed that MoU-imposed reforms were also specifically targeted to the judicial system and to the legal profession as such, in the capacity of both as a service provided to people. See on that point Kaltsouni and Kosma 106 et seq., where Kaltsouni and Kosma record the austerity reforms and the measures adopted in relation to legal and judicial services in Greece with the increase in judicial fees and lawyers' fees and the introduction of more stringent admissibility conditions before higher and supreme courts in Greece, which heavily impacted the right of access to justice for people, and the overall efficiency of courts, leading in this way to the understaffing of courts and the overall impairment of law enforcement and delivery of justice.

[48] Scicluna 94

rights' compliance."[49] All the more reason, it was held nigh on impossible for affected people to understand and decipher either how the law was implicated in austerity measures or how they could seek to enforce their rights based on the national, European and international legal protection afforded to them.[50] This has further created confusion and the inability of legal experts and citizens to seek or exercise the protection of their rights in challenging austerity measures before domestic and supranational courts.[51]

On an international plane, the confusion has also been reflected in that ordinary lawyers, academic lawyers and corporate lawyers have all been clumped together in one indistinct category. An explanation for this confusion could be that existing studies and analyses "tend to pay more attention to the so-called global law firms that have branch offices across the world, rather than to local or regional firms that operate primarily in a particular country or region."[52] However, it would be erroneous to assume that local and regional legal advocates have not been implicated in the legal reality of austerity and were not called upon to legally address the international and supranational dimensions of the crisis. Rather, as Sida Liu has emphatically pointed out, ordinary legal practitioners "are often the primary sites for the production of a hybrid type of legal expertise at the boundary of global-local interaction."[53] Put simply, ordinary lawyers at a national level "are the *true brokers* between the global market and the nation-state."[54] By extension, social rights litigation at the level of ordinary law practice during the austerity years, has been entangled with questions of national primary and secondary legislation, deriving from the signed MoU commitments, together with questions about human rights protection at an international and regional European level.

Following these observations, when talking about lawyers in the analysis at hand, the focus is placed on local and ordinary lawyers, in the context of the examined austerity-afflicted countries, who usually exercise law in private practice and more specifically on labour and social lawyers.[55] These are practitioners who are mostly legally educated in national public universities, trained in national bar associations and prepared to meet the requirements expected of them in a specified national legal order. Local lawyers are further qualified to pursue their professional activities under the professional titles issued in their

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[49] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 342
[50] Ibid
[51] On that note see for instance ibid
[52] Liu 681
[53] Ibid
[54] Ibid; emphasis added.
[55] Cf. Bruun, Lörcher and Schömann 351

home countries and within the juridical bounds of a particular jurisdiction in a self-employed or salarial capacity.[56] Local lawyers in the present study are thus not to be conflated with international lawyers.[57] As they routinely practice the legal profession before different instances of national state courts and judicial bodies, local lawyers may have high-skilled training in ordinary litigation, for instance on civil procedure, administrative law or labour law. However, they do not usually specialize, or it is not anticipated of them to specialize in international human rights law in order to perform the solicitation of their clients or to secure a career path in practicing law at a domestic level.

Looking at the ethical commitments of a lawyer in practicing their profession, an ordinary lawyer, as we read in the *Code of Conduct for European Lawyers* "fulfils a special role"[58] in a society that is founded on respect for the rule of law.[59] The lawyer's duties, the code further informs us, do not begin and end with the faithful performance of what advocates are instructed to do "so far as the law permits."[60] Legal ethics and professional responsibility are contingent upon a variety of legal and moral obligations on behalf of a lawyer towards their clients, the courts, the legal profession itself and fellow legal practitioners, as well as towards the public, for whom the existence of the legal profession

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[56] Directive 98/5/EC of the European Parliament and of the Council of the European Union of 16 February 1998 'to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained' Official Journal of the European Communities 14.03.1998 Article 1 para 2(a), (d); Article 2 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0005&from=EN <last accessed 27.07.2020>. See also the commentary by Julian Lonbay, 'Legal Ethics and Professional Responsibility in a Global Context' (2005) 4 (3) Washington University Global Studies Law Review "Centennial Universal Congress of Lawyers Conference—Lawyers & Jurists in the 21st Century", 610, where Lonbay assesses Directive 77/249/EC, Directive 89/48/EC, and Directive 98/5/EC and examines in this connection, the tripartite EU framework on the main modes of practice, free movement, and cross-border qualification and practice of the legal profession, concerning lawyers in EU member states.

[57] In the thesis at hand, it is assumed that there is no authoritative definition of what an 'international lawyer' is as a legal concept. For the purposes of the analysis an 'international lawyer' is someone who represents, consults and works with clients before judicial or quasi-judicial bodies, as part of consultation services or in on-site or off court disputes, which relate to more than one designated jurisdiction. In this context, an international lawyer exercises international law as a field of expertise in their professional capacity, specializes in answering questions of international law and follows certain argumentative patters and legal doctrines found in international legal studies. For a more critical analysis of what an international lawyer is, see Wouter Werner, Marieke de Hoon and Alexis Galán, 'Introduction: The Law of International Lawyers' in Alexis Galán, Marieke de Hoon and Wouter Werner (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 5; Sahib Singh, 'The Critic(-al Subject)' in Alexis Galán, Marieke de Hoon and Wouter Werner (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 206, 215. In those analyses, the image of the international lawyer is portrayed as a social agent who occupies given social roles and helps producing the structure of international legal language. In this connection, an international lawyer is requested to display critical thought and reflection upon the legal and political structures and of the interplay between those structures and issues of active agency.

[58] CCBE, *Charter of core principles of the European legal profession & Code of conduct for European lawyers (*Responsible editor: Philip Buisseret, *Council of Bars & Law Societies of Europe (CCBE): The Voice of the European Legal Profession)* Code of Conduct for European Lawyers 1. Preamble 1.1. The Function of the Lawyer in society 10

[59] Ibid

[60] Ibid

"is an essential means of safeguarding human rights in face of *the power of the state* and *other interests* in society."[61] Lawyers in Europe must serve, according to this deontological set of instructions, the "interests of justice"[62] as well as advise and plead the cause of those people whose rights and liberties are trusted to assert and defend. In a similar vein, the *United Nations Basic Principles on the Role of Lawyers* emphasizes the role of lawyers in "furthering the ends of justice and public interest."[63] Lawyers are urged to promote the cause of justice and uphold human rights and fundamental freedoms recognized by national and international law.[64]

Turning to Greece and the domestic deontological code of ethics in force, a similar statement is found, dating from 1980. In particular, according to that declaration, ordinary lawyers are not restricted to the narrow confinements of their professional interests. Instead, lawyers "are interested in the *broader problems that the Country is facing*, offer their knowledge and services for the country's progress and serve their Public Function in a way that is useful both to the individuals and the Society as a whole."[65] Whether a "public servant,"[66] in the Greek framework, or "a servant of justice and law"[67] in the Portuguese legal system,[68] the role of advocates in the context of ordinary national or transnational practice across European borders is thus considered to extend beyond the strictly private and individualized interests of the involved parties or the lawyers themselves.

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[61] Ibid; emphasis added.
[62] Ibid
[63] OHCHR, 'UN Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba ' (*United Nations Human Rights Office of the High Commissioner*, 1990)
[64] Ibid par. 14
[65] Georgios B. Argyropoulos and others, *Code of Conduct and Deontology Code of Lawyers in Greece Z' Edition (*Plenary of Greek Bar Assosiations Interactive Electronic Services of Preliminary Proceedings - On-line e-Services for Lawyers, Judges and Citizens *2018)* Deontology Code of Lawyers in Greece A' 'The function of the lawyer' Article 3 par. a); translation of the text in Greek provided by the author. Emphasis added; capitalization kept as stated in the original. The original text in Greek reads as follows: "Α' Το Λειτούργημα του Δικηγόρου: Άρθρο 3 παρ. α) Ο Δικηγόρος δεν περιορίζεται μόνο στα στενά επαγγελματικά του συμφέροντα. Ενδιαφέρεται για τα γενικότερα προβλήματα της Χώρας, προσφέρει τις γνώσεις του και τις υπηρεσίες του για την πρόοδο της και ασκεί το Λειτούργημά του, κατά τρόπο ώστε να είναι χρήσιμος και στα άτομα και στο Κοινωνικό Σύνολο."
[66] Ibid A' article 1 'The nature of the legal profession' par. 1.
[67] Ordem dos Advogados, 'Código Deontológico' (*Conselho Regional Lisboa Despacho n.º 121/GM/92*, 1992) which reads: "The lawyer must, in the exercise of his profession and outside of it, consider himself a servant of justice and law and, as such, show himself worthy of the honor and responsibilities that are inherent to him."; translation of the text in Portuguese provided by the author. The original text in Portuguese reads in particular: "1. O advogado deve, no exercício da profissão e fora dela, considerarse um servidor da justiça e do direito e, como tal, mostrarse digno da honra e responsabilidades que lhe são inerentes."
[68] The deontology code of ethics and professional conduct for lawyers in Portugal is laid in the Portuguese Bar Association's Statute, which is in conformity with the Code of Conduct for European Lawyers and is binding for Portuguese Lawyers in cross-border cases. On that note, see https://www.oa.pt/conteudos/artigos/detalhe_artigo.aspx?idc=66537, para 3.

Bearing in mind the general guidelines above, the role of domestic lawyers in safeguarding fundamental rights and the rule of law has been further stressed during the crisis years through declaratory and advisory statements. At a supranational level, the *Council of Bars and Law Societies of Europe*, as early as in 2012, stressed that the economic crisis and the radical justice reforms that it spurred, as part of austerity measures, remained high on its agenda, while close attention has been paid to the affected countries.[69] The Council asserted its continuous effort to foster a permanent dialogue with European institutions on the challenges that the justice system faced due to the economic downturn and austerity-imposed budget cuts, and alerted about "the consequences for the administration of justice, the rule of law, and the trust of citizens in the justice system."[70]

The same rationale has been also found at a national level in austerity-afflicted countries. Looking at Greece, the President of the largest Bar Association in the country, namely that of the capital city of Athens, stressed the following about the legal profession and the role of lawyers in the midst of the fiscal crisis that was tormenting the country:

> "The preservation of the institution of Bar Associations is vital for the protection of the rights of citizens, for individual freedoms in general, but also for the democratic processes themselves. In this context, faithful to our institutional duty but also to our history as scientific Associations, we act *in a targeted manner*, taking a variety of initiatives, thus contributing to the restoration of legality and the rule of law for the benefit of *the average citizen, who is lately affected by "Memoranda" policies, which in their conception and origin are the product of an extra-institutional and Troika combined configuration*."[71]

Evidently, lawyers' organizations at a European as much as a national level, have all acknowledged the gravity of austerity measures and their impact at the level of national legislation on issues of legality and the rule of law. Local lawyers in affected jurisdictions, such as in that of Greece, have also explicitly called for a *targeted* litigation and for the need for initiatives to protect citizens and their rights. Appeals like this could give credence to

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[69] CCBE, *Annual Report* (Jonathan Goldsmith (ed); Hugo Roebroeck (Coord); Simone Cuomo, Sieglinde Gamsjäger; Alonso Hernández-Pinzón; Karine Métayer; Peter Mc Namee (Contr); Alexandre Mahé (tr), *Council of Bars & Law Societies of Europe (CCBE): The Voice of the European Legal Profession, 2013)* 6

[70] Ibid 17, 18

[71] Ioannis Kalogridakis, *Ελληνική Δικηγορία "Μνημονιακοί" Μύθοι και Καθημερινές Πραγματικότητες: Αντιστεκόμαστε με την Ιστορία μας"* (Athens Bar Association 2012) 9. Emphasis and capitalization as stated in the original; translation in English provided by the author. The original text in Greek reads as follows: "Η διαφύλαξη του θεσμού των Δικηγορικών Συλλόγων τυγχάνει ζωτικής σημασίας για την προστασία των δικαιωμάτων του πολίτη, των εν γένει ατομικών ελευθεριών, αλλά και των ίδιων των δημοκρατικών διαδικασιών. Στο πλαίσιο αυτό, πιστοί στο θεσμικό μας καθήκον αλλά και στην ιστορία μας ως επιστημονικών Συλλόγων, *ενεργούμε στοχευμένα*, αναλαμβάνοντας πληθώρα πρωτοβουλιών, συμβάλλοντας έτσι στην αποκατάσταση της νομιμότητας και του κράτους δικαίου, *προς όφελος των δικαιωμάτων του μέσου πολίτη, που πλήττεται εσχάτως από «μνημονιακές» πολιτικές εξωθεσμικής-τροϊκανής σύλληψης και προέλευσης*."

two impressions that might easily occur to the reader, namely that a targeted and politicized litigation has taken place at a domestic level and second, that this type of practice falls under the category of cause lawyering. In the paragraphs below, I dispel these two impressions and demonstrate why the classification of strategic litigation is a nebulous and unhelpful taxonomy in the context of the examined austerity discourse.

Considering the first conjecture, arguably, traditional civil law systems generally lack a tradition of public interest litigation or cause-lawyering in the way that it has been described above.[72] However, these systems are well equipped to provide individual applicants with urgent and basic relief mechanisms, which lawyers can use to their strategic advantage towards securing successful outcomes.[73] Greece offers an interesting example in this regard.[74] As has already been examined in detail, during the first wave of austerity measures in Greece, local lawyers showed the legal reflexes and employed the legal tools that the law allowed them to employ. Notably, local lawyers asked for injunctive relief before lower courts as a first and most immediate step for the purpose of rectifying the unexpected social predicament that their clients had found themselves in. While requesting for such immediate relief before lower courts, it is significant to note that local lawyers have not only resorted to the national constitutional framework but have also applied the European Social Charter and the European Convention on Human Rights. Thus, ordinary practitioners, by bringing combined legal arguments based on national law, EU law and provisions derived from the ECHR, have helped their clients to not only seek for

[72] Evangelia Psychogiopoulou, 'European Courts and the Rights of Migrants and Asylum Seekers in Greece' in Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-level European System* (Hart Publishing 2014) 132 note 138., where it is noted that 'public interest litigation' is the type of litigation "that is not focused on vindicating private interests but on raising, through legal action, matters of general public interest in the pursuit of systemic policy change and broad political/social reform." See also Adam Weiss, 'The Essence of Strategic Litigation' in Alexander Graser and Christian Helmrich (eds), *Strategic Litigation: Begriff und Praxis* (Nomos 2019) 28, where Weiss notes that "[s]trategic litigation will be harder to achieve in places where the courts have less power (or generally refuse to exercise their power) to *force powerful people* to *change* their behaviour *in ways those people do not expect*."; emphasis added.

[73] Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-legal Review' 95

[74] Psychogiopoulou remarks that "Although Greece lacks a tradition of public interest litigation, there have been instances of strategic use of the ECHR regime with a clear focus on law and policy reform" in the context of rights protection of vulnerable groups; see Psychogiopoulou, 'European Courts and the Rights of Migrants and Asylum Seekers in Greece' 132. The analysis here does not appertain to the type of legal advocacy that has been encountered in Greece after the end of the military dictatorship in Greece (1967-1974). In particular it does not touch upon the ways the legal profession has been exercised during the years of 1975-1981, a time in which the Greek state and legal regime has started to take its modern form and a period during which legal advocacy has been part of a broader restructuring of the Greek justice system. The thesis rather takes as a point of departure the 'Third Hellenic Republic', namely the years after the so-called "Metapolitefsi" (Μεταπολίτευση), that is, the regime change, which followed the overthrow of the 'Regime of the Colonels' or 'Greek junta' and the establishment of the liberal democracy of the 'Third Hellenic Republic' that extends up to this date.

supranational protection, but also to comprehend and realize that they were protected by the supranational human rights schemes that were in place.

In the meantime, the fact that claims were not raised by local lawyers before national courts on the basis of international human rights provisions but rather by virtue of regional European provisions, potentially alludes to a lack of common engagement with international law provisions. Most significantly, however, such a lack hints at the potential failure of using international law before domestic courts especially at lower instances of justice. The fact that local lawyers may not be familiarized with arguments stemming from an international framework of protection or may even not feel confident that these would bear successful outcomes before domestic courts, let alone before courts at lower instances, is surely the result of multiple interlinked factors. The overall legal and judicial culture, the type of doctrinal legal education and pedagogy[75] followed by the ways legal training and common legal practice are conducted, are some of the factors that determine and partly foretell the legal arguments and methods that an advocate will use during their practice before ordinary courts.

In any case, ordinary practitioners did not demonstrate distrust towards the existing legal framework or aim to enunciate new legal principles, nor did they seek to fix the legal system by making new law. Instead, at the level of doctrine, they identified an abuse of the democratic proceedings as well as a compromise of the principles of legality and the rule of law in the domestic legal order, while at the same time, they pointed towards the material reality of the affected citizens and the ways in which these citizens were being deprived of their existing social entitlements. In developing their rationale, lawyers thus developed a reasoned, principled and coherent argumentative line.[76] This practice was in conformity with the existing legal doctrine and it was driven by the aim of restoring legality[77] and rebalancing a legal system that showed signs of derailment from the legal paradigm of the rule of law, as it existed up to that date.

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[75] Duncan Kennedy, 'How the Law School Fails: A Polemic' (1971) 1 (1) Yale Review of Law and Social Action; Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 (4) Journal of Legal Education; Duncan Kennedy, 'The Political Significance of the Structure of the Law School Curriculum' (1983) 14 (1) Seton Hall Law Review. With his eyesight focused on the US-based law schools, Kennedy develops an acute argumentation on the conservative and doctrinal legal education that is provided in most American law schools and the political as well as social implications that this has on the subsequent exercising of the legal profession. I argue here that this analysis resembles the situation in law schools in the examined case study of Greece and thus is referenced here.

[76] On the reasoned and principled development of legal analysis as the fundamental goal of practicing law as a vocation, see the analysis Dietrich 555 et seq.

[77] Kalogridakis 9; see the reference on the 'restoration of legality and the rule of law for the benefit of the average citizen', as examined previously in the present thesis.

Local lawyers were not and could not have been capable of destabilizing the legal system, and thereby the political system, in that particular context. This is because the typological construct of lawyers in the austerity context assumed the structure and political bias of liberal democracy and liberal legalism. Set against this background, the scope of actions and causes that local lawyers demonstrated have been compatible with liberal philosophical prescriptions and therefore their activity has been somewhat restricted and predetermined in order to not jeopardize the legal system.[78] In this vein, it would be safe to say that local lawyers, while operating within the limits of an established deontology and by employing procedures and doctrines that they have been educated, trained and offered to use, have not exercised their professional activities with the purpose of forging legal turning points or with an eye towards instigating political or social changes in the society.

Instead, ordinary lawyers, while being bedeviled with a highly complicated austerity legislation, acted towards defending already established social rights from redress and sought to safeguard existing social services from further deterioration. In this respect, lawyers and the justice system were caught in the middle of preserving the social welfare and liberal democratic character of the state on the one hand and interpreting austerity-led and market-oriented reforms, which have been incorporated in national legislation on the other hand. As part of this process, lawyers may have identified the downfall of liberal legal values, but their activities have not surpassed the conceptual justifications of liberal legalism itself. Instead, lawyers, by using legal procedures and arguments deriving from the existing legal arsenal, did not compromise the liberal legal system, but have rather showed how this system was stretched to its limits through its own internal contradictions and while it was moving towards a new direction of governance managerialism.[79]

Taking into consideration all the above, I would contend that the examples of legal advocacy that have been examined in the austerity context do not attest or confirm incidents of strategic litigation or cause-lawyering in the examined countries at hand. Not at least in the way that cause lawyering has come to be understood in its American-embedded meaning. This is because cause lawyering and targeted litigation in the American context, as it has been described above, surmises an intentional, calculated and systematic series of actions that aim not only at *reforming* but essentially at *making* law that in effect stretches or surpasses the limits of the existing legal framework. However, this did not hold true in the cases of social rights advocacy in Greece and Portugal.

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[78] Boukalas 400, 401

[79] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 346, 347

iii. Social Rights Advocacy as Cause-Lawyering: Criticism

All things considered, despite the hype and practical interest that cause lawyering or strategic litigation carry with them, the use of these terms is not a useful or appropriate terminology to explain the multifaceted judicial reality and the different legal particularities of South European legal systems, as these have been implicated in the austerity discourse during the MoU years. This is because, for one, the fact of the matter remains that these terms are strongly affiliated with the US social rights history and legal culture, and even if they are re-purposed and re-conceptualized in the context of European country-specific examples, they remain unable to transcend the deep-rooted American conceptual underpinnings that support them because they are premised on fundamentally different historical and political foundations. That is to say, using 'cause-lawyering' and 'strategic litigation' has set the United States as the yardstick against which legal activities in other countries have been measured, forcing in this way "analyses of cause lawyering in other countries to take a 'comparative' hue,"[80] due to the conceptual influence of the US paradigm. Invoking cause-lawyering or strategic litigation at a national or supranational European level to explain the austerity jurisprudence could thus be misleading if we were to untangle the social and ethical issues underlying austerity.

Borrowing terms such as strategic litigation or cause lawyering to explain the legal and social reality of the MoU years in financially assisted countries does not necessarily mean that these terms are adjusted from the American to the European country-specific reality in which these are employed. Rather, in my view, such practice runs the opposite risk. Namely, it is more likely that legal orders which have traditionally not been accustomed to the use of concepts such as strategic litigation, public interest litigation or cause lawyering, will adjust their legal vocabulary and re-configure their legal culture to understandings of social justice within a minimal social welfare state, where social rights are stripped of their social dimension and gird themselves with a privately-initiated or individually-responsibilized dimension of social mobilization and litigation. This is because, the fact of the matter remains that cause-lawyering as a legal practice has been pioneered in the historical and political setting of the United States and has been imported into other legal cultures' vocabulary and in some instances, has been applied unreflectively in legal frameworks alongside the use of American-inspired notions of rights.[81]

[80] Boukalas 401
[81] Ibid

Drawing on that, there is copious literature which focuses on lawyers, namely on the reasons, motivations and ways in which lawyers pursue their profession, on their practice, strategies and goals as well as on their public reception and the interplay between lawyers and grassroots movements.[82] However, these are debates in which scholars have engaged for years against the American backdrop, and a large body of the existing scholarship on theoretical and practical aspects of lawyering has been predominantly grounded upon American legal history and rights advocacy before American courts.[83] Comparing the abundant literature stemming from the United States with relevant country-specific studies in European settings, there is a broad lack of academic scrutiny in European settings and the role of lawyers or the practice of the legal profession remains an undertheorized discussion, whether it refers to national jurisdictions separately, or is placed in a comparative supranational or inter-continental perspective. In other words, issues pertaining to the performance, impact, cultural or class background and broader demographics within national and interregional bar associations, together with questions surrounding public confidence in the legal profession or the public perception of lawyers, do not enjoy wide academic engagement in Europe. Thus, there is not enough existing data to support claims about the phenomena of strategic litigation or cause lawyering coming from a European perspective.

When addressing strategic litigation in Europe, there has been some recent scholarship which placed its attention on supranational courts and more specifically at the European Court of Human Rights. There, commentators have identified instances of strategic litigation, in the sense that a professed mission to protect the rights of vulnerable individuals and groups in the margins of the society has been showcased during recent years.[84] These efforts have been characterized by an explicit focus on challenging existing national laws and administrative or judicial practices, while it has been underlined in relevant analyses, that these endeavors aimed to initiate legal and policy reform at a national level.[85] Within this framework, synergetic litigation pursued by networks of lawyers, social

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[82] US-based law professors Austin Sarat and Stuart Scheingold have conducted extensive research and collected abundant empirical data on the phenomenon of cause lawyering in the United States, which they systematically phrased as such. For a charting of their work and contribution to cause lawyering studies, see Austin Sarat and Stuart A. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998); Austin Sarat and Stuart A. Scheingold (eds), *The Cultural Lives of Cause Lawyers* (Cambridge University Press 2008). For an overview of the categorizations of cause-lawyering as these have been typified and developed in the US legal settings, see Thomas Hilbink M., 'You Know the Type...: Categories of Cause Lawyering' (2004) 29 (3) Law & Social Inquiry.

[83] Marshall and Hale 314

[84] Anagnostou, 'Law and Rights' Claiming on behalf of Minorities in the Multi-level European System' 8

[85] Psychogiopoulou, 'European Courts and the Rights of Migrants and Asylum Seekers in Greece' 132

movements and human rights actors, was assessed to have exerted notable influence over the jurisprudential and adjudicatory process in Strasbourg.

However, the cases before the Strasbourg Court that have been assessed in relevant European literature and have been described as strategic, have hardly ever concerned social rights claims, not before the crisis and less so during the crisis. That is to say, what has been phrased as strategic litigation at a European level has primarily concerned civil and political rights and has not touched upon social rights, which are pertinent to much more complex issues of state sovereignty, allocation of national public resources and nation-shaped understandings of citizenship. Moreover, social rights litigation during the MoU years, as it has been hinted at above, has not been part of a broader repertoire of actions. In other words, it has not been reported whether litigation has been deliberately and jointly employed together with social movements, or if it has been in tandem with public campaigns or broader political strategies.[86] Rather, litigation may have been acknowledged as "an essential part of the social mobilisation against austerity,"[87] yet this has been viewed as "only one *among* several forms of contesting austerity."[88]

This segmented understanding of mobilization, which did not include lawyers in its ranks, could be caused by various country-specific reasons, which go beyond the scope of this analysis. In short, I will limit myself to arguing here, that the practice of lawyers did not amount to cause-lawyering in social welfare states, such as that of Greece and Portugal. A plausible broader explanation for this could be that social rights mobilization during the austerity years has been met with the ambivalent character of law itself in contributing to the establishment of austerity on the one hand and in providing the emancipatory potential through the semantic of rights to contest that particular establishment.[89] Going with a narrower take, I would contend here that the complex relationship between social movements and lawyers has been due, among others, to the historical precedent of social gains having been achieved through political routes, due to the questioning of the effectiveness of litigation versus legislation and by virtue of the general skepticism towards social engagement through institutions, of which lawyers were deemed to be part.

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[86] Anagnostou, 'Law and Rights' Claiming on behalf of Minorities in the Multi-level European System' 15

[87] Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 281, 282; Kaidatzis makes this remark in relation to Greece during the MoU years.

[88] Ibid 276; Kaidatzis refers indistinctly to litigation and does not make any explicit reference to lawyers.

[89] Carolina Alves Vestena makes a similar claim in her investigation of the role of lawyers in disputing austerity policies and of the relationship of lawyers with social movements during the MoU years focusing on Portugal and France; see Carolina Alves Vestena, 'Fighting austerity and legal strategies: Lawyers between austerity policy and social movements' (Manuskript 1 EDA Conference - 30 years of Activism: Lawyers in Europe and the Crisis of Fundamental Rights) 13

iv. The Role of Lawyers in Social Rights Litigation: Potential

It has been argued above that the term 'cause-lawyering' may not be an applicable and useful term to address the role of lawyers in advocating social rights, especially in the examined context of the social crisis of Europe. However, the rejection of such terminology is not a rejection of the significance or relevance that lawyers can have, not only in the adequate protection of social rights but in giving voice to conceptualizations of social values. Having assessed the meaning of cause layering in social rights advocacy in the United States, as a leading example, and having examined both how lawyers defended social rights in countries of South Europe, and whether this could be described as activist litigation, I now proceed with some final observations about lawyers and their potential contribution to effectively litigating social rights in times of protracted crises.

In this connection, the significance and the role of legal practitioners in illustrating the potential of international protection and in bridging national human rights protection schemes with supranational ones, needs to come to the fore. The social rights challenge at a domestic level often pans out to be "simultaneously local and global because it enables and elicits international scrutiny of local conditions."[90] Against this backdrop, social rights litigation at a domestic level can target national policies in a given local order, but it can simultaneously invoke the international order through a focus on supranational standards.[91] Within this framework, local lawyers are among the first responders in the legal process, equipped with the necessary dexterity to navigate the highly intricate legal establishment of rules and regulations. They are not passive onlookers of the judicial process but are rather part of the 'lifeblood' of litigation, by bringing violations of supranational and international human rights commitments to light and by making connections with national legislation. In this respect, legal advocates can make use of the globalized vocabulary of human rights in a localized setting, simplify the highly intricate legal language and promote awareness to those seeking a legal arm and a torch to light the path of the many under-utilized justiciable avenues.[92]

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[90] Lisa Hajjar, 'Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine' (1997) 31 (3) Law & Society Review, 474

[91] Ibid; Hajjar makes this argument with a broader outlook on the significance of human rights in the international order. On the importance of domestic courts in ascertaining international law with a focus on Swiss domestic courts; see Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning based on the Swiss Example* (Brill | Nijhoff 2020) 31 et seq.

[92] On that note, see also Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-legal Review' 111

This rights-prone advocacy can augment the capacity for protecting social rights through an international, supranational and national protection scheme. In addition, it has the potential to generate a gradual shift in public and scholarly perceptions of judicial authorities and human rights protective schemes that may not enjoy enough attention at the level of domestic litigation,[93] and it can thus directly impact the number of cases that reach supranational judicial bodies.[94] That is even more so because, as it has been stressed in scholarship, rights litigation is nowadays very different "from the privately motivated and individualised form of engagement that prevailed in the 1970s, including in the civil law traditions of continental Europe."[95] Namely, despite the generally agreed upon crisis of international law[96] and the growing skepticism towards the human rights regime, rights litigation has been found to be "increasingly implicated, *directly* or *indirectly*" [97] in synergies and alliances built between legal and social actors within and across state borders.

On the social rights plane, this could be translated in that lawyers can map out and highlight the entangled legal route to social rights protection by piecing together various legal sources and provisions and by lending their voice and expertise to a legally pluralistic vision of international and regional social rights protection. In this sense, legal pluralism can be "a professional opportunity,"[98] as David Kennedy submits, but also, at a theoretical level, it can be an alternative to loom over legal centrality, power dynamics and supremacy, be it judicial or executive. With this in mind, lawyers bringing social rights claims under a combined reading of international human rights and national provisions, can activate what has been termed as a rights-based approach, which judges can, in turn, adopt while assessing a contested legislation.[99] This has the potential to enhance democratic decision-

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[93] Cf. also the analysis on the shift of scholarly perceptions of supranational bodies by domestic lawyers in Italy; Stéphanie Hennette-Vauchez, 'Constitutional v International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights: Between Law and Politics* (Oxford University Press 2013) 155

[94] Rachel A. Cichowski, 'Civil Society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights: Between Law and Politics* (Oxford University Press 2013) 95

[95] Anagnostou, 'Law and Rights as Opportunity and Promise for Minorities in Europe? Concluding Observations and Research Agendas' 218

[96] Cf. Charlesworth; Heike Krieger and Georg Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure' October 2016 Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin KFG Working Paper Series, No 1 5 et seq.

[97] Anagnostou, 'Law and Rights as Opportunity and Promise for Minorities in Europe? Concluding Observations and Research Agendas' 218; emphasis added.

[98] Paraphrasing David W. Kennedy, 'One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' (2007) 31 (3) New York University Review of Law & Social Change, 6; the original reads: "Our struggle against legal pluralism is a professional retreat, a denial of agency, and an apology for rulership denied-a professional will to irresponsible marginality in a world we have come to rule […] we should rather embrace legal pluralism as professional opportunity."

[99] Adam Habib examines the mobilization and endorsement of rights-based approaches by social activists more broadly in South Africa; see Habib 131 et seq.

making processes, since it can provide citizens with an additional outlet to express their convictions and values and to delineate the content of their rights.[100]

Certainly, social rights advocacy seems to be swinging in an unremitting "pendulum between law and politics."[101] Against this backdrop, it may be the case that lawyers, as much as judges, may not be able to process or estimate long scale political happenings, and that they may be oblivious of or skeptical towards widescale political or social developments that take place and affect the law. Complacent in the seemingly objectivity of their positivist approach, it may also hold true that domestic lawyers may stand reluctant "against acknowledging the role of politics in their profession."[102] It could also be argued that legal practitioners when they identify, apply and interpret traditional legal norms and methods may not be able "to evaluate the long-term effects of these processes and thus identify whether a metamorphosis is taking place."[103] However, lawyers cannot "afford to ignore the political or social context,"[104] and they ought not to close their eyes in the face of contemporary developments at the interplay of international law and national law.[105] As Heike Krieger insightfully notes, lawyers rather "need to assess the political culture in which the law operates and to analyse the interdependencies between law and the social and political emotions attached to it."[106] It thus falls within the range of a lawyer's task to dissect the political emotions and cognitions of a society as well as to weigh the effect of the political word and deed in this regard.[107]

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[100] For a 'rights-based' review of statutes attuned to societal convictions and values; see Alon Harel, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22 (3/4) Law and Philosophy, 248, 260 et seq.

[101] Here, I borrow this metaphor as it is illustrated at Broude, 'Deontology, Functionality, and Scope in The Sovereignty of Human Rights' 120

[102] Tomer Broude, Marc L. Busch and Amelia Porges, 'Introduction: Some Observations on the Politics of International Economic Law' in Tomer Broude, Marc L. Busch and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge University Press 2011) 6; the authors refer to international lawyers in their analysis. I consider their observations to apply to the examined example of domestic lawyers, especially in the Greek case, which has a strongly positivistic legal tradition and culture and there is an ingrained inhbition of domestic lawyers in recognizing the exchages of law and politics in their profession.

[103] Heike Krieger and Andrea Liese, 'A Metamorphosis of International Law? Value changes in the international legal order from the perspectives of legal and political science' January 2019 Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin KFG Working Paper Series, No 27 6; Krieger and Liese make these remarks with respect to international law specifically and concerning the significance of an interdisciplinary exchange among international law and international relations, which is needed when interpreting legal rules and norms. I take that these observations are relevant in the austerity crisis context examined here, since the latter finds itself at the intersection of national and international law.

[104] Krieger, Nolte and Zimmermann 19

[105] See also on that note ibid 4; Krieger makes those remarks in the context of international law.

[106] Krieger, 'Cynicism as an Analytical Lense for International Law? Concluding Observations' 357; Krieger also remarks that "[…] where lawyers want to understand and assess the current crisis of international law they need to take a broad look which includes language, behavioural rules and the emotional surroundings which result thereof." Krieger's analysis is situated within international law. I take that these observations can be extrapolated to the examined role of lawyers in social rights litigation during the MoU years, as this has been implicated with questions of international and national law.

[107] Loughlin 231

In concluding this section, it has been suggested above that the terminology of 'cause-lawyering' or 'strategic litigation' may not be fitting in describing the role of lawyers in litigating social rights during the MoU years in countries of South Europe. A more generic phrasing, such as 'social rights advocacy' could be more helpful in bringing lawyers out of the shadow, without imparting on them a political intention from the context of the social rights structure in which this kind of advocacy originally took place. This does not mean that the cooperation of lawyers, the civil society and social movements is not encouraged in this rationale. Quite the opposite, as it will be highlighted in the sections to follow, social rights advocacy endorses a discursive relationship among the different segments and epistemic communities of the society – be it institutional or grassroots – within a broader understanding of complementarity instead of rivalry and competition.[108]

This cooperative and discursive element, together with a processual understanding of the legal profession are characteristic of an understanding of lawyers and their potential in highlighting the relational aspect of the ethical foundations of social rights. That is to say, although lawyers generally locate their activities within an already prescribed normative order comprising of rules, methods and institutions, all of the aforementioned rest on a set of social practices and narratives which invest them with meaning.[109] This meaning is not static and confined however, nor it is the outcome of mere logical deduction that transcends human experience. After all, as Martin Loughlin writes, "the politico-legal world we inhabit is a world that we have made."[110] Understood this way, law becomes not merely a system of rules to be observed and declared, but a *processual reality* and effectively an entire world system that we live in, *through* which and *in* which we form patterns of political and social behavior as well as conceptions of relations and what they stand for.[111]

Drawing on the above, lawyers can be understood as those who "study legal norms, how they come into being, cease to exist or *change their meaning* and validity through interpretative legal discourses according to the rules of the legal system or even through other *discourses* and *practices*."[112] Mindful of that, it could be argued that lawyers, in this undertaking, can shed light on the priorities, attitudes and shared values of the society, they can illustrate how norms are understood and they can bring forward in legal words the

[108] Cf. Laurent Scheeck, 'Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European Court as a Constitutional Actor of the European Union' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights: Between Law and Politics* (Oxford University Press 2013) 165, 171
[109] Loughlin 21, 22
[110] Ibid
[111] Ibid
[112] Krieger and Liese 7; emphasis added.

unrealized or unarticulated necessities that may trouble the society. Lawyers can thus be the medium through which public sentiments can be reflected. They can echo social concerns and apply rights in a way that can take on the meaning of social correctives of certain market aspirations and outcomes and as "de-commodifying certain aspects of life."[113] Moreover, the emphasis on the individual, local lawyer can challenge a traditional, image of law in which "the objective law effaces the individual lawyer applying it."[114]

Considering the above, and while moving forward to the next chapters, what the analysis opts for is a *processual theory* that understands the legal profession as not merely "a social structure, a market monopoly, or a political entity, but as a social process that changes over space and time."[115] This study thus endorses a type of social rights advocacy that seeks "to establish a conceptual link between *interaction* and *structure* using multiple social processes."[116] Seen in this way, legal advocacy is perceived as not being limited neither to the microlevel, that is, to the experience of the lawyer-client interaction, nor to the macro-level, namely to considerations pertaining simply to governance issues. Instead, a processual theory seeks to establish a conceptual link between interactions and structures by looking at the various social processes that reflect social values and thereby, on conceptions of relations beyond a strictly economic theorem of such relations.

This understanding of the legal profession as being much more than a faceless mediation of strictly economistic relations, is aligned with the broader thematic running through this thesis. Namely, that relationality and its unpredictable[117] and processual character informs the ethical foundations of sociality, contrary to an ethics of social rights that is premised on an individualized or merely structurally mediated notion of the 'social' and of relationality in this respect. With that in mind, the analysis proceeds in the next section with an investigation into the sibling concept to cause-lawyering, notably that of 'judicial activism' and will conclude in the last section of this part of the thesis, with an overall evaluative assessment of the previously examined austerity jurisprudence.

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[113] Ragnarsson 621; Ragnarsson develops that argument while examining the case of indebted and financially assisted countries in Europe during the MoU years in relation to the rights discourse.
[114] Cf. Andreas L. Paulus, 'Review: Korhonen Outi: International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community' (2001) 12 (5) European Journal of International Law, 1029
[115] Liu 671
[116] Ibid 674; emphasis added.
[117] See Weiss 30; Weiss, while assessing strategic litigation in its conceptual merits, makes an interesting observation about the linkage of unpredictability and legal advocacy. He notes in particular: "Anyone who tells you he is litigating a strategic case right now is wrong: it is impossible to know in advance if a case will prove to have been strategic or not, because *unpredictability* is a *key element*. Strategic litigators should aim for a strategic litigation practice, and a kind of *flexible thinking* that is unusual in our profession."; emphasis added.

6.2. Judicial Activism or Judicial Deference During the Crisis: A Theoretical Inquiry

6.2.1. An Ongoing Discourse of Language and Content

i. Situating the Discussion

The term 'judicial activism' has undoubtedly been painted in a deeply instilled American hue. The discourse on judicial politics and judicial activism has been explored and developed for decades in North America, producing a wealth of literature, as numerous constitutional scholars as well as political and legal theorists have bestowed their time and intellect on the task of grappling with such strenuous and cumbersome subjects of theoretical inquiry. These issues reach great depths of philosophical thinking and draw on foundational questions on the nature of law itself and on the never-ending debates between natural law and legal positivism, as well as between legal formalism and legal realism in the interpretation of legal provisions and statutes.[118] Judicial activism has been a focal point, not only in legal scholarly literature but also at the intersection of theoretical and methodological debates in law and political science, bringing forward questions on the political impact of judicial decisions on public opinion, and in examining the interplay between national governments and supranational and national courts.[119]

Taking this discussion away from its place of origin, the idea of courts exceeding their legitimate prerogatives and proper bounds has been travelling under the moniker of 'judicial activism' for decades now, reaching countries at a wide wavelength around the globe, and producing a fathomless body of comparative and domestic literature.[120]

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[118] For an introduction to the debate in American legal thought, see Lon L. Fuller, 'American Legal Realism' (1934) 82 (5) University Pennsylvania Law Review; Richard A. Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 (2) Case Western Reserve Law Review; On the tension between natural law and legal positivism and their relation to judicial activism, see also Massimo La Torre, 'Between Nightmare and Noble Dream: Judicial Activism and Legal Theory' in Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) 6 et seq.

[119] Henri de Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice - The Case of LGBT Rights' (2011) 19 (3) Michigan State Journal of International Law, 640, 641, 651 et seq.; Richard Lehne and John Reynolds, 'The Impact of Judicial Activism on Public Opinion' (1978) 22 (4) American Journal of Political Science; For an analysis on judicial politics scholarship from a law and political science perspective with a comparative juxtaposition of judicial activism in America and Canada, see also the extensive research conducted by Emmett MacFarlane, 'The Supreme Court of Canada and the Judicial Role: A Historical Institutionalist Account' (DPhil Thesis, Queen's University Kingston, Ontario, Canada 2009)

[120] See Jane S. Schacter, 'Putting the Politics of "Judicial Activism" in Historical Perspective' [2017] The Supreme Court Review 216. For a comparative analysis of fundamental rights jurisprudence of the Canadian Supreme Court, the German Federal Constitutional Court and Constitutional Court of South Africa in light of the principle of proportionality as an instrument of judicial self-empowerment and in view of the interplay between the proportionality test and judicial activism, see Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press 2017). For

Throughout the years, the term seems to have been widely invoked in popular media, where according to Jane Schacter, just one search of the term in the New York Times magazine has produced around 162 results, in a period ranging from 1896 to 2018.[121] Yet, despite its casual usage, the translation and incorporation of this concept in legal discussions has been "no easy task, if at all possible or desirable."[122] Rather, trying to define judicial activism "from within the law is a hopeless enterprise since judicial activism is not something legally impermissible."[123] Yet, even if judicial activism is divulged now in the US where it originated as a "shopworn phrase that has outlived its usefulness,"[124] or whether it is renounced through aphoristic commandments in European media outlets,[125] the terminology still has a strong hold on public opinion,[126] but most significantly, it is a recurrent theme in academic commentaries far and wide.

Against this backdrop, whether judicial activism is portrayed as a term of opprobrium, as an accusation[127] or complaint[128] or, quite dramatically, as a "judicial sin,"[129] or "a pathological phenomenon,"[130] it is safe to say, borrowing the words of Richard Posner, that on the one hand, judicial restraint and judicial deference "survive, but as vague, all-purpose compliments,"[131] whereas on the other hand, judicial activism treads "as a vague, all-purpose pejorative."[132] Judicial activism is thus not a "not a value-free label."[133]

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a comparative analysis of the political role and the development of the Supreme Court of India and the German Federal Constitutional Court, see Fabian Schusser, *Judicial activism in a comparative perspective: the Supreme Court of India vs. the Bundesverfassungsgericht* (Nomos 2019). For an appraisal of the long-documented judicial activism followed by the Constitutional Court of South Africa, see Lucky Mathebe, 'The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism' (2021) 56 (1) Journal of Asian and African studies (Leiden)

121 Schacter 216

122 Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) Preface

123 Fuad Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' (2012) 3 (2) Journal of International Dispute Settlement, 251

124 James Taranto, 'What Is 'Judicial Activism'? A shopworn phrase that has outlived its usefulness' *The Wall Street Journal* (9 February 2011)

125 Uffe Ostergard, 'Ten Commandments to overcome the EU's many crises' (*EU Observer*, 2018)

126 Sean Illing notes, rather crudely, that judicial activism is often just a way "of saying that you really don't like something that someone else is doing."; see Sean Illing, 'How do we know if we're in a constitutional crisis? 11 experts explain' (*Vox - Understand the systems that shape society*, 2019)

127 Zarbiyev 252

128 A. Alexander Lawrence, 'Judicial Activism: Clearing the Air and the Head ' in Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) 15

129 Ibid 16

130 Maria Urbano Benedita, 'Politics and the Judiciary: A Naïve Step Towards the End of Judicial Policy-Making' in Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) 167

131 Richard A. Posner, 'The Rise and Fall of Judicial Self-Restraint' (2012) 100 (2) California Law Review, 533

132 Ibid

133 Zarbiyev 252

Quite to the opposite, in both the Anglo-American and continental European legal pedagogy and practice, an activist judge "seems to be either an oxymoron or a bad judge,"[134] while a judge's fundamental virtue is considered to be passivity and abstention from any action that remotely resembles taking a political stance.

In Europe, during the last two decades, judicial activism has ensued broad debates from an EU governance and law perspective, while the focus has been placed primarily on the jurisprudence of the European Court of Justice. In this regard, it has been explored whether the Court of Justice has construed EU law by 'constitutionalizing' the EU treaties along the way, or whether the CJEU judges pursued and prioritized certain economic objectives at the expense of social ones in an activist fashion.[135] Moving from the EU to the Members State level, the term has gained a lot of traction during the Euro-crisis years, especially due to the austerity cases that reached national Supreme Courts in financially assisted countries. However, apart from the cases that resulted in European debt-bound countries, "judicial activism took place even in countries which were not signatories of MoUs, but were under severe budgetary restrictions and had to adopt austerity measures."[136] Due to this far-reaching new normality of austerity in Europe, the language of 'judicial activism' has been ushered in to report the changed attitude that judges at the highest ranks of justice allegedly manifested, while it has been further used to hint at broader issues of concern, namely surrounding the relationship between legislators and courts in reviewing austerity measures across different European jurisdictions.[137] This, in turn, revived the debate among academics and practitioners across borders, on the role of judges in reviewing austerity measures during the ten years of the crisis in Europe.[138]

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134 La Torre 3, 10

135 For an inter-subjective discussion among academics, practitioners and stakeholders on matters pertaining to judicial activism at the European Court of Justice, see Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013). For a discussion on the teleological method of interpretation used by ECJ, see Albertina Albors Llorens, 'The European Court of Justice, More than a Teleological Court' (1999) 2 Cambridge Yearbook of European Legal Studies; Koen Lenaerts and A. José Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' 2013 European University Institute Academy of European Law EUI Working Paper AEL 2013/9 Academy of European Law Distinguished Lectures of the Academy 27 et seq.; Lourenço Vilhena de Freitas, 'The Judicial Activism of the European Court of Justice' in Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015). See also de Waele and van der Vleuten 640, 641, 651 et seq.

136 Sciarra 16

137 Tania Groppi examines the so-called 'Austrian' or 'Kelsenian' model of constitutional review, which is prevalent – with a few exceptions – in continental Europe and suggests a decentralized system of judicial review as an alternative to judicial activism by focusing on the Italian review system as a case study; see Groppi 2,

138 Pietro Faraguna, Cristina Fasone and Diletta Tega, 'Introduction to I-CONnect Symposium–The Euro-Crisis Ten Years Later: A Constitutional Appraisal' (*International Journal of Constitutional Law Blog*, 2019)

Part of this debate has already been touched upon in previous sections of this thesis, where arguments on the justiciability or non-justiciability of social and economic rights have been assessed and weighted in.[139] There, it has been pointed out that this web of arguments is entangled with broader discussions of judicial review and judicial reasoning, and thereby with variations of judicial conduct throughout different legal traditions, judicial systems and national historical trajectories. While the interest in social rights scholarship and constitutional law remained unabated in those fronts, discussions on judicial activism in the context of the Euro-crisis have also started to get attention from international human rights scholars, who questioned the interplay between the phenomena of judicial activism and populism, be it right or left populism.[140]

The analysis here sidesteps those debates and does not assess the concept of judicial activism by inquiring into the impact of populism in judicial reasoning. Nor does it examine the positioning of courts in a democratic polity seen from the separation of powers doctrine or from the debate on judicial review and its outreach in a democratic polity. It refrains from diving further into the great depths and breadths of the debate on *judicial supremacy*, *judicialization* and *judicial politics* from a comparative constitutional perspective between the United States and continental Europe, as this has been shaped throughout decades of scholarly output. Such an endeavor would require a vastly longer analysis and a frame of reference that would focus on the concept of judicial review as such and on whether the legislature owes deference to the courts or the other way round.

Instead, the angle of the present section is the judicial meaning-making of social rights, the prescriptions upon which that meaning is grounded, and courts as part of that process. By courts, what is meant here, are mainly the national highest and lowest courts of financially assisted European countries, which have been examined in previous paragraphs. Being arguably a highly politicized and deeply contested term, one could be forgiven for thinking that another attempt at exploring judicial activism is redundant or fruitless at least from a legal perspective, especially when the focus is restricted within the European social crisis, like in the present undertaking.

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[139] See Part III. Chapter 4. Are Social Rights Justiciable?

[140] See for instance the call for submission of papers for the forthcoming special issue on 'Judicial Activism in an Age of Populism' by the International Journal of Human Rights https://think.taylorandfrancis.com/international-journal-human-right-judicial-activism/?utm_source=CPB&utm_medium=cms&utm_campaign=JOH10988# <last accessed 03.07.2021> that places the focus on explorations of meanings attributed to the terms 'judicial activism' and 'populism' – whether coming from the left or the right – as well as on the interplay between these two phenomena and the impact of 'populism' in judicial-making processes by looking at issues of integrity, independence and the role of the judiciary in contemporary case law materials.

Be that as it may, the reasons why I consider that an extensive examination of the term is necessary here are manifold. *First*, when talking about judicial activism, as it has been stressed in theory, "there is no agreement on the meaning of judicial activism, besides that the term is a terribly misunderstood concept."[141] Despite this lack of common understanding, the term is habitually used and most of the time is blindly reproduced, without any conceptual explanation attached to it. This, in turn, adds to further confusion that surrounds the term as such, as well as to the situations that it is employed to describe. Hence, the term calls for a careful assessment before it is applied in a certain judicial reality.

Second, in spite of the common usage of the term, the truth of the matter remains that this phraseology is set against the American background where there is sizeable body of literature on judicial studies, as opposed to Europe, where the study of judicial decision-making is still "at an embryonic stage."[142]Accordingly, taking not just the verbiage but also the practice of judicial activism, as it has evolved within the very particular context of the United States, and applying this unreflectively in judicial contexts without considering the *ad hoc* historical, legal, political and economic particularities and cultural contingencies of each jurisdiction, constitutes an oversimplification that may ultimately lead to a failed attempt to talk in terms of judicial activism, as such.[143]

Applying this last observation to the European crisis discourse, a *third* reason for the present focus on this topic is that judicial activism seems to have acted as a common denominator in comparing constitutional responses to the austerity measures and has been widely employed among mainly constitutional scholars. That is to say, it is taken here that the discussion on the adjudication of social rights in the context of the Euro-crisis has unfurled to a large extent along the lines of judicial activism, making the later a decisive element of the social rights discussion as well. Mindful of the above, a fourth reason to investigate the term of judicial activism in detail before applying it to the examined context of austerity jurisprudence, is because that despite its institutional parameters, the term is also deeply engrained with an ethical aspect that is often neglected.

Drawing on that last remark, I consider here that mapping out the discussion in merely proceduralist and binary terms between judicial activism and judicial passiveness,

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[141] Lina Urbaitė, 'Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State' (2011) 11 (1) Baltic Yearbook of International Law 225

[142] Anagnostou, 'Judicial Activism in the Name of the Nation: Reneging on the Integration of Immigrants in Greece' 600

[143] Craig Green notes that "current uses of the term 'judicial activism' are mistaken" and puts forward an analysis of judicial activism that is informed by historicism and acknowledges institutional sensitivity and cultural relativism; see Craig Green, 'An Intellectual History of Judicial Activism' (2009) 58 (5) Emory Law Journal, 1258, 1260

does not help to illustrate the existing ethical issues that are at stake in a given context and that judges are asked to address. Put differently, when entering into debates about judicial activism, these rarely touch upon latent issues of the protection of rights or upon understandings of the meaning of the 'social' in articulations of social rights. Instead, debates about judicial activism end up being debates about legalistic and procedural aspects of institutions themselves, of liberal legalism and of political portfolios and popularized uses of the term within different ideological currents. Contrary to such understanding of the discourse, I take here that judicial activism, and the ways in which this is employed, can shed light on the ways in which this discourse is implicated with understandings of the 'social' in the conceptualization of social rights that will be of concern later in the analysis.

Since the backbone of this treatise is social rights theory, seen through the lens of social relationality, the discourse on judicial activism is understood here as one that implicates conceptions of *social relations* and *ethicism*, and is thus relevant to the present endeavor. In light of the above, the analysis does not assess judicial activism from a constitutionalism perspective, neither does it engage with a theoretical discussion of the term from within the different currents of the liberal legal tradition. Judicial activism is approached instead as part of a joint discussion on social rights litigation and on the role of judges in ascribing meaning to such rights, especially during a financial and fiscal crisis.

In this respect, for the purposes of this analysis, courts are not considered to be *achronous* and *atemporal*, standing above and beyond the conventional time and space limits that confine them and the political and social conditions that include them. In addition, arguments for or against judicial activism are not fished out from the inland waters of American constitutional and legal theory and uncritically adapted to the multifarious judicial, political and historical reality of the financially assisted countries under examination. Rather, within the bounds of the present venture, judges are understood as being chronologically and spatially situated through temporal, historical, geographical and social entanglements, making in turn "socially situated judgments that inevitably foreground certain facets of our collective values while minimizing others as outdated or recessive in the public culture."[144]

[144] Goodwin 253

ii. A Short Historical Journey

Historically, discussions on judicial activism have been documented to trace back to the 1920s and 1930s, when the conditions of its modern form were spawned in the context of both the New Deal in the United States and totalitarianism in the European continent, reaching a point of momentum in American academic debates by 1937-38.[145] It wasn't until January 1947, though, that the use of the term 'judicial activism' was recorded for the first time in a lay American magazine called *Fortune*. There, the term was coined by Arthur Schlesinger Jr., an author with no legal background, who introduced this phrase to the American public with an article titled *The Supreme Court: 1947*.[146] In that piece, Schlesinger made use of 'judicial activism' in a depreciatory way, while attempting to sketch the political profile and explain the alliances and divisions among all nine Supreme Court Justices sitting at the bench of the Supreme Court of the United States at the time.[147]

Prior to that, articulations of the term were captured by sibling phrases such as the often cited 'government of judges.'[148] These were used to describe judicial practices and to express concerns about judges overstepping their authority and effectively "legislating from the bench,"[149] interfering in this way with the political process and with the legislative and executive powers. In other words, framings as such circulated in American and European scholarly debates in an attempt to connote the judicialization of politics or the politicization of justice, and they have been used as other possible phrasings for the politically activist stance that the judiciary exhibited.[150]

French jurists and legal scholars in Central Europe kept vocalizing their concerns about the judicialization of justice until the phrase 'judicial activism' was explicitly used for the first time in Garapon's 1996 '*Le gardien des promesses: Justice et démocratie*'.[151] After that, 'judicial activism' started gaining momentum in the European legal landscape and steadily acquired currency over the years in the public discourse in America and Europe, as well as in other global jurisdictions, such as in Canada, India, South Africa and Australia.

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[145] Robert M. Cover, 'The Origins of Judicial Activism in the Protection of Minorities' (1982) 91 (7) The Yale Law Journal, 1289

[146] According to Kmiec, substantial research conducted on his part has failed to locate any earlier references to 'judicial activism,' apart from the one made by Arthur Schlesinger Jr. in his article Arthur M. Schlesinger, Jr., *The Supreme Court: 1947,* FORTUNE, Jan. 1947, 202, 208, as cited in Kmiec's article; see Keenan D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 (5) California Law Review, 1445, 1446

[147] Ibid 1446; Coutinho, La Torre and Smith Preface

[148] Lambert. See also Part III. 4.2.iii. The Institutional Critique

[149] Schacter 217

[150] Nogueira 676

[151] Ibid

Eventually, the term has become a familiar component of the political and legal vernacular, being invoked more as an expression and less as a legal concept and using activism to denote the ideological profile of both judges, who allegedly perform it or not, and commentators, who criticize such practice or not.

Put another way, discussions on judicial activism have come to define activism by differentiating between liberal and conservative judges, who respectively have been depicted as being more or less inclined to have an activist stance. In a similar fashion, commentators, who stood more or less in favor of judicial activism, have been portrayed as being either politically liberal or politically conservative.[152] A closer review of such descriptions shows that these have been found mainly in the vast American scholarship and have been designed to describe the particular American legal and political culture. In this sense, such observations have been situated and resonated to a large degree with distinctions of political liberalism and conservativism that apply to the American history of politics, and which differ significantly from, for instance, the European spectrum of ordinary politics, political oratory, and lingo.

In spite of the ideological and legal differences among the United States and Europe, though, what seems to have bound competing views on judicial activism, especially at the highest ranks of decision-making, has been the affront and distrust that goes with it.[153] Appeals to judicial activism and recognition of the display of such judicial conduct have implied, regardless of diverging definitions, that judicial-decision making is driven by political considerations and betokens political bias. Building on that and bringing the term in the settings of continental Europe, it is probably due to the highly politicized tincture of the term, that judicial activism is generally frowned upon.

One explanation for this could be that judicial activism alludes to an enhanced judicial review and thus incurs the longstanding controversy on the relation between the elected legislature and the appointed judiciary. That is to say, judicial review, as it has been vividly portrayed in theory, is "a bête noire of democratic theory,"[154] against which "advocates of judicial review are branded as enemies of the legislature, while proclaimed

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[152] On that point see Lori A. Ringhand, 'Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court' (2007) 24 Constitutional Commentary, 43; Daniel Suhr, 'Does "Judicial Activism" Mean Something?' (*Marquette University Law School Faculty Blog*, 2008), where the following remark is noted: "Does the term "judicial activism" have some objective meaning? *The Capital Times* does not seem to think so, reporting earlier this week: [C]ourt observers and legal scholars are skeptical that the descriptive terms [judicial activist and strict constructionist] have any meaning, except as buzzwords used by *conservative candidates* to create a clear distinction between themselves and their *more liberal rivals*."; Emphasis added.

[153] Jones 141

[154] Yuval Eylon and Alon Harel, 'The Right to Judicial Review' (2006) 92 (5) Virginia Law Review, 992

friends of the legislature oppose judicial review."[155] This leads to another possible reading, according to which, whenever judicial activism is invoked, it is instantly associated with jeopardizing the liberal doctrine of the separation of powers and the foundations of liberal democracy of popular sovereignty. Setting these two considerations against the backdrop of the European social states, judicial activism is also remonstrated. This is perhaps owing to the fact that the term has gradually become a symptom of the weakening of the state, understood as the post-war, sovereign, social welfare state in continental Europe.[156]

iii. Defining Judicial Activism

At present, judicial activism does not have a univocal meaning in the different contexts that it makes its appearance. The analysis here takes as a working definition the one suggested by legal scholar, Fuad Zarbiyev, notably that judicial activism is "a term of art to characterize a course of action that goes beyond the boundaries of what is deemed appropriate for the judiciary in a given context."[157] Despite this working definition, though, it is necessary to explore further and try to pin down the different meanings ascribed to judicial activism, including the most prevalent ones that set the tone in relevant debates. In line with this, a common understanding of judicial activism that straddles legal traditions and judicial models encompasses either one of the following three meanings:

First, judges are believed to engage with judicial activism when they interpret constitutional provisions far from the original meaning intended by the lawmaker and while departing from precedents, the latter being especially the case in the American review system.[158] *Second*, judicial activism is held to occur when judges exceed the boundaries of their designated role and when they interfere with the legislature or the executive, usually by overstepping into matters of 'economic legislation.'[159] This effectively means that at the event of judicial activism, the latter "implies the violation of the principle of separation of powers."[160] *Third*, judicial activism takes place when the judiciary moves from interpreting to effectively creating law, namely when interpretation goes from judicial *decision-making* to judicial *policy-making*.[161] Seen in this way, activism is taken as a synonym of the 'positive

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[155] Ibid
[156] Nogueira 676
[157] Zarbiyev 251, 252
[158] Cf. Ringhand 43; Larry Kramer, 'The People v. Judicial Activism: Who has the last word on the Constitution?' (*Boston Review: A Political and Literary Forum*, 2004)
[159] Cover 1289
[160] Guerra Martins 703
[161] American conservative economists put forward another definition of judicial activism. As Thomas Sowell writes "[i]n recent years, a brand-new definition of "judicial activism" has been created by the political left,

legislator',[162] contrary to the traditional positivist view which holds that supreme judges have the role of a 'negative legislator'[163] in the justice system. In such a frame, the tendency to positively legislate is considered as being driven by a result-oriented impetus and policy-shaping role assumed by the bench together with a professed eagerness of the judges to serve contemporary societal needs and remedy social injustices that the letter of law does not address.[164]

All the aforementioned meanings accorded to judicial activism are taken within the contours of the nation state. In essence, it would not be an exaggeration to say that the concept of judicial activism, seen at the intersection of law and politics, gets wrapped up with the endless confusion surrounding who has the last word in interpreting the constitution in a given state, and who is effectively the "Sovereign"[165] to make final decisions within a polity. Departing from such a state-restricted view of judicial activism and turning to the international plane, judicial activism seems to constitute "a horse of a different colour."[166] That is because, not only the context but also the legal connotations change and hence, in the international arena, judicial activism is usually regarded as a forum for delegated policy making.[167] However, for the purposes of the present analysis, I do not refer to judicial activism seen from an international law perspective, but rather look at the connotations that are attached to the term from the standpoint of the nation-state.

Moving along from the content of the term to its different variations, judicial practice described above is not exhaustively pinned down to the term 'judicial activism' alone. Rather in the ample literature engaging with the phenomenon, this judicial behavior takes various labels. To name a few, such a practice is described as "judicial self-

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so that they can turn the tables on critics of judicial activism. The new definition of "judicial activism" defines it as declaring laws unconstitutional."; see on that point Taranto, .

[162] According to the 'Kelsenian' or 'Austrian' model of judicial review, the Parliament acts as a positive legislature by introducing statutes, while the courts act as a 'negative legislature' by expunging those legislative acts that are not consistent with the Constitution; see Groppi 3

[163] Vieira de Andrade, Loureiro and Tavares da Silva 235, 239

[164] Urbaitė 225

[165] This line of thinking is interestingly developed by former President of the Hellenic Council of State, Panagiotis Pikrammenos, who served in this position during the contested period 2009-2012, during which the Hellenic Council of State handed down the seminal ruling 668/2012 concerning the first Greek MoU. Pikrammenos, in his assessment of the Council of State judges' stance and while portraying the optimal role of the judge, takes his cue from Carl Schmitt's *Political Theology* and argues that a judge "should not be Sovereign, but should not be absent either" (capitalization kept as in the original); see Pikrammenos 390. The notion of sovereign is understood in this respect as one having a monopoly over the final decision, not by means of coercion or ruling, but in the sense of having the exclusive power to decide, especially in situations of extraordinary emergency; see Carl Schmitt, *Political theology: four chapters on the concept of sovereignty* (George Schwab tr, 1922 1st edn, The University of Chicago Press 1985) 5, 12-13.

[166] Urbaitė 225. For an assessment of judicial activism in international law, see Fuad Zarbiyev, 'Judicial Activism ' November 2018 Oxford Public International Law Max Planck Encyclopedia of International Procedural Law [MPEiPro]

[167] Urbaitė 225

empowerment,"[168] "incipient activism,"[169] "judicial overreach,"[170] "adjudicative activism,"[171] while on the opposite end of the spectrum stand its rhetorical antonyms, namely the phenomenon of "judicial restraint,"[172] "quietism,"[173] or most recently the status of "judicial passivism,"[174] among others.

Another alternative formulation to judicial activism or judicial deference comes from the usurpation or abdication discourse.[175] In this connection, judicial usurpation is considered to take place in those occasions where there is a transfer of amount of power from representative institutions to judiciaries. In this sense, judges do not only follow and apply a set of procedures and legal doctrines, but they interpret the law in such manner that they effectively make the law. As a result, judges are considered to assume control over the political branches by crabbing or crowding out democratically elected representatives and by invalidating the political process.[176] Practically, the above explication of judicial usurpation hinges on the fear of giving the courts the power to override the decisions of other state institutions, political branches and democratically elected legislatures and of ultimately overturning the political status quo and stifling representative democracy.[177] Judicial abdication on the other hand, occurs when the courts, through a series of legal techniques and "procedural obfuscation,"[178] decline to either adjudicate and extend legal acknowledgment to certain rights, thereby jeopardizing the possible debasement of the entire constitutional and fundamental rights blueprint.[179]

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168 Möllers, *The Three Branches: A Comparative Model of Separation of Powers*. Tsiftsoglou and Koutnatzis make mention of "a tendency of judicial empowerment" in the context of crisis jurisprudence in Europe and taking Greece as a case study; see Tsiftsoglou and Koutnatzis

169 Javier Couso and Lisa Hilbink, 'From Quietism to Incipient Activism' in Gretchen Helmke and Julio Rios-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011)

170 Karl Klare, 'Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers' in Helena Alviar García, Karl E. Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical inquiries* (Routledge 2015) 21

171 Boguslaw Banaszak, 'Constitutional Tribunals' Judicial Review of Public Power in Poland' in Rainer Arnold and José Ignacio Martínez-Estay (eds), *Rule of Law, Human Rights and Judicial Control of Power: Some Reflections from National and International Law* (Springer 2017) 254, who uses the term 'adjudicative activism' or 'excessive adjudicative activism' as a synonym to 'judicial activism' while assessing the Polish Constitutional Tribunal.

172 Urbaitė 225

173 Couso and Hilbink

174 Ernő Várnay, 'Judicial Passivism at the European Court of Justice?' (2019) 60 (2) Hungarian Journal of Legal Studies

175 Michelman, 'Socioeconomic Rights in Constitutional Law: Explaining America Away'

176 Cf. Young 231; Lawrence 16

177 Klare 21

178 Langford, 'Judicial Politics and Social Rights' 67

179 Cf. Young 231; Lawrence 16

6.2.2. Judicial Activism versus Judicial Activity

i. Judges and the Question of Social Change

In the previous paragraphs, it has been assessed how concerns for judicial activism have broadly been framed as concerns for courts overreaching into the political sphere. As a counterargument to such adverse criticism, it has been suggested in scholarship that the executive can also show signs of overreach and that parliamentary politics can calcify and showcase disruption of customary parliamentary procedure, chronic legislative blockages or an outspread dysfunction. In such an event, the judiciary has been claimed to serve as an extra-legislative venue so that underrepresented groups can seek for protection and the civil society can hold the political branches accountable for their social policies.[180] Bringing this to a view from the ground, commentators have scrutinized the role of judges in the Latin Americas. Within this framework, scholars examined how historic failures in social policy coupled with a political culture of cronyism and overreliance on the executive, have extended wide demands from the society towards the judiciary, asking from the latter to safeguard the rights of the populace and hold governments accountable.[181]

In the European context, in the not so distant past, courts have also acted as an outlet for safeguarding democratic politics when political branches in fragile national economies have been put under the thumb of international financial institutions.[182] In particular, as Kim Lane Scheppele has argued, during the 1990's and while the Hungarian parliament has committed to an economic austerity program under the strict guardianship of the IMF, domestic courts have acted as a much-needed outlet for the protection of the rule of law and social rights, and as a venue towards which citizens have resorted to protect their already established social benefits.[183] Against this backdrop of economic and political instability and of an imminent budget collapse threat, Scheppele submitted that "*a*

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[180] Klare 21

[181] Langford, 'Why Judicial Review?' 68; Gaspard Estrada, 'The politicization of justice in Latin America' (*openDemocracy*, 2018)

[182] Kim Lane Scheppele, by focusing on Hungary and Russia, makes the case for the "defense of court-articulated social rights in a precise political context in which democracies – particularly fragile democracies with fragile economies – find themselves."; see Kim Lane Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 (7) Texas Law Review, 1923

[183] Kim Lane Scheppele has conducted lengthy on-site research in Hungary; see Kim Lane Scheppele, 'Democracy by Judiciary: Or, Why Courts Can be More Democratic than Parliaments' in Czarnota Adam, Krygier Martin and Sadurski Wojciech (eds), *Rethinking the Rule of Law After Communism* (Central European University Press 2005) 46. For an analysis on the rule of law as a key normative pillar of the Hungarian Constitutional Court in the 1990s, see also Kim Lane Scheppele, 'Unconstitutional Constituent Power' in Rogers M. Smith and Richard R. Beeman (eds), *Modern Constitutions* (University of Pennsylvania Press 2020) 175 et seq.

realpolitik defense of social rights"[184] could safeguard social rights in the face of grave austerity policies and obstruction of domestic discursive politics. Reposing on that thought, Scheppele contended that a court-articulated defense of social rights could represent the will of the majority of the people and facilitate negotiations towards less drastic and more gradual budgetary cuts that would less heavily affect the general populace.[185]

Surely, claims about the positive role that the courts have played, especially in the context of Latin America[186] or in the context of its European counterparts[187]have received severe criticism on the basis, among others, that they eventually ended up entrenching the rights of the already entitled classes of the society. Under these circumstances, the role of courts has been outshined by the wider skepticism clouding social rights and by broader understandings of the nature and scope of human rights. One explanation for this is that in countries where socio-economic rights were not part of the founding constitutional mythology, social rights discourses appeared to have played out in courtroom halls.[188]

Drawing on the above, courts ultimately and once again have been measured against the criticism that they have not been capable to mobilize political change, even if they have engaged in judicial activism.[189] In light of this, courts have been accused of resisting "the winds of change,"[190] that is to say, they have been criticized for blindly following legal techniques and doctrines, in an out-of-context manner, and for not keeping sight of the societal momentum. As we have seen with crisis theorizing,[191] the justiciability

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184 Scheppele, 'A Realpolitik Defense of Social Rights' 1923; emphasis added.

185 Landau and Dixon 121

186 See Ferraz; Ferraz. Samuel Moyn stressed a similar position in the context of the judicial developments in Latin America: "[…] pensioners battling any budgetary reorientation to free funds for other purposes were able to induce courts in Latin America and elsewhere *to lock in their entitlements*"; emphasis added, see Moyn, *Not Enough: Human Rights in an Unequal World* 201

187 The Hungarian Constitutional Court received criticism for invalidating austerity measures imposed as part of international financial assistance programs in Hungary in the 1980s, on the basis that it hampered market efficiency, macro-economic budgetary stability of the state and the transition to a free market-based economy; for such criticism, see András Sajó, 'How the Rule of Law Killed Hungarian Welfare Reform' (1996) 5 (1) East European Constitutional Review . For a counterargument to that position, see Scheppele, 'A Realpolitik Defense of Social Rights', where Scheppele argues that the Hungarian Constitutional Court respected the austerity measures but gave precedence to material justice and to respect for the rule of law as a prerequisite for a stable market economy. For a discussion of this debate, see Mark V. Tushnet, *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* (Princeton University Press 2008) 235, 236, 237. Some of those arguments can be recalled in Part III. Chapter 4.2.iii. The Institutional Critique.

188 Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-legal Review' 96

189 On the US context, see Gerald N. Rosenberg, *The hollow hope: Can courts bring about social change?* (University of Chicago 1991). For an overview and criticism against judicial activism in India, see also Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the geographies of injustice' in S.K. (Shashi Kant) Verma and Kusum (eds), *Fifty years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press 2000)

190 Langford, 'Judicial Politics and Social Rights' 67

191 See Part II. 2.2.2. Social Crisis *as* in Crisis of Social Rights

discourse and in our examination of social rights lawyering,[192] judicial activism has also been highly implicated with questions of political and social change, the latter taking the meaning of a political and ideological transformation away from the existent dominant political paradigm. In this sense, activism has been seen as a metonym to an anti-establishment, rebellious or reactionary decision-making, similar to the idea of 'rebellious cause-lawyering' that has been mentioned earlier in the analysis.

However, the main question in this thesis is not how political change – however this may be defined – comes about, namely through the courts or through parliamentary politics. In my view, reproduction and blind reiteration of narratives that either present a fixation on the existence of 'crisis' or 'judicial activism', share a common preoccupation with the significance of single events and how change can come in a moment, through a single venue or a unique event. Whether this is a question that can be answered in an "either-or" way is doubtful to begin with. What is more, though, talking about social change through social rights and the attainment of the change in holistic terms through one medium, one social praxis or through one instant in the endless passage of time, is certainly a misplaced discussion in the way that this has been targeted at courts.

Moreover, questioning of the role of courts with regards to the colossal question of their accomplishment of political change or not, let alone asking such question in the context for the austerity and crisis years in Europe, is taken here to be a misplaced question, especially if looked at in the austerity context. That is because, this is a question that is destined to find the courts always failing to fulfil a role that they were not designed to fulfill in the first place. Put differently, judicial activism and activist lawyering are both manifestations of a broader liberal legal edifice that is rooted in a theoretical framework underpinned by "a set of acute separations between the 'branches' of state power; law and politics; state and society; and liberal and non-liberal juridico-political frameworks."[193] Judicial models in liberal democracies, despite the differences they exhibit, are by and large devised within the conceptual imaginaries of liberal legalism itself, while they fluctuate within the margins of such conceptions of liberalism and the ways in which these have developed in each jurisdiction and historical context. In other words, and as it can be recalled from previous chapters,[194] it has been argued that courts exercise and are expected

[192] For the question of change in relation to the justiciability discourse, see Part III. Chapter 4.2. iii. The Institutional Critique. For a discussion of change and social rights advocacy, see Part III. Chapter 6.1. Social Rights Lawyering in the Crisis.
[193] Boukalas 396
[194] See in particular Part III. Chapter 4.3. The Case in Favor of Justiciability.

to exercise their vested role within their institutional bounds and theoretical purlieu of liberal legalism upon which such institutions have been established.[195]

Surely, as it has been stated by the United Nations Office of the High Commissioner for Human Rights "judicial enforcement has a clear role in *developing our understanding* of these rights [i.e. economic, social and cultural rights], in affording remedies in cases of clear violations and in providing decisions on test cases which can lead to *systematic institutional change* to prevent violations of rights in the future."[196] However, as Upendra Baxi has vividly illustrated from an Indian-descended perspective, courts are, "at the end of the day, never an instrument of total societal revolution"[197] but they are rather, at best, "instruments of *piecemeal social engineering*."[198] Therefore, courts which display a more activist stance and thereupon may be labelled as activist courts, "are never a *substitute* for direct political action, including mass politics of direct action."[199]

In light of the above, asking whether courts can bring real, actual political change is not a useful question to ask in the austerity social rights discourse. Framed that way, it is my view that such criticism obfuscates the discussion at a conceptual level, while it deflects the attention from underlying, fundamental questions about the ethical premises of social rights, to a singularly state-focused and institutionally mediated understanding of such rights. With this in mind, in the remainder of this section, I proceed with a counterargument to the charge of judicial activism by making the case for an active, yet not *activist*, judicial stance and for the latter's potential in entrenching the protection and conceptual realization of social rights in times of procedural crisis.

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[195] Helfer and Slaughter 330; emphasis added.
[196] OHCHR, 'Key Concepts on ESCRs - Can Economic, Social and Cultural Rights be Litigated at Courts?'; emphasis added.
[197] Baxi 164
[198] Ibid; emphasis in original. The entire excerpt reads as follows: "Courts are, at the end of the day, never an instrument of total societal revolution; they are, at best, in the images of Roscoe Pound and Karl Popper, instruments of piecemeal social engineering."
[199] Ibid

ii. Active not Activist: A Counter-Argument

In the foregoing pages, what is considered to be an activist attitude assumed by judges at the level of domestic adjudication has been described. In the remainder of this section, I proceed with a counter-narrative, by looking at what could be framed as an active stance on behalf of the judges, and yet could avoid the charge of political activism.

As much as an active judge does not mean an activist judge, a judge's "passivity cannot overstep into silence,"[200] and judicial abdication cannot be justified at instances of non liquet. Surely, active or passive is often a matter of perspective as one can be active by omission, and ultimately the questions of whether one is active or passive in acting or failing to act, or if the application of law can be considered 'regular'[201] remains in the eyes of the beholder. In any case and despite appearances to the contrary, a judge cannot be "a judge that decides not to decide"[202] and in the fullness of time, courts are anticipated to secure that a legislative act is duly enacted and that it respects the rule of law and stands in conformity with certain procedural democratic standards and legal principles.[203] In that sense, the judiciary is empowered to exercise its competences and ask the executive to justify their policies when far-reaching societal implications are at stake.[204]

In addition, as it has been stressed in literature, courts can secure and promote the democratic agency that the citizens of a polity exercise, when ordinary politics and democratic processes are compromised, entrenching in this way, the vitality of the political process.[205] Practically, the argument that this thesis stands in line with is that judges ought not to usurp the role and functions of other political bodies. Still, they should not abdicate what is anticipated of them either. That is to say, judges in a democratic legal order are required to hold the rest of the political branches accountable and to facilitate and safeguard the realization of social rights in all of its various dimensions.[206]

This legitimate function of the judiciary is all the more important because, as it has been hinted at above, in majoritarian political processes, the administrative authorities and the legislative procedure may be subject to a series of prolonged blockages. These impediments can take the form of a very strong judicial deference to the legislature coupled with an overreliance on the executive, while obstructions in the democratic procedure may

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[200] La Torre 10
[201] Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' 252
[202] Cf. Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 (3-4) International Journal of Constitutional Law, 637; La Torre 10
[203] Cf. Kyritsis, 'Principles, Policies and the Power of Courts' 397; Jones 143
[204] Boyle 16
[205] Cf. the analysis on the relation of democratic agency, courts and social rights at Desai 31 et seq., 40
[206] Boyle 21

arise from blind spots and a lack of focus in the legislative process or by political intransigence and inertia in lawmaking and law implementation. [207] In more detail, as legal scholar Rosalind Dixon has sharply pointed out,[208] lawmakers may fail to recognize that a piece of legislation could be applied in ways that can infringe certain rights, due to capacity or time constraints of a given legislative session or by reason of other limitations on the legislative foresight. This has been especially the case in both Greece and Portugal where decree-laws have been used extensively so as to implement MoU-required commitments in an urgent manner yet without challenging parliamentary law-making powers.[209]

In addition, the legislature may fail to anticipate the impact of certain laws on the protection and fulfilment of social rights by certain categories within the society. That is because, lawmakers may not be able to adequately appreciate the particularities and perspectives of those rights holders who may come from different economic, ethnic or cultural backgrounds, who might face different structural disadvantages within the society and carry very different lived experiences. Lastly, while hinting at the popular accusation that social rights are exceedingly costly, Dixon also underlines that legislators who are focused on a particular legislative objective and have limited knowledge and experience, "may be ill-equipped to perceive ways in which a rights-based claim might more fully be accommodated, without *undue cost* to the relevant legislative objective."[210] The validity of such observations is difficult for one to deny. Situating judges within the above-described conditions shows the ability that courts have to counter and correct legislative blind spots and naked political interests and to further highlight missing viewpoints as well as the failure of societal inclusiveness and responsiveness on behalf of the lawmaker.[211]

Against this backdrop, power diffusion among different legal branches is not considered here to be a usurpation of political power by the judiciary or a judicialization of politics. Instead, a demonstrated active judicial review may have the capacity to correct political missteps and to restore imbalances in the political process. In this context, judges do not act in an activist manner when they mitigate the disproportionate burdens, which are taken by politically disadvantaged groups. Judicial activism is not displayed either when

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[207] Cf. Rosalind Dixon, 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 (3) International Journal of Constitutional Law, 394, 402; King, *Judging Social Rights* 164, 165, 260, 261, 285, 286

[208] For all three points that are developed in the analysis, see Dixon 402

[209] Cf. Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' 180, 184, 193, 302, 303; Vieira de Andrade, Loureiro and Tavares da Silva 239. See also Part II. Chapter 3.1.ii.d. Austerity as Law and Law's Austerity.

[210] Dixon 402; emphasis added.

[211] For a commentary on the role of judicial review as a corrective to the problem of marginalization of vulnerable and excluded groups in the legislature, see King, *Judging Social Rights* 176, 177

the judiciary reviews legislative rationality and ensures that "the legislature took all relevant interests into account in the legislative process."[212] Rather, it could be argued here, that when the judiciary inspects the legislative capture and asks for the legislature to justify their policy-making decisions, it effectively attends to the right of citizens "to an explanation"[213] that the legislature ought to provide them with. Hence, such an activity constitutes a legitimate and anticipated exercise of judicial power and does not fall under the ambit of judicial activism, as the levelling and inaccurate characterizations against the contend.[214]

Former judge of the Supreme Court of the United States, Ruth Bader Ginsburg, stressed in 1979 that few jurists would subscribe to "a wooden notion that each branch must be limited to the exercise of the powers appropriate to its own department and no other."[215] Drawing insights from this US-oriented observation, it could be said that despite the required attention that must be given to the particularities of different judicial models and review systems, a standpoint that sees the various political branches as not rigidly compartmentalized and isolated to each other but rather as interdependent,[216] reflects a cooperative understanding of justice that is much needed. In line with this, it could be argued that the realization of social rights is a matter of a dialogical process pursued through all democratic venues and democratic branches that are available to the public.

Following this thinking, courts can exercise their interpretative power when assessing social rights cases and they can foster horizontal dialogues while still signaling their respect for the separation of powers doctrine. Put simply, judges can manifest an active judicial stance and at the same time still show *interbranch comity* without being activist.[217] The separation of powers as a normative principle is not to be understood in

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[212] Petersen 185, 186

[213] Yuval Eylon and Alon Harel argue that citizens have "a right to judicial review," which is based on what they label as "the right to a hearing" or "the right to voice a grievance" as a right that is not overridden by the right to equal democratic participation Eylon and Harel 1005, 1016, 1021. In an earlier version of this study Eylon and Harel have called this "the right to an explanation" owed by the legislature to each person whose rights are infringed by legislative acts; see Yuval Eylon and Alon Harel, 'The Right to Judicial Review [draft version]' SSRN article [on file with author] 3, 8 et seq.

[214] Cf. Guerra Martins 704, who notes regarding the Portuguese Constitutional Court: "The expression 'judicial activism' was not used in a rigorous sense. What was considered 'judicial activism' was nothing less than the normal activity of creative interpretation of the rules that every Constitutional Court employs."

[215] Ginsburg Bader 324

[216] Ibid

[217] Angel-Cabo frames this as 'dialogical activism', namely as the robust judicial activism coupled with a genuine and not merely rhetorical sensitivity to concerns about the separation of powers and locates this in the Colombian Constitutional Court; see Natalia Angel-Cabo and Domingo Lovera Parmo, 'Latin American Social Constitutionalism: Courts and Popular Participation' in Helena Alviar García, Karl E. Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical inquiries* (Routledge 2015) 90, 91. David Bilchitz argues in favor of 'inter-branch comity' in social rights adjudication with a focus on the Constitutional Court of Africa; see David Bilchitz, 'Avoidance remains avoidance: is it desirable in socio-economic rights cases?' (2013) 5 (1) Constitutional Court Review 302

this respect as an end in itself through a fixation on stale proceduralism, but it is rather to be seen as a means of keeping governments and political branches in check. The latter is crucial so as to ensure that all political forces are responsive to the rights of citizens, including those least privileged, and that policymakers do not lose sight of the challenges and social disparities that different social groups face within the society.[218]

This approach of seeing courts as interlocutors in transnational dialogues has been endorsed by international legal scholars and human rights theorists, who have come to stand more positively inclined towards an active judicial review as a means of safeguarding legal principles. To that connection, it has been argued, that the relation of judicial activism to the protection of human rights and the right to due process "is an essential element of the democratic rule of law in a constitutional democracy as opposed to being 'judicial overreach'."[219] Of course, the discussion on trans-judicial cooperation and communication and the place of judicial activity in this process, is a much more nuanced one, that falls within the ambit of international law studies and surpasses the limits of the endeavor at hand.[220] Staying within the context of European austerity it can be recalled that national judges have, by and large, defended their grounds of reasoning in their austerity judgments by resorting to legal principles of the rule of law and to due process. In other words, judges have not created law, but they have rather kept an active frame of mind in safeguarding the rule of law and constitutional fundamental rights, the status of which has been jeopardized by secondary national legislation. Whether genuine judicial activism has taken place in the examined focus countries or whether judicial practice has been hastily generalized under this epithet, is examined in the ensuing paragraphs, where a more elaborated, evaluative assessment of the austerity jurisprudence is further pursued.

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[218] Cf. Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 773; Helmke and Ríos-Figueroa 2

[219] Sonja Grover makes this argument while discussing selected cases of the US Supreme Court, the Canadian Supreme Court and the European Court of Human Rights; see Sonja C. Grover, *Judicial Activism and the Democratic Rule of Law : Selected Case Studies* (Springer International Publishing 2020). See also the analysis by Jeremy Waldron "on the role of courts in advancing or upholding the political ideal that we call 'the rule of law'." Waldron's objections to judicial review "do not really deny that *judicial review is required by the rule of law*" but they are based on democracy and democratic legitimacy. See Jeremy Waldron, 'The rule of law and the role of courts' (2021) 10 (1) Global Constitutionalism, 91, 94; emphasis added.

[220] Daniel Quiroga-Villamarín, 'From Speaking Truth to Power to Speaking Power's Truth: Transnational Judicial Activism in an Increasingly Illiberal World' in Björnstjern Baade and others (eds), *Cynical International Law?: Abuse and Circumvention in Public International and European Law* (Springer Berlin Heidelberg 2020) 112, 113; Daniel Quiroga-Villamarín, while examining judicial activism from an international law perspective, alerts that we should remain vigilant of judicial activism favoring illiberal objectives, of courts serving as a bulwark for the status quo and of the ways that strategic litigation can be employed by the far right.

"A trial is not therapy"
Denial (film)[*]

6.3. The Case of Portugal and Greece: Reflections on the Austerity Jurisprudence

In the previous sections, it has been assessed how memoranda-instructed austerity measures were challenged before lower and highest ordinary courts in Greece and Portugal and before European Courts. Following this more descriptive part of the analysis, the thesis proceeded with a conceptual investigation of the notions and practices of activist lawyering and judicial activism, and how these have come to be understood in their places of origin and in European settings. Weaving together the theoretical insights on social rights advocacy and judicial practice, in the ensuing paragraphs the analysis dives deeper into a qualitative assessment of the stance of the judges, the rationale of the decisions and the ethical dimensions of the austerity jurisprudence on matters pertaining to the concept of social rights and to the values and nuances attached to it.

[*] The quote here is borrowed from the 2016 British-American historical drama film under the title 'Denial', directed by Mick Jackson and written by David Hare, which is based on Deborah Lipstadt's book *History on Trial: My Day in Court with a Holocaust Denier* (Ecco/HarperCollins, 2006). The movie dramatizes the *Irving v Penguin Books Ltd* libel case, in which Deboraj Lipstadt, Dorot Professor of Modern Jewish History and Holocaust Studies at Emory College and her publisher, Penguin Books, was sued by English author and Holocaust denier David Irving. Irving brought a lawsuit for libel before the British justice against Lipstadt and the Penguin publishing house, claiming that Lipstadt's statements in her 1993 book, *Denying the Holocaust: The Growing Assault on Truth and Memory*, that Irving was a Holocaust denier, were false and harmed his reputation. Building on these events, the film recounts the judicial proceedings and the trial. In that context and in the course of the movie's narration, there is a scene with a fictional cross-talk between Deborah E. Lipstadt, portrayed by actress Rachel Weisz, and one of the leading attorneys of the case, notably British lawyer Anthony Julius, portrayed by actor Andrew Scott, which unfolds along these lines: Deborah: "You can look them in the face, can you, you can look survivors in the face and tell them they have no right to testify? They were there! They have the authority."/ Julius: "Deborah, these people came out of hell. I understand that. After all these years, they still haven't *processed* the *experience*. I know that too. But *a trial*, I'm afraid, *isn't therapy*. Still less is it vindication."; emphasis added. The present author does not, in no way, and in a categorical manner, draw here any sort of parallels between the Holocaust or the trial dramatized in the film and the examined austerity and crisis case-law. The present author does not use the cinematic dramatization of real historical events in any lighthearted way and is in full awareness that any cinematic depiction of such events that refer to the darkest and most horrific times in history is inadequate to describe those times. Trauma is understood in this sense as signaling the impossibility of narration and as reflecting on the divide of representation and real experience. The analysis here borrows this excerpt from the afore-mentioned fictional dialogue and uses this quote out of its specific context, only on the basis of the content of that quote alone, and the ways in which this could be expropriated to describe judicial practice in general.

Moving forward to the austerity cases-law, as it has already been hinted at in previous paragraphs, this has been met with much interest not only due to its juridical importance but because it "triggered a far-reaching debate that was not confined to the realms of legal scholarship and political discussion, but that affected the whole of society."[221] In the early years of assistance programs across many European countries, the Hellenic Council of State[222] was the first Supreme Administrative Court with constitutional review competence to hear a MoU-related case "where the social rights of people, the rule of law, the country's eminent default, and its subsequent relationship with other EU member states were at stake."[223] Avowedly, as there was a lot on the line, the Council of State upheld the constitutionality of the impugned measures and thus followed an approach that has been characterized by the judges themselves as pragmatic and realistic,[224] and by its critics as reserved and limited.[225] However, at an internal level, a concomitant contestation of austerity measures was taking place in ordinary lower courts, as we have seen above, which struck down MoU-related secondary national legislation that infringed upon labour rights. In spite of such internal display of discrepancy among the different instances of judicial review, the impression that has prevailed, and which amassed in the face of the Supreme Judges, was that the review of the MoU demands in Greece has been met with a lack of robust and sufficient scrutiny.[226]

Meanwhile, the judges of the Portuguese Constitutional Court[227] did what - in the public conscience of the Portuguese constituents - the Parliament has failed to have done.[228] That is to say, by declaring the unconstitutionality of the austerity measures brought before its chambers, and by preventing consecutive and heavy salary and pension cuts, the Tribunal was popularly and symbolically held as striking down the Portuguese's

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221 Coutinho 81; Coutinho makes this claim in the context of the Portuguese Constitutional Court, but it could also be applied to the situation that was encountered with respect to the Greek judicial developments and the Greek society.

222 Hereinafter in this section, Hellenic Council of State or Council of State, if not stated otherwise.

223 Bakavou 166

224 Vana Fotopoulou, '8 υποθέσεις - "βόμβες" στα χέρια του Συμβουλίου της Επικρατείας 8 files - "bombs" in the hands of the Council of State' *Κυριακάτικη Ελευθεροτυπία* (3 November 2013)

225 Cf. Konstantinos Giannakopoulos, 'Το Ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων: "να είστε ρεαλιστές, να ζητάτε το αδύνατο"' (2015) 4 Εφημερίδα Διοικητικού Δικαίου 438; Bohoslavsky, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights on his mission to Greece from 30 Nov. to 8 Dec. 2015* 14 paras 50, 51

226 Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' 289, 300

227 Hereinafter in this section, Portuguese Constitutional Court or Tribunal, if not stated otherwise.

228 António José Seguro, 'The Centrality of the Portuguese Parliament: Reform, Troika and "Contraption"' in António Costa Pinto and Conceição Pequito Teixeira (eds), *Political Institutions and Democracy in Portugal: Assessing the Impact of the Eurocrisis* (Springer International Publishing 2019) 111

government political plan. Accordingly, this jurisprudence has been widely portrayed as *anti-austerity*, catalyzing, in this way, unprecedented political, academic and media attention in and outside Portugal.[229] Due to this protracted national and international exposure and visibility, it was during this period that most of the Portuguese people "discovered the existence of a Constitutional Court that until then had been largely unknown."[230]

Following this course of events, the approach taken by the Portuguese Constitutional Court seemed destined to exceed its national boundaries and to beget cross-fertilized, horizontal dialogues amongst apex courts and national Supreme Judges in austerity-inflicted national economies.[231] In a trice, the Portuguese Constitutional Court "rose to stardom,"[232] resulting in clamorous discontent from EU officials, who hastened to discipline the Portuguese government not to imperil the adjustment program's viability and the latter's timeline and fiscal targets.[233] During this time, the Portuguese and Greek Courts were set side by side in the intensity and determination of their response to the assistance programs, commitments and directives. In this comparison, the Portuguese crisis case-law has been characterized as "exemplary,"[234] in the approach that it followed.

The crux of the matter is that the Hellenic Council of State, in its *first MoU decision,* upheld the constitutionality of the austerity measures in question at the same time that the Portuguese Constitutional Court invalidated the MoU-dictated legislation as being unconstitutional. However, with the passage of time, and from 2016 onwards, to be more exact, the Portuguese Constitutional Court started receiving less requests about budgetary or social security issues covering workers' rights and pensions and the Tribunal has been "smoothly cast aside."[235] In the meantime, apex courts in Greece were being confronted with three assistance programs and a "real avalanche of austerity measures,"[236] and they

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[229] Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 132

[230] Seguro 111. Violante raises a similar remark: "The few empirical studies available show that social awareness of the court [i.e. the Portuguese Constitutional Court] has been traditionally low."; see, Teresa Violante, 'I-CONnect Symposium on "The Euro-Crisis Ten Years Later: A Constitutional Appraisal"–Part I: The Eurozone Crisis and the Rise of the Portuguese Constitutional Court' (*International Journal of Constitutional Law Blog*, 2019)

[231] Cisotta and Gallo 10

[232] Violante, 'I-CONnect Symposium on "The Euro-Crisis Ten Years Later: A Constitutional Appraisal"–Part I: The Eurozone Crisis and the Rise of the Portuguese Constitutional Court'

[233] Cf. Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' 179; European Commission, *Statement by the European Commission on Portugal (*Memo/13/307*)*

[234] Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 9, 10. In Greek media outlets the approach that the Hellenic Council of State took towards the first Greek MoU has been compared with that of the Portuguese Constitutional Court in assessing the Portuguese MoU; see Fotopoulou,

[235] Violante, 'I-CONnect Symposium on "The Euro-Crisis Ten Years Later: A Constitutional Appraisal"–Part I: The Eurozone Crisis and the Rise of the Portuguese Constitutional Court'

[236] Joaquim Jose Coehlo de Sousa Ribeiro, 'Austerity and Social Rights in Times of Crisis' in Magistrats Europeens Pour La Democratie et Les Libertes (MEDEL) (ed), *Austerity and Social Rights* (International

continued adjudicating on several austerity-related cases, producing prolific austerity jurisprudence in which they found consecutive social cuts and reductions unconstitutional.

In view of this political environment and the judicial and political developments of the early MoU years in Greece and Portugal, the analysis takes stock of the panorama of austerity cases surveyed earlier, together with the theoretical explorations of the justiciability of social rights and the role of judges and lawyers in this regard. Bearing in mind the arguments and counter-arguments related to the judicial enforcement of social rights, together with the crisis narratives, which have been explored earlier in the analysis,[237] it appears that the examined austerity cases have come to stand as an amalgam and a real time manifestation of all those seemingly abstract and theoretical discourses on social rights protection. Simply put, pervasive ideas of crisis theory and austerity, together with criticisms and counter-criticisms on social rights protection and judicial practice, have all been meddled together and have materialized in the framework of those countries, bringing forward, in this way, not only questions of normative nature, but equally significantly, questions about the ethical justifications of the entire social rights edifice.

6.3.1. Judicial Activism and the Greek and Portuguese Courts

i. Greece

Austerity case-law in Greece has been characterized as being asymmetric with the highest courts applying different levels of scrutiny to the contested social policies and displaying a statist understanding of the economy. At the onset of the financial crisis, as we have seen earlier, the highest Greek courts resorted to deference, granting in this way much leeway to the executive and the legislature. However, in later years and while the heated crisis-talk abated, judicial scrutiny of austerity measures intensified, targeting mainly the justification and proportionality of austerity adjustments in social policy sectors.[238]

Accordingly, the apex courts encountered much criticism coming especially from constitutional scholars, who challenged the Hellenic Council of State for its inconsistency, inefficiency and insubstantiality in assessing the impugned austerity measures and in safeguarding fundamental human rights. Given this, the judiciary has been initially criticized for displaying timidity in its judgements, for endorsing a formalistic turn in legal

Colloquium 30th Anniversary of the Society of Greek Judges for Democracy and Liberties, Athens, 16.03.2019, Sakkoulas Publishing Athens-Thessaloniki 2019) 77

[237] See Part II. Chapter 2.1.2. In Search of a Narrative: Different Conceptualizations of the European Crisis and Part III. Chapter 4.2 The Case Against Justiciability and 4.3. The Case in Favor of Justiciability

[238] Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 15

thinking and for creating legal confusion and stasis.[239] In a sterner tone, the early austerity jurisprudence of the Council of State has been criticized for having practically immunized governmental social policies from a substantial review and for being imbued by "a pro-Memorandum spirit,"[240] namely a positively inclined stance towards the austerity policies.

With time and as a shift in the judiciary's attitude took place, apex courts continued to receive criticism, this time for displaying proactiveness. In this connection, some analysts have argued that apex Greek courts, with an emphasis given to the Hellenic Council of State, resorted to judicial activism, either as a mark of the latter's "pronounced political nature"[241] or due to the overall political developments that judges have found themselves being dragged into, oftentimes unwillingly.[242] Another stream in the literature refrained from classifying this attitude as outright judicial activism, while acknowledging "the more active role"[243] that the highest courts assumed. Not surprisingly, occasional characterizations of highest courts as manifesting judicial activism have been made by academic scholars,[244] whereas the judges of the Council of State, for instance, despite

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[239] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 340

[240] Dimitris Travlos-Tzanetatos, 'Δικαιοδοτική Αυτονομία ή Δικαιοδοτική Αυτοσυγκράτηση: Το άρθρο 249 Κ.Πολ.Δ. στην Αναιρετική Διαδικασία κατά την πρόσφατη Νομολογία του Αρείου Πάγου' (2015) 73 (18) Επιθερεώρηση Εργατικού Δικαίου, 1183

[241] Lampropoulou 136. See also Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 284 et seq.

[242] See academic commentators Tsiftsoglou, 'Beyond Crisis: Constitutional Change in Greece after the Memoranda'; Kaidatzis, 'Socio-economic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 15; Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283, who explicitly refer to the Hellenic Council of State. See also Lampropoulou 138 et seq., 143 et seq., where Lampropoulou argues that the Hellenic Council of state displayed "selective judicial activism" on some occasions, while on others it demonstrated "reverse judicial activism." The latter is used as another way of framing judicial usurpation during the assessment of specific austerity measures. Giannakopoulos also characterizes the "intensified" judicial scrutiny displayed by the Hellenic Council of State as a "reverse fiscal activism"; see Giannakopoulos, 'Το Ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων: "να είστε ρεαλιστές, να ζητάτε το αδύνατο"' 438. Karavokyris also considers that the Hellenic Council of State demonstrated judicial activism, even though he argues that the "the radical developments that may be observed in Greek jurisprudence during the period of crisis cannot be regarded as an exception to normality, nor as a refutation"; see George Karavokyris, 'The Role of Judges and Legislators in the Greek Financial Crisis: A Matter of Competence' in Lina Papadopoulou, Ingolf Pernice and Joseph H. H. Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis: Dimitris Tsatsos in memoriam* (Nomos Verlag 2017) 161, 228

[243] Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty' 195. See also the analysis in Ragnarsson 613 et seq.

[244] On the judicial activism argument, there has not been a meeting of minds among academic commentators. On critics arguing that the Greek highest courts displayed judicial activism, see Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 7, 11; Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 283 et seq.; Lampropoulou 143 et seq.

identifying the significance and gradual shift of the courts towards the measures, have made no explicit references to judicial activism.[245]

In the long run, legal commentators have taken a more sympathetic stance to the Greek judiciary, while reflecting on its overall reaction to the austerity measures. Looking at the highly featured *first MoU decision*,[246] the Hellenic Council of State was excused for not having shown a bolder approach when the first application for the annulment of austerity measures was heard in its courtroom. That is to say, scholars emphasized that the Council found itself contemplating highly political issues that touched not only upon several legal considerations but also on several multilevel national and supranational governance-related matters as well, and that all the while, the Council of State had no "judicial precedent to fall back on."[247]

Adding to that and while assessing the stance that highest courts exhibited, other scholars emphasized the exceptional circumstances of adjudicating on highly politicized matters during a politically-charged period. Against this backdrop, it has been stressed that judges, despite the exceptional conditions of performing their regular duties, have managed to nonetheless safeguard constitutional guarantees "while landing their judgments in the anomalous terrain of the economic reality of the crisis."[248] Building on this more lenient evaluation of adjudicatory conduct and while looking at the overall judicial outturn of the MoU jurisprudential years, other analysts contended that apex courts have been more attuned to the social impact of austerity with the passage of time. Stated differently, commentators held that as soon as the initial overwhelming state of uncertainty had settled down, and once the new austerity reality started to take shape, highest courts were able to overcome their initial numbness and react more readily to the social demands advanced before them.[249]

On the other side of the debate, scholars doubted the role of apex courts in responding to the debt crisis and in effectively contesting austerity measures, counting instead "few successes and many failures."[250] Drawing upon broader arguments against the

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[245] Bakavou 171 et seq., Bakavou serves as a Judge at the Hellenic Council of State at the time of this writing. See also Pikrammenos 390, whose analysis was published at a time that its author, Panagiotis Pikrammenos, served as the President of the Hellenic Council of State from 2009 to 2012.

[246] Hellenic Council of State (Plenum) Decision No 668/2012 on the constitutionality of Law 3845/2010 according to which, the 1st MoU was enacted (application date 26.07.2010; publication date 20.02.2012); hereinafter 'first MoU decision'.

[247] Bakavou 166

[248] See Kofinis 264

[249] Bakavou 166; Bakavou raises a similar point by arguing that the judgement of the ECtHR on the Koufaki case threw "into sharp relief" the Hellenic Council of State.

[250] Lampropoulou 136, who makes this remark with respect to the Hellenic Council of State in particular.

justiciability of social rights on the basis of institutional inaccessibility and the unaffordability of courts and litigation, commentators took a critical stance towards the highest courts for what these were not able to do,[251] notably protect the poor and less privileged classes of the society. Sailing in the charted waters of a critical studies critique, scholars argued that domestic courts essentially helped an already privileged middle-class demographic in securing and maintaining their already existing privileges at the expense of the underclass. The remarks by constitutional scholar, Akritas Kaidatzis, are characteristic in this respect when he submits that "although intended as anti-austerity acts, the courts' decisions are effectively *anti-anti-austerity* acts, since they risk governmental policies to combat poverty."[252] Talking about the later phase of tightened judicial scrutiny that apex courts manifested and the respective rulings that they issued, particularly regarding cuts to pensions and salaries, Kaidatzis emphasized that those decisions, "will make better-off people from the middle classes, people who already had a stable job or a pension, including judges themselves, and they will make worse-off people from the lower classes, the most needy and poor."[253] About this last line of criticism there is much more to be said. For now, we put a mental pin in this ordinary criticism, to which we will come back in the paragraphs immediately below.

ii. Portugal

From early on, and while the pages of the Memoranda history in countries of South Europe were still being inscrolled, commentators rushed into characterizing the Portuguese Constitutional Court as an activist court.[254] Judicial activism seemed to have been taken at face value and went unchallenged at least during the first critical years that the financial assistance programs were, almost simultaneously, being executed in both Greece and Portugal. However, as Teresa Violante has emphasized, the Portuguese

[251] Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 285 et seq.
[252] Kaidatzis, 'Socio-economic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 2, 6, 7; emphasis added.
[253] Ibid; emphasis added.
[254] On those identifying an activist stance on behalf of the Portuguese Constitutional Court see Gonçalo de Almeida Ribeiro, 'Judicial Activism Against Austerity in Portugal' (*International Journal of Constitutional Law Blog*, 2013); de Brito Nogueira, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis ' 73, 75; Antonia Baraggia and Elena Gennusa Maria, 'Social Rights Protection in Europe in Times of Crisis: 'A Tale of Two Cities" (2017) 11 (4) ICL Journal, 490; Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' 183

Constitutional Court's "reaction to austerity legislation was complex and simply claiming its activist nature runs the risk of telling just one part of the story."[255]

Looking at the reviews that the Tribunal received, the later has been subjected to hefty criticism for exhibiting intense[256] and unauthorized activism,[257] or it has been more mildly reproved for demonstrating "a novel interventionist approach"[258] or for producing a "gradually empowered jurisprudence."[259] Critics held that the Tribunal was walking down an activist path, because according to their appraisal, the Court struck down MoU-related legislation. Scholars also held that the judiciary overstepped its bounds when it advised the government that raising state revenue through taxes rather than reducing state spending through cutbacks, was a better option in distributing public burdens.[260] To that end, commentators have been rather fierce in their disapproval and have acidly underlined that the Tribunal did "a *disservice* to democracy when it took on an activist role against the austerity policies *sponsored* by the Government."[261]

On the upside of all this, counter-critics argued that the Portuguese Constitutional Court did not exhibit any "real judicial activism"[262] or embrace a "dirigistic"[263] control. Legal commentators contended in this respect, that the Portuguese austerity jurisprudence has been primarily based on the rule of law, equality, and legitimate expectations principles, and it "did not have a positive effect on legislation, meaning there was no legislative creation therein, and that can be an indicator that the case law was not

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255 Violante, 'I-CONnect Symposium on "The Euro-Crisis Ten Years Later: A Constitutional Appraisal"– Part I: The Eurozone Crisis and the Rise of the Portuguese Constitutional Court'

256 Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 9, 10

257 Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' 122

258 Faraguna, Fasone and Tega

259 Akrivopoulou, 'Striking Down Austerity Measures: Crisis Jurisprudence in Europe'

260 de Brito Nogueira, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis ' 75; Miguel Nogueira de Brito notes that he refers here to Ruling No 187/2013 (Plenum) of the Portuguese Constitutional Court and cites para 44 of the Ruling according to which, "the legislator, in the choice of the political decision, could not have failed to confer an autonomous relevance to the principle of equality before public burdens, which in principle is brought to effect through the tax system." Earlier in the analysis it has been examined that the Portuguese Constitutional Court in its pre-MoU Ruling No 396/2011, has declared obiter dicta that the imposition of taxes instead of public expenditure cuts was a more equality-friendly measure; see Coutinho 82,83. See also Part III. Chapter 5.1.2. ii. a. The *pre*-Memorandum Jurisprudence.

261 de Almeida Ribeiro, 'Judicial Activism Against Austerity in Portugal'; emphasis added.

262 See Violante and André 258 et seq. Claire Kilpatrick argues against the 'judicial activism' charge elevated towards the Portuguese Constitutional Court; see Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' 305 et seq.. Kári Hólmar Ragnarsson, notes that although the Portuguese Constitutional Court "has been perhaps the most active European court in striking down austerity, it too proceeds from a position of deference."; Ragnarsson 614. Anuscheh Farahat explores in detail and rebuffs the charges on judicial activism against the Tribunal, which she characterizes as "excessive"; see Anuscheh Farahat, *Transnationale Solidaritätskonflikte: Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise* (Mohr Siebeck 2021) 321 et seq., 342

263 Next to the judicial activism charge, Farahat lists the allegation that the Portuguese Constitutional Court has embraced "a dirigiste approach," and counteracts both criticisms; see Farahat 328, 342

activist."[264] In a similar spirit, it has been noted that the portrayal of the Tribunal as fighting the externally-imposed austerity has been completely at odds with the intentions of the judiciary, since the latter "made every effort to *internalize* the European and international obligations of the Portuguese State."[265] Simply put, scholars claimed that the judiciary did not oppose the significance of austerity but only questioned the way this has been fleshed out into the specific measures under review. Seen that way, analysts observed that the jurisprudence produced by the Tribunal, especially when seen under the prism of its social rights implications, did not represent "a *genuine revolution*, that is to say, a radical twist of the overall framework of the contested state budget laws."[266]

Following the above, scholars stressed that what the Constitutional Judges did instead, was to choose a rather common and paved path of relying on familiar constitutional doctrines of equality and legal certainty, which did not challenge the scope or competence of the legislature or the executive. Arguably, the way these principles have been applied could be debated and has elicited criticisms from a constitutional and administrative law perspective.[267] However, scholars generally agreed that the bench did not wish to call into question or claim for itself the powers invested in the executive or the legislature, nor did it intend to make new law in this respect. In other words, as it has been emphasized in relevant analyses, the Tribunal requested that the legislature fully justify its social strategy and choice of specific measures in tackling the fiscal impasse. For this reason, the approach followed by the Portuguese Constitutional Court was held to be far from novel. Instead, counter-critics argued that it was expected that the Tribunal would require the legislator to provide a reasoned justification for its legislative actions and to ask the lawmaker to consider less onerous, alternative measures in this framework.[268]

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[264] Violante and André 258.

[265] Coutinho 123

[266] Cisotta and Gallo 9. See also Roberto Cisotta and Daniel Gallo, 'The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal in Social Rights' 2014 EUI Department of Law Research Paper No. 2014/05 Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges 85; emphasis added.

[267] Cisotta and Gallo discuss the criticism raised towards the application of the 'equality principle test' and the results of its application concerning certain social policies and pre-set fiscal targets, which have been prescribed in accordance with the MoU agreed commitments; see Cisotta and Gallo, 'The Portuguese Constitutional Court case law on austerity measures: a reappraisal' 7, 8

[268] The same reasoning has been used in courts outside Portugal and Greece. For instance, Farahat and Violante identify interesting parallels between the austerity-induced jurisprudence of the Portuguese Constitutional Court and recent case-law produced by the German Federal Constitutional Court. In particular, Farahat and Violante argue that the judgments issued by the Portuguese Constitutional Court on pay cuts affecting public employees, based on the enforced austerity measures during the Eurozone crisis, reveals commonalities with the judgement of the German Federal Constitutional Court, which declared certain cuts on wages for civil servants in the state Baden-Württemberg unconstitutional on the basis that these cutbacks violated the principle of equitable and equal alimentation according to Art. 33(5) of the

This was deemed to fall within the usual competences of the Tribunal, in its reviewing activities, particularly since in Portugal the government made use, at the time, of its broad "legislative competence to enact decree-laws in the field of social protection without challenging the law-making powers of the Parliament."[269] In line with this, it has been stressed that the judiciary, with its Memorandum-related judgements, did not compromise the institutional balance among the branches of the state, nor did it alter, in any way, the separation of powers model.[270] To support this last claim, commentators emphasized that the only reason the Tribunal deliberated in the first place was because representatives of the Portuguese Parliament took the lead and requested a constitutionality review of the austerity measures at issue,[271] and that allegations on the compromise of the separation of powers doctrine have been unfounded and misplaced.[272]

Drawing on such arguments, it has been highlighted that the Tribunal, as much as it did not wish to overstep its bounds and cause an imbalance among the political powers, also did not intend to interfere with the state's public finances and budgetary planning. According to jurisprudence analysts, this has been the case with the Tribunal's first judgement after the signing of the MoU.[273] In that connection, it has been stressed that despite all the criticism that this ruling received in declaring certain austerity cuts unconstitutional, it often went unmentioned that the Tribunal decided to suspend the effects of its judgement. However, this has been, according to those commentators, the Tribunal's way of showing awareness of the already scarce public resources and financial constraints that the state was facing. What's more, this was held as the Tribunal's way to exercise caution so as to not endanger the assistance package, which was being carried out at the time under the supervision of the state's international creditors.[274]

In assessing the austerity jurisprudence, critics have further put their finger on the Tribunal's tactic not to engage in a judicial dialogue with the CJEU by raising questions

German Basic Law; see Anuscheh Farahat and Teresa Violante, 'Combatting TINA- Rhetoric through Judicial Review: Dealing with Pay Cuts in Times of Financial Consolidation' (*VerfBlog*, 2018)

[269] Vieira de Andrade, Loureiro and Tavares da Silva 239

[270] Cf. Ibid 235, 239; Farahat 258

[271] Seguro 111

[272] See Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' 292, 306. Farahat counters the charge of judicial activism as misplaced, by comparatively assessing Supreme Courts in European countries in their response to austerity measures, including the Portuguese Constitutional Court and the Hellenic Council of State, and contends that courts followed a "proceduralization of control" in their approaches; see Farahat 365 et seq.

[273] See Tribunal Constitucional, Acórdão No 353/2012 (Plenum), delivered on 5 July 2012, available at https://www.tribunalconstitucional.pt/tc/acordaos/20120353.html <last accessed 09.04.2021>. See also Part III. Chapter 5.1.2. ii. b. Distribution of Sacrifices.

[274] Cf. Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' 183; Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 15

about the legal nature and the validity of the Portuguese assistance program. In this context, it was highlighted that the Tribunal's lack of investigation on the European ramifications of the austerity measures, laid down by the MoU, was a conscious choice, because doing otherwise could have been "seen as a sign of judicial activism against the political will of the Government and of European institutions."[275] This was a road, however, that the Tribunal consciously did not want to go down and thus, critics insisted, the judiciary preferred to restrict its analysis to the national legislation and to address the austerity conundrum by using the Portuguese Constitution as its main anchor point.[276]

iii. Comparative Reflections

Greek and Portuguese apex courts have been habitually depicted in crisis scholarship as having followed drastically different routes while adjudicating on impugned austerity policies, with the judges showing activism in both cases, yet at different phases. Contrary to such a depthless narrative, I argue that there have been more commonalities in their trajectories than these courts have been credited for and I identify what could be characterized as a *reverse course* in the intensity of their reviewing activity.

As a first common approach, Portuguese and Greek judges at the highest tiers of justice seem to have taken the dire financial situation of the national economies and the implementation of the Memoranda obligations as the standard point of reference, not seeking to establish EU links or to carve out new approaches to social rights protection. As it will be assessed in the following paragraphs, Supreme Judges may have seemed alarmed by the erosion of social welfare provisions and by the deterioration of the socio-economic conditions. Regardless, judges did not directly address social rights by invoking their international and constitutional framework of protection. Much less, when it came to the effective protection of social rights, highest judges chose a nation-based and state-centric focus and they did not raise questions before European Courts on the compatibility of the MoU conditionality criteria with Union law.[277] Instead, the judiciary preferred to restrict its approach to domestic legislation and used the constitutional text as its main interpretative tool in both cases.[278]

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[275] Pires 106

[276] Cf. Ibid; Bonelli and Claes 624, 625

[277] Cf. Bonelli and Claes 624, 625; Pires 107

[278] Cf. Baraggia and Gennusa Maria 489; Baraggia even though she argues that the Portuguese Constitutional Court adopted an activist approach, with respect to social rights, she argues nonetheless the following: "Comparing the case law of Portugal, Italy and Greece, we can identify *a common trend*: national Courts seemed to adopt a *very cautious* approach in assessing the constitutionality of the austerity measures with regard to social rights."; emphasis added.

One possible reason for this lack of direct engagement with the constitutional provisions of social rights, I would argue here, which has not been highlighted in relevant analyses, is that apex courts in both countries have traditionally been reserved in addressing social rights claims by invoking their constitutional bearings. That is to say, highest courts did not refrain from addressing social policies by invoking social rights during the crisis as such. Rather, "rulings regarding social rights, in particular, have been few and self-restrained,"[279] long before the crisis, due "to the weakness of the mechanism of judicial review and the dominant influence of German legal doctrine."[280] Put differently, highest courts in both Greece and Portugal have followed the footsteps of the German legal paradigm, where "social rights do not even figure in the German Constitution, only the principle of a 'social state' does."[281] That is to say, courts, by being part of a social welfare institutional infrastructure, tended to understand social rights cases as cases belonging to the realm of the welfare system and to the latter's social arrangements in the fair distribution of resources. Hence, by not invoking social provisions during the crisis, apex courts, sure enough, acted as it was expected.

Another highlighted reason for the this judicial attitude, has been that judges were wary of justifying their reasoning in a way that would not strategically jeopardize the implementation of the assistance programs.[282] In other words, underlying their rationale, judges have been concerned to accord governments enough latitude in administering large-scale social policies, especially since the slings and arrows of the onerous austerity measures were wide-ranging, poly-centric and resource-intensive. Linked to this cautious approach was the interpretation of the legal status of the Memoranda as well. Fact is, that the Tribunal affirmed the binding legal force of the Portuguese MoU, whereas the Hellenic Council of State found that the first MoU did not qualify for a legally binding instrument and was merely the government's fiscal plan in tackling the crisis.[283] In spite of this

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[279] Brito Vieira and Carreira da Silva raise this argument concerning the Portuguese Constitutional Court. Due to the commonalities that the Portuguese and Greek legal and justice system display, I take that these observations about the strong influence that the German legal doctrine has exerted in constitutional reality in Portugal could also apply in the case of Greece; see Vieira and da Silva 919. See also Part I. Chapter 1.2.i. Selection of Focus Countries.

[280] Ibid

[281] Ibid

[282] Cf. Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* 376, 377; Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' 183; Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' 178

[283] Cf. Contiades and Tassopoulos 203; Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis' 122, 126. On that point, Poulou juxtaposes Rulings No 396/2011 para 5; No 353/2012 para 3 and No 187/2013 para 29 by the Portuguese Constitutional Court, with the Decisions No 668/2012, para 28 and Nos 1283-6/2012 para 24 issued by the Hellenic Council of State; see Poulou, 'Human Rights Obligations of European Financial Assistance Mechanisms' 38

difference in reasoning, though, it seems that a similar tenor underlaid the rationale of both Supreme Courts. Notably, both the Tribunal and the Council of State considered that even while the MoUs imposed some very concrete measures, these were set in the form of *targets*, while the specifics were left in the hands of state authorities and national institutions. In other words, the syllogism that the Courts developed in their judgments was that the MoUs "imposed *obligations of result*, as opposed to *obligations of means*."[284]

In this way, it could be argued that the judiciaries did not out rightly contradict the adopted austerity measures and the governmental social policies. What is more, the Portuguese Constitutional Court, in all of the above examined judgments that it handed down since 2010, referred to the 'crisis' without questioning the reality or existence of the crisis, which it specified as a shortage in financial resources.[285] In acknowledging that the austerity policies carried obligations of result, Supreme Courts in both countries did not question the necessity of the reform measures, nor did they cast doubts on the discretion of the legislature or the executive's decision in taking them. Instead, what the Courts progressively challenged, was the way that the contested measures had been specifically designed and justified. On the basis thereof, Supreme Judges sought to ensure that the burdens placed on the shoulders of citizens were distributed in roughly equal shares.[286]

In addition, despite the seemingly existing chasm between the Supreme Courts' approaches, a closer look reveals that the judiciary in both jurisdictions relied on similar legal tools and doctrines. In other words, it has been repeatedly noted in commentaries that the judiciaries chose to ground their judgments on the breach of general and well-established constitutional principles, of equality, legal certainty and legitimate expectations, and on the rule of law, while they chose to navigate within their institutional bounds and national limits, without seeking to challenge the measures at a supranational level or look for links to EU or international human rights law.[287]

Following on from this, the characterization of the judiciary's response in Greece and Portugal as falling under the judicial activism nomenclature, calls for further

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[284] Coutinho makes this argument for the Portuguese Constitutional Court; see Coutinho 76

[285] Fasone 42

[286] de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' 98

[287] Cf. Mariana Canotilho, 'Constitutional Law and Crisis: The Portuguese Constitutional Court under pressure?' in Zoltán Szente and Fruzsina Gárdos-Orosz (eds), *Constitutional Law and Crisis* (Routledge 2018) 157, 158; Vieira de Andrade, Loureiro and Tavares da Silva 233; de Brito Nogueira, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis ' 73; Martucci 314 par.312.355; Fasone 46. Drossos observes that "the Portuguese Constitutional Court despite some noise that it has caused, as resorting to an anti-memorandum jurisprudential *resistance*, it basically moves along similar lines to those of decision 668/2012 of the Hellenic Council of State"; emphasis added. See Drossos, 'Η κρίση της οικονομίας και η κρίση του δικαστή' 19

investigation. In line with this, it has been demonstrated above that apex courts in both countries have issued moderate outcomes, while being confronted with a barrage of harsh measures, despite appearances. That is to say, judges did not call into question the liberal institutional or theoretical underpinnings of the relevant national Constitutions, nor did they attempt to positively legislate on social policy matters. Rather, the issued rulings in both jurisdictions have been informed, principled and guided by the legal doctrines and interpretative methods that the law required the judges to use. In this respect, adjudication of the MoU-mandated austerity measures - in Greece, but mainly in Portugal, to which strong criticism has been targeted - did not represent a jurisprudential breakthrough.[288]

Instead, courts cruised within their designated institutional perimeter, and broadly manifested elements of continuity and coherence in the review of the measures throughout the crisis years, when compared with pre-crisis judicial reasoning.[289] In this connection, judges themselves, who served at apex courts in both focus countries, have also repeatedly emphasized that magistrates have remained faithful to their independent judicial function.[290] In line with this, Supreme Judges underscored that during the controversial and politically electric period of 2012-2016 and in the midst of an exceedingly difficult political and economic climate, they did not neglect the limits of their designated role, yet they did not exceed them either. The latter has also been backed up, in the case of Portugal, by empirical studies on judicial behavior during the crisis years, which have found "no evidence of any increased judicial activism."[291]

Taking stock of all above, we may strongly question whether the judiciary's stance in the inspected countries could be considered as genuinely activist, the latter being understood as the conscious and purposeful action of judges to legislate and make law. Considering the different definitional nuances and the overall US-influenced semantic load that judicial activism carries as a concept, the latter does not seem to apply in the examined cases of the Portuguese and Greek paradigm. That is to say, judges in Greece and Portugal

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[288] See also the analysis at Fasone 2, 3, 7

[289] Concerning the stance of judges in Greece during the MoU years, Karavokyris notes: "[…] the economic crisis has not led to a change in judicial methods, nor to the invention or application of new ones. In Greece *no crisis jurisprudence exists or has developed*."; emphasis added, see Karavokyris, 'The Role of Judges and Legislators in the Greek Financial Crisis: A Matter of Competence' 227

[290] On the case of Portugal, see the rebuttal of the alleged judicial activism charged against the Portuguese Constitutional Court, by former President of the Portuguese Constitutional Court, Judge, Joaquim José Coelho de Sousa Ribeiro, and by Judge of the Portuguese Constitutional Court, Ana Maria Guerra Martins; de Sousa Ribeiro 77; Guerra Martins 703, 704, 705. On the case of Greece, see the commentary by former President of the Hellenic Council of State, Judge, Panagiotis Pikrammenos; see Pikrammenos 389, 390

[291] See Susana Coroado, Nuno Garoupa and Pedro C. Magalhães, 'Judicial Behavior under Austerity: An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002–2016' (2017) 5 (2) Journal of Law and Courts

did not demonstrate any intention to actively legislate, but rather navigated within the designated limits of their constitutional role. In the midst of a far-reaching fiscal crisis, legal uncertainty and societal unrest, judges have rather acted as guardians of last resort for the protection of core legal values and of the constitutionally safeguarded rights of citizens.

This depiction of judges as guarantors of constitutionalism and human rights during the crisis, has also been endorsed by scholars and judges themselves while assessing the Portuguese and Greek austerity caseload.[292] In this regard, former Justice of the Portuguese Constitutional Court, Ana Maria Guerra Martins,[293] has stressed that judges "are empowered to decide in a creative manner."[294] That is because, as Guerra Martins emphasized, a judge is not merely '*la bouche de loi,*'[295] namely the mouthpiece of the law, who decides in a vacuum, but is rather situated within the operation of the political and social life. Seen this way, a proactive stance attuned to the safeguard of social rights within an existing national and supranational protection scheme, is to be taken neither as activist nor as menacing to the political and legal establishment. Instead, judges who engage in an active role reflect and show responsiveness to social practices and to the values embodied in them, namely to the societal convictions and moral judgements of the public.[296]

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[292] See, selectively, in international literature: Cisotta and Gallo, 'The Portuguese Constitutional Court case law on austerity measures: a reappraisal' 11; Guerra Martins 695, 698; Poulou, *Soziale Grundrechte und Europäische Finanzhilfe: Anwendbarkeit, Gerichtsschutz, Legitimation* 294; in domestic Greek literature: Poulou, 'Μέτρα Λιτότητας και Χάρτης Θεμελιωδών Δικαιωμάτων της ΕΕ: Η Δικαστική Προστασία των Κοινωνικών Δικαιωμάτων σε Εποχές Κρίσης' 871, 872; Stergiou 100, 101. Kim Lane Scheppele has systematically researched on the role of Supreme Judges as guardians of the rule of law in new-founded and fragile democracies by placing her focus on Hungary; see Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 (6) University of Pennsylvania Law Review. For an analysis on the role of courts as constitutional guardians in domestic legal systems by drawing theoretical parallels and analogies between a Kelsenian vision of an international judiciary and historical German and Austrian constitutional debates, on the one hand, and debates on the constitutionalization of international law and the role of an international judiciary on the other hand, see Tomer Broude, 'The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated' (2012) 4 (2) Goettingen Journal of International Law, 521, 522. For a comparative study across different jurisdictions, see also Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing 2016)

[293] Ana Maria Guerra Martins served as a Judge at the Portuguese Constitutional Court for nine years, from 2007 until 2016. See https://www.echrblog.com/2019/10/new-judge-elected-in-respect-of-portugal.html?m=1 <last accessed 12.07.2021> At the time of writing, Ana Maria Guerra Martins serves as the Judge in respect of Portugal at the ECtHR for a term of office of nine years that commenced as from 1 April 2020. See https://pace.coe.int/en/news/7642/pace-elects-ana-maria-guerra-martins-judge-to-the-european-court-of-human-rights-in-respect-of-portugal <last accessed 12.07.2021>

[294] Guerra Martins 703. Guerra Martins has emphasized that judicial interpretation is a creative task and stressed in this regard that "The power of judges […] certainly, overcomes a blind, automatic mission of applying the law. By contrast, it also implies a creative task of interpretation […] judges are empowered to decide about the life of other human beings and undertakings in a creative manner."; q.v. Ana Maria Guerra Martins, 'Judicial Legitimacy and the Functions of the Judge in a Multilevel Constitutional System' (2012) 24 (1) European Review of Public Law; emphasis added.

[295] Guerra Martins, 'Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law' 703

[296] Cf. Harel 260

6.3.2. Social Rights as Poverty Management Rights

Besides the institutional questions that austerity cases have posed and the criticism of the role of the judiciary in relation to the other democratic powers, courts have also received much distrust for adjudicating on budget-sensitive matters of a wide scale. In this connection, legal scholars have found fault with courts for their judgment of pension and labour rights, raising their criticism mainly from two different standpoints. On the one hand, it has been submitted that the decisions of highest courts, in finding salary cutbacks to be consecutive, biased and effectively unconstitutional, may have eased civil servants but in this way, they have overburdened market-based, private sector employees, who were asked to "subsidize excessive earnings in the public sector."[297] According to this argument, public sector employees were seen as being cushioned and over-protected in the labor market by enjoying a greater job security and stable income, as opposed to private stakeholders, who were seen as exposed to high job insecurity and were left to pick up the pieces of a crumbled national economy. Differently to such an account, yet still assuming the societal composition in terms of an outright internal competition and eternal conflict among social actors, other scholars have also disapproved of the rulings of the courts. This time, however, critics raised the common argument that apex courts tilted the balance of distributive benefits to the already entitled middle-class public servants, and not towards the least advantaged, to the poor and to those most in need.

Drawing from this second line of criticism, it is no novelty that such charges, which we have examined before at a more abstract level, have been levelled against Greek and Portuguese Supreme Courts as well. Undoubtedly, concerns about the distributive effects and challenges of social rights adjudication, voiced usually from scholars following the critical theory school of thought, broadly defined, need to be taken seriously. However, as Kilpatrick argues, "used without care this kind of analysis is deeply problematic,"[298] as it suggests frameworks of social rights protection on the basis of an everlasting competition among social actors. Otherwise stated, depictions like this are underpinned by a zero-sum, trade-off logic, were public-sector workers are pitted against poor people, and the social safety net of one group implies the exclusion or, at best, the further marginalization of the other. Certainly, the structured relationships of production and the dynamics developed among the different social classes, especially during the MoU years, require serious

[297] See the blog commentary by de Almeida Ribeiro, 'Judicial Activism Against Austerity in Portugal'
[298] Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' 303

investigation and constant vigilance. Meanwhile, however, instead of portraying the societal tissue in terms of eternal winners and losers, "it may well often be the case,"[299] as Kilpatrick suggests, "that protecting *both* is *mutually* beneficial and promotes an overall package lessening societal inequalities."[300]

This portrayal of social relations as being essentially relations of competition is not the only ethically problematic aspect of such criticism. Such allegations against the courts, which assume the preferential treatment of the middle class at the expense of poor people, seriously call for supporting evidence and a working definition – that is usually missing – of who is considered poor and by what standards, what is understood by poverty in a given context, and more significantly, who is considered poor in the context of a proclaimed social welfare state, as it has been the case of both Greece and Portugal.

To elaborate on that thought, allegations against domestic courts in austerity-struck countries criticizing those courts for not protecting the poor, need to be confronted with the 'poverty complex,'[301] as I would call it here, of social welfare states of the European South, such as Greece and Portugal. Arguably, these countries fall within the rubric of social welfare states with a robust post-dictatorship social security and benefits scheme and a strong liberal legal tradition that, up until the fiscal crisis, did not understand or speak of the social fabric in poverty terms, because these social states have been committed to protect their citizens from lapsing into impoverishment and destitution. In other words, I would contend here, that the social welfare states in question did not understand the society's fabric in poverty analogies, not because they did not acknowledge marginalized and impoverished citizens, but precisely because these social welfare states, in their own vision of self-entity, have been premised on a model of social security and prosperity for the entirety of the citizenry and thus, poverty has not been a condition against which welfare has conventionally been measured.

Mindful of the above, these states have been confronted during the crisis with a morally-charged discourse of austerity, which was based upon a larger ethical liberal

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[299] Ibid

[300] Claire Kilpatrick calls the assumptions made about public sector workers in the context of these criticisms as "default neo-liberal assumptions." In this regard, Kilpatrick discerns between two "very different strands, one 'neo-liberal' and one 'critical', of constitutional social scholarship," which condemn the courts for protecting civil servants and public workers at the expense of either private sector employees or poor and needy people; see ibid 300 et seq., 303; emphasis added.

[301] I use the term 'complex' here in the sense that it is used in psychological studies, as the bundle of conscious and mainly unconscious associations and as a core pattern of political emotions, public affects, perceptions, predispositions and embedded intergenerational beliefs towards understandings of the 'social welfare model' in the way that the latter has emerged, consolidated and evolved in different states in the second post-war period across the Southern part of the European continent.

framework of individualism and personal utilitarianism. This framework, as it has been suggested in theory,[302] has been premised on the notion of poverty, as a fundamental notion to conceive and explain welfare in societal terms. To put it plainly, poverty in this theoretical paradigm, has been used as a defining notion to advance a two-tier society between the poor and the wealthy, and to morally differentiate between the 'deserving poor' and the 'undeserving poor', in order to incentivize the second category to overcome poverty. In the greater scheme of things, this has significant ethical implications in societal terms, since poverty represents another facet of the broader liberal ideal of the self-reliant, overachieving and independent self, who is not in need of social support, because welfare is a private matter and it is individualized. Connecting the dots, I would suggest here, that social states, such as that of Greece and Portugal, have been found at the junction of having to uphold the ideal of non-poverty, envisaged by the social welfare state, while at the same time, having to stand behind the ideal of poverty as a measurement by which to determine the claim to public welfare by austerity standards.

The question of poverty is not the only problematic aspect of the aforementioned criticism, however. Moving along, what calls for further scrutiny concerns the very category of the middle class as well. In other words, what is understood as a stable job, or a secured pension, or even what is considered the middle class, are all susceptible to different interpretations and scrutiny, and these open-ended notions have all been put to test during the social crisis years.[303] Drawing on that, rulings of highest courts, on judges' pensions, for instance, which have been heavily criticized,[304] cannot be put into the same

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[302] See the analysis by Sciurba 14, 15

[303] Maria Markantonatou, reports, among the social and political consequences of the crisis in Greece, the "*strangling* of the lower middle class"; emphasis kept as in the original, see Maria Markantonatou, *Diagnosis, Treatment, and Effects of the Crisis in Greece: A "Special Case" or a "Test Case"? (*MPIfG Discussion Paper 13/3, *February, 2013)* 17. Maria Mexi also notes that "[o]ne of the most crucial effects of Greece's economic crisis has been the *enormous* economic and social class *re-ranking* of large parts of the population (going from middle to lower class)"; emphasis added, see Maria M. Mexi, 'Greece' in Veronica Federico and Christian Lahusen (eds), *Solidarity as a Public Virtue?* (Nomos 2018) 91, 93. Maria Petmesidou notes that "[t]he lower middle-class has been most severely hit," and documents in here research the deterioration of the living conditions of the lower and middle-class during the crisis; see Petmesidou, 'Welfare Reform in Greece: A Major Crisis, Crippling Debt Conditions and Stark Challenges Ahead' 167, 168

[304] Special Court (hearing cases on salaries of Justices) as stipulated by Article 88 para 2 of the Constitution of Greece Decision No 88/2013 (concerning judges' salaries and pension). Article 88 para 2 on 'Judicial Power' reads as follows: "The remuneration of judicial functionaries shall be commensurate with their office. Matters concerning their rank, remuneration and their general status shall be regulated by special statutes." Akritas Kaidatzis calls this 'Article 88 Court'; see for a criticism of the decision No 88/2013 Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 282, 284; Drossos, 'Η κρίση της οικονομίας και η κρίση του δικαστή' 19. See also Hellenic Council of State Decision No 4741/2014 (Plenary) (concerning salary and pension cuts for public university professors); No 1506/2016 (on salaries and pensions of university professors). For a critical appraisal of those decisions, see also Giannakopoulos, 'Το Ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων: "να είστε ρεαλιστές, να ζητάτε το αδύνατο"' 438, 439

basket with decisions issued by lower courts, which have unquestionably benefited "low-income members of the society."[305] That is because, had they not been judicially protected, those low paid employees would have lapsed into poverty, while judges or other high paid public servants – who have also been affected by salary cuts – would have not.

Regrettably, what has been under-researched and has generally gone unnoticed in the examination of the Memoranda, at least in legal commentaries, are the references to 'poverty,' which have been made throughout those texts. In more detail, poverty in the MoU guidelines and the relevant national statutes, has been elevated to a legally-relevant and decisive social and economic indicator in measuring the social wellbeing of the people in the affected societies.[306] Arguably, outright references to 'poverty' as a social minimum, have been unfamiliar references up until the crisis outburst, in national legislative acts regulating on social matters, at least in the Greek legal order.[307] That is to say, poverty related references have rather made their appearance in a systematic fashion in the MoU texts and have been used to instruct and formulate national secondary legislations in financially assisted countries. To take Greece as an example, it is noteworthy that in the midst of the crisis and while the first and second MoUs were being carried out, a new-founded 'Directorate for Combating Poverty' has been established in 2016.[308] Undeniably,

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[305] Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' 106, 107, 117

[306] See EC, *The Economic Adjustment Programme for Portugal 2011-2014* and particularly the Executive Summary. See also for instance, among others, Law 3845/2010 (Greek Government Gazette A'65/06.05.2010), Article 2 para 2; implementing the First Economic Adjustment for Greece (MoU I); See II. Key Objectives and the Outlook III. Economic Policies EC, *The Economic Adjustment Programme for Greece* 47 para 48; Law 4093/2012 (Greek Government Gazette A' 222 /12.12.0212) (on the Approval of the Medium-Term Fiscal Strategy Framework 2013-2016-Urgent Measures for the Implementation of Law 4046/2012 and the Medium-Term Fiscal Strategy Framework 2013-2016) subpara IA. 3. para 2; Law 4052/2012 (Greek Government Gazette A'41/01.03.2012); Law 4389/2016 (Greek Government Gazette A' 94/27.05.2016) (on emergency provisions for the implementation of the agreement on fiscal objectives and structural reform and other provisions) paras 1 and 3.

[307] Substantial research by the author on legislative acts during the period from 1989 to 2021 showed that in a number of 108 statutes and 196 articles referring to 'poverty', 34 out of these statutes ranged chronologically from 1989 to 2010, that is, in a period covering 21 years preceding the crisis, while the remaining 74 statutes have been produced, in twice the speed, in a period covering 11 years midst and post-crisis.

[308] See Law 4445/2016 (Greek Government Gazette A' 236/19.12.2016) (on the National Mechanism of Coordination, Monitoring and Evaluation of the Social Integration and Social Cohesion Policies, on regulations regarding social solidarity, implementing provisions for the Law N 4387/2016 and other provisions); Article 8 'Directorate for Combating Poverty' available in Greek at http://www.opengov.gr/minlab/?p=3480 <last accessed 16 June 2021>. See also ILO NATLEX Database of national labour, social security and related human rights legislation https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=104673 <last accessed 16.06.2021>. The 'Directorate for Combating Poverty' has been part of the 'National Mechanism for the Coordination, Monitoring and Evaluation of Social Inclusion and Social Cohesion Policies and other provisions on Social Solidarity' of the Directorate General for Welfare and has been established under the auspices of the Greek Ministry of Labor, Social Security and Social Solidarity; see text of the Draft Bill available at http://www.opengov.gr/minlab/wp-content/uploads/downloads/2016/09/ethnikos_mixanismos.pdf <last accessed 16.06.2021>

this systematic use of the specific language of poverty stood at odds with *pre-crisis* legislation on social matters, where this language did not appear at all or has been moderately phrased in social welfare policies along the lines of combatting or alleviating poverty.

Certainly, these observations are just the tip of the iceberg in a discussion that runs very deep into understandings of the social welfare state endorsed from an either social-legal studies perspective or a social-liberal angle. There is much more to be said about the relationship of poverty, the social or liberal welfare state in the crisis, and the role of judges in this equation, but this could be the subject matter of another thesis. One that could explore how poverty clauses that have been introduced in the MoUs ignited, among other things, a shift in the understanding of social rights, not as *welfare rights* but rather as *poverty management rights*, as I would phrase it here. This turn, in the meaning of social rights as rights that effectively manage poverty, could be better understood if we look at the underlying, dormant changes which were produced in the slipstream of the crisis. Namely, the post-crisis direction of governance towards efficiency and economic and business-friendly reforms,[309] together with a poverty-focused adjudication of social rights, could all be seen as aspects of a general turn of social governance towards a managerial direction.[310]

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[309] Cf. Moodys, *Rating Action: Moody's upgrades Greece's rating to Ba3, outlook remains stable (Moody's Investors Service Ltd., London, 6 November 2020)*, where Moodys notes the following: "While it will take commitment over many years to reap the full benefits of the institutional changes in progress to create a *modern* and *efficient* public administration, these improvements are beginning to be reflected in governance indicators. […] In Moody's view, the risk of reversal of these reforms in the coming years is low. The current government was elected on a platform of *economic* and *business-friendly reforms* and seems likely to use its parliamentary majority to push that platform forward. Over the medium-term, today's action reflects Moody's view that *governments will continue to aim for compliance* with the challenging *targets agreed with the Eurogroup* and that incentives on both sides are strong enough to avoid the stand-offs seen earlier in the decade."; emphasis added.

[310] On the managerial direction of EU governance, seen from the perspective of the financial assistance programs and in view of the relation of these programs to considerations on the rule of law, see Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 331. Kilpatrick differentiates between what she calls 'managerial direction' and 'new governance' seen in the context of EU governance. 'Managerial direction' can gradually undermine the rule of law, according to Kilpatrick, while 'new governance' and the 'Rule of Law' (capitalization kept as in the original) "share foundational commitments to human beings that respect their *freedom* and dignity as active intelligences." Albeit Kilpatrick grounds ethically new governance to liberty and dignity, she does not make explicit what 'managerial direction' is ethically grounded upon. See ibid 347; emphasis added. On the relation of managerialism as a model with the 'de-constitutionalization' of social rights with a focus on Spain, see also Diez Sánchez, 'Deconstitutionalisation of Social Rights and the Quest for Efficiency' 2014 EUI Department of Law Research Paper No. 2014/05 Kilpatrick, Claire and Witte, Bruno de (eds) Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges 114, 116, 120. On the poverty-focused jurisprudence in post-crisis Greece, see Maria Kotsoni ICON-S Mundo, 2021 Conference of the International Society of Public Law, Session#44 'New Developments in the Field of Social Rights'; Presentation "Learning from previous crises: The constitutionalization of the decent standard of living in Greece' [in file with the author]; Kotsoni argues that "post-economic crisis social rights constitutionalism in Greece is poverty-focused, being preoccupied with the protection of a social minimum, thus limiting the ambition and normative value of constitutional norms that protect social rights."

For now, suffice it to say that the impoverishment and pauperization of the society[311] and the transformation of social classes, meaning the transitions and changeovers of social groups from higher to lower-income ranks, together with the appearance of new-founded groups of poor and vulnerable people, have all been pages in the history of financially assisted countries that are still being written. 'Poverty' and 'vulnerability' in this sense cannot be taken at face value, as cases concerning these highly complicated issues, have been brought before judges during the crisis, while "significant shifts regarding the social composition of poverty"[312] have taken place at a domestic level. Much less, courts cannot be condemned for having only benefited the privileged and not the poor strata of the society through their decisions. That is because, if one thing could be said, it is that these societal groups and the realization of their social rights have not been set in stone, but rather their living conditions, material reality and social relations, have all been put to test and have started to be reshaped during the austerity years.

Nearing an end, and taking all the above into consideration, I would argue here that claims about poverty and attacks on the courts for not being able to protect the poor or for protecting the already entitled, have had multiple conceptual layers attached to them, which in austerity legal scholarship, have generally gone unchallenged. To phrase this differently, it is my view that charges that the courts failed to protect poor people in a liberal democracy with a social welfare substratum and strong social protection floors in place are charges falsely addressed to the courts in the first place. If courts have been inaccessible, unaffordable, costly or if they have been designed to provide services for the middle or upper classes of the society, this was a political choice made long before the crisis, and a decision that neither courts nor judges made and were capable of making. As Gauri and Brinks emphasize, "it is crucial not to compare the reality of litigation to an *ideal* of public-interested-oriented, democratic, legislated policy making"[313] while they acutely note that eviscerating the judiciary is not "likely to spark a fit of spontaneous empathy for

311 Tassos Giannitsis, 'Austerity and Social State in Crisis' in Magistrats Europeens Pour La Democratie et Les Libertes (MEDEL) (ed), *Austerity and Social Rights* (International Colloquium 30th Anniversary of the Society of Greek Judges for Democracy and Liberties, Athens, 16.03.2019, Sakkoulas Publishing Athens-Thessaloniki 2019) 116 et seq., where Giannitsis provides an analysis on the relationship of austerity with social policy in Greece, backed up by empirical data and seen under the prism of pauperization and poverty, and considering the impact of shrinking public expenses and pursuing 'negative redistribution' strategies in the context of the Greek society. See also Giannitsis and Zografakis 43` et seq.

312 Giannitsis 122

313 Gauri Varun and Daniel M. Brinks, 'Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights' in Daniel M. Brinks and Varun Gauri (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) 22; emphasis added.

the poor and marginalized on the part of bureaucrats, legislators, and private providers."[314] Drawing on that, essentially what the courts have been criticized of not doing, is that which the courts were asked not to do.[315] That is, to resolve profoundly intricate political and societal pathologies, moral dilemmas and societal gaps that the society needed to address and demand collectively through political deliberation in the political arena.

6.3.3. Social Values versus Economic Objectives

The financial assistance programs in both Greece and Portugal, from their negotiation and signing to their translation into austerity measures and their enforcement and adjudication, in each national jurisdiction respectively, have been met with trenchant criticism by constitutional scholars. In the case of Greece, this process has been acidly characterized as a broad 'constitutional deconstruction'[316] or *apathetic* witnessing of the "erosion"[317] of the Constitution's functions, while the constitutional developments that followed the fiscal crisis were seen by some scholars as "a significant concession of the domestic sovereignty and the rule of law so as to safeguard the overriding effect of stability"[318] in order to avoid the risk of a financial collapse and default.[319] In this broader context of constitutional turmoil, and while determining the measures' conformity with the Greek Constitution, it was suggested that Greek apex courts applied a "presumption of constitutionality"[320] concerning the enacted austerity legislation. Scholars submitted in this respect, that Supreme Judges exercised an *in dubio pro lege* reasoning, namely, in the face of doubt, they assumed that the austerity legislation had been constitutional.[321] Against this background, and while the focus has been placed primarily on the constitutional, institutional and procedural challenges that austerity jurisprudence raised, social rights

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[314] Ibid; in a similar vein, Gauri and Brinks stress: "Almost by definition, the elected branches have not solved the economic and social problems that *courts are now being asked to address*."; emphasis added.

[315] See the analysis under the title "What the Courts Did Not Do, and the Impact of What They Did"; Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 285 et seq.

[316] Cf. Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty' 189, 190, 194, 198; also Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?' on constitutional faith.

[317] Cf. Contiades and Tassopoulos 210; Contiades and Tassopoulos refer to a "political apathy," as they phrase it, that has been cultivated in the context of economic stagnation in Greece during the fiscal crisis.

[318] Gerapetritis 97

[319] On that strand of Greek domestic constitutional scholarship, see also the analysis at Part I. 1.5.i. Reflecting on Existing Literature: A Mapping Exercise.

[320] Dimitris Travlos-Tzanetatos, "Κατάσταση Ανάγκης", Δημόσιο Συμφέρον και Έλεγχος Συνταγματικότητας: Με αφορμή την 2307/2014 Απόφαση της Ολομέλειας του Συμβουλίου της Επικρατείας' (2015) 74 (1) Επιθερεώρηση Εργατικού Δικαίου 16

[321] Ibid

considerations have been assessed as part of these broader discussions and less frequently on their own merits and conceptual challenges.

These heavy criticisms and concerns referred, however, to a large extent to the early jurisprudence of Greek Supreme Courts. As it has already been examined, Greek apex courts displayed a piecemeal shifting in their jurisprudence from initially upholding the constitutionality of austerity measures to applying stricter scrutiny on the adopted MoU-related legislation over the years. Put differently, at the onset of crisis, Greek judges seemed not only reluctant but numb to the heavy task of addressing the austerity social policies in substance.[322] While the political and media pressure winded down,[323] however, judges found more room to develop their concerns towards the executive's actions.

In this regard, being concerned about the cumulative impact of the decreased income and the increased taxation, and while evaluating the overall drastic changes to the disposable earnings of a large number of households, apex courts alerted the legislator not only to preserve a subsistence minimum but to secure a decent standard of living for the citizens. Thus, Supreme Courts gradually displayed significant dignitarian concerns, which involved the shielding of established social welfare provisions and prior social achievements. Against this background, social rights were seen as predicates to human flourishing, and judges, while not opposing the executive's social policies, nonetheless strived to ensure that citizens would not be deprived of what they once had.[324] Essentially, what the judiciary purported to have done in the case of Greece, was to acknowledge the significance of reducing the public deficit, while at the same time, urging the legislature to seek for other alternatives that would put a halt to the further erosion of the social welfare state.[325]

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[322] Giannakopoulos referred to an "uncomfortable self-restraint of national and European judges" in protecting fundamental rights and observed that the national judge "after hesitations and ambivalence" has displayed a stricter and more composed scrutiny of the austerity measures; see Giannakopoulos, 'Το Ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων: "να είστε ρεαλιστές, να ζητάτε το αδύνατο"' 439, 440. Viljam Engström also characterized the role of courts in not assuming "a more openly activist role," during the implementation of austerity measures in Europe as "an expression of self-preservation"; see Engström 9

[323] See also the analysis at Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 428. Lampropoulou argues that "the (often erroneous) overrepresentation of CoS [i.e. Council of State] decisions by the mass media," was among one of the factors during the crisis, which had implications in the shifting balance of competences in the system of the separation of powers and further in the stagnation of fundamental rights protection in the Greek legal order; see Lampropoulou 146

[324] On that point see also Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court' 97

[325] Bakavou 168

In light of this, what to some critics seemed like a timid approach, to the judiciary was considered to be a pragmatic approach, a position which was underscored by the Supreme Judges themselves at the time. The former president of the Hellenic Council of State, Sotiris Rizos,[326] while commenting on the early austerity jurisprudence of the Court noted the following: "The Council of State is moving in *realisti*c directions, but at the same time is trying to protect the constitutional edifice of the *rule of law* and the *welfare state*."[327] The same concern has also been a point of reference for the Portuguese Constitutional Court. As former President of the Portuguese Constitutional Court, Joaquim José Coelho de Sousa Ribeiro, emphasized, the Tribunal's compass in assessing the impugned measures has consistently been to maintain "the constitutional guarantees of the social welfare state, to the extent possible, even under the thrall of the imposed burdensome measures."[328]

Despite the apparent silence on the social rights front, Supreme Judges, including some who have actively participated in the adjudication of austerity cases, seemed eager to address the thorny subject of the relation of social rights and austerity outside courtrooms as well.[329] In their appraisal of the judicial events that took place, judges emphasized that over time, the direction of their judgments has been attuned towards the need to protect "the rights of the poorer social classes, who possessed limited resources."[330] In line with this, it has been noted that the stricter scrutiny that the Tribunal applied in reviewing the burdens placed on certain categories of citizens, "was justified either because of the *vulnerability* of the individuals at stake or the accumulation of sacrifices that fell on a particular category of workers."[331]

Surely, the Tribunal's argumentative path had little to do with the state enforcement or the protection of social rights in constitutional terms. Put differently, several scholars have concurred that the Portuguese Constitutional Court did not assess the austerity measures as if they were tampering with fundamental rights, let alone on social

[326] Sotirios Rizos served as the President of the Hellenic Council of State from 2013 to 2015. For a list of Former Presidents of the Council of State in Greek and the period of their term of office, see http://www.adjustice.gr/webcenter/portal/ste/pageste/leitourgoi/page166?_afrLoop=132479144429797 93#!%40%40%3F_afrLoop%3D13247914442979793%26centerWidth%3D65%2525%26leftWidth%3D0 %2525%26rigthWidth%3D35%2525%26showFooter%3Dfalse%26showHeader%3Dtrue%26_adf.ctrl-state%3Dzxehah4xv_132 <last accessed 15.04.2021>

[327] Fotopoulou, ; emphasis added.

[328] de Sousa Ribeiro 85 para 84; translation of the text from Greek to English provided by the author.

[329] See for instance the International Colloquium held jointly in 2019 by the Association of European Judges and Public Prosecutors for Democracy and Fundamental Rights ("Magistrats européens pour la démocratie et les libertés") and the Society of Greek Judges for Democracy and Liberties, the contributions of which were published in an edited volume; see MEDEL

[330] de Sousa Ribeiro 84, 85 para 84

[331] Violante and André 258; emphasis added.

and economic rights.[332] Instead, as it has been noted throughout this analysis, the Tribunal followed the safe path of mainly applying the legal principles of the rule of law, equality and legitimate trust, and did not go for a bolder approach of proclaiming the inviolability of social rights through relevant provisions, albeit "these are abundantly provided for in the Portuguese Constitution."[333]

Be that as it may, commentators submitted that by relying on the principles of equality and legal certainty in lieu of social rights provisions, the Tribunal managed to declare several austerity restrictions unconstitutional. In doing so, it has been argued that the Court surpassed several obstacles inherent in the judicial protection of social rights, such as state budgetary constraints and considerations.[334] Notably, this tactic had significant consequences, since the Tribunal refrained from being drawn to the justiciability debate of social rights and it did not engage with questions concerning the legal status of social rights at a domestic level.[335]

Moreover and despite all criticism, Portuguese Judges stressed that what they have "silently aimed for all along in their rulings, was to safeguard constitutional normalcy,"[336] and the rule of law, and to impede the retrocession of already constitutionally protected fundamental social rights.[337] To that end, it has been underscored that judges, in seeking the proper balance between the *economic objective* of reducing public expenditures, on the one hand, and the *social objective* of protecting fundamental social rights, on the other, have provided for a solid framework on which the equilibrium was balanced out.[338] Namely, judges did not just settle for mere theoretical speculations on the relationship between the state's external obligations, stemming from the contracted MoU and its internal obligations for safeguarding fundamental rights as recognized in the national legal order.[339] Rather, the

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[332] Cf. Canotilho 157, 158; Vieira de Andrade, Loureiro and Tavares da Silva 233; de Brito Nogueira, 'Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis' 98; Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 9, 10

[333] de Brito Nogueira, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis ' 73. See also Baraggia and Gennusa Maria 490

[334] Tsiftsoglou, 'Greece after the Memoranda: A Constitutional Retrospective' 9, 10

[335] Canotilho 157, 158

[336] de Sousa Ribeiro 81; translation of the text from Greek to English, provided by the present author. See also Guerra Martins, 'Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law' 697, 704

[337] Guerra Martins, 'Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law' 695, 704; Ana Maria Guerra Martins, going against an "at all costs" logic, notes that although the Portuguese legislator had a wide margin of appreciation to reverse the level of protection of social rights, "the eventual retrocession of social rights cannot be realized *à tout prix*"; emphasis in original.

[338] Cisotta and Gallo, 'The Portuguese Constitutional Court case law on austerity measures: a reappraisal' 8

[339] Ibid

judges anchored the protection of fundamental rights on the practical dimensions of the legitimate expectations and proportionality principles.[340]

In a similar vein, Greek magistrates have identified a distinctly *economic element* in the austerity policies and an inherent *value element* in social rights.[341] They have been assertive in that austerity and social rights could not coexist, and that in the case of Greece, these two elements have rather collided, because the economic aspect in the Memoranda-imposed austerity measures "has been absolutely dominant."[342] Upon reflection, highest judges underlined that while they were adjudicating, they have been fully aware that in balancing social rights with fiscal policy considerations, this balancing exercise bore an underlying *ethical* dimension. The words of Portuguese Constitutional Judge, de Sousa Ribeiro, are enlightening in this respect:

> "Proportionality values the relative weight of sacrifices and benefits and the balanced relationship between means and ends. This act, however, must be subject to *a moral constraint*, arising from the inherent *non-value* of the content of the restrictive measure. In some cases, the gravity of the sacrifice is so great that the sphere of the personality of the victims is so severely affected that, *whatever the interests sought*, this sacrifice goes beyond what can be *reasonably* tolerated."[343]

This 'non-value' aspect and the 'moral constraint' that highest judges emphasized they have been conscious of, calls to mind that which lower judges in the case of Greece have also explicitly drawn attention to. That is, that the affected individuals could not be "transformed into the means"[344] for achieving the economic goals set by the government. Judges hinted in this regard, that forcing economic rationality for the accomplishment of merely fiscal goals has brought forward an instrumentalist use of law that rendered the subject of judicial interpretation into the object. Lower judges, by acknowledging the right

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[340] Ibid 8, 9

[341] Georgios Stavropoulos, 'Austerity and Social Rights: A Collusive Relationship' in Magistrats Européens pour la Démocratie et les Libertés (MEDEL) (ed), *Austerity and Social Rights* (International Colloquium 30th Anniversary of the Society of Greek Judges for Democracy and Liberties, Athens, 16.03.2019, Sakkoulas Publishing Athens-Thessaloniki 2019) 62; George Stavropoulos is an Honorary Vice-President of the Hellenic Council of State.

[342] Ibid

[343] See de Sousa Ribeiro 73, 88, 89, para 76; emphasis added. The formulation in the original text in French is 'une restriction déontologique,' while the translation of the text in the Greek language is 'an ethical restriction.' The present thesis subscribes to the Greek translation as attributing the spirit of the text in the sense of the deontological imperative being informed from the ethical imperative on its foundational basis. For the connection of deontology and ethics in the crisis framework with social rights advocacy, see also Part III. Chapter 6.1. ii. Lawyers in the Face of the Crisis.

[344] See Decision No 117/2014 First Instance Court of Preveza; see also the analysis at Part III. Chapter 6.1.1. Greece iii. Lower Courts and the Austerity Measure of Labor Reserve

to property[345] as a means of subsistence in times of deep financial recession and by placing this as a constituent to a life with dignity, addressed social rights not under purely managerial or utilitarian parameters, but instead sought to strike a fair balance between economic efficiency goals and concerns for the subsequent negative social effects. Contrary to an impoverished and narrow conception of value, being squared with macro-economic value, lower judges sought to balance social concerns with arithmetical considerations and mathematical prognoses regarding fiscal consolidation and debt reduction, while they foresaw and condemned the yielding of the social to the financial.[346] It could be thus argued, that in countering abstract economic interests and entrenching social values, judges traced the effective protection of social rights in the material conditions of the lives of the people upon which these measures have been inflicted.

In this framework, lower courts, as we have seen earlier, assessed the impugned measures not only within a strictly national protection framework, but also under a supranational lens, by bringing together constitutional safeguards and human rights provisions at the European regional level. In doing so, lower courts pointed towards the realization of social rights as not only being dependent upon the availability of public resources or framed within a state-limited vision. By interpreting the constitutional right to a decent standard of living as a threshold to the legislator's power to social rights curtailments, and by combining this with supranational human rights considerations, judges have refrained from interpreting the contested reforms under a model of managerial efficiency and aggregate utility "as the *be-all* and *end-all* of public policy."[347]

Instead, by employing both constitutional and supranational human rights provisions, judges sought for an intensified protection and embraced a rights-based approach[348] in their interpretation. In consequence, judges paved the way for a more

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[345] Cf. Matthew McManus, *Making Human Dignity Central to International Human Rights Law: A Critical Legal Argument* (University of Wales Press 2019) 162, where McManus laments that property rights are elevated as the only considerable rights among economic and social rights. McManus notes in particular "[t]ragically the only substantial economic and social rights that are given significant care remain property rights."

[346] For a similar argument made with respect to the jurisprudence of the Hellenic Council of State; see Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty' 196, 198.

[347] Sánchez 116, 120. In examining socio-economic rights under a more theoretical lens, Jeremy Waldron makes a similar claim; Waldron writes in particular: "Critics who regard efficiency or aggregate utility as the *be-all* and *end-all* of public policy have already committed serious mistakes: they have an *impoverished conception of value*; and they pursue the values that they recognize in an inappropriate way, by concentrating on arithmetical aggregates rather than on individualized or distributive concerns." See Jeremy Waldron, 'Socioeconomic Rights and Theories of Justice' (2011) 48 (3) San Diego Law Review, 778; emphasis added.

[348] Cf. Aristea Koukiadaki and Ioannis Katsaroumpas, *Temporary contracts, precarious employment, employees' fundamental rights and EU employment law (*PE 596823, *European Parliament Directorate-General for Internal Policies; Study requested by Committee on Petitions and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs., November 2017)* 30, where the authors argue in favor of a rights-based approach in the interpretation of social rights, and labour rights per se, and contend that a "rights-based

effective protection of fundamental rights of the affected individuals, "who *found refuge* in the protection offered mainly by human rights treaty provisions."[349] In this sense, the right to a dignified and decent standard of living, "has been *socially realised* through the lower courts' decisions"[350] and through the government's subsequent policy actions, which have been causally linked to the issued decisions by lower courts.

Taking the above into consideration, it may well be argued that judges at the highest and lowest instances have approached their judicial role with a sensitivity to the everyday experience and the social anxieties, convictions and material realities of the affected citizens. However, reviewing social policies and state budgetary plans in an active fashion did not turn these judges into innovators of moral theory or instigators of large-scale social changes. This is not to suggest that judges, especially those at the highest ranks, acted during the crisis years as "moral persons in the eyes of the public."[351] An assertion like that would infer that judges possess some kind of universal moral truth, static in time, pre-given and unaffected or uninterested in ad hoc cultural contingencies and historical conditions. It would also assume the aggregation of moral truth to one person, meaning the judge, or more generally to one authority, rather than to human beings and their capacity for a configuration of their own morals.

Contrary to such view that draws on high theory,[352] according to the present author, judges "do not operate as moral experts"[353] but rather, they interpret societal values by being more attentive to broader political sentiments.[354] That is to say, judges do not impose their moral vision upon the rest of the society, as if they sat on a dais of higher moral standard, but rather voice the convictions of the public itself.[355] In doing so, judges

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perspective entails the categorical rejection of a 'contingent' legitimation of social rights, that is *as means* to achieve other (economic) ends in favour of one 'based on their inherent value' for the worker."; emphasis added.

[349] Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' 105; emphasis added. Papadopoulos raises this argument in discussing the judgments in question, which have been issued by Greek lower courts.

[350] Ibid 107; emphasis added.

[351] Cf. Gonçalo de Almeida Ribeiro, 'Judicial Activism and Fidelity to Law' in Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) 42; G. de Almeida Ribeiro argues contrariwise that "Courts, particularly the highest in a jurisdiction, are *moral persons in the eyes of the public*, not simply collections of individual judges belonging to this or that jurisprudential tendency or this or that generation."; emphasis added.

[352] For an analysis of judicial activism through a critique of high theory, as this is developed in Dworkin's work on judges, law and morality, see Green 1241 et seq.

[353] Harel 256

[354] For a similar argument, see Alon Harel, 'Why Constitutionalism Matters: The Case for Robust Constitutionalism' (2014) 1 (1) Critical Analysis of Law and the New Interdisciplinarity, 38,49. See also Goodwin 210, 253

[355] For an analysis of the relation of judicial review from the perspective of societal convictions and moral judgments, see Harel, 'Rights-Based Judicial Review: A Democratic Justification' 261 et seq.

do not simply discover or describe shared understandings of a society, "as if those understandings simply exist 'out there' as discrete and tidy concepts."[356] Instead, shared comprehensions are in constant motion and are articulated and re-articulated in law seen as a social practice and judges are requested to be vigilant to those changes.

Seen this way, the judiciary further "interacts with the history and principles applicable to a particular jurisdiction."[357] Situating these observations in the examined austerity context, it has been suggested that law, as an expression of the historical realization of social politics, ensures the stability and predictability of the conditions of dignified living and coexistence and prescribes the meaning of social relations in their legal realization.[358] To that end, commentators advised that in times of crisis, judges need to interpret and apply legal norms and doctrines, such as that of the rule of law, with the aim of preserving the "socially (democratically) required measure of decent *social coexistence*."[359]

Following on from that, I would venture here to state that at the level of the public, social co-existence and morals are not to be looked at in the sense of a quantitative idea of value. Besides, as it can be recalled, judges in the examined caselaw have pointed towards the concept of 'non-value' and to human beings as not being a means towards the achievement of other economic-related ends. Taking my cue from that, it is my view that social convictions and social coexistence, inhere another aspect that goes deeper than the analysis of social relations as simply economic relations and of social existence as a merely material, value-based condition. And that is, the very idea of *relationality* as such in informing our conceptions of the social. To express this in different words, it has been examined in the first two chapters that crisis and austerity in Europe have been more than a simple economic-related narrative, but rather they have been morally, politically and culturally interdependent.

Taking this into account, a scholarly approach to austerity jurisprudence that only focusses on the relationship of economic interests versus social values or on the debate of judicial activism is destined to be a conceptually subtractive approach. Instead, searching for the connection between social co-existence and the law is a far more intricate task, because "the rule of law 'is not just a set of rules to be applied to an otherwise independent social order. Rather, law is, in part, constitutive of the *self-understanding* of individuals and

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[356] Goodwin 253

[357] Green 1258

[358] Georgios Kassimatis, 'Οι Βασικές Θέσεις της Απόφ. 668/2012 της Ολομέλειας του Συμβούλιου Της Επικρατείας: Σχόλια - Παρατηρήσεις -Σκέψεις' (2012) 1 Το Σύνταγμα, 2669

[359] Ibid; emphasis added. Kassimatis makes this argument while examining the Greek austerity jurisprudence with a focus on the first MoU decision issued by the Hellenic of Council State.

communities."[360] This self-understanding, however, cannot be reduced to a merely state-mediated understanding or to an individualistic model, either. Rather, it requires for a serious deliberation on the concept of *sociality* in its ethical and ontological bearings and the latter's translation in a legally relevant language.

"A trial is not therapy,"[361] however, it has been stated in the epigraph of this chapter and many readers would hasten to say this in response to appeals for an examination of sociality and law. In reading this averment, a first, self-explanatory interpretation could be that people may seek a therapeutic role in a trial, especially on highly contested social issues and during politically charged times, such as that of the austerity crisis, during which justice can take up the role of providing for a collective catharsis and moral vindication. A trial in this regard, in its real time dimensions, its teleturgy and formality and in its perceived finality in serving justice, may bear symbolisms similar to that of a therapeutic process to the collective conscience. The latter may experience certain events in a particular historical and geographical context as a collective, defined not in essentialist terms, traumatic experience of a smaller or larger extent, and might seek ways to address that collective trauma through justice. A therapeutic function could call, in this connection, for an explanation about the fundaments of law, its ethical justifications, its inherent malaises and processes of internal transformation.

However, I would suggest a reading of this quote under a different light. Law is conventionally taken to be dependent on reason as opposed to lived experience[362] and is understood to broadly address relations, usually in the sense of assessing or ascribing some economic dividend to these relations, even in the cases of, let's say, family law, that pertains to the private sphere of one person. Therapy on the other hand, to my understanding, approaches relations in their non-value, non-materialistic aspect in both their rational and arational[363] dimensions and addresses the human being as an inherently relational being in its own standing and ontological existence. Moreover, a therapy alludes to a process and knowledge in the making, while a trial is defined by its ending.

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[360] Afsah 255; see also how this quote is related to the particular historical background of post-dictatorship and the establishment of the rule of law in Greece and Portugal.

[361] The analysis here borrows this excerpt from the fictional dialogue as quoted in the British-American historical drama film 'Denial'. See note * above.

[362] On that point, see also the analysis at Loughlin 11

[363] For an analysis of the concept of 'rational' and 'arational' in relation to law, and an argument in favor of legal rationality and law as an organized form of both rationality and arationality, and of legal decisions as having "arational as well as rational dimensions"; see Andreas Fischer-Lescano, 'Sociological Aesthetics of Law' [2016] Law, Culture and the Humanities, 3, 6 et seq.

A reading of a trial as not being therapy is consistent with an understanding of law, where the subject of law is either strictly structurally-mediated, as opposed to being grasped through lived experience and agency. Or it coincides with an ethical model of selfhood, where relationality is relationality to oneself, and the social is mediated through the individual. Divergent from such comprehension, I take here that social values and convictions are neither the product of singular structures, such as the economy, nor the outcome of one-dimensional ontological viewpoints that understand sociality only through calculable reductions. Instead, social values have both a material and non-material element attached to them and are not only mediated through economic relations and the structures that facilitate such relations. With such reading in mind, the thesis delves in the ensuing chapters with a more conceptual analysis of social rights, the meaning that they have taken during the austerity crisis, and the meaning that they could possibly take, if we were to embark upon the challenging task of discovering "the structure of ethical order embedded within human reason itself."[364] And if we were to understand law under a processual theory that binds interactions with structures and welcomes unpredictability in learning and in problem solving. So that law, and a trial, for that matter, could be *therapy*, too.

[364] Loughlin 201; Loughlin makes this argument while examining the influence of Kantian philosophical thinking in establishing the authority of rights of human beings. This, according to Loughlin, cannot be established in the "existence of a constant and unchanging human nature" governed entirely by reason.

IV. SOCIAL RIGHTS NOT YET REALIZED: A VICIOUS CYCLE

7. Conceptualizing Social Rights During the Crisis

Hitherto the analysis at hand has examined how social rights have been doubted in scholarly debates on the basis of their justiciability and have been dislodged in practice. Focusing on countries where austerity policies have been implemented during the Euro-crisis, targeting mainly social protection schemes and labour and pension rights, the previous chapters have shed light on how timeless, common objections to the justiciability of social rights have been substantiated during the specific period of the financial and fiscal crisis before national and supranational courts, which were called upon to adjudicate on austerity-relevant cases. In this connection, concerns about the protection of social rights have broadly taken the shape of concerns for the de-formation and re-formation of welfare provisions and social services,[1] and the weakening of social welfare states. Considerations as such have been expressed by sitting and retired judges themselves together with scholarly commentators, while it can also be recalled that in austerity impact assessments reports, civil society and non-governmental organizations have also drawn attention to the implications of austerity in social protection and benefits schemes provided in social welfare systems.

Against this background, discussions on the already befuddled narrative of crisis and austerity have been further entangled with analyses on the nature, concept and content of social rights. By drawing on the long-lived assumption that social rights are inherently different to civil and political rights, the fragility of social rights was attributed on the one hand to their structure and content, while the impact of the crisis was deemed predetermined due to social rights' semantic indeterminacy, lack of precision and resources-dependent character. On the other hand, the deterioration and reform of the welfare state was not only seen as impacting social rights, but the social welfare state was taken to be a synonym of social rights. In all these accounts, the language of 'nature', 'concept' and 'content' has been used indiscriminately, obfuscating in this way an already highly obfuscated discussion not only at the level of the meaning and conceptual realization of social rights but most crucially at the level of their underlying ethical and ontological justifications, which went unaddressed.

[1] Emilios Christodoulidis and Marco Goldoni, 'The political economy of European social rights' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018) 242

With this in mind, the study distinguishes among the three notions, yet follows the wording and formulation of commentators while navigating through the relevant social rights scholarship. The working hypothesis here is that 'content' refers to the scope of rights provisions, stipulating specific duties and obligations, as well as to the normative latitude of application of those rights. 'Concept' is further understood as being linked but not exhausted to the specific 'content' of such rights, and it is rather taken to signify the idea of social rights devised at the level of abstract thought and shaped through certain methodologies. Lastly, 'nature' alludes to the foundational ethical and ontological assumptions that inform in turn the philosophical premises of social theories, in which conceptions of social rights are ingrained.

Throughout the present chapter the angle is neither doctrinal nor normative, but social rights are investigated from a theoretical viewpoint on the basis of their relation to costs, to other rights and to the state. This is not to say that social rights are approached conceptually by focusing on the obligations and duties of states. This approach is usually encountered in legal commentaries that investigate the nature and content of social rights by heavily relying on the interpretative postures adopted by judicial and non-judicial bodies. However, this is an approach that the present thesis deviates from. That is because, the analysis here rather seeks to address social rights not as a concept that is dependent upon other notions so as to derive its meaning, but rather as a concept that has an intrinsic meaning to it on the basis of the idea of 'sociality' that is inherent to it.

In view of the above, the present chapter takes off by mapping the contours of the most common approaches in the conceptualization of social rights, namely a first one that addresses social rights on the basis of their relation to costs and affirmative state action, and a second that juxtaposes social and economic rights to civil and political rights. After unpacking this discourse, the analysis continues by looking at theoretical accounts to social rights, which have been advanced at a domestic level in financially assisted countries. Taking Greek domestic scholarship as an example, it is briefly examined in this regard, how relevant analyses have resorted to notions of the national 'social acquis' and of state-dependent and resource-implicated explanations in order to theoretically approach social rights during the crisis. In all of these accounts, the present author identifies a lack of scholarly engagement with the ethical premises that permeate conceptions of social rights and inform understandings of the 'social.' With that in mind, the chapter concludes by adding few caveats to the examined approaches before proceeding with a more focused analysis in conceptualizing social rights from an ethics and ontology perspective.

7.1. The Relation of Rights with Costs

i. The Negative versus Positive Distinction: The Discontinuity Thesis

Earlier in the analysis[2] it has been presented that the positive-negative obligations distinction has been held intrinsic to the nature of socio-economic rights and civil and political rights respectively. Usually assessed separately from the other two standard charges that social rights routinely face, namely that they are costly and vague, the positive/ negative division stands as an objection for itself, signifying accordingly the *demand for* or the *absence of* governmental action.[3] The underlying distinction posits then "between action and omission from action,"[4] namely positive rights are held to infer correlative duties to act, while negative rights are considered those that effectuate correlative duties to refrain from acting. Contrary to such manner, in what follows, I do not differentiate between the alleged positive and resource-intensive[5] aspects of social rights but rather take the latter to be a subcategory of the former. Put simply, affirmative action is translated here as in cost-generative and resource-demanding action. In doing so, the analysis proceeds by looking at the positive/negative feature of rights from the perspective of how this has come to be associated to public costs and services, elevating the latter to a defining conceptual component of social rights.

Despite the fact that hierarchizations and definitional divisions among rights are now considered obsolete and parochial mostly in international human rights law,[6] insinuations and inferences that build upon the positive/negative dichotomy, are still found in philosophical accounts and interpretations of social rights at different national domestic contexts. Fact remains, that the assumption that social rights are assigned and "introduce mutually conflicting claims to *scarce goods*," [7] as opposed to civil and political

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[2] See Part III. Chapter 4.2.i. The Critique on Social Rights Nature

[3] Mantouvalou, 'In Support of Legalisation' 110, 111

[4] Shue 37

[5] On an inventoried presentation of the distinctions between economic, social and cultural rights on the one hand and civil and political rights on the other, see the list and the critical account of such cataloguing in Craig Scott, 'The interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants on Human Rights' (1989) 27 (4) Osgoode Hall Law Journal, 833, 834 et seq.

[6] Cf. Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 (3) Human Rights Law Review, 135; Feria Tinta 432, 435

[7] Pedro C. Magalhães, 'Explaining the Constitutionalization of Social Rights: Portuguese Hypotheses and a Cross-National Test' in Denis J. Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 434; emphasis added. Pedro C. Magalhães poignantly summarizes the mantra against social rights as this has come to be established in standard narratives, as follows: "social rights lead to an overextension of the *role of the judiciary*, introduce mutually conflicting claims to *scarce goods*, put excessive limits to democratic deliberation and popular sovereignty, delegitimize the constitution by filling it

rights, has still a firm hold not only in academic debates[8] but also in policy strategies and at the level of judicial practice, as it has been exemplified during the Euro-crisis years in countries subject to financial assistance schemes. Encountered with the conundrum of conceptually grasping social rights, the principal positive/negative distinction has been rebuffed in various ways, yet it continues to spark vigorous debates. In delineating a panorama of the entangled web of conceptual criticisms that have been put forward in human rights and social theory, I single out three of them.

First, skeptics of the rights discourse in its entirety, have challenged the binding/ aspirational distinction between the two group of rights by submitting that all human rights are programmatic and aspirational by definition, and that none of them requires for positive state action anyways.[9] *Second*, it has been suggested that socio-economic rights ought to be seen not as involving entirely positive obligations, but it should be acknowledged that negative obligations flow from such rights as well.[10] *Third*, it has been asserted that affirmative state action is required for both social and economic rights as well as for civil and political rights, which are also much dependent on public resources and national budgets. This last argument has attracted a lot of attention and is the one that is usually cited in debates on the nature and judicial and state enforceability of social rights. In summation, if we were to epigrammatically sketch the afore-mentioned positions, these have ranged within the following wavelength. There are no positive obligations for all rights. Positive obligations stem from both social and economic rights and from civil and political rights. Social and economic rights as much as civil and political rights carry with them negative obligations. Or to state this differently, we could argue that positions developed along these lines. *First*, there are no rights since rights are rejected in principle. *Second*, "all rights are positive rights."[11] *Third*, there is no such thing as positive and negative when it comes to rights since all rights can be both, thus this affirmation negates not only the distinction in its descriptive extend but it also *depolarizes* the very positive and negative variable, used as a scalar value system in the measurement of state and social action.

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with *unenforceable aspirations* in lieu of actually enforceable norms, and *interfere* with the development of *free market economies*, civil societies, and property rights."; emphasis added.

[8] See for instance Fabre, 'Constitutionalising Social Rights' 276, who even though she argues against the positive/negative definitional distinction, she asserts nonetheless the resource-based distinction between the two sets of rights.

[9] On the historical rejection of rights in general by "scientific Marxism," see Moyn, *Not Enough: Human Rights in an Unequal World* 28, 29

[10] David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' (2014) 12 (3) International Journal of Constitutional Law, 714

[11] Holmes and Sunstein 48. See also David Garland, 'On the Concept of 'Social Rights'' (2015) 24 (4) Social & Legal Studies, 626, who makes the same point: "All rights, including those we conventionally call individual rights, are positive […]".

Moving along to the criticisms, concerning the first one, namely that social rights are not real rights because they demand affirmative state action, some scholars counter-argued that if questions on state and judicial enforceability are implicated with the meaning of social rights, then such questions are implicated with the meaning of human rights *en masse* in the first place. According to this standpoint, rights provisions – be it about social and economic rights or about civil and political rights – were held as being "programmatic statements, at most expressing a set of guidelines for legislative protection, but not judicial enforcement, of rights."[12] On this account, none of the rights were deemed to have an inherently binding character and an obvious duty-bearer from their inception, neither socio-economic rights nor civil and political rights for that matter.

It could be argued that this argument has been of application in contexts where generally robust or weaker forms of the social welfare model were to be found. Certainly, as the notion of the social welfare state varied and evolved in a different pace across different geographical and historical contexts around the globe, conceptual understandings of rights have not been unidimensional, historically linear or unified, but they have rather been situated and mediated through different legal and political structures and historical conditions. This has been the case especially in European continental legal orders, where rights *in toto* were held not to possess a direct effect, while their scope of protection and state enforcement have been actualized gradually through constitutional safeguards and public law provisions which were considered as "the functionalist equivalent of socio-economic rights."[13] Stated otherwise, as Dieter Grimm has illustrated in his analysis by taking the German constitutional order as an example, a state could be considered to be a social state within "a social liberal concept"[14] of social rights protection without a recourse to the language of socioeconomic rights and without explicitly containing protective clauses formulated as socio-economic rights in the constitutional text.

Moving away from the European continental precincts and placing the positive/negative discussion against the Anglo-American backdrop, other commentators submitted that rights have been historically designed and conceptually solidified as restrictions on the power of the state.[15] Somewhat connected to the skepticism towards

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[12] Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* 116. See also Hershkoff and Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' 931, 932

[13] Dieter Grimm, 'Legitimation by Constitution and Socioeconomic Rights from German Perspective' (2015) 98 (3) KritV, CritQ, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law, 209

[14] Ibid

[15] Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* 116. See also Hershkoff and Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' 931, 932

the rights discourse by social democrats or by social liberals, this arguments travels us way back in time to the very post-war rights discourse in its historical conditions at the time. Taking this as a starting point, commentators of the positive/negative divide have argued that rights have been historically conceived and designed to protect individuals in their relations with public authority, hence a government was not expected or required to engage in any protective or service-providing function by taking any affirmative or preventive action. Following that line of thinking, state action towards the entrenchment of any human right, be it positive or negative, was not to be granted. Since no affirmative state action was ever to be anticipated, doing otherwise would contradict the very essence of human rights on the basis of their conceptual design. Stated differently, if no rights were to require affirmative supplying action on behalf of the state this ought to be the case for both social and economic rights and civil and political rights with no exemption.

By all means, the argument presented above in such a succinct manner, reposes on volumes of literature and arduous intellectual labor contemplating on the foundations of the liberal political edifice. Inverting the lens of inquiry from the state to the individual, the above-mentioned positive/negative distinction marks otherwise the lack or not of interference by the state on the freedom of the individual. The latter is an intellection that runs thus deep within the very idea of liberty, which serves as the backbone of liberal political theory and as the kernel of conceiving the human condition in liberal thought. In this respect, the most widely known formulation of the negative and positive conception of liberty is assuredly that of Isaiah Berlin in his infamous piece *Two Concepts of Liberty*, which Berlin delivered before the University of Oxford on 1958.[16] Herein, Berlin grunted his skepticism on doctrines of positive freedom and made the case for negative freedom, the later signifying the absence from interference or coercion by the will of others and essentially by the will of the government.[17] Predicated on this negative concept of freedom, the state does not assume any particular protective function but rather, as Heike Krieger

[16] In 1958 Isaiah Berlin gave his celebrated inaugural lecture 'Two Concepts of Liberty' as Chichele Professor of Social and Political Theory at the University of Oxford; see Henry Hardy (ed) *Isaiah Berlin: Liberty* (Oxford University Press 2002) xii. Also Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 52

[17] On the notion of negative freedom, Isaiah Berlin notes, among others "Political liberty in this sense is simply the area within which a man can act unobstructed by others. […] Coercion implies the deliberate interference of other human beings within the area in which I could otherwise *act*. You lack political liberty or freedom only if you are prevented from attaining a goal *by human beings*. Mere *incapacity* to attain a goal is not lack of political freedom." Hardy 169; emphasis added. See the analysis on Berlin's concept of positive and negative freedom by Fredman 52 et seq.

notes, "it is the individual himself or herself who must take care that he or she can realise the freedoms protected from governmental interference."[18]

Whatever the lasting impact of such a conceptual analysis, liberal philosophers across different currents within the liberal tradition, have widely questioned this presupposition and gradually shifted to an understanding of liberty as the pinnacle of individual autonomy through the advancement of positive freedom.[19] Within this framework, the point of rights was no longer to protect people from their governments and to "*disable governments*, but to *enable individuals* to take control of their lives."[20] To that end, any affirmative action taken by the government was welcomed as long as it promoted autonomy and it protected individuals from outside interferences that would meddle with the control that individuals held over their own lives and actions. Hence, in this mindset, where autonomy stood as the cornice framing the liberal way of life, social rights were seen as protecting the pre-conditions of such an autonomous life in liberty.[21]

In a similar vein to Berlin's reasoning, yet relying on the philosophical theory of utilitarianism rather than on natural law, economist and classical liberalism thinker, F.A. Hayek,[22] understood liberty as "a state in which a man is not subject to coercion,"[23] and defended individual rights provided that those rights were negative.[24] However, Hayek's employment of negative rights, as part of the global normative order that he envisioned, should not to give the false impression that Hayek endorsed a passive or inactive state.[25] Rather, as historian Quin Slobodian has insightfully pointed out, even though Hayek and thinkers alike did not acknowledge social and economic rights as being negative rights, they nonetheless explicitly referred to the necessity for a *proactively* engaged state in securing

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[18] Krieger, 'The Protective Function of the State in the United States and Europe: A Right to State Protection? – Comment' 193

[19] See for instance Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986). Fabre, 'Constitutionalising Social Rights' 9 et seq. submits that social rights safeguard the interests that individuals have in their autonomy and well-being.

[20] Kai Möller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights' 29 (4) Oxford Journal of Legal Studies, 758; emphasis in original.

[21] Ibid 757, 758

[22] For a short introductory note on F.A. Hayek, see the Mont Pèlerin Society's website, whose Society, Hayek was amongst its founders. F.A. Hayek is quoted there as being "widely recognized as one of the most important thinkers in the classical liberal tradition."; see https://www.montpelerin.org/f-a-hayek/ <last accessed 28.06.2021>

[23] F.A. Hayek writes in specific: "The state in which a man is not subject to coercion by the arbitrary will of another or others is often also distinguished as "individual" or "personal" freedom, and whenever we want to remind the reader that it is in this sense that we are using the word "freedom," we shall employ that expression."Ronald Hamowy (ed) *The Constitution of Liberty: The Definitive Edition*, vol XVII (The Collected Works of F.A. Hayek, The University of Chicago Press 2011) 58; See also Fredman 53

[24] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 121, 122; Fredman 53

[25] Slobodian 123

that individuals have "protected rights to safe passage and unmolested ownership of their property and capital, regardless of the territory."[26]

Within this reasoning, liberal utilitarian thinkers did not reject social and economic rights and human rights outright, like social democrat thinkers did. Instead, the free movement of goods, services and labor were rebranded into "as much a social and economic right as the demand for social security, employment, or nourishment."[27] What is more interesting for the outlook of the present thesis, though, is that goods, trade and services by being secured under a watchful state, they did not allude to a concept of communal relations, where sociality and interpersonal relations stood at the epicentre. Instead, the supply and safeguard of goods and services has not been seen as an obligation by the state but rather it has been still held very much "a matter of personal relations,"[28] wherein the concept of sociality fitted within a self-interested and individualized notion of social rights. As for the state, it has been considered to exist so as to secure and facilitate the supply and movement of services but not to provide these services itself.

Approaching the conceptual hurdle of social rights from the angle of interference, other scholars from within the liberal script contended that it is not only civil and political rights that have as much positive as negative implications, but it is also social and economic rights that have congruent negative and positive consequences. Stated differently, this position gave rise to the argument that social and economic rights can and ought to be negatively protected, and that negative obligations do not only flow from civil and political rights, but they do incur by socio-economic rights as well.[29] Applying this argument to the late financial crisis and the widespread implementation of austerity policies that have negatively impacted social rights, this position effectively translated in that governments as well as private parties ought not to jeopardize or effectively deteriorate the legally protected expectations among citizens and their formerly secured ability to provide for themselves and to make use of public resources in order to meet their basic needs.[30]

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[26] Ibid; Slobodian calls these rights as "xenos rights," borrowing the term from F.A. Hayek and his use of the word 'xenos', as found in early Greek history, meaning 'guest-friend', so as to connote the person, "who was assured individual admission and protection within an alien territory."

[27] Ibid 136

[28] Ibid 123

[29] Cf. Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' 714; Mantouvalou, 'In Support of Legalisation' 111

[30] On that point see Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' 714, 715, 718 at (d)` and 724, 725, 726, where Bilchitz draws attention to the accountability of private parties in relation to structural crises within a society. Bilchitz takes as such structural crisis the late financial and banking crisis and contends that this has resulted in that a large number of individuals were rendered no longer capable of providing for their own basic needs. Bilchitz goes on to suggest that a duty to compensation arises on such occasions. In particular he notes "a duty to compensate flows from a failure of those private parties to

In other words, governments or private parties (such as international financial institutions) in times of severe financial and economic crises, were deemed responsible for negatively protecting social rights by not interfering in the already vested enjoyment of such rights. Simply put, the nub of the argument could be phrased as follows. There is a much more negative obligation on behalf of states and third parties to protect social rights *prior* to these being encroached by sudden and abrupt shifts in the already established social protection system, than a positive obligation for authorities and agencies to provide for enhanced protection of social rights and reinstate their former status, *after* these rights have been encroached. Or to put things bluntly, it is one thing not to deprive someone of what they already have, while it is quite another to deprive someone of something only to give it back, usually in a lesser form and with the pensile angst hanging that this entitlement can be retracted again at any given time. On that note, David Bilchitz has stressed that what we need to keep in mind especially in times of financial crises are "the circumstances under which the positive obligations for the realization of social rights are *triggered*"[31] and how this significantly implicates the obligations of governments and the private sector.[32]

Moving forward to a second possible reading of the negative content of social rights, this could be advanced from within the contours of liberal legal theory itself, broadly defined. On the face of it, it could be suggested that behind the negative concept of social rights stands a similar justification, namely that of the lack of interference at the hands of a third party, be it the government, another private actor or a physical entity. However, this is a much more complex discussion that has only started to unfurl within the strands of liberal moral and legal theory. For the purposes of the analysis here, I would venture to say that there is a subtle difference between these two approaches that appears to be relevant to the angle of this thesis. According to the first position, positive and negative rights are taken to be equally sustained insofar as they facilitate the conditions to the autonomy of the individual who, if not being obstructed by others, is uniquely *responsible* for their own prosperity or destitution. Seen this way, this translates in that the "greater the detachment of the self from the community, its values, ends, and history, the more free one is deemed to be,"[33] while poverty is the threshold that can give rise to governmental aid that can be provided by the state conditionally.

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comply with their negative obligations not to interfere with the existing access of other individuals to socio-economic resources that enable them to meet their needs."

[31] Ibid 715; emphasis added.

[32] Ibid

[33] Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 769

On the other hand, in cases such as that of the late global financial crisis, responsibility for one's inability to provide for themselves may not be considered a personal failure and incapacity, and rather governments are dissuaded from interfering with peoples' basic needs at the face of the destabilization of welfare state provisions. However, I take here that this position is not to endorse a community-implicated understanding of social rights. Rather, the recognition of basic needs on the part of the government or third parties has been elevated from within the liberal legal script and has rested on the minimum core approach in international human rights law.[34] The latter has marked renewed traction in recent years due to the work on minimum core obligations by legal philosopher John Tasioulas and did not come without criticism.[35] Rather, this suggestive framework has been doubted from within liberal moral philosophy for being insulated and too disciplined-oriented.[36] Moreover, it has been questioned in judicial practice for being too rigid and incapable of addressing real world exigencies.[37] While in critical legal scholarship it has been rejected for helping the middle class to lock in their privileges rather than for succoring the truly indigent.[38] As Samuel Moyn has drily observed "the internationally developed concept of a "minimum core" to each social right proved of less use than many originally hoped."[39] For the purposes of this study suffices to note that at the centre of such an approach, stands the individual and the quality of the lives of

[34] For an analysis on the minimum core obligations of states parties under the ICESCR and a 'social protection floor' to be observed by states during economic crises, see Diane A. Desierto, 'Growth versus Austerity: Protecting, Respecting, and Fulfilling International Economic and Social Rights during Economic Crises' (2012) 57 (2) Ateneo Law Journal, 378, 380 et seq. On a critical appraisal of the social protection floors endorsed by the ILO and the CESCR as a question of rights and an embodiment of the idea of a minimum core or essential level of socio-economic protection, see Viljam Engström, 'Unpacking the Debate on Social Protection Floors' (2019) 9 (3) Goettingen Journal of International Law, 577 et seq., 590

[35] John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now (*Research Paper Commissioned by the Nordic Trust Fund, *October 2017)*

[36] See the criticism raised by Martha Nussbaum, who notices that "the document is frustrating," as "the most important questions seem utterly neglected," and criticizes such an analysis for being destined to engage only with legal practitioners or international human rights law theorists and thus, "[i]t cannot persuade even the skeptical philosopher, and it certainly can't persuade the world."; Martha Nussbaum, 'Minimum Core Obligations: Toward a Deeper Philosphical Inquiry' (*James G. Stewart Blog*, 2018)

[37] David Bilchitz has elaborated in his writings on the minimum core obligations in the judicial practice of the Constitutional Court of Africa; see David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance Note' (2002) 119 (3) South African Law Journal. Bilchitz while critically commenting on the jurisprudence of the Constitutional Court of Africa in relation to the minimum core doctrine notes the Court's reluctance to apply the doctrine as being rigid, absolutist and "not able to deal with the exigencies of the real world, and the limitations imposed by scarcity."; David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 (1) South African Journal on Human Rights, 15 et seq.. For an application of the minimum core approach with respect to social rights considerations in the late economic and financial crisis, see also Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine'

[38] Moyn, *Not Enough: Human Rights in an Unequal World* 201

[39] Ibid; Moyn makes such assesses the minimum core obligation with Latin America in mind and the judicial developments that took place in that context.

people in a society, the latter being understood as a sum of individuals from a self-centered perspective as opposed to an idea of a community from a group-centered angle.

Without delving into the merits of such an approach in its "self-standing quality,"[40] for the purposes of the thesis at hand I point towards what David Bilchitz stressed in his analysis. Notably, Bilchitz noted that "a decent society recognizes that *political equality* alone is not sufficient; there has, at least, to be some measure of *economic equality*."[41] To that end, the scholar welcomed the notion of a minimum core obligation as being capable to "help achieve this aim."[42] As I see it, the core point of such standpoint, which is too complex to be dwelt upon here, but which nonetheless comes into sight under a dim light, is the question of social relations as such. That is to say, political equality connotes the equal political status of individuals in their relations with each other and with the state, not from an inter-personal vantage point but on the basis of their relationship with other people before the state as citizens. Meaning, their interrelations are mediated through the state and its structures in a top-bottom fashion, rather than through the people themselves in a horizontal manner. On the other hand, economic equality is taken to allude to social relations being essentially economic relations. And once again, sociality as an aspect of social relations is nowhere to be found in this equation.

A second possible reading of the afore-mentioned argument on the negative duties that social rights infer during a financial crisis, during which austerity policies are executed, could be the one that has also been advanced during the 1980s in Eastern European social states, which have resorted to international financial assistance. In that connection, as it can be recalled from earlier references,[43] austerity measures imposed in Hungary as part of the financial support agreement with the IMF, have been invalidated by the Hungarian Constitutional Court. This has set alight the debate on whether the state should have not interfered and should have negatively protected citizens' already vested rights to welfare provisions from being tampered by third parties, or whether this was not an issue of judicial adjudication to begin with but it was rather a matter of political contestation.[44] Arguably and despite the differences in social welfare state models around Europe, this argument

[40] John Tasioulas, 'Working on the Core: A Response to Commentators' (*James G. Stewart Blog*, 2018)
[41] Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance Note' 500, 501
[42] Ibid
[43] See Part I. 1.2. Selection of Focus Countries and Part III. Chapter 6.2. Judicial Activism or Judicial Reference During the Crisis: A Theoretical Inquiry
[44] For a presentation of such a debate regarding the judicial enforcement of social and political rights in the Hungarian Constitutional Court in the 1980s, see also Tushnet, *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* 235, 236, 237

has been sustained in former socialist countries, which have provided for social benefits and social support equivalent to that of socio-economic rights protection.

For one, the Greek jurisprudence of economic downturn in the early twenty-tens, that has been previously assessed,[45] has been suggested in legal scholarship to showcase "remarkable similarities with the Hungarian experience of two decades ago."[46] In a fashion analogous to that of the Hungarian austerity discourse of the late 1980s, social rights in Greece and Portugal, during the late financial crisis, have been conceptualized in the context of their adjudication before national courts. In that framework, social rights derived their meaning in three ways stemming mainly from three different ideological and philosophical vantage points. By way of illustration and bearing in mind all of the analytical points raised above, I suggest that these ways have been the following. From a *liberal market-oriented perspective*, social rights have been considered as state-incarnated welfare rights to public goods and services, whose protection hampered the transition from former social welfare economies towards a semi-regulated, free market economy of conditional social rights entitlements. From a *social liberal vantage point*, social rights were seen as part of the market economy yet adherence and commitment to the ideal of the rule of law that would not jeopardize the doctrines of legal certainty and the legitimate expectations of citizens on social protection have been considered of utmost concern. Lastly, from a *social democratic position*, social rights have been understood as the by-product of social victories and class struggles, taking their form through legislation. Thus, they have been considered as not being suitable for judicial adjudication since the latter was held to effectively secure the privileges of the middle and upper classes of the society.

ii. Breaking the Dichotomy: The Continuity Thesis

Moving from an individual-centered towards a community-based reading of social rights, British sociologist Thomas Humphrey Marshall has put forward a conceptualization of social rights as the product of a more responsive state under the lens of a social democratic-attuned analysis. The notion of enjoying a basic level of well-being as a condition for social rights protection has been formulated by T.H. Marshall in his influential work *Citizenship and Social Class*[47] that was initially presented during his lectures

[45] See Part III. Chapter 5. Austerity Measures Before the Courts: A Case Study for Greece and Portugal.
[46] See on that observation the analysis at Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018' 288.
[47] Thomas Humphrey Marshall, *Citizenship and Social Class* (Cambridge University Press 1950)

at Cambridge University in 1949.[48] Embedded within its nineteenth and twentieth-century heritage, which has been marked by "two world wars, the economic crisis of the interwar era, the onset of the Cold War and the rise of decolonization,"[49] and while having Britain in mind, T.H. Marshall adverted to the development of a triadic set of civil, political, and social citizenship rights as an evolutionary sequence, were each set of rights pointed to the other in succession.[50]

By laying the grounds for the theory of the welfare state in Britain, Marshall synthesized the idea of the value of the person with that of the community and with the concept of the state, while he elevated citizenship as the hallmark of his theory.[51] Cautious to acknowledge the common liberal reservation on state coercion, Marshall dispelled this concern by arguing that duties of citizenship "do not require a man to sacrifice his *individual liberty* or to *submit* without question to every demand made by government."[52] However, Marshall went on to add that citizenship duties "*do* require that his [i.e. a man's] acts should be inspired by a *lively sense* of responsibility towards the welfare of the community."[53] Being attuned to the significance of social policies in shaping social relations within the society, Marshall defended an idea of *equality of social status* among citizens despite any existent *inequality of material status* among them under the impact of economic changes.[54]

All of the afore-mentioned positions seceded from, as it has been phrased in legal theory, the 'discontinuity thesis'[55] which stood in favor of the partition of positive and negative rights. Breaking with this "naïve separation,"[56] commentators have instead endorsed the fusion of, the once proclaimed as oppositional, socio-economic rights and civil and political rights. In this respect, scholars showcased that all rights require some degree of affirmative action as they entail resource-demanding duties on the part of the state. Building on that, analysts further demonstrated that judgements and social policies alike can have financial repercussions for the government and the state to bear, resulting in that all rights can have resource allocation and budgetary implications in some way.[57]

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[48] T.H. Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto Press 1992) 55
[49] Julia Moses, 'Social Citizenship and Social rights in an Age of Extremes: T.H.Marshall's social Philosophy in the Longue Durée' (2019) 16 (1) Modern Intellectual History, 155, see also 157, 158
[50] Moses notes that the "triadic element of Marshall's theory had Hegelian undertones, although Marshall did not refer to idealist philosophers in his work; see ibid 169. See also the analysis by Mitchell Cohen, 'T.H. Marshall's "Citizenship and Social Class"' (*Dissent Magazine*, 2010)
[51] Mantouvalou, 'In Support of Legalisation' 105; Moses 159
[52] Marshall and Bottomore 41; emphasis added.
[53] Ibid; emphasis added.
[54] Cf. Moses 158, 162, 168
[55] Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 130, 131
[56] Ibid
[57] King, *Judging Social Rights* 197; Mantouvalou, 'Are Labour Rights Human Rights?' 161; Feria Tinta 433

Zooming out from the British whereabouts and focusing back on its American counterpart, the philosophical consensus maintained that liberty rights imposed duties on the state to abstain from violating them, while social rights imposed duties on the state to act.[58] As of 1980, though, political philosopher Henry Shue embarked on a philosophical revision of the nature of rights.[59] Assessing these against the backdrop of US foreign policy, Shue argued that distinctions reside not between rights, but among duties, and demonstrated how 'rights to physical security' are more 'positive' than they are often considered to be, while 'rights to subsistence' are more 'negative' than they are often said to be.[60] Effectively, Shue contended that every basic right entails three duties, notably 'to avoid depriving,' 'to protect from deprivation,' and 'to aid the deprived.' This trifurcation of duties was refined by human rights scholar, Asbjørn Eide, in 1987, who in his capacity as the UN Special Rapporteur on the Right to Adequate Food at the time, reframed them as obligations on behalf of states 'to respect,' 'to protect' and 'to fulfil.'[61] This set of commands has been later officially canonized at a United Nations level along the now familiar 'respect, protect, and fulfill'[62] axis of economic, social and cultural rights.

Almost two decades later, legal scholars Stephen Holmes and Cass Sunstein have put forth a similar argument in their thenceforward, widely cited work, *The Cost of Rights*, which would become a much influential work in the field. In the context of this study, 'costs' were taken to mean budgetary costs, while 'rights' were understood as individual or group interests that are protected through governmental instrumentalities.[63] Holmes and Sunstein acknowledged the lure that the dichotomy[64] between negative and positive rights maintained in the American political and legal culture. However, to them, such distinction

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[58] Moyn, *Not Enough: Human Rights in an Unequal World* 166

[59] Ibid 165

[60] Henry Shue does not use in his analysis the language of social, economic and cultural rights and of civil and political rights. It is understood here that what Henry Shue means by 'subsistence rights' are social and economic rights, even though he differentiates between subsistence and economic rights. When Shue refers to 'rights of physical security', it is implied that these concern civil and political rights; Shue 23, 37, 52. In her reading of Shue's argument, Virginia Mantouvalou notes that "[…] Henry Shue argued that what is negative or positive is not the right itself, but the duties that correspond to it." to critically assess this analysis as being misconceived, because "it is incorrect to suggest that social rights necessarily impose positive duties, while civil rights are always negative." Mantouvalou, 'In Support of Legalisation' 111

[61] Asbjørn Eide, *Report on the right to adequate food as a human right (*UN Special Rapporteur on the Right to Adequate Food as a Human Right UN Doc E/CN4/Sub2/1987/23 *)*para. 66, which reads "State responsibility for human rights can be examined at three levels: The obligation to respect, the obligation to protect, and the obligation to fulfil human rights."; Eide elaborated later on this three-level set of obligations, in his academic work; see Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001) 23. See also Chirwa and Amodu 29

[62] Cf. Boyle 11; Moyn, *Not Enough: Human Rights in an Unequal World* 165; Langford, 'The Justiciability of Social Rights: From Practice to Theory' 12

[63] Holmes and Sunstein 16

[64] Ibid 39

appeared like the capstone of oversimplifications and reductions that befogged reality, and stood as the culmination of "fundamental confusions, both theoretical and empirical."[65]

In discarding such misconceptions, the authors suggested instead that all rights, seen from "the perspective of public *finance*,"[66] do not constitute radically distinct claims but rather "occupy a continuum"[67] in the budgetary requests that they convey. In this respect, all rights were seen as aspirational, and all rights were considered open-ended due to the fact that all rights bore costs, which were not directly shown or could not be prognosticated in advance. As a result, the analysis followed, the state was anticipated to responsibly expend the resources, which were collected from responsible citizens through paying taxes, towards the fulfillment of all rights.[68] This argument, which was phrased in scholarship, as the "budgetary continuity"[69] thesis, has been formulated in various ways by several other scholars, who maintained and endorsed the position that all judicial and institutional orders linked to negative duties require enforcement by agencies and, hence have a considerable impact on the distribution of resources.[70]

Drawing on that, it is for a fact that throughout the years a lot of ink has been spilt by scholars, who have not only theoretically challenged the budget/non-budget allegations, but also managed to place the discourse in practical terms on a much more sophisticated level. That is to say, commentators have drawn attention to general principles of allocative fairness and impact as well as to allocative decision-making and distributive procedures.[71]

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65 Ibid 43

66 Ibid; I take here that the use of word 'finance' is indicative of the idea of the state that Sunstein and Holmes put forward in their analysis, that is, a state where public 'expenditures' are called public 'finances' because finance entails the management of money and assets, and *management* is a defining aspect of the liberal social state, compared to the idea of *administration* in the social welfare state. Furthermore, I consider that management is profit-driven and profit-oriented and is targeted towards managing people, as compared to administration, which is an act of executing public decisions by a group people with the aim of serving and facilitating public interest first, as opposed to private profit.

67 Ibid 127

68 Ibid 120, 171; emphasis added.

69 Cf. Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 130 et seq., where Christodoulidis characterizes the argument by Holmes and Sunstein as the 'budgetary continuity' thesis and juxtaposes this to what he phrases, the 'discontinuity thesis', while standing critical to both expressed theses. Fernando Atria in assessing T.H. Marshall's theory of rights, refers to this as the language of 'continuity'; see Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24 (4) Social & Legal Studies, 602

70 Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* 130. Mantouvalou, 'In Support of Legalisation' 113 notes that civil and political rights claims "sometimes have significant budgetary implications." Sunstein develops the same position in the context of the South African legal order; see Sunstein. Garland contends that all rights are *positive*, *costly*, *social* and are also fundamentally *public*, involving social resources, state authority and the supportive conduct of state officials; see Garland 626. See also Nicholas Bernard, 'A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU' in Tamara K. Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights - A Legal Perspective* (Hart Publishing 2003) 264

71 On the relation of social rights and distributive claims, see Katharine G. Young, 'Rights and Queues: Distributive Contests in the Modern State' (2016) 55 (1) Columbia Journal of Transnational Law. See also Jeff King, 'The Justiciability of Resource Allocation' (2007) 70 (2) Modern Law Review, 197, 201, 208

In this respect, when talking about budgetary obligations that socio-economic claims impose, it has been emphasized that such objections ought to happen "in the context of the *precise definition* of the scope and content of the right and the *national context* in which it is considered."[72] Responding to criticisms on the size of the fiscal impact of social rights enforcement, commentators also underscored that this "is itself a principle relevant to the choice of enforcement mechanisms."[73]

In line with the above, it has been stressed in theory that a particular society might not be capable at a given point in time, due to budget deficits and resource-constraints to comply with its obligations in fulfilling and realizing through state enforcement the enjoyment of certain social rights. The fact that this might be the case does not imply that social rights are not binding, but rather it infers that there "is a stringent normative standard towards which this *society ought to strive*."[74] This is a significant point to make, as it does not exhaustively associate social rights to public funds or to the lack thereof, but it rather links such rights to their articulation, re-articulation and acknowledgement on the basis of a coordinated effort at all levels, be it interpersonal, grassroots and institutional.

The afore-mentioned declarations on the progressive realization of the enjoyment of social rights have been a longtime point of discussion at an international policy level and in international law, where it is generally accepted that the states' efforts in meeting recourse-implicated obligations, are progressive and proportional and are linked to the availability of a state's resources.[75] This is a common *topos* among international law scholars by now and an observation as old as the "perennial problem"[76] of how states and courts ought to address legal and policy challenges to the allocation of public funds. And yet, the progressivity element in the advancement of social rights does not imply that states are excused from trying or are justified in deferring efforts to ensure full state realization.[77] What is most significant for the purposes of this study, though, is that the constant challenge for the practical enjoyment of such rights that states and the international community face, does not strip social rights of their inherent *social* element.

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[72] Mira Dutschke and others, 'Budgeting for Economic and Social Rights: A Human Rights Framework ' October 5, 2010 SSRN article 11; emphasis added. See also King, 'The Justiciability of Resource Allocation' 197, 201, 208

[73] Tushnet, *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* 247

[74] On that pertinent point see Mantouvalou, 'Are Labour Rights Human Rights?'; emphasis added.

[75] Arbour, *Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the Third Session of the Open-Ended WG OP ICESCR*

[76] King, 'The Justiciability of Resource Allocation' 197

[77] Úbeda de Torres 54. In discussing the re-conceptualization of social rights in relation to the 'progressive realization' doctrine of international law against the backdrop of the Greek fiscal crisis, see also Natalie Alkiviadou, 'Sustainable Enjoyment of Economic and Social Rights in Times of Crisis: Obstacles to Overcome and Bridges to Cross' (2018) 20 (4) European Journal of Law Reform, 4, 5, 21 et seq.

Drawing from the analysis on the relation of social rights with costs and with their resource-dependent enjoyment, an interesting conceptual question that arises in the words of David Bilchitz is "whether the availability of recourses must be considered in the process of *defining* the very *content* of a right, or whether the very content is determined *independently* of the availability of resources."[78] Answering that question seems like standing at the high point of not only legal theory but of several philosophical traditions that have dwelled into the insurmountable toil of conceptualizing social rights. For the limited purposes of the present endeavor, I stay confined within the lines of arguing that whether or not social rights can be fulfilled by means of the specific budgetary requirements and conditions attached to them, this does not make them any less rights. That is because, the *relational* aspect of the social dimension in the social rights diptych, which we assess later in the thesis,[79] remains intact.

7.2. The Relation of Rights with Rights

i. The Interdependence and Indivisibility Thesis

Earlier in this study it has already been presented[80] that one of the most common arguments on the non-justiciability of social rights hinges upon the allegedly vaguely formulated, aspirational, "inherently intractable and unmanageable"[81] and "postulatory"[82] character of such rights. There, the nature of social rights was tersely looked at from the perspective of the justiciability of social rights, whilst the affirmation of such justiciability was taken to be "part and parcel of the more general acknowledgement of the interdependence and indivisibility of all fundamental rights."[83] This last assertion on the indivisibility of rights, has been the fruitful outcome of much intellectual reflection in international legal scholarship and treaty implementation at an international human rights instruments level, signifying a "seamless, non-hierarchical affirmation of inalienable rights and shared societal values that are at once intertwined and capable of promotion and protection in equal measure."[84]

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[78] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' 19; emphasis added.
[79] See Part V. Realizing Social Rights – A Quest for Meaning.
[80] See Part III. 4.2. The Case Against Justiciability
[81] Mapulanga-Hulston 42
[82] Banaszak, 'Constitutionalisation of Social Human Rights – necessity or luxury?' 22
[83] Henrard 375
[84] Jeff Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in Tamara K. Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights - A Legal Perspective* (Hart Publishing 2003) 1. See also Annabel Egan, Laurent Pech and Colm O'Cinneide, *Enhancing*

In international human rights law it is now settled that economic, social and cultural rights and civil and political rights are 'indivisible,' in the sense that both sets of rights are interdependent, interrelated and interlinked.[85] That is to say, meaningful enjoyment of one set of rights is considered possible only "if the other set of rights is also meaningfully enjoyed."[86] The once proclaimed 'intrinsic' lack of justiciability of social rights was proven to be "not at all intrinsic, but constructed,"[87] while it has been broadly agreed that dichotomies between rights are over-simplistic, erroneous and manufactured.[88] With that in mind, it has been stressed in legal scholarship that much of the conceptual and doctrinaire debate on the separation of civil and political rights and social, economic and cultural rights, "sprang from a legal fiction"[89] that has been based on an "artificial watertight compartmentalization of the *nature* of *obligations* assigned to each set of rights."[90]

Viewed against this background, answers to the puzzling task of conceptualizing social rights have been liaised with the interpretation of such rights. In other words, the various techniques and reasonings that different courts employ when confronted with social rights claims and the interpretation of such rights in this regard, have become a synonym of the conceptual depth of social rights. In this connection, responses to the concept of social rights have been sought in appeals to their legal status when compared with their civil and political counterparts. Namely, scholarly focus has been placed on whether social rights have a legal standing on their own or whether their protection is achieved through the canon of civil and political rights.[91] Breaking with long-standing analytical conventions and departing from discursive limits that place rights in hierarchical competition with each other, several human rights law commentators have stressed that there are no categorical differences among rights. To that end, theorists suggested various theoretical frameworks while deflating the fabricated conceptual divide between the two sets of rights. These frames have navigated, but have not been exhausted, from the *impermeability* to the *intersectionality* theses, while at a level of supranational judicial practice,

*EU Actions on Economic, Social and Cultural Rights Within its Human Rights Policy (*EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/16 PE603838, *Study requested by the European Parliament's Subcommittee on Human Rights (DROI), 22 February 2018)* 7

[85] Cf. Egan, Pech and O'Cinneide 7; Chirwa and Amodu 28, 29. Here, I do not assess the difference in nuances between the terms 'interdependent', 'interrelated' and 'interlinked'; for an analysis of the terms, see Daniel J. Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010) 3 et seq.

[86] Egan, Pech and O'Cinneide 7

[87] Cismas 460

[88] Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' 135; Feria Tinta 432, 435; Kenner 3

[89] Feria Tinta 432

[90] Ibid; emphasis added.

[91] Aristi Volou, 'The Protection of Socio-Economic Rights Through the Canon of Civil and Political Rights: A Comparative Perspective' (2017) 5 (2) Groningen Journal of International Law, 151

social rights have been interpreted and conceptualized through the so-called *integrated* and *indirect* approaches, among others.[92]

In broad outline, legal scholars have stressed that separations between economic, social and cultural rights on the one hand and civil and political rights, are artificial and do not occur in reality.[93] Instead, seen under a *synthesis* of rights, it has been suggested that rights "are intertwined and interwoven, existing as a living organism,"[94] in the same way that a human being exists in real life as a "whole,"[95] while it was further stressed that "some *organic interdependence* between social rights and the civil right to personal liberty" needs to be recognized.[96] Taking a different approach, Craig Scott introduced the 'permeability thesis' in exploring the relationship between socio-economic rights and civil and political rights as enshrined in the ICESCR and the ICCPR respectively. By the idea of *permeability* or *normative interchange*,[97] as he framed it, Scott sought to illustrate how a treaty's norms, which have been applicable to one category of rights, could be used "as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights."[98] More specifically, the aim of this theoretical framework has been to examine the extent in which human rights norms located in the ICESCR could permeate the ICCPR, giving in this way practical normative effect to the doctrine of interdependence beyond the latter's rhetorical impetus.[99]

On the international plane, as it has been hinted above, attempts to conceptualize social rights have sought to break "the wall of separation"[100] among the two set of rights, by making use of treaty provisions on civil and political rights so as to interpret social and

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[92] The present chapter does not aim to examine in depth these theses as they have been developed, performed and criticized in international and human rights law literature from a case-law perspective. Different judicial approaches to interpretation of treaty provisions and their relation to social rights protection and the positive obligations of states have been carefully and meticulously assessed by scholars. For an analysis from the perspective of the ECtHR and an assessment of the so-called 'evolutive-dynamic approach' of the ECtHR, see, indicatively, Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018); Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemein- europäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?'. For a comparative presentation of the theory of 'effective adjudication,' see Helfer and Slaughter 282 et seq.

[93] Feria Tinta 432; Kenner 1, 4

[94] Feria Tinta 435

[95] Ibid

[96] Ida Elisabeth Koch, 'Social Rights as Components in the Civil Right to Personal Liberty: Another Step Forward in the Integrated Human Rights Approach?' (2002) 20 (1) Netherlands Quarterly of Human Rights, 35, 36, 51

[97] Craig Scott, 'Reaching beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' (1999) 21 (3) Human Rights Quarterly, 637

[98] Scott, 'The interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants on Human Rights' 771

[99] Cf. Ibid; Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' 545

[100] Here, I borrow the term by Cismas 452 et seq., 472

economic rights through complaint procedures mechanisms and litigation before international human rights bodies. This practice has come to be known as the 'integrated approach,'[101] a term that was initially coined by Martin Scheinin in 2001. Since then, the term has widely been used to signify the option for international treaty bodies to consider and defend social and economic rights by affording protection, which has been otherwise explicitly covered by international treaties on civil and political rights. Being employed by various monitoring bodies and international tribunals, including the UN Human Rights Committee (HRC) and the ECtHR,[102] this approach has been used "to give practical effect to the doctrine of interdependence of human rights,"[103] while it has been suggested that theoretically it drew on the 'permeability thesis.'[104] Standing as the conscious marker of breaking down with normative boundaries among rights, the integrated approach, implied that "rights may be found not only *in* given rights but also *between* given rights and in the combined *interstitial* zones of the entire treaty understood as a system of values and interests."[105] This has put forward an understanding of social rights, at least in normative terms, as being in combination with civil and political rights. Put differently, rights were considered as not being addressed in seriatim but have rather been looked at in a more holistic way, while the ICCPR treaty served as "the normative touchstone."[106]

Looking at the ECtHR's case law, Virginia Mantouvalou has also documented and scrutinized the application of the integrated approach in the case-law of the Strasbourg Court. Addressing the necessity for a deeper philosophical justification of the integrated approach, Mantouvalou has grounded this on the value of freedom[107] understood as capability.[108] Taking a leaf from the theory of capabilities,[109] the latter being the brainchild

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[101] Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001) 32. Scheinin has further elaborated and developed his analysis on the relation of the 'integrated approach' and indivisibility; see in particular Scheinin, 'Justiciability and the Indivisibility of Human Rights' 18, 19

[102] The use of ECtHR or Strasbourg Court is used interchangeably in this section.

[103] Volou 151

[104] See on that point the analysis by ibid

[105] Cf. Craig Scott, 'Toward the Institutional Integration of the Core Human Rights Treaties' in Isfahan Merali and Valerie Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights* (University of Pennsylvania Press 2001) 30; Isfahan Merali and Valerie Oosterveld, 'Introduction' in Isfahan Merali and Valerie Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights* (University of Pennsylvania Press 2001) 2

[106] Scott and Macklem 29, 30

[107] Mantouvalou clarifies that "the words 'freedom' and 'liberty' are used interchangeably" in her analysis; see Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' 547 note 594. By the same token, 'liberty' and 'freedom' are also used here indistinguishably.

[108] Ibid 545. Mantouvalou distinguishes between a 'substantive' and an 'instrumental' aspect of the integrated approach of the ECtHR's interpretative stance. For more on that point, see Leijten 74, 75

[109] See Amartya Sen, *The Idea of Justice* (Penguin Books 2010); Amartya Sen, *Inequality Reexamined* (Oxford University Press 1995); Amartya Sen, 'Tanner Lectures in Human Values: The Standard of Living ' in

of Amartya Sen and further developed by Martha Nussbaum, Mantouvalou acknowledged that the notion of liberty in rights theory is traditionally wrapped under an individualistic veil. In this respect, Mantouvalou readily advocated for an account of liberty beyond an individualistic frame of reference, and towards an understanding that highlighted the *relational* dimension of liberty as a central component of the latter.[110]

Distancing herself from afore-mentioned examined proposals, Ioana Cismas suggested what she called the 'intersectionality thesis'[111] to rights interpretation and towards an effort to gestate social rights in this regard.[112] Drawing her inspiration from the widely influential work on intersectionality by critical race scholar and legal theorist, Kimberlé Crenshaw,[113] Cismas argued that economic, social and cultural rights and civil and political rights "intersect not only at the normative level, on the basis of the interdependence principle but also, and more importantly, in practice."[114] Breaking ranks with the permeability, integration and indirect approaches, Cismas stressed that the intersectionality thesis differs in two ways from previously held approaches in terms of standing and scope. To state this position more fully, Cismas contended that other

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Geoffrey Hawthorn (ed), *Tanner Lectures in Human Values: The Standard of Living* (Cambridge University Press 1987). In *The Idea of Justice,* Amartya Sen, puts forward a comprehensive formulation of equality and egalitarian theory within a general framework of social justice theory. Sen departs from John Rawl's theory of primary goods, Ronald Dworkin's equality of resources or G.A. Cohen's equality of opportunity and suggests a 'theory of capabilities' within an egalitarian theory. According to this, equality is described as the overall *capability* of a person to achieve *functionings* that they have reason to value in relation to the real freedoms that they actually enjoy, which will then lead to the endmost pursuit of rational life choices.

[110] Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' 552, 553

[111] See Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 (6) Stanford Law Review. For a study of the term see also Helma Lutz (ed) *Framing intersectionality: debates on a multi-faceted concept in gender studies* (Ashgate 2011)

[112] Other scholas have employed "intersectional theories" or "theories of intersectionality" in economic, social and cultural rights by relying on the work of Kimberlé Crenshaw; see for instance Johanne Bouchard and Patrice Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights Same or Different' (2016) 16 The Equal Rights Review, 189 et seq., who use the concept of intersectionality beyond its traditional range of application so as to apply this to issues pertaining to human rights violations.

[113] Kimberlé Crenshaw laid the groundwork for the term 'intersectionality', in an essay in 1989, where she described the multidimensional lives of those, whose experiences are found at the intersection of race and gender; see in particular Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] (1) University of Chicago Legal Forum. The term is usually attributed to Crenshaw in her article of 1991 by commentators of her work, including Ioana Cismas; see in particular Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'. This analysis here favors a reading of the term as presented in 1991 in tandem with this essay's predecessor in 1989; on that point see also Thomas 516. For a broader application of the term, see Devon W. Carbado and others, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 (2) Du Bois Review, 308, where regarding intersectionality's movement in the international arena it is argued that "contextual differences generate alternative engagements with the theory." See also Katy Steinmetz, 'Crenshaw, Kimberlé: She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today' (*Time Magazine*, 2020), where Crenshaw stresses that 'intersectionality' is a prism, for the various forms of inequality, to which some people are subjected, and which often operate together and exacerbate each other.

[114] Cismas

interpretative approaches to the concept of rights were deemed to carry "an inbuilt single-axis mindset"[115] that conceived of civil and political rights as "the privileged group of rights."[116] Thus, the argument unfolded, the full range of interactions between the two set of rights tended to remain obscured, while little attention has routinely been given to the advancement of social rights.[117] Civil and political rights were taken in this respect, to be the benchmark against which social rights were measured and acknowledged. Moreover, according to Cismas, the permeability, integrated and indirect approaches, were designed as merely litigation strategies, whereas intersectionality was "construed as a framework applicable to litigation, monitoring, and advocacy,"[118] contributing in this way "to the *de-categorization* of human rights in practice and at normative-theoretical level."[119]

ii. *Status Mixtus* and the Supplementarity Thesis

Despite the theoretical nuance of the above-mentioned theses and approaches to interpreting and conceptualizing social rights, these positions have not been utilized at the level of the examined in this thesis domestic courts neither have they been called forth in domestic academic discussions on the nature and concept of social rights against the backdrop of austerity. Bringing this to the level of Greek scholarship, commentators have rather revived the concept of *status mixtus* in their attempt to conceptualize social rights. Setting this concept against the backdrop of the crisis and the negative impact of austerity measures, scholars have employed the *status mixtus* thesis so as to theorize the relation of the social rights of the individual and of the individual's relation to the society. In this regard, academics resorted to the so-called, in Greek constitutional and social rights scholarship, 'supplementarity thesis'[120] (παραπληρωματικότητα /paraplιromatikótita) of fundamental rights by backing this up with the idea of the national 'social acquis.'[121]

In brief, the notion of *status mixtus* in conceiving social rights goes back to the theory of German positivist public law thinker Georg Jellinek.[122] Jellinek discerned between four types of 'status' that demarcate the relationship of the individuals with the state. That is, the jurist differentiated between, i) a *status passivus* or *status subiectionis*, where

[115] Ibid 451
[116] Ibid
[117] Ibid
[118] Ibid 452
[119] Ibid; emphasis added.
[120] This could also be translated as the 'complementarity thesis'; I translate this term as 'supplementarity.
[121] I take that the analysis made here about the post-dictatorship national social acquis in the Greek social rights scholarship could also be broadly extrapolated to the social rights theorizing in Portugal as well.
[122] See Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Mohr 1892)

the individual is subject to the regulatory power of the state; ii) a *status negativus* or *status libertatis*, where the individual is free from state power; iii) a *status positivus* or *status civitatis*, in which the individual, as a member of a given state, demands from the latter affirmative action and provision of living standards adequate for a decent livelihood and iv) a *status activus* or status of *active citizenship*, where individuals have the right to participate in state power due to their citizenship status.[123]

Contrary to such steep distinctions, Greek constitutional theory has relativized this classic formulation. To that end, constitutional scholars have advanced the idea that two or more statuses, can be combined together, talking in this way about a so-called 'supplementarity approach.'[124] Practically what this thesis entailed, was that rights "are not contradictory values, but function dialectically with each other"[125] in the sense that they compose the respect and protection of the value of the human being and the right to the development of their personality as enshrined in the Greek Constitution.[126] Thus, according to such thesis, and in a similar way to the indivisibility thesis seen above, scholars have theorized social rights by arguing that rights of all kinds, "be it social, economic, civil and political, are intertwined with each other as *axiologically* and *legally* equivalent: on the one hand they are complementary, on the other hand they are not mutually limiting."[127]

Interestingly enough the liberal constitutional doctrine of *status mixtus* has been further entangled in Greek social rights scholarship with the socialist-descending concept of the national 'social acquis' and with apprehensions of social solidarity, which are assessed in detail in the next chapter.[128] Along these lines, the 'social acquis' has been theorized domestically as one of the main principles and manifestations of the protective and intervening function of the welfare state in constitutionally safeguarding social rights.[129] Throughout the years, the 'social acquis' safeguard has been translated in that the state guaranteed the established social provisions and social benefits legislation, and the protections of the historically achieved entitlements that the labor force has secured domestically. That is to say, the 'complementarity thesis' has been used to entrench the

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[123] See the analysis at Papadopoulou, 'Η κανονιστικότητα και εκδικασιμότητα των κοινωνικών δικαιωμάτων, και ταυτόχρονα μία συνηγορία υπέρ του status mixtus των δικαιωμάτων ' 950, 951

[124] Ibid 952

[125] Anastasia Poulou, 'Τα βαλλόμενα κοινωνικά δικαιώματα και η σύγχρονη έννοια της κοινωνικής δημοκρατίας κατά τον Αριστόβουλο Μάνεση' [2019] (1) Το Σύνταγμα, 91; translation from Greek to English provided by the present author.

[126] See, The Constitution of Greece 1975 (rev. 2008) Article 2 para 1 and Article 5 para 1

[127] Poulou, 'Τα βαλλόμενα κοινωνικά δικαιώματα και η σύγχρονη έννοια της κοινωνικής δημοκρατίας κατά τον Αριστόβουλο Μάνεση' 91; translation from Greek to English provided by the present author.

[128] See Part V. Chapter 8.1. Solidarity as a Fundamental Value.

[129] Cf. Ktistaki 483; Kamtsidou 3

combined status of civil liberties and social rights at the level of a formalistic and doctrinal categorization of rights. During the crisis, scholars have brought back to the spotlight the notion of supplementarity in conceptualizing social rights in order to stress that the *status mixtus* of rights signifies "the complementarity and unity of the individual, political and social self-determination."[130] In this regard, it has been emphasized that the social acquis is absolute, inviolable and inalienable and that no regress to the status of social rights could be justified.[131] Adding to that, domestic constitutional scholars emphasized that any response to the retrenchment of already established social rights "ought to be *primarily defensive*."[132] Ultimately, academics anchored the indivisibility and complementarity of social rights on the safeguarded principle of the "constitutional liberty"[133] of the individual. Thus, ethical justifications on the liberty of the individual have been coupled with characteristics of the post-dictatorship socialist welfare state model in defining conceptions of social rights in both focus countries of Greece and Portugal.[134]

The last position has been described in human rights scholarship as "the defensive position"[135] to social rights, namely a posture, according to analysts, where governments have pre-committed themselves towards their constituents to certain social provisions and advantages.[136] Towards that direction, it has been particularly interesting what theorists of social rights stressed in examined domestic scholarship. And that is, that the *status mixtu*s and supplementarity thesis essentially stood during the austerity crisis as the expression of "the relationship between the *polity* and the *human being*,"[137] which in turn served as the cornerstone upon which the democratic principle has been historically founded.[138] Put differently, this *defensive approach* to social rights, has been the amalgam of the liberal

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130 Georgios Sotirelis, 'Τα Κοινωνικά Δικαιώματα στη Δίνη της Οικονομικής Κρίσης ' (2013) 3 Εφημερίδα Διοικητικού Δικαίου, 302

131 Ibid; In Greek constitutional and social rights scholarship, there has been a debate on the variations of the national 'social acquis,' meaning whether this is 'absolute' or 'relevant'. The specifics of such debate are of no relevance to the present thesis; for a discussion of this; see Ktistaki 483

132 Sotirelis 302

133 Ibid

134 For an analysis of the post-dictatorship welfare model in Greece and Portugal being situated within a distinct welfare model of Southern Europe, see also on Part I.1.2.i. Selection of Focus Countries.

135 Cf. the analysis and criticism of such an approach at Olivier De Schutter, 'Welfare State Reform and Social Rights' (2015) 33 (2) Netherlands Quarterly of Human Rights, 137, 151

136 It is not within the aim of this study to discuss the "defensive approach" in detail. For a criticism, see ibid 137, 150, 151, where De Schutter contends that such an approach carries the risk of protecting "the 'insiders'," who already hold recognized entitlements, at the expense of those, who have limited protection by the state and occupy a vulnerable position in the legal system. Elise Dermine also criticizes such "defensive or conservative approach" that "ties the state to past political choices" and suggests "a conception of social rights by promoting an *experimentalist* approach" to social rights; emphasis added, see Dermine 375, 385, 392

137 Neda Kanellopoulou Malouchou, 'Οι «μεταμορφώσεις» του Συντάγματος και το status mixtus' (*www.constitutionalism.gr Blog*, 2011); emphasis added.

138 Ibid 301.

doctrine of the rule of law state that has the outmost respect to the liberty of the individual on the one hand and understands the *social* in the sense of social self-determination on the other hand, while the individual derives its ontological status as an entity which is subjected to the protective and interventionist structures of the social welfare state.

7.3. Social Rights not Yet Conceptually Realized: Two Preliminary Caveats

After briefly sketching a panorama of the analytical frameworks that scholars commonly use to address conceptual aspects of social rights, in the remainder of this chapter, I add few preliminary caveats to those approaches. The first caveat to be entered, concerns the conceptualization of social rights as cost-generating rights. The second resides in the way that social rights have been theorized through the normative de-categorization of the different set of rights.

Concerning the *first caveat*, it has been examined above that arguments countering the cost-related nature of social rights have been advanced by scholars within the US legal and political factuality. In this settings, costs have been traditionally understood as being financed exclusively from *private* tax revenues within a model of the minimal state.[139] Put differently, in their highly influential analysis of social rights, which has been generalized and employed by likeminded scholars in legal orders other than the American, Cass and Sunstein have emphasized that "[a]ll rights are costly because all rights presuppose *taxpayer funding* of effective supervisory machinery for monitoring and enforcement."[140] What has been implied here, but has gone unaddressed, is that taxpayer funding corresponds to taxation of private property owned by physical entities.

Sunstein and Holmes developed an elaborate account on the cost of rights with the American legal order in mind. Remarkably, just a few years earlier, Sunstein would advocate that it is not whether rights bearing costs or not that counts, but it is the "*size* of the budgetary *consequences* that matters."[141] In support of that argument, Sunstein stressed that enforcing social and economic rights has by default much *greater* budgetary and fiscal consequences as opposed to civil and political rights, whose enforcement and realization yields pecuniary ramifications to a much *lesser* degree. Talking about the constitutions of

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[139] On an analysis of the minimal and ultraminimal state in the frame of classical liberal theory, see Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 26, 27

[140] Holmes and Sunstein 44

[141] This is a reading of Sunstein's views as expressed in Cass R. Sunstein, 'Against Positive Rights' [1993] 2 East European Constitutional Review . Tushnet notes that "Sunstein's views may have changed," probably implying Sunstein's later works, but without specifying which ones; see Tushnet, *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* 234, 227, footnote 231.

post-communist Eastern Europe, Sunstein apropos forcefully advocated against the inclusion of social and economic rights in the constitutional text. Instead he zealously upheld structural adjustment efforts to diminish the sense of public entitlement to state protection, to encourage individual initiative and to undo what he called "the culture of dependency,"[142] while states transitioned from a former-communist to a market economy.

These clarifications are interesting for this study because they manifest the hollowness of the cost-related argument by which social rights are conceived. Analyses on the costs of rights, we have seen above, have been developed to dispel definitional confusions that exist in American settings. Staying within this context, for which they were intended, these analyses may have been handy in scattering domestic confusions on cost-related assumptions about rights. Taken out of their *ad hoc* context, though, observations like that create different kinds of confusions when they are sweepingly applied to the much more complex political and legal reality of Europe. Put simply, saying that all rights have costs, means nothing on its own. These are only descriptive observations that merely scratch the surface of the conceptual puzzle of social rights. Asking *who* pays for these costs and *how* costs relate to public welfare is a different question.

Stated differently, a budget-dependent and cost-inferring understanding of social rights in the frame of the social welfare state, effectively means that all rights are costly because they do not just entail the transfer of resources from private taxation of private property. Instead recourses are also public as they accrue from taxation and revenue accumulation obtained from publicly owned assets and publicly governed administration of natural resources. By contrast, in a minimal liberal state where property is owned by private entities and capital investment services and where public and communal property is increasingly privatized, the concept of resources gradually identifies with private resources alone, while taxing heavily, if not entirely, burdens individuals.

Subsequently, when everything is gradually privately owned, then anything that is publicly claimed needs to be indemnified through taxpayers' money, since the only source of public funds is through sources of individual revenue and not through collective and public ownership and common use of resources. In this vein, everything that costs is at the individual's expense and not at the expense of, let's say, the community and public ownership. Against this backdrop, funded by the public practically rewords into being funded by the private funds of taxpayers to such an extent that taxpayers may have the political feeling of being individually targeted and asked to compensate for public needs.

[142] Sunstein 37

As one would imagine, these inferences have implications not only at the institutional administration and distribution of funds but crucially at understandings of the *relation* of the individual to the society, impacting and molding in this way the deepest seams of thought on how people *relate* to each other and to the societies that they form. Thus, in a society that understands the *social* as a sum of self-sustained individuals and their private property, social rights become merely "taxpayer-subsidized welfare rights."[143]

However, what lies beneath cost-related arguments, and which time and again goes unaddressed, are the ethical assumptions that shape social values and lead in turn to different understandings of what constitutes 'welfare' or what - derivative to 'welfare' - concepts (such as 'resources' or 'costs') stand for. With that in mind, arguments about social rights having costs are not blatant endorsements of the social welfare model, despite common readings towards that direction performed from a social welfarist perspective. Rather in politically liberal analyses, the term 'welfare' usually takes on a pejorative connotation, since it is linked "to social assistance benefits provided to economically inactive people of working age."[144] Thus, as Hartley Dean remarks, 'welfare' "has become a code word for idleness, personal irresponsibility and moral degeneration."[145] The socio-ontological assumptions that give credibility to such associations, as it will be examined later in this study,[146] is that human persons are considered of not only a lesser social status but of a lesser nature, in the sense that they are depicted as inordinately needy, dependent and vulnerable and incapable of self-sustaining themselves. Conversely, austerity as the opposite moral, economic and political model, is advanced, as it can be recalled from earlier in the analysis,[147] to the equivalent of moral exaltation, responsibility and productivity.

Moving to the *second caveat*, this relates to the de-categorization of the different sets of rights. Despite the fact that such views are reminiscent of, and draw largely upon, false dichotomies and much-discredited hierarchies by now of positive and negative rights,[148] formalistic and quantitative single-axis thinking continues nonetheless to have a strong hold in legal imagination. Arguably, as it has been stressed in scholarship, theorizing social rights by comparing and demonstrating the similarities in both set of rights, has not resulted in breaking the terms of the discussion.[149] Instead, the unintended result has been

[143] Holmes and Sunstein 42
[144] Hartley 44
[145] Ibid
[146] See Part V. Chapter 9.1. ii. Liberal-Moral Approaches o Vulnerability.
[147] See Part II. Chapter 3.1. ii. b. Austerity as a Moral and Political Discourse.
[148] Cf. Chirwa and Amodu 28; Scott, 'Reaching beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' 634
[149] Feria Tinta 433

that legal thinking remained preoccupied with disproving such nebulous divisions in a self-referential, enclaved frame of reference, while "the idea that *there are* indeed "two sets of rights" (beyond the legal fiction of it), was reinforced."[150] Linked with this observation, Craig Scott has acknowledged regarding his own 'permeability thesis,' that "the close focus on treaty texts may have been overdone"[151] and rejected an overextended focus on technical issues of textuality. Stated differently, Scott alerted that "legal doctrine can all too easily come to develop a legal logic all its own"[152] leading in that rights analysis can effectively "lose touch with the basic rationales for human rights protection."[153]

Mindful of the above, analysts have raised the caveat that all these ways of theorizing social rights, namely the 'permeability thesis' or the 'integrated approach,' have been articulated, developed, debated and employed as *mechanisms* or as *legal techniques* for increasing respect and protection for economic, social, and cultural rights.[154] Thus, attention has been placed on doctrinal aspects and methodological approaches, while there has been no reflection on the philosophical presuppositions underlying the dichotomizations that were in place. Doctrinal and descriptive analyses of that sort, though, have only pointed out the obvious. That is, we break a conceptual framework into pieces for then to spend years into try and piece it together into the conceptual continuum that it has been all along. This way, however, the discussion on the concept of social rights stays within the limits of doctrine and method alone. However, as Craig Scott has forcefully underlined, the discourse on the interdependence of rights is not a discussion founded on doctrine, but essentially it is a discussion "on a full conception of personhood."[155] That is because, the discourse may take place at the level of rights, as Scott has underscored, "but the rights are stand-ins for competing conceptions of *what it means to be fully human*."[156]

Following on from that, social rights are usually portrayed "as demands of distributive justice on the other,"[157] where the other is the state and its members (as citizens of the state). On this regard, the anxiety to demarcate the limits of the discussion about

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150 Ibid
151 Scott, 'Reaching beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' 637; Scott refers here to the international legal instruments of the ICCPR and the ICESCR.
152 Ibid
153 Ibid
154 Chisanga Puta-Chekwe and Nora Flood, 'From Division to Integration Economic, Social, and Cultural Rights as Basic Human Rights' in Isfahan Merali and Valerie Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights* (University of Pennsylvania Press 2001) 45
155 Scott, 'The interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants on Human Rights' 808
156 Ibid; emphasis added.
157 Frankenberg 1375

social rights,[158] is an anxiety to demarcate the limits of resource-implicated claims directed to states. In doing so, however, the discussion is doomed to extent so far as the borders of one's state are. Talking about social rights in those terms, this author cannot help but wonder whether objections directed to the *nature of social rights* are actually objections directed to theories of the *nature of the state* and of the state's institutions and structures as such. The same way that it has been stressed that "many social rights skeptics are in fact skeptics of judicial review,"[159] it seems that criticisms on the nature of social rights place more time and attention to grappling with questions on procedural and institutional aspects of protecting social rights, rather than searching about the philosophical assumptions that underpin such rights and precede issues of protection. That said, social rights appear as derivative concepts, that is to say, they actually exist in the void, only to derive their meaning from the meaning of other concepts, such as costs, other rights and the state or its lack thereof. Thus, conceptions of social rights are doomed to fall back to dead-end conclusions and *vicious cycles* of argumentation.

However, if we wish to explore conceptions of social rights, then addressing arbitrary dichotomizations at the level of doctrine or advocating on the complementarity of social rights with other rights at a descriptive level, does not suffice. Instead, assessing the ontological and ethical assumptions that inform social rights conceptions in liberal and social welfarist schemes, seems much needed at the face of the endless debates that social rights are mired in. With that in mind, the study proceeds in the next three chapters in exploring the notions of solidarity and vulnerability and the underlying broad ontological presumptions tied to these notions, namely that of intersubjectivity and relational ontology respectively. Following from that, the thesis concludes by proposing the concept of transindividuality in conceiving what the *social* stands for in the social rights diptych and in reconciling the individual and collective dimension of social rights.

[158] Cf. the arguments at Kamtsidou 3, 4
[159] Mantouvalou, 'In Support of Legalisation' 116

V. REALIZING SOCIAL RIGHTS – A QUEST FOR MEANING

8. Solidarity and Social Rights in Post-Crisis Europe

The foundations of social rights, are commonly proclaimed to be dignity, liberty, and citizenship, the latter being understood as the sense of belonging to a community.[1] In other strands of literature, a potential basis for the justification of social rights is found in "the moral demands for solidarity, justice and "a dignified life."[2] Arguably, this standard angle on the philosophical foundations of social rights draws on larger theorizations about the foundations of human rights, where the common consensus is that human dignity grounds rights in general.[3] Going past an analysis that seeks for the foundations of rights in the legal edifice, broadly speaking, the thesis at hand invites us in the next three chapters to think of ethical and ontological assumptions that inhibit liberal conceptions of social rights.[4] In doing so, the study departs from a scrutiny of the concepts of dignity and liberty and rather places its emphasis on the concepts of solidarity, vulnerability, and transindividuality from an ontological and ethical perspective.

Starting with the notion of solidarity, this concept looms large in social sciences and the humanities, where theorists have put the notion to work in a plethora of ways. In

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[1] Cf. Ibid 98 et seq.; Mantouvalou, 'The Case for Social Rights' 7; Sajó, 'Possibilities of Constitutional Adjudication in Social Rights Matters' 9, 10. For a perceptive analysis of dignity and its various concepts by reference to social rights, see also Christina Deliyianni-Dimitrakou, 'Substantial Equality and Human Dignity' (2015) 3 (1) International Journal of Human Rights and Constitutional Studies, 6 et seq. For a critical appraisal of human dignity as the foundation of social rights, see Stefan Huster, 'The Universality of Human Dignity and the Relativity of Social Rights' in Dieter Grimm, Alexandra Kemmerer and Christoph Möllers (eds), *Human Dignity in Context: Explorations of a Contested Concept*, vol 5 (Nomos 2018) 415, 417 et seq.

[2] Lohmann 58. See also Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge University Press 2021) 229 et seq., who considers constitutionality through institutional form and solidarity to be the two fundamental premises "for any theorisation of *social rights constitutionalism*"; emphasis in original.

[3] Cf. Jeremy Waldron, 'Is Dignity the Foundation of Human Rights? ' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015); for a criticism of Waldron's position, see Stamatina Liosi, 'Why Dignity is not the Foundation of Human Rights' (2017) 8 (1-2) Public Reason. Tasioulas submits a 'pluralist theory' on the foundations of human rights, being founded on interest and human dignity; see John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 50, 56 et seq. Tiedemann, in a rather pedestrian approach, makes the case for a dignity-based conception of human rights in general, as capable of providing sufficient philosophical foundation, on the grounds of a Kantian distinction between price and dignity; see Tiedemann. From an international law perspective, see James Griffin, 'Human Rights and the Autonomy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 342. McManus detaches the concept of dignity from the classical liberal approach and links this to a theoretical architecture that synthesizes the approaches of Roberto Unger and Amartya Sen; see Matthew McManus, 'A Critical Legal Conception of Human Dignity' (2019) 18 (1) Journal of Human Rights; McManus, *Making Human Dignity Central to International Human Rights Law: A Critical Legal Argument*.

[4] Cf. Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 767

what follows, the analysis does not offer a categorical definition of what solidarity is. The aim is not to fully explicate the depthless content of the resonances that solidarity has acquired in liberal moral theory and virtue ethics, in liberal legalism or in critical legal studies. That would not only be futile to perform, but it would also be impossible since I take that solidarity could be defined in a highly contextualized and situated way. From a legal perspective, the study does not address solidarity in order to examine whether this is a right or a duty and what obligations stem from the latter for the state or the individual. Instead, the thesis takes a more focused reading of solidarity by looking at the ways in which it has been interpreted and understood in the context of the European crisis, as part of the implementation of austerity policies and in relation to conceptions of social rights.

That said, I shall raise a point here about the particular angle that I take regarding austerity, the financial assistance programs and solidarity in this respect. It is for a fact that solidarity, to a large extent, has been linked with questions of solidary financing and interstate cooperation between EU member states, particularly from robust member states' economies towards financially ailing countries, bound by lending programs. In this framework, appeals to solidarity have been examined against issues of the stability of the currency of the Union, the overall alliance of member states and the separate national responsibility of financially assisted countries for budgetary consolidation.[5] At the same time, discussions about the meaning of solidarity have been approached on the basis of redistributive models, professed Eurozone conflicts and *monetary solidarity* within the Eurozone perimeter and on the basis of treaty-based obligations of member states.[6]

The analysis here does not engage with the discussion of solidarity understood as monetary solidarity between states. In this respect, solidarity is not employed here as a lens for the examination and promotion of mechanisms of interstate redistribution of public funds. Further, it is not used as a claim for cross-national financial aid towards financially anemic Eurozone member states, which faced economic adversities and underwent austerity-imposed reforms that targeted social rights. Moreover, the study does not

[5] See for instance the analysis in Borger

[6] Here, I refer to the form of solidarity as formulated in assistance provisions in Articles 122 and 143 para 2 of the TFEU; for a discussion of solidarity in this frame, see Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 (1) European Constitutional Law Review. For an analysis of solidarity from the perspective of monetary solidarity in the Euro area, see also Waltraud Schelkle, *The Political Economy of Monetary Solidarity: Understanding the Euro Experiment* (Oxford University Press 2017)

examine nor conceptualize solidarity as a potentially appropriate principle of socio-economic justice for the EU in times of financial and economic crises.[7]

Departing from such an angle, the analysis is interested in solidarity as it has been theorized in the particular temporality of the crisis and against the backdrop of the examined social welfarist model. With that said, solidarity is examined in the ensuing paragraphs from a narrow angle, namely in three ways: *First*, it sketches how solidarity has been theoretically and normatively pinned down as a fundamental constitutional value in the EU and turns to how solidarity has specifically been dealt before courts in the examined countries of Greece and Portugal. *Second*, it looks at the main ways in which the idea of solidarity has been infused with meaning during the crisis and post-crisis period in the Union. Linked to that, the study *thirdly* investigates how solidarity has been theoretically approached in commentaries during the austerity years and in relation to social rights from a law and political economy perspective, against the background of the social welfare state.

Following that, the section concludes by looking at the philosophical ideas of reciprocity, recognition and self-reliance as ethical justifications which have been employed in intellectual attempts to justify and conceptualize solidarity. In inquiring into the ethical presuppositions underlying the concept of solidarity, the study takes the perspective of relationality as an ontological inquiry. That is another key point that needs to be emphasized here, notably that the present study does not examine solidarity from the standpoint of democratic theory. That means, within the bounds of the present undertaking, the analysis does not examine and question solidarity as a concept of social order, as mode and criterion of organizational justice, or as a requirement of social democracy, pertaining to questions of fairness in recognitive and redistributive models of justice.[8] Instead, what is propounded here is an idea of solidarity seen from the angle of sociality and relationality, as ontologically relevant questions to solidarity. In this connection, the analysis turns to the idea of mutual aid, which has resurfaced during the austerity years, and assesses this concept with respect to solidarity, before proceeding in the next two chapters with a more in-depth analysis of vulnerability and relational ontology as relevant subject matters to social rights theory.

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[7] Cf. the analysis at Viehoff Juri and Kalypso Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity and Choice' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 279 et seq., 289 et seq.

[8] Cf. Roberto Frega, 'Reflexive cooperation between fraternity and social involvement' (2019) 45 (6) Philosophy & Social Criticism, where Frega inquires into Axel Honneth's work on solidarity in contemporary theories of democracy and positively evaluates Honneht's contribution. For a critical appraisal which does not favor Honneth's approach, see Christopher F. Zurn, 'Recognition, Redistribution, and Democracy: Dilemmas of Honneth's Critical Social Theory' (2005) 13 (1) European Journal of Philosophy, 118, 119

8.1. Solidarity as a Fundamental Value

i. In Search of a Compass: A Normative and Theoretical Inquiry

In theoretical appraisals of solidarity, the concept's lineage is found to trace back to the well-known triptych of the French Revolution, *Liberté, Égalité, Fraternité*. The little attention that has been paid to fraternity has been repeatedly rebuked in scholarship.[9] This leitmotif, connoting the symbiotic ties of liberty, equality and fraternity, has been made into the official dogma of French Republicanism in manifesting and operationalizing the Republican affiliation of citizens and the internal social cohesion and unity of the polity as a sustainable national body.[10] Remarkably, even though solidarity, in the sense of fraternity, has historically been framed as "an undisputed Republican principle"[11] and has been associated with the Jacobin Revolution of the bourgeois democrats, the idea of brotherhood among workers increasingly spread within Marxist and socialist theory, where it has been used to refer "to a proletarian mental attitude that should stimulate class-consciousness and the insight that workers had common interests."[12] This is interesting for our analysis here, because this understanding of solidarity as being directly linked to the labor force as well as to social services and public welfare schemes, has been steeped in the national constitutional letter in the examined countries of Greece and Portugal, and infiltrated the founding documents of the Union as well.

Taking this observation at the level of the EU framework, solidarity has been transposed over time from a philosophical and moral notion into a legally binding standard.[13] "Conscious of its spiritual and moral heritage,"[14] the Union asserted in the Preamble of the Charter of Fundamental Rights,[15] namely in its main human rights instrument, that solidarity is among its founding values, together with human dignity,

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[9] Cf. John Rawls, *A Theory of Justice* (Rev. 1971 1st edn, Harvard University Press 1999) 90; Stergios Mitas, *Η αλληλεγγύη ως θεμελιώδης αρχή δικαίου* (Ίδρυμα Σάκη Καράγιωργα 2016) 15 et seq.; Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer 2017) 47

[10] Manilo Cinalli and Carlo de Nuzzo, 'France' in Veronica Federico and Christian Lahusen (eds), *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (Nomos 2018) 55; see also on that point Manilo Cinalli and Carlo de Nuzzo, 'Disability, Unemployment, Immigration: Does Solidarity Matter in Times of Crisis in France?' in Veronica Federico and Christian Lahusen (eds), *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (Nomos 2018) 275, 280

[11] Cinalli and de Nuzzo, 'France' 55. For a historical overview of the origin of the term in the French Revolution, see also Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT Press 2005) 1 et seq.

[12] Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 42

[13] Veronica Federico, 'Conclusion: Solidarity as a Public Virtue?' in Veronica Federico and Christian Lahusen (eds), *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (Nomos 2018) 497, 500

[14] Charter of Fundamental Rights of the European Union, 2012, OJ C 202/393; Preamble

[15] Charter of Fundamental Rights of the European Union, 2012, OJ C 202/389

freedom and equality. To that end, the Charter, under the heading of solidarity, devoted a series of provisions concerning mainly labor and employment rights, and entitlements to social security benefits and social services.[16] Acknowledgment of solidarity has not been incidental in this respect. Instead, if we look at the founding documents of the European Union, the idea of solidarity has featured as a benchmark throughout its historical trajectory, gradually evolving, at least in principle, as part of the Union's economic and social integration project.[17]

Looking back through time, even though solidarity was not a key concept in the Treaties of Rome,[18] it has been emphasized, nonetheless, in the Treaty establishing the European Coal and Steel Community, where it was stated that "Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development."[19] Seen beyond a strictly economic affiliation, references to social solidarity have continued to be made throughout the Union's history. Initially, the Union manifested a more outward outlook, by affirming solidarity with overseas countries.[20] Inverting the focus to a transboundary, European level, this proclamation was latter followed by the Union's professed commitment to act with consistency and solidarity in order to effectively protect the principles of democracy and compliance with the law and with human rights in the Single European Act.[21]

Following these founding treaties, the Union stressed its desire to deepen the solidarity between its people and restated its intention for overseas solidarity in the Treaty on European Union[22] and the Treaty on the Functioning of the European Union,[23] respectively. In the corpus of those treaties, it has been declared that within European society, solidarity needs to prevail, and it was highlighted that solidarity between people

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16 Ibid, Title IV Solidarity Articles 27-38

17 For a synopsis and critical appraisal of solidarity in EU law, see Reza Banakar, 'Law, Love and Responsibility: A Note on Solidarity in EU Law' in R. Banakar, K. Dahlstrand and L. Ryberg Welander (eds), *Festskrift till Håkan Hydén* (Juristförlaget i Lund 2018) 7, 8, 9; Pieter Van Cleynenbreugel, 'Typologies of solidarity in EU law: a non–shifting landscape in the wake of economic crises' in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU law: Legal Principle in the Making* (Edward Elgar Publishing 2018) 18 et seq. For an analysis of the principle of solidarity in primary European law in relation to conditions of financial crises, see Prokopios Pavlopoulos, 'Η αρχής της αλληλεγγύης στο πλαίσιο του πρωτογενούς ευρωπαϊκού δικαίου: Οι εγγυήσεις της Συνθήκης για την Ευρωπαϊκή Ένωση και της Συνθήκης για τη Λειτουργία της Ευρωπαϊκής Ένωσης' (2017) 2 Εφημερίδα Διοικητικού Δικαίου

18 Treaties of Rome include the Treaty establishing the European Economic Community (EEC) 11957E and the Consolidated Version of the Treaty establishing the European Atomic Energy Community (Euratom), 1957, OJ C 203/01

19 Treaty Establishing the European Coal and Steel Community (Treaty of Paris), 1951; Preamble

20 Treaty Establishing the European Economic Community (Treaty of Rome) 1957; Preamble

21 Single European Act OJ L 169/1

22 Treaty on European Union (Treaty of Maastricht), 1992, OJ C 191; Preamble

23 Treaty on the Functioning of the European Union, 2016, OJ C 326/49; Preamble

and among member states, in the form of mutual respect, needs to be entrenched.[24] Coming to recent years, the Treaty of Lisbon expanded the scope of solidarity to a socially cohesive, intergenerational idea not only among member states but among Union citizens as well. Next to that, an explicit reference has been made to the interlaced relevance of solidarity to issues of gender equality and protection of the rights of the child.[25]

On the face of it, it could be argued that the Treaty of Lisbon has expanded the axiological horizon of the Union by adding an array of constitutional goals related to social progress and social cohesion and by connecting solidarity with those objectives.[26] Regrettably, however, as it has been observed in legal scholarship, "the Lisbon Treaty came into force when the Greek crisis, the first in a series of national emergencies, began to show its devastating impact on social rights, as well as on more complex institutional balances."[27] Therefore, and looking to the trenchant consequences that stern recessionary measures had on social rights as well as the mounting evidence of the erosion of welfare provisions in financially assisted countries, it has been emphasized that the so-called 'social clause' of the Lisbon Treaty, "which obliges the EU to consider the social consequences of its policies, has so far remained a dead letter."[28] In this respect, solidarity was declared an empty signifier,[29] while the Union has found itself unfavorably "stuck in a bad equilibrium"[30] between its economic integration agenda and its social promulgations.

With the aforementioned in mind, let us now turn to the focus countries of this study and accordingly, to the constitutional vesture of solidarity in the constitutions of Portugal and Greece and in the way that solidarity has been addressed in governmental social policies of austerity and in crisis jurisprudence. At the level of the constitutional text, in the Constitution of the Portuguese Republic, solidarity is explicitly referred to as part of the foundational corpus of the democratic polity, together with respect to dignity, freedom and justice of all people in the society.[31] Solidarity is further inlaid within the broader

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[24] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2016, OJ C 202/1; Articles 2 and 3 paras 3, 5 TEU C 202/17

[25] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 2007, OJ C 306/11 Articles 1a and 2 paras 3, 5

[26] Maurizio Ferrera, 'Solidarity in Europe after the Crisis' (2014) 21 (2) Constellations, 230

[27] Silvana Sciarra, 'The European Union and Social Policy' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley & Sons 2016) 484. The Treaty of Lisbon was signed on 13 December 2007 and was entered into force on 1 December 2009.

[28] Ferrera 230

[29] Cf. Andreas Grimmel, 'Solidarity in the European Union: Fundamental Value or "Empty Signifier"' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer 2017) 164, 171

[30] Ferrera 235

[31] Constitution of the Portuguese Republic of 1976 (rev. 2005) Article 1, where it is stipulated that "Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and

constitutional edifice of fundamental social rights in several provisions, in the form of social solidarity among citizens or as an additional facet of intrastate solidarity or intergenerational solidarity.[32] In juxtaposition, the Constitution of Greece - in the single solidarity provision laid down in the constitutional text - stipulates that "[t]he State has the right to claim of all citizens to fulfil the duty of social and national solidarity."[33]

Moving from the letter to the spirit of the law, the principle of solidarity in its constitutional formulation has showcased remarkable flourishing both in theoretical appraisals and in judicial practice during the MoU years in the jurisdictions in question. Seen in the framework of the Greek constitutional order, the principle has been theoretically considered to conceptually supplement the fundamental constitutional safeguards of the protection of human dignity[34] and the right to free development.[35] That is to say, constitutional safeguards of dignity and self-development were deemed to focus on the individual[36] and stand on one side of the individual-society dipole, whereas solidarity, by being tied to the duty of national and social solidarity, pointed to the other side of the dipole and the individual's place in the society. Put simply, the constitutional provision of solidarity, in its explicit formulation, pointed at the dual predisposition "of the *human being* as an individual and as a member of the society."[37] Read in conjunction

committed to building a free, just and solidary society." Information retrieved from *Constitute Project* https://constituteproject.org/?lang=en <last accessed 07.08.2020>; see also *The Comparative Constitutions Project: Informing Constitutional Design*, directed by Zachary Elkins, Tom Ginsburg, and James Melton, which is a project that provides for comprehensive data analysis about the world's Constitutions at https://comparativeconstitutionsproject.org/ <last accessed 07.08.2020>

[32] Constitution of the Portuguese Republic of 1976 (rev. 2005) Chapter II Social rights and duties Article 63 para 5 reinforcing the pursuit of 'social solidarity' in relation to social security; Article 66 para 2 on the protection of the environment, ecological stability and quality of life "with respect for the principle of inter-generational solidarity."; Article 71 para 2 establishing the "duties of respect and solidarity" towards disabled citizens; Chapter III Cultural rights and duties Article 73 para 2 providing for the promotion of "the democratisation of education and the other conditions needed for an education conducted at school and via other means of training to contribute to equal opportunities, the overcoming of economic, social and cultural inequalities, the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in public life."; see also Article 225 para 2 on the "strengthening of national unity and of the bonds of solidarity between all Portuguese"; Article 227 para 1 on fairness of the allocation of state's tax revenues "in accordance with a principle that ensures effective national solidarity." Information retrieved from *Constitute Project* https://constituteproject.org/?lang=en <last accessed 7 August 2020>

[33] The Constitution of Greece 1975 (rev. 2008) Article 25 para 4; available at https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma/ <last accessed 21.08.2020>; capitalization as stated in the original.

[34] Ibid, Article 2 para 1 "Respect and protection of the value of the human being constitute the primary obligations of the State."

[35] Ibid, Article 5 para 1 "All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages."

[36] Iakovos Mathioudakis, 'Η αρχή της αλληλεγγύης κατά το άρθ. 25 παρ. 4 Συντ. Ερμηνευτικές οριοθετήσεις με βάση τη νομολογία της οικονομικής κρίσης' (2016) 4 Εφημερίδα Διοικητικού Δικαίου, 464

[37] The Constitution of Greece 1975 (rev. 2008) Article 25 para 1 "The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by

with the provision on the "principle of the welfare state rule of law,"[38] as a primary obligation of the Greek state towards its citizens, solidarity has been contended to stand in close affinity with the obligation of Greek citizens to "contribute without distinction to public charges in proportion to their means."[39] Thus, solidarity in the Greek state has acquired a double meaning, namely a duty of the state towards its citizens and a duty of the citizens towards the nation and the political community.[40]

This dual meaning of solidarity can theoretically be traced in the constitutional history of democratization of the Greek state when it was inscribed for the first time in the post-dictatorship constitutional text of 1975.[41] In this framework, the narrative of solidarity has been woven into the Greek Constitution as a descendant of the French triptych on liberty, equality and fraternity as this has been laid out in the Preamble of the French Constitution of 1946.[42] Carrying this historical heritage and idealistic impetus, yet being formulated within a constitutional text which is otherwise liberal in character[43] – where the individual stands on high ground compared to the state[44] – the interpretation of solidarity has been nothing but consentient among scholars in domestic constitutional scholarship. Summed up briefly, on the one hand, solidarity and its focus of duties has been contested and justified the "liberal aversion to the notion."[45] That is to say, detractors from within the liberal script perceived solidarity to infringe upon the ideal of individual freedom, prioritize the collective over the individual and even invert the hierarchization of the state over the individual.[46] On the other hand, advocates of a statist-communitarian ideal, which was held to be expressed through social welfare provisions and inherited social entitlements, understood solidarity as a collective commitment to the preservation of that collective standard of social prosperity. Thus, solidarity was considered to stand as a duty

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the State. […]"; emphasis added. In my view, the use of 'human being' instead of 'citizen' is interesting here from a perspective of the ontological structure of the liberal norm, because it addresses the constituents of the polity not at the level of their citizenship but at the level of their being, while it links that being to the duty of solidarity as a natural extension of a shared constitutional identity that essentially relies on intersubjectivity as a way of ontologically conceiving existence.

[38] Ibid

[39] The Constitution of Greece 1975 (rev. 2008) Article 4 para 5 "Greek citizens contribute without distinction to public charges in proportion to their means."

[40] Cf. Federico 518

[41] Cf. Mathioudakis 465, 466

[42] Ibid

[43] Ibid 467

[44] Ibid

[45] Tamar Hostovsky Brandes, 'Constitutionalism and Social Solidarity: A Theoretical and Comparative Analysis' 29 August 2020 SSRN pre-print draft paper 24

[46] In addressing that criticism in the context of Greece, see Mathioudakis 466, 467, 468. For a more general discussion of the relation between solidarities and duties, see Tamar Hostovsky Brandes, 'Solidarity as a Constitutional Value ' (2021) 27 (2) Buffalo Human Rights Law Review, 81, 82

emanating from such commitment, on behalf of the citizens to the state and by extension to the polity, in the name of the wider public interest.[47]

ii. Solidarity and Austerity Jurisprudence

Following the theoretical division between liberal and social welfarist understandings of the meaning of solidarity, the latter has been predictably reflected at the level of jurisprudence as well. In this regard, the Greek austerity jurisprudence has been quite ambivalent in dealing with questions of solidarity when compared to other countries.[48] That is because the Greek example, similarly to the Portuguese one, has highlighted a "very important entailment of the principle of solidarity: *sacrificing* the interests of determined categories in the name of the survival of the whole nation."[49] In other words, it has been argued that during the crisis, the Greek judiciary interpreted solidarity in two ways. From one side, it evoked national solidarity as a constitutional basis upon which the wider common good was grounded in order to uphold austerity laws. On the other side, it resorted to solidarity as a way of mitigating the cumulative adverse effect of austerity-led reforms and invoked solidarity in its protective function so as to shield people from the encroachment of their fundamental rights, the deterioration of their living standard and the further minimizing of social welfare services.[50]

Taking the leading *first MoU decision* as an example[51] that has been discussed earlier, commentators highlighted the implicit and explicit invocation of national and inter-state solidarity in the Hellenic Council of State's reasoning.[52] In more detail, the recourse to public interest as the justification for the austerity-driven social policies, coupled with the

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47 On that point, see Thomas Psimmas, *Τα θεμέλια της κοινωνικής ασφάλισης: Διανεμητική Δικαιοσύνη, Ισότητα, Δημοκρατία* (Sakkoulas Publishing Athens-Thessaloniki 2020) 94, 95; Psimmas rebuffs the argument that the duty to solidarity encroaches on individual freedom and contends in this regard that "the duty to solidarity is a justificatory reason for the restriction of individual rights, without always acting as a ratio of the very existence of these rights. It does not emanate from an anti-liberal morality that demands the sacrifice of the individual for the common good. Quite the opposite, it is grounded on a profoundly liberal ethics of respect for the rights and dignity of all citizens. Besides, the principle of solidarity finds itself in a dialectical relation to the antinomic nature of rights."; translation from Greek to English provided by the present author.

48 Mexi 96 et seq.

49 Federico 506; emphasis added. On the extensive use of 'sacrifice' in the Portuguese austerity case-law, see also Part III. Chapter 5.1.ii.b. Distribution of Sacrifices.

50 Ibid

51 Hellenic Council of State Decision No 668/2012 (Plenum) implementing Law 3845/2010 (Greek Government Gazette A'65/06.05.2010) (on MoU I)

52 Ibid, para 37, where the Council of State explicitly refers in its grounds to Article 25 para 4 of the Constitution of Greece read together with Article 4 para 5 on the equality before public charges and Article 2 para 1 on the respect of human dignity. The implicit reference to solidarity in the reasoning of the judgment, refers to the invocation of the public interest argument trumping the imposed austerity reductions; see Hellenic Council of State Decision No 668/2012 (Plenum), paras 10, 34, 35.

assertion that the measures were necessary for the wider common interest of the member states of the Eurozone, have all been considered implicit facets of a reinforced idea of national and cross-national solidarity.[53] Even though scholars positively acknowledged the inclusion of the solidarity provision[54] in the *ratio* of the decision, they have nonetheless underlined that the use of solidarity has been defined by a normative and notional ellipsis.[55] That is to say, scholars stressed that the employment of the solidarity clause in the Greek Constitution did not simply provide for a duty of the citizens to contribute in proportion to their economic capacities in the name of the public interest, the latter being squared to the fiscal interest of the state.[56] To that end, it has been emphasized, that the Council of State should have interpreted the constitutional provision for solidarity on the basis of the principle of proportionality, as a criterion for substantially reviewing the adopted legislative measures in implementing austerity policies.[57]

In a similar spirit, the Hellenic Council of State and the Portuguese Constitutional Court maintained in their jurisprudence that solidarity levies and social security contributions, which were requested by the legislator, were extraordinary and justified under the broader public interest and thus, the Courts held that the solidarity charges in question were constitutional.[58] These decisions, which implicated notions of solidarity in the encroachment of social provisions, have not been met without censure. Quite the opposite, additional social burdens, which were effectively translated as added taxes, have been criticized from a liberal legal vantage point, for infringing upon the property rights of individuals, and for using social solidarity among citizens as a counterbalance to the meager funds of the state and its deficiency in providing social services. Put differently, social security contributions and additional taxation have been vehemently criticized for seemingly becoming "a privileged field where not only the State does claim the share of every individual or entity for the *operation* of the State and the *services provided thereof*, but they also become the main tool to escape the imminent economic crisis in European States through an understanding of *social solidarity*."[59]

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[53] Federico 506

[54] Id est Article 25 para 4 of the Constitution of Greece 1975 (rev. 2008).

[55] Stergios Mitas, 'Η αρχή της αλληλεγγύης-εν όψει και του άρθρου 25 παρ.4 του Συντάγματος' (2013) 5 Εφημερίδα Διοικητικού Δικαίου 725

[56] Psimmas 223, 226, 230 et seq.

[57] Mitas, 'Η αρχή της αλληλεγγύης-εν όψει και του άρθρου 25 παρ.4 του Συντάγματος' 725

[58] Selectively, see Portuguese Constitutional Court Ruling No 572/2014 (on extraordinary solidarity contribution as provided in Budget Law for 2014); Ruling 187/2013 (on extraordinary solidarity contribution contained in the Budget Law for 2013); Hellenic Council of State Decision No 2653/2015 (on the constitutionality of solidarity surtax and license quota applied to professionals) Decision available at Δίκαιο Επιχειρήσεων και Εταιριών [Business and Company Law] 2016 (4) 575-585

[59] Gerapetritis 174; emphasis added.

In hindsight, and mindful of prior observations about the nation-restricted approach that apex courts displayed, it could be said that understandings of solidarity in both of the examined states have been imbued by a similar internalized logic. Said otherwise, this type of national and social solidarity had the characteristics of an economic solidarity that has been pervaded by the effort, at the level of judicial practice and domestic governance, not to jeopardize the financial assistance agreements. Solidarity, being manifested in this way, bore the intention by assisted countries to guarantee that they were invested and nationally united in their commitment to cut public debt and rationalize the public expenditure system. That is to say, national solidarity was invoked as another form of manifesting consensus and readiness among citizens to abide by the financial agreements. Most importantly, though, national solidarity has been said to constitute a way for the assisted countries to demonstrate that they acknowledged and owned responsibility for the debt and to reassure their debtors that they would not postpone the expected objective of budgetary consolidation.[60]

Gradually, this usance of social solidarity placed onto the citizens has been questioned and challenged by the very same Supreme Courts in both Greece and Portugal, and solidarity as a duty of the citizens to the state has been conversely approached as a duty from the state to the citizens. In a series of cases,[61] apex Greek courts found that the fiscal public interest no longer provided enough justification for the reduction in wages and pensions of specific categories of public employees, including mainly judges, university professors and doctors as well as armed and police forces. In the grounds of the judgments in question, it has been further stated that the drastic retrenchment of public spending through successive restrictive measures ought not to jeopardize the standard of living of

[60] On that point see the analysis on national solidarity from an intergovernmental perspective during the fiscal crisis in Greece at Sergio Fabbrini, 'Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46 (9) Comparative Political Studies, 1017; see also the introductory commentary at Christian Ghymers, 'Proposal for a Pact for National Responsibility Through EU Solidarity Within the Present EU Architecture' in Bettina De Souza Guilherme and others (eds), *Financial Crisis Management and Democracy: Lessons from Europe and Latin America* (Springer International Publishing 2021) 337

[61] Selectively, see Hellenic Council of State Decisions Nos 2192-95/2014 (Plenum) (on pension of armed forces); No 1125/2016 (Plenum) (on armed forces and cuts in salaries of military personnel) para 10; No 4741/2014 (Plenum) (on wage reductions concerning public university professors) para 12; No 2287/2015 (Plenum) (on social security and public pension cuts) paras 5, 7, 9; Hellenic Court of Audit No 1506/2016 (Plenum) (on salary cutbacks of public university faculty members in office and on reduction of pensionable remuneration of former faculty members) paras 2A, 2B, 9, 10, 11, 13; No 7412/ 2015 (on pension cuts of retired doctors of the national health system) paras 2, 3, 14, 15; Decisions available in online Greek legal database NOMOS https://lawdb.intrasoftnet.com/ <last accessed 25.06.2021> In all of the afore-mentioned cases, the respective cutbacks were found to stand contrary to Articles 4 para 5 on equality before public charges and Article 25 para 4 on social and national solidarity.

individuals and should ensure the fair distribution of crisis burdens among all citizens, not only at the detriment of certain categories of the populace.[62]

Seen this way, consecutive reductions in salaries and pensions have broached the issue of putting a strain on an already encumbered multitude and pushing further people into poverty and social exclusion. The latter, as it can be recalled,[63] has also been a point of deliberation in the reasoning of the Portuguese Constitutional Court, which has repeatedly drawn attention throughout its austerity jurisprudence to the undertaking of sacrifices and fair allocation of burdens among all citizens and not only by a specific category of citizens. Solidarity, in this framework, has been linked to the notion of security, while in theoretical accounts, it has been highlighted that solidarity has stood as the moral and normative foundation of public policies and social security and of the enhanced role that the state ought to assume with respect to the protection of public social welfare.[64]

8.2. Thinking of Solidarity *Midst* and *Post*-Crisis

The aforementioned judgments and constitutional interpretations of solidarity have not been performed in a social and political vacuum. Rather, they have been situated within a broader societal reality, where solidarity has been repeatedly chanted as a slogan during demonstrations and rallies across the globe to express allegiance and sympathy with people and places, which were undergoing drastic austerity reforms and severe recession.[65] Bringing this to Europe, the widespread talk of solidarity has been also manifested across several large-scale research programs,[66] which have been initiated *during* and *post*-crisis.

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[62] Mexi 99; Federico 506; Mexi and Federico both refer in their analyses to the Proceedings of the 2nd Special Session of the Plenary of the Hellenic Court of Audit (27 February 2013), where according to the authors, the state's right to ask for social and national solidarity as a duty of all citizens and the discretion of legislator to adopt restrictive measures in order to decrease public spending ought to be subject to the constitutional safeguards of the adequate living conditions (Articles 2 and 4 para 5 of the Constitution), and of the a fair distribution of the public charges in the name of the principle of proportionality (Article 25 para 1 of the Constitution). Papadopoulos singles out a series of cases issued by the Hellenic Council of State in relation to salary and pension reductions and the constitutional provision of solidarity; see Papadopoulos, 'Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies' Jurisprudence' 428

[63] See Portuguese Constitutional Court Ruling No 353/2012 (Plenum); No 187/2013 (Plenum); No 413/2014 (Plenum); No 572/2014 (Plenum)

[64] Mexi 99; Sciarra, *Solidarity and Conflict: European Social Law in Crisis* 18. Psimmas, in his treatise on the foundations of social security with a focus on the Greek system, relates solidarity to the institutionalized distributional justice via the state and differentiates among what he calls, solidarity as 'a noble sentiment'; solidarity as 'a state purpose' and solidarity as a provision for 'social freedom'; see Psimmas 90 et seq.

[65] See also on that point Theodoros Rakopoulos, 'Resonance of Solidarity: Meanings of a Local Concept in Anti-austerity Greece' (2014) 32 (2) Journal of Modern Greek Studies, 318

[66] At an EU level, see the *TransSOL-Transnational Solidarity at times of crisis* project, an EU Horizon 2020 transnational research project that ran from June 2015 to May 2018 and has been dedicated to providing systematic and practice-related knowledge about European solidarity at times of crisis, by bringing together

These initiatives aimed at assessing the concept of solidarity at an EU scale, at a time when pleas for a more solidary Union and support for austerity-ridden countries and affected populations have been made both at the level of academic scholarship and judicial practice.[67] On the flip side, at a domestic and interstate level, the establishment of austerity living among a large portion of people in countries, whether these have been subjected to financial assistance or not, gave rise to the concept of '*negative solidarity*.'[68] Namely, the adverse social impact of austerity,[69] coupled with the general scarcity of public resources at a widescale level, also led to definitions of solidarity as "an aggressively enraged sense of injustice, committed to the idea that, because I must endure increasingly austere working conditions (wage freezes, loss of benefits, declining pension pot, erasure of job security and increasing precarity) then everyone else must too."[70]

Across the wide range of contexts in which solidarity has appeared during the financial crisis, a diagnosis has been made and a verdict has been given; that living in a world of multiple interlinked crises, "solidarity is in crisis"[71] as well. Drawing upon the larger crisis theory of capitalism that has been assessed earlier in this thesis,[72] the crisis of solidarity has been linked with the crisis of the social welfare model. Set against the historical background of the post-war social welfare state in continental Europe, solidarity has been commonly identified with the "solidarity of the welfare state."[73] The latter has

researchers and civil society practitioners from eight European countries, namely Denmark, France, Germany, Greece, Italy, Poland, Switzerland and the United Kingdom; for more information https://transsol.eu/ <last accessed 12.08.2021>; see also the *SOLIDUS: Solidarity in European societies: empowerment, social justice and citizenship* project, an EU Horizon 2020 research project that also ran from June 2015 to May 2018 and whose research focus was to conceptually and empirically explore expressions of European solidarity from an inter-disciplinary approach in European societies after the crisis, by integrating views from the fields of philosophy, sociology, psychology, economic geography, economy and public management; for an overview see http://solidush2020.eu/ <last accessed 12.08.2021>. On a social-investment focused project based on the values of solidarity and trust in the EU, see also the *RE-InVest* EU Horizon 2020 project that aimed at assessing the social dimension of the Europe 2020 strategy during and post-financial crisis and diagnosing through participatory research the social damage of the crisis in terms of human rights erosion, social (dis)investment and loss of collective capabilities, while the project focused on developing a theoretical counter-model of social investment based on the effective promotion of human rights and capabilities; see http://www.re-invest.eu/ <last accessed 14.08.2021>.

[67] See for instance the statement of solidarity issued by the Association of European Judges and Public Prosecutors for Democracy and Fundamental Rights urging for the respect of solidarity and dignity, as the founding principles of the European Union, during the execution of austerity programs; MEDEL

[68] Jason Read, 'Negative Solidarity: The Affective Economy of Austerity' (*Unemployed Negativity* 2019)

[69] On the negative social impact of austerity, see Part II. Chapter 3.2. Austerity Impact Assessment of Social Rights Protection

[70] Read, 'Negative Solidarity: The Affective Economy of Austerity'

[71] Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer 2017) Part II The Crisis of Solidarity. See also the introductory text to the Critical Theory Summer School 2021 at the Humboldt-Universität zu Berlin, under the tile 'Foundations of Solidarity' http://criticaltheoryinberlin.de/summer_school/ <last accessed 14.08.2021>

[72] See Part II. Chapter 2.1.1. What is a Crisis? An Introduction.

[73] Carol C. Gould, 'Transnational Solidarities' (2007) 38 (1) Journal of Social Philosophy, 151

been taken to connote the preparedness to share resources with deprived people, while it was further used to describe a form of social bond founded on a shared feeling of community.[74] These overtones prompted the meaning that solidarity "came to have in the Marxist and socialist tradition in the next hundred years,"[75] and "are similar to the ways in which the concept is used today."[76] In line with this, solidarity in European social states has been imbued with a strong distributional semasiology, which has subsequently reflected in public opinion as "the readiness to share resources with others."[77]

Following on from that, the fact that solidarity has been widely associated with policy-implicated and resource allocation issues has meant that legal crisis scholarship has commonly approached solidarity in the frame of EU and domestic governance. In this way, this scholarship has provided analyses on concepts of institutionalized solidarity and sought for the conceptualization of solidarity in normative terms.[78] At the same time, critical approaches have mainly scrutinized solidarity through the lens of the division of labor, by looking at constitutionalism through the institutional structures of power. Given that labor law has been a primary field to bear the brunt of austerity reforms, solidarity and social theory analyses during the crisis placed their focus on workers' rights at a supranational level. In this connection, Silvana Sciarra has put forward an "idea of *solidarities* in the plural"[79] as a way of assessing social policies and policymaking in times of economic instability in a cross-border, inclusive manner. In this respect, Sciarra has stressed that social policies are founded upon social dialogue and urged for the participation of workers, labor unions, and social partners as part of an all-encompassing understanding of solidarity.[80]

Arguably, this conception of solidarity has drawn upon a wider, long-lived stream of political and legal theorizing on solidarity. That is to say, it is historically linked to the field of EU labor law which has conceived social solidarity as a manifestation of collective

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[74] Stjernø 28; Gillian Lester, 'Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 335
[75] Stjernø 28
[76] Ibid
[77] TransSol, *TransSOL Research Summary 5: Transnational Solidarity in the Public Domain Media Analysis: Collective Identities and Public Solidarity (WP5) (*TransSol Transnational Solidarity in times of crisis*)* 1
[78] Selectively, see Frank Vandenbroucke, 'The Idea of a European Social Union: A Normative Introduction' in Catherine Barnard, Frank Vandenbroucke and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017); Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU law: Legal Principle in the Making* (Edward Elgar Publishing 2018); Ana Bobic, '(Re)Turning to Solidarity EU Economic Governance: A Normative Proposal' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021)
[79] Silvana Sciarra, 'Notions of Solidarity in Times of Economic Uncertainty' (2010) 39 (3) Industrial Law Journal, 236, 239; emphasis added.
[80] Silvana Sciarra, 'European Social Policy in the Covid-19 Crisis' (*IACL-AIDC Blog*, 2020)

autonomy and self-determination of workers, echoing a conception of collective or group rights. By contrast, human rights skeptics considered these rights as individual rights alluding to an individualistic ethos of political liberalism that did not recognize social institutions and overemphasized instead the individual.[81] Fundamentally, this criticism conjured up a broader divide between welfare provisions *qua* social rights and civil liberties *qua* individual rights. Stated differently, solidarity in this framework has been taken to constitute part of what has been described in theory as the social democratic concept of solidarity.[82] Drawing upon the larger scheme of socialist tradition mentioned above, social solidarity signified, in this respect, a common identity and shared sense of destiny among the working class and popular classes in their struggles for the recognition of shared entitlements and in the establishment and securement of a common social standing.[83]

Bringing the notion of social solidarity to the reality of the financial and economic crisis in the EU, scholars have approached this notion in light of the idea of 'Social Europe,' namely through the lens of the Union's market and social integration project. Social solidarity in this regard has been interpreted through a broader rhetoric of 'transnational solidarity,'[84] taking various nuances and forms. One of such connotations that legal scholars have endorsed has been the notion of 'horizontal' solidarity, namely a solidarity not only among states but crucially among individuals across European borders.[85]

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[81] Cf. Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 141, 155. See also Jay Youngdahl, 'Solidarity First: Labor Rights Are Not the Same as Human Rights' (2009) 18 (1) New Labor Forum and for a response, see Lance Compa, 'Solidarity and Human Rights: A Response to Youngdahl' (2009) 18 (1) New Labor Forum. For a discussion of this debate, see Mantouvalou, 'Are Labour Rights Human Rights?' 160

[82] Sophie Pornschlegel, 'Solidarity in the EU: More hype than substance?' 28 July 2021 European Policy Centre 8 calls this the 'socialist concept of solidarity'. For an analysis of the lineage of solidarity in classic social theory and the divergent use of the concept in socialist theory, see Stjernø 25, 42, 58 et seq. Stjernø discerns between the 'classic Marxist' idea of solidarity, which places a strong focus on the collective as a community between fellow workers; the 'Leninist' concept, which whereas on the same wavelength, places yet a strong focus on the working class and dismisses individual freedom as an ideal; and the 'classic social democratic' concept, which encompasses not only the interests of workers, but of other segments of the society, while it possesses an ethical and moral component based on a shared "feeling of community between those, who are included." Gould also emphasizes that through much of the twentieth century, solidarity has been tied to labor movements or to socialism; see Gould, *Globalizing Democracy and Human Rights* 66

[83] Cf. Peter Baldwin, *The Politics of Social Solidarity: Class Bases of the European Welfare State, 1875-1975* (Cambridge University Press 1990), discussing the solidaristic basis and the interests developed in or against social policy by various classes of society, in five states, namely in Britain, France, Germany, Denmark and Sweden, during the period of the late nineteenth and early twentieth centuries.

[84] See for instance Catherine Jacqueson, 'For better or for worse? Transnational solidarity in the light of Social Europe' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 380 et seq., 382

[85] Malcolm Ross, 'Transnational Solidarity: A Transformative Narrative for the EU and its Citizens?' (2021) 56 (2) Acta Politica, 234. See also Hostovsky Brandes, 'Solidarity as a Constitutional Value ' 74, 78, 84; Hostovsky Brandes uses transnational solidarity to refer both to solidarity between states or nations and among individuals across borders, while elsewhere she differentiates between transnational (as encompassing solidarity between states) and cosmopolitan solidarity (as solidarity among individuals across borders).

This idea has been aligned but *not entirely* anchored in a rights-oriented concept of EU citizenship[86] and has been characterized by its potential to deliver and bootstrap "stronger social integration"[87] within the territorial scope of the Union.

Solidarity as a mutually reinforcing dynamic among citizens and states has also been found in more focused formulations of the concept in the context of the Euro-crisis. Thereat, transnational solidarity has been conceived as "more than the mere compensation of disparate costs of adaptation necessary for the realization of a common transnational political order"[88] and it has rather been defined as a social norm that establishes relationships of mutual support and recognition.[89] The qualitative difference to other accounts of transnational solidarity is that through this lens, solidarity and in relation to social rights considerations has been understood as being closely linked to the idea of EU citizenship. That is to say, the Union has been viewed as a community of equal, free, and economically active as well as inactive citizens, where solidarity "presupposes a certain amount of community and at the same time creates this community."[90]

Next to such accounts of transnational solidarity, recent analyses that have been developed on the heels of the European financial crisis have taken a step further and placed emphasis on the actual social reality of citizens. Commentators on this route have approached solidarity by either pointing towards the linkage of the Union's citizens and their lived experiences at a micro level, or they have focused on the interactions of citizens with each other and drawn attention to the *relational* aspect of justice and solidarity in this regard, as a legally and normatively relevant parameter.[91]

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[86] Malcolm Ross, 'Solidarity—A New Constitutional Paradigm for the EU?' in Malcolm G. Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 36, 37, 38

[87] Ross, 'Transnational Solidarity: A Transformative Narrative for the EU and its Citizens?' 231

[88] See the *TSC-Transnational Solidarity Conflicts: Constitutional Courts as fora for and players in conflict resolution* project, a research group at the Friedrich-Alexander University Erlangen-Nürnberg affiliated with the Max Planck Institute for Comparative Public Law and International Law, Heidelberg; for an overview of the objectives and research output of the project, see https://www.tsc-project.org/en/topic/2.welcome.html <last accessed 19.08.2020>; see in particular subproject 6. Social recognition through judicial conflict resolution https://www.tsc-project.org/en/topic/34.social-recognition-through-judicial-conflict-resolution.html <last accessed 20.08.2020>

[89] Ibid, see subproject 1. The concept of transnational solidarity conflict, https://www.tsc-project.org/en/topic/29.the-concept-of-transnational-solidarity-conflict.html <last accessed 20.08.2020>; see also Farahat 46

[90] Anuscheh Farahat, 'Konflikte um Solidarität und Inklusion vor dem EuGH' in Monika Eigmüller and Nikola Tietze (eds), *Ungleichheitskonflikte in Europa: Jenseits von Klasse und Nation* (Springer Fachmedien Wiesbaden 2019) 240; translation from the German text to English provided by the present author. Farahat develops an account of transnational solidarity in relation to the judicial protection of social rights by the CJEU and places her focus on solidarity among citizens.

[91] See Banakar 2, 12, who argues that although solidarity has been developed as a principle in EU law to enhance the unity and cooperation between member states, the viability of this concept can be traced at the micro level in the lived experiences of EU citizens. On justice being a relational commitment among citizens, who advance interpersonal claims within the structures of the nation state, see Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015)

At first sight, academic analyses have seemed to agree that normative questions concerning solidarity on the supranational level could no longer be answered through appeals to the primacy of the national design, but rather required "global social responses that extend beyond the nation state."[92] However, the idea of the state in incarnating the idea of a transnational and cosmopolitan solidarity has not been outwardly dismissed. Instead, studies coming from comparative constitutional law suggested a different reading of transnational solidarity. In this respect, it has been submitted in legal scholarship that transnational and cosmopolitan solidarity can be cultivated through constitutional law as one state's own constitutional identity.[93] In other words, it has been stressed that transnational solidarity in the European constellation could be entrenched if it were aligned to "a state's own values and culture,"[94] namely if states forged solidarity relations with each other in a bottom-up, grassroots fashion and not through the imposition of transnational solidarity via international treaties in "a "top-down" manner."[95]

Closely linked to issues of domestic constitutionalism, other academics have endorsed an idea of transnational solidarity that is based on an enlarged idea of citizenship, while remaining aware of the distributional considerations usually attached to such claims. Set against the backdrop of post-crisis Europe, academics have envisioned an idea of solidarity that exceeds beyond the state yet respects the contracting intentions and commitments that members states have entered into, and that highlights the ties among Union citizens in a normative and institutional model of integration yet stays vigilant to the stability of national welfare systems.[96] In most of these accounts, solidarity as "a source of social integration"[97] has been associated with signs of an "institutional disorder"[98] or "institutionalized destitution"[99] manifested at the rank of political deliberation and judicial practice at a member states and Union level. Thus, institutionalized solidarity has been in the limelight of legal analyses, which have linked this to the very nature of the EU

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92 Andreas Fischer-Lescano, *Europäische Rechtspolitik und soziale Demokratie (*Internationale Politikanalyse, *Friedrich-Ebert-Stiftung, March 2010)* 4

93 Hostovsky Brandes, 'Solidarity as a Constitutional Value ' 86

94 Ibid

95 Ibid

96 See de Witte 70, 74 et seq. For an analysis of the strengthening of the social dimension of the EMU with national welfare systems and with EU fiscal and monetary instruments; see László Andor, 'The Impact of Eurozone Governance on Welfare State Stability' in Catherine Barnard, Frank Vandenbroucke and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 146, 158, 159

97 Silvana Sciarra, 'Social Law in the Wake of the Crisis' Centre for the Study of European Labour Law "Massimo D' Antona" Working Paper 108/2014 17

98 Ibid

99 Pervou 114. Concerning the term is borrowed here, Pervou does not make this argument in relation to solidarity but rather places this within the context of the Euro-crisis, identified as an institutional crisis, by looking at the judicial stance that European and Greek highest courts held during the early crisis years.

enterprise, its commitment to a social agenda as provided in its various treaty declarations and to solidarity's embeddedness in the EU *social acquis*.[100]

Taken within the bounds of an institutionalized understanding, yet plunging from different theoretical premises, other commentators have endorsed an understanding of solidarity as the organizing concept behind the institutional methodization of social rights in the form of social insurance and public services.[101] Placed within the wider rhetoric of the European crisis as a crisis of capitalism, solidarity has been examined in this regard as part of crisis theorizing through the lens of a socio-legal or broad critical theory analysis.[102] Seen within the contours of social democratic theory and steeped in the tradition of 'structural Marxism,'[103] scholars aligning to such criticism, have considered the system to be one of internal contradictions, conflict, and antagonism through class struggle.[104] In this connection, solidarity has been advanced as an axiomatic, non-negotiable and dogmatic "constitutional *value* and as an *achievement* of political constitutionalism."[105]

Accordingly, public services in the form of social rights have been seen as "a collective defense against the risks of existence,"[106] that is, against the existential precariousness that the market conveys onto the society through the burdening of and exposure to costs and risks.[107] Countering the neoliberal narrative that politics is violent and coercive as opposed to markets that are free and peaceful,[108] theorists of that school

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[100] Ross, 'Solidarity—A New Constitutional Paradigm for the EU?' 36, 41, 45; Kalypso Nicolaïdis and Viehoff Juri, 'The Choice for Sustainable Solidarity in Post-Crisis Europe' in Gordon Banji and others (eds), *Solidarity: For Sale? The Social Dimension of the New European Economic Governance* (Gütersloh, Bertelsmann Stiftung Europe in Dialogue 01 2012) 41

[101] Emilios Christodoulidis, 'Democracy, Solidarity and Crisis. Some Reflections on the State of Europe' in Alessandra Silveira, Mariana Canotilho and Pedro Froufe Madeira (eds), *Citizenship and Solidarity in the European Union: From the Charter of Fundamental Rights to the Crisis, the State of the Art* (P.I.E. Peter Lang 2013); Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 126, 128, 129

[102] An assessment of crisis theorizing from the perspective of systems theory and sociology of law has been presented earlier in the thesis; see Part II. Chapter 2.1.1. What is a Crisis? An Introduction.

[103] Structural Marxism is considered the theoretical current in Marxist historiography that has been associated with the works of philosopher Louis Althusser and sociologist Nicos Poulantzas; this current is based around the principled rejection of transcendence and the Hegelian negative dialectic in understanding subjectivity and places the emphasis instead on structuralism as the determinant factor of subjectivity; see for an introduction and discussion Emilios Christodoulidis and Marco Goldoni, 'Marxism and the political economy of law' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 108, 109. See also Geoff Boucher, 'Understanding Marxism' in Geoff Boucher (ed), (Acumen Publishing 2012) 131 et seq.

[104] Wilkinson and Goldoni argue that the constitutional order has a "conflictual dimension" and identify this "affinity with the Marxist tradition"; Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution' (2018) 81 (4) The Modern Law Review, 588

[105] Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 129, 140; emphasis added. See also Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* 229, 231

[106] Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 129

[107] Ibid 128, 135

[108] For an insightful analysis of the historical construction of this ideological dichotomy in human rights theory, see Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* 32, 33, 119, 160

of thought, evoked solidarity as the material foundation of the social welfare state and stressed that social rights are, in principle, the product of the antinomic articulation of social demands and social victories.[109] Solidarity and the notions of cooperation and emancipation have been portrayed in this regard as drivers of social reproduction and as social dynamics against the forces of market competition in a castellated class struggle.[110]

Placing the aforementioned critique in the settings of austerity governance across Europe, retrenchment in primary public expenditure and buoyance of tax revenues as part of the austerity reforms has been condemned as a regress of already established social entitlements. At the same time, the new governance displayed at the level of the European Union has been questioned for leading to the "eclipsing of democratic thinking"[111] through the curtailment of political routes and the loss of participation in democratic collective processes. In this framework, solidarity has been conceived as the foundation of the social welfare state, designating the responsibility among members of a society to help each other, not out of personal initiative and voluntarism or as an individualistic exercise of charity, but by virtue of the social ties that bind fellow citizens to each other.[112] Seen against this background, scholars, while identifying the erosion of the welfare state and lamenting the market-oriented direction and ideological consolidation of Europe in neoliberal politics, have stressed that in coming out of the financial and social crisis, "Europe would have to exist as a Europe based on solidarity, or it would not exist at all."[113]

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[109] Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 142 et seq. On solidarity being material, see O. Erik Eriksen, 'Structural Injustice: The Eurozone Crisis and the Duty of Solidarity' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer 2017) 110

[110] Goldoni and Wilkinson 586, 591

[111] Emilios Christodoulidis, 'The Myth of Democratic Governance' in Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 88

[112] Cf. Gould, 'Transnational Solidarities' 151; Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement' 142; Luca Bonadiman, 'Changing Paradigms: From Victimhood to Solidarity' (*Rights! On Human Rights and Democratisation*, 2021), where Bonadiman calls for the advancement of "solidarity as foundational principle of contemporary democratic societies in empowering peoples and individuals."

[113] Sonja Buckel and others, 'Europa wird ein solidarisches Europa sein, oder es wird nicht sein' in Sonja Buckel and others (eds), *Solidarisches Europa: Mosaiklinke Perspektiven* (VSA-Verlag Institut Solidarische, Moderne 2013) 10 et seq.; the quote is slightly paraphrased here. The original quote reads as follows: "Europe will be a Europe based on solidarity, or it will not exist at all."; translation from German to English provided by the present author.

8.3. In Search of Ethical and Ontological Answers

So far, it has been examined how solidarity has been stipulated at the level of the European Union level, within the constitutional letter of Greece and Portugal, and how this has been dealt with as a legal principle in the austerity case law of those countries. Adding to that, I have further sought to synopsize the ways in which solidarity has been broadly theorized against the backdrop of the financial crisis. In the remainder of this chapter, I proceed with an inquiry into the ethical justifications behind the notion of solidarity, which draw on intrinsic, yet often invisible, ontological presuppositions. To that end, I discern few prevalent ideas that have suffused the ethics discourse of solidarity, especially in the European social welfare states setting. These are the ideas of recognition and reciprocity,[114] as well as the concept of self-reliance, which are examined in the way they have been specifically related to solidarity. It should be emphasized here that in what follows, I do not approach individual authors in a way that purports to typify or thoroughly assess the entirety of their respective intellectual work.[115] Rather, in the following lines, I treat the examined viewpoints as representative of larger strands of literature that share similar yet not identical valuations and perform comparable interpretations on the common philosophical texts from which they derive their inspiration.

The aim of the succeeding inquiry is to highlight the philosophical premises upon which solidarity has been grounded and has in turn determined conceptions of the 'social' in social rights, not only during the crisis but long before that. Critically, the purpose of searching for the ethical premises of solidarity is to highlight the idea of *intersubjectivity* as a central mode of understanding relationality in solidary attachments. Applying this in retrospect, a preliminary and non-conclusive observation I make here, is that intersubjectivity has been a prevalent way in which individuals have been conceived - in their social nature and in the way they *form* social relations - in both liberal and social welfarist analyses of constitutional and transnational social solidarity, which have been employed during the examined financial and fiscal crisis. Following that examination, the idea of intersubjectivity will be of relevance in the concluding chapter of the thesis at hand, when we assess transindividuality as an idea countering both intersubjectivity and the presumption that subjectivity is solely determined through single structures.

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[114] The theoretical nuance between the concepts of recognition and reciprocity is acknowledged here. However, due to the limited scope of this study the concepts are used interchangeably.

[115] It should be noted here, that while examining the positions presented in this section, I do not offer an exhaustive account of the catalogue of arguments advanced in the laborious and longtime research of those authors but only a selective presentation of those arguments that are relevant to the angle of this study.

i. Reciprocity and Self-Reliance

Starting with the ideas of reciprocity and recognition, in current legal and political theory we find multiple registers in which these concepts reverberate. That is to say, reciprocity and recognition constitute vital pillars in both the liberal egalitarian tradition of the liberal welfare state and in social democratic thought surrounding the social welfare state,[116] where they are inscribed with a distinct *ethical* and *social* dimension upon which solidarity is grounded.[117] Due to the focused angle of the thesis at hand, the analysis is restricted to looking at how these concepts have been carved out mainly by calling on the philosophical thinking of Hegel and Kant and have been deployed in secondary literature with reference to the idea of solidarity and ethics.[118]

Drawing on the tenets of the Frankfurt School and the Hegelian legacy, Axel Honneth has written in a prolific and systematic manner on the theme of solidarity and has placed in this regard, *mutual recognition* at the nucleus of his theory of social freedom as positive liberty through social institutionalization.[119] Mutual recognition, according to Honneth, develops out of intersubjective relations, which are sustained by the perspective of a "we" as opposed to the standpoint of an "I" that is animated by the notion of negative freedom of liberal thought.[120] This intersubjective character of reciprocal recognition signifies the relationship of interdependence and mutual complementarity of freedom, where one completes the freedom of the other not only from an internally directed agency but, critically, through external conditions of institutional actualization.[121] The latter is where Honneth places his emphasis, namely on institutions and the ways in which these

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[116] Reciprocity has been a recurring concept and point of deliberation in the liberal egalitarian tradition as a ground to social justice and as a notion linked to solidarity as well as to questions of distributive justice. The analysis here does not investigate into this strand of literature but rather focuses on the idea of reciprocity as this has been addressed from within a Hegelian and Kantian perspective in the European political reality of the social welfare state. For a study of reciprocity from within egalitarian liberalism in relation to issues of fairness and as part of an inquiry into state theory, see Brian Barry, *Liberty and Justice: Essays in Political Theory* vol 2 (1991) 159 et seq., 211 et seq.; Rawls 12 et seq., 397 et seq.

[117] Cf. Rahel Jaeggi, 'Solidarity and Indifference' in Ruud ter Meulen, Wil Arts and Ruud Muffels (eds), *Solidarity in Health and Social Care in Europe*, vol 69 (Springer Netherlands 2001) 288; Juri and Nicolaïdis 283

[118] The reader should bear in mind that this analysis engages with the employment of reciprocity and self-reliance as these have been developed in secondary literature, and it does not delve into an examination of these concepts as they appear in the original works of Hegelian and Kantian philosophy. Hence, no direct references to the original texts of Kant and Hegel are made in this section.

[119] Selectively, see Axel Honneth, *Recognition: A Chapter in the History of European Ideas* (Joseph Patrick Ganahl tr, Cambridge University Press 2021); Axel Honneth, *Freedom's Right: The social Foundations of Democratic Life* (Joseph Ganahl tr, Reprint. edn, Cambridge: Polity Press 2014); Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso 2003). For an overview of Honneth's arguments, see Craig Browne, *Critical Social Theory* (Sage Publications 2017) 147, 148 et seq.

[120] Browne 149, 152

[121] Ibid 148, 149, 150

implicate the intersubjective character of the social bond by *socializing* individuals into an intersubjective and structurally-mediated understanding of freedom.[122]

Intersubjectivity in this regard takes the meaning "that the subject is constituted by what it has not entirely created itself and that the other is partly constitutive of one's identity and freedom."[123] Significantly, what appears to be of interest in Honneth's rendering of reciprocity for the purposes of the thesis at hand, is the idea of intersubjectivity, not only as an ethical framework of social justice but as an ontologically-relevant concept for the idea of sociality as such. In this respect, while drawing on the spirit of the Hegelian idea of the 'ethical life' (Sittlichkeit), Honneth notes that "Hegel's entire theory of justice amounts to an account of *ethical relations*; it presents a normative reconstruction of the layered order of institutions in which subjects can realize their freedom in the experience of mutual recognition."[124] In doing so, Honneth surpasses the idea of relations at the degree of interpersonal interaction and rather consolidates this concept at the level of institutionalized structures within the political system.[125]

Building upon the groundwork of the Hegelian idea of an 'ethical life' as well, yet scrupulously placing her attention on the concept of reciprocity rather than recognition, Rahel Jaeggi anchors reciprocity to solidarity as an explicit form of cooperation.[126] Resting on the idea of a common life form,[127] Jaeggi expounds the concept of an *enlarged reciprocity*[128] in her theoretical framework, as a source of not only social integration but crucially as a possibility for the individual's self-realization. Read along these lines, an 'enlarged reciprocity' goes past a simple relation of exchange and an understanding of cooperation on the basis of a commonality of interest. Instead, an 'enlarged reciprocity' invites us to think of solidaristic support as an expression of not only one's identity to the other but fundamentally as an ethical expression of one's one non-instrumental and symmetrical relatedness to *others*. That is to say, solidarity is understood as part of a communal life, and

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122 Ibid 149, 151

123 Ibid 151, the interpretation of Honneth's theory on intersubjectivity is according to Browne's reading of his theory.

124 Honneth, *Freedom's Right: The social Foundations of Democratic Life* 57, 58; emphasis added

125 Browne 152, 153

126 Jaeggi, 'Solidarity and Indifference' 287, 291, 293

127 In later works, Jaeggi refines this term as 'forms of life', which she frames as a bundle or ensemble of social practices, namely, as "a culturally informed "order of human co-existence" that encompasses an "ensemble of practices and orientations" as well as their institutional manifestations and materializations." See Rahel Jaeggi, 'Towards an Immanent Critique of Forms of Life' (2015) 57 (1) Raisons Politiques, 16 et seq.; Jaeggi, 'A Wide Concept of Economy: Economy as a Social Practice and the Critique of Capitalism' 166 et seq.

128 Jaeggi, 'Solidarity and Indifference' 293, 296

is invoked for the common cause of the preservation of this form of life and exigently for the flourishing of common projects to which individuals identify themselves.[129]

Within this framework, it is further submitted that solidarity denotes realizing and relating to the net of social interdependencies to which one is already connected, in the double meaning of knowingly recognizing and acting upon such realization.[130] In other words, Jaeggi ventures that solidarity denotes the ability to actively and positively relate and shape in a mutual, reciprocal and essentially *empowered* manner, the social bonds and dependencies, "in which the individual is, as a matter of fact, *always already involved*."[131]

The latter is significant because solidarity as a symmetrical relation signifies that this is not built upon a one-sided relation of dependency but is rather seen as an all-encompassing engagement of the individual in an ethical form of life that is premised in a mode of cooperation.[132] This differentiation between the symmetric and asymmetric dimension of relation is also critical because Jaeggi draws a distinct line, in this way, between altruism and solidarity. Given this, altruism is taken to likely denote a "relation between unequals"[133] and thus evokes distance and separateness, while solidarity subsists in the form of connectedness and mutual attachment and hence is informed by the idea of "standing in for each other."[134]

The distinction between solidarity and altruism is also acute in that it is diametrically opposed to alternative narratives of reciprocity, where the latter is understood on the basis of an individualized exercise of voluntary commitments, made by choice, and has a distinct aspect of self-interest and profitable end-result attached to it.[135] Jaeggi is categorical in this respect, that "the motivation for solidarity cannot be reduced to the *enlightened self-interest* of rationally calculating individuals."[136] This stands in opposition to utilitarian approaches to social theory, which questionably assume that self-interested reciprocity is "the mainspring of human *sociality,*"[137] and unapologetically advance an

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[129] Ibid 292, 295; see also Rahel Jaeggi, 'Rejoinder' (2021) 22 (2) Critical Horizons: Journal of Social & Critical Theory, 211

[130] Jaeggi, 'Solidarity and Indifference' 218, 297

[131] Ibid 298

[132] Ibid 291, 292; Jaeggi, 'Rejoinder' 211

[133] Jaeggi, 'Solidarity and Indifference' 291

[134] Ibid 288; emphasis added.

[135] For a discussion of that strand of literature, see Jennifer Eschweiler and Lars Hulgård, 'The social and solidarity economy sector: A bottom-up alternative?' in Paolo Chiocchetti and Frédéric Allemand (eds), *Competitiveness and Solidarity in the European Union: Interdisciplinary Perspectives* (London: Routledge 2018) 127, 132, 136, 140

[136] Jaeggi, 'Solidarity and Indifference' 292; emphasis added.

[137] G. Ken Binmore, *Natural Justice* (Oxford University Press 2005) 77; emphasis added. Binmore places reciprocity within a broader framework of social contract theory that is based on utilitarianism and operates an egalitarian norm.

understanding of reciprocity as *reciprocation*, driven by a calculating logic of material interest, and of solidarity as an action followed by an expectation of gaining advantage in return.[138] In a similar vein, Jaeggi's approach also runs counter to moderate accounts of solidarity from within the liberal egalitarian tradition, where "solidarity is located somewhere in between the notion of pure self-interest and ideal community."[139]

Going past such an understanding of reciprocity on the basis of individualism and personal utility, reciprocity as a form of non-instrumental and symmetric solidarity is commonly linked to social welfare arrangements of social security. In this connection, and despite the matrix of influences and variations that reciprocity takes within the different currents of social democratic thought, it could be argued that reciprocity in the social state essentially rewords in the idea of mutual cooperation and class interest. That is to say, being informed by an *ethos* of reciprocity translates in that solidarity, at the level of *relationality*, is to be considered "as a status of intersubjectivity, in which people are bound together, whether by a shared identity or by the facts of their actual interest, into mutual relationships of interdependence and reciprocal aid."[140] Critically, in this ideal reciprocal relation of mutual, interpersonal recognition,[141] each subject sees the other "both as its equal and also as separate from it."[142] Subsequently, "this *relation* is constitutive for *subjectivity*: one becomes an *individual* subject only by virtue of recognizing, and being recognized by, another subject."[143] Following this statement, it could be argued that

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138 For a discussion of literature on solidarity and reciprocity as an expectation, see Raphaela Hobbach, *European Solidarity: An Analysis of Debates on Redistributive Policies in France and Germany* (Springer 2021) 26, 27. See also the criticism at Ferrera 232

139 Juri and Nicolaïdis 285. Juri and Nicolaidis self-categorize their approach as falling into the philosophical category of the liberal egalitarian tradition; see ibid 279. Interestingly, the idea of the 'enlightened self-interest' in relation to reciprocity and cooperation is also found in moral accounts elevated from an economics and game theory perspective within a liberal egalitarian framework. For an argument in favor of 'enlightened self-interest' in relation to reciprocity, see the analysis by game theorist G. Ken Binmore, *Game Theory and the Social Contract*, vol 2nd (MIT Press 1994) 15 et seq., 266 et seq. which, however, I deem to be questionable in its assumptions and crude in its literary style. For a discussion of Binmore's argument and a Kantian-based examination of reciprocity from the standpoint of moral philosophy and game theory, see E. John Hare, 'Moral Motivation' in A. Simon Levin (ed), *Games, Groups, and the Global Good* (Springer 2009) 182.

140 Federico 506. Gould argues that "the context of recognition is a fundamentally intersubjective and social one, indeed one of reciprocal recognition, as Hegel argued […]"; see Gould, *Globalizing Democracy and Human Rights* 144.

141 On the significance of mutuality in recognition from the perspective of the "relationship" between the self and the other in the Hegelian thought, see Johanna Meehan, 'Intersubjectivity on the Couch: Recognition and Destruction in the Work of Jessica Benjamin' in Amy Allen and Brian O'Connor (eds), *Transitional Subjects: Critical Theory and Object Relations* (Columbia University Press 2019) 191, 192 Here, I do not assess intersubjectivity and subjectivity with respect to the Hegelian idea of identity; for an analysis, see Nancy Fraser, 'Rethinking Recognition' [2000] (3) New Left Review, 109 et seq. Deliyianni-Dimitrakou phrases Honneth's approach to human identity "as the product of *interpersonal* recognition in the framework of social relations."; emphasis added, see Deliyianni-Dimitrakou, 'Substantial Equality and Human Dignity' 7

142 Fraser, 'Rethinking Recognition' 109 et seq.

143 Ibid

individuality in the intersubjective model identifies with subjectivity, that is, the individual is subjected to another entity to which it relates yet stands in separation from.

This insistence on intersubjectivity, across which we usually come in pro social-welfarist analyses, is crucial, as I see it, because it renders intersubjectivity not only as an ethical justification to solidarity but significantly, as an ontological one. That is to say, the individual is taken to derive its ontological status by being integrated in an organized community of inert structures that pre-exist the individual and in which, as it has been examined above, the individual is "*always already involved.*"[144] Certainly, the "notion that we are always already involved in relations of recognition"[145] and reciprocity, takes on a variety of meanings in modern intellection, which are linked to the historical, cultural and political particularities of the contexts in which the term is employed.[146]

Paradoxically, and despite the differences in meaning that this notion has acquired across contexts, applying this notion to solidarity would mean, as Jaeggi points out, that "there would seem to be no fixed or certain foundation for solidarity, be it the cultural or historical origins of an individual or a group, their social, geographical, or organizational proximity, or even their objectively shared interests."[147] That is to say, intersubjectivity, as I understand it in reflecting upon such interpretations, means that the individual is considered already constituted by being subjected to already pre-existing social structures, irrespective of how these structures may vary in their different contexts.

This structural determination of subjectivity[148] that alludes to a further lack of the subject's agency in questioning the forces behind those structures, constitutes a central claim in theoretical explorations of the ethical foundations of solidarity on the duty/right dipole. Taken against the European social welfarist paradigm, it has been argued in legal literature[149] that solidarity stands for the duty of the social state towards its citizens and for a right to a dignified life that citizens advance towards the state. At the same time, solidarity is positioned as a duty of the citizens towards the state, while the latter requests "the sacrifice of individual interests and benefits"[150] for the existence of the community. Seen

144 Jaeggi, 'Solidarity and Indifference' 298
145 Honneth, *Recognition: A Chapter in the History of European Ideas* 4
146 Ibid
147 Jaeggi, 'Solidarity and Indifference' 291
148 Cf. Christodoulidis and Goldoni, 'Marxism and the political economy of law' 109
149 Federico 506, 507; Federico makes this argument in relation to the Greek austerity measures but extends her observations beyond Greece as a case-study and endorses the notion of solidarity as an "interconnection of rights and duties" in the face of critical situations.
150 Ibid 506

this way, solidarity as reciprocity practically transmutes in the interconnectivity between rights and duties that goes past an individual's virtue or discretion.

The idea of solidarity as a principle founded at the intersection of rights and duties has also been embraced in theoretical analyses that derive their inspiration from Kantian philosophy. In this respect, solidarity, set against the backdrop of the social welfare state, is not simply taken as a duty at a normative level, but it is considered to largely draw on the Kantian ethics of pure duty from a philosophical angle. Along this line of thinking, legal scholar, Stergios Mitas, places his focus on the Kantian idea of self-reliance with regard to resources (Selbstständigkeit), while looking for an ethical grounding of solidarity within the ideal of a redistributive and protective state. Solidarity is understood in this framework, as a fundamental principle of social justice before its legal institutionalization and as a derivative constitutional principle that is normatively structured on the dyad of right and duty in a bipartite way. That is to say, according to Mitas, self-reliance in its *affirmative* dimension, entails that citizens invoke their rights before the polity and the state to be self-reliant and align themselves to a right to solidarity that they bear mutually. In its *apophatic* dimension, the organized state carries an obligation for the promotion of the social welfare and ensures that everyone "contributes to the self-reliance of all."[151] Therefore, understood as a legal principle, solidarity provides for a content of social rights, seen as partial claims of the integral claim of oneself for equal and shared self-reliance.[152]

In substance, this approach does not deviate far from previous studies on the social welfare state and solidarity, and rather anchors the latter to the idea of liberty as social freedom with a focus on institutions. That is to say, Mitas invites us to understand the ethical grounding of solidarity on self-reliance, as a principle that essentially partakes in the fundamental condition of shared liberty among people under positive law.[153] However, the qualitative difference to the ethical accounts of solidarity examined above, which center on the Hegelian reciprocity, is that solidarity grounded upon the ideal of self-reliance does not conceive of liberty on the basis of self-realization or self-actualization,[154] bounded by a common goal. Rather, it is suggested that acknowledgment of self-reliance – that of both of ourselves and of others - is what commits us to a normative principle of shared liberty.

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[151] See Mitas, *Η αλληλεγγύη ως θεμελιώδης αρχή δικαίου* 31, 32, 51 et seq., 132, 133
[152] Ibid 134, 135, 149
[153] Ibid 141, 142
[154] According to critics, self-actualization or self-realization is a central theme in Hegelian ethics; see Robert Stern, 'Does Hegelian Ethics Rest on a Mistake?' in Italo Testa and Luigi Ruggiu (eds), *"I that is we, we that is I," Perspectives on Contemporary Hegel: Social Ontology, Recognition, Naturalism, and the Critique of Kantian Constructivism* (Brill 2016) 109 et seq.

Subsequently, reading this thesis under a social welfarist lens translates as follows: Solidarity *qua* self-reliance is posited as one's right to have enough resources to live a life in self-sufficiency and as a duty to contribute to the self-sufficiency of others under conditions of dignity that the welfare infrastructure ensures.

In this regard, both the right and the duty to solidarity stem from the imperatives of pure reason alone. Thus, freely self-legislating individuals, by applying reason to their inclinations, passions, and convictions, exercise their moral and legal duty for duty's sake.[155] Relationality to other individuals is subsequently grounded on the reasoned, self-imposed duty of the duty-bearer for the realization of their own freedom. Seen from this perspective, solidarity does not simply entail a degree of civic duty under a shared consensus that has no binding status.[156] Instead, if solidarity is understood as self-reliance at the level of one's own realization of personal freedom, this renders solidarity binding on the level of a shared moral duty that is principally grounded on reason. Thus, according to this theoretical framework, solidarity is distinctly dissociated from the field of personal sentiments, which is often cast as inconsistent and seemingly irrelevant to justice. [157]

Approaching freedom from a Kantian perspective as well, yet showing a great deal of interest in the relation of *affects* and not simply *reason*, Carol Gould puts forward her idea of solidarity as an ethical notion,[158] under the cognomen of "transnational solidarities."[159] In her rendering of solidarity, Gould stresses that her conception "centrally involves an *affective* element, combined with an effort to understand the specifics of others' concrete situations, and to imaginatively construct for oneself their feelings and needs."[160] To summarize the main aspects of Gould's take on solidarity, it is motivated by affective ties of concern, care and empathy and is characterized by an openness and receptivity to the concrete social contexts and perspectives of others, even though it is constructed through interactions and understandings over time.[161] In this framework, solidaristic interrelations can be purely discursive or they can occur through cooperative and common projects that are not statist in their focus but rather involve a wide net of cross-border, overlapping solidarities.[162] In her interpretation, Gould makes sure to emphasize that her

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155 Cf. Liosi 60
156 Cf. Rakopoulos, 'Resonance of Solidarity: Meanings of a Local Concept in Anti-austerity Greece' 318
157 See Mitas, *Η αλληλεγγύη ως θεμελιώδης αρχή δικαίου* 34, 37, 38, 39
158 Gould, 'Transnational Solidarities' 150, 152
159 Ibid
160 Carol C. Gould, *Interactive Democracy: The Social Roots of Global Justice* (Cambridge University Press 2014) 110, 111; emphasis in original.
161 Ibid
162 Ibid 25, 110, 112, 113

conceptualization of solidarity does not simply stand as a moral disposition but is attentive to institutional structures and to issues of inclusiveness and participation in deliberations through political routes with the aim of "improving the lot of others."[163]

Apropos "the difficult category of reciprocity,"[164] as encompassed in the idea of transnational solidarities, Gould underscores that she understands this "as an intentional relation of reciprocal recognition in which each person recognizes the other as *free* and *self-developing*."[165] Notably, reciprocity is considered in this frame as a prerequisite for the equal positive freedom of individuals.[166] Freedom, subsequently, takes the form of a life activity of *chosen* self-development or "self-transformation as *a process* over time."[167] Evidently, if set against interpretations of shared freedom that we have seen directly before, Gould understands the idea of freedom in a similar way to other accounts on solidarity. Namely, Gould takes freedom to be the end value of the goal in life that she typifies, even if this is conducted in the form of a continuing process across time. However, differently to other philosophical exegeses, Gould submits that what binds us to a normative principle of equal positive freedom is not self-reliance, but rather our recognition of the *agency* and *free choic*e of ourselves and others.

Similarly attentive to the affective dimension of solidarity, yet standing more closely to Honneth's social theory, the last position that is deemed relevant to mention here is that of Roberto Frega, who understands solidarity "as social involvement."[168] In the course of his theoretical framework, Frega draws attention to the *mutuality* of relations among individuals and on their direct and personal involvement in social practices of cooperation, which shore up his idea of 'fraternal coexistence.'[169] Contrary to what has been critically phrased in theory, as "sober brotherhood,"[170] namely "a brotherhood devoid of pathos, but nevertheless able to foster and sustain a minimum of economic solidarity, inspired by "primitive" ethical principles,"[171] Frega elevates his idea of 'fraternal coexistence,' as a concept where sympathy, personal attachments and emotional bonds are

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163 Ibid 113; Gould does not use the customary expression "common lot" but rather refers to "the lot of others."
164 Gould, 'Transnational Solidarities' 157
165 Gould, *Globalizing Democracy and Human Rights* 42; emphasis added.
166 Ibid
167 Ibid 33; emphasis added.
168 Frega, 'Solidarity as Social Involvement' 20 et seq.
169 Ibid 24. Roberto Frega assesses Honneth's social and political philosophy and what he phrases as abstract solidarity, fraternal coexistence and reflexive cooperation, being central concepts in Honneth's thinking; see Frega, 'Reflexive cooperation between fraternity and social involvement' 676 et seq.
170 Ferrera 232
171 Ibid

all deemed necessary ingredients of social cohesion.[172] However, differently to other accounts on solidarity, Frega draws attention to the importance of shared affectedness and to concrete interaction among interdependent agents.

This is what makes Frega's account of solidarity engrossing, namely his careful consideration and insistence on the neglected element of the lived aspect of solidarity. To put it simply, Frega seems well aware that solidarity, in the largely influential Hegelian tradition of abstract solidarity, as he calls it, implies that the latter cannot be achieved outside a set of social and political institutions.[173] This abstract form of solidarity, Frega further observes, takes as a *pregiven* that social cooperation is *always only* realized through institutional mediation, which in scholarly contributions, has come to be a synonym for the general redistributive function of the welfare state.[174] Nevertheless, although Frega acknowledges and preserves the original intuition of institutionalized solidarity, his suggestion of solidarity as social involvement aspires to go "beyond this limitation."[175] In this regard, the author insightfully points out that while abstract solidarity is determined by institutionally mediated social relations, solidarity as social involvement is rooted in the lived experience of affected individuals.[176]

ii. Solidarity and Mutual Aid

Having shortly assessed the idea of solidarity on the basis of reciprocity, self-reliance, and social involvement, in the remainder of this chapter I turn a spotlight to the notion of *mutual aid*, which, though relatively peripheral in scholarly discussions, has evolved in parallel with solidarity and has been approached either as constituted by solidarity or as constituting solidarity. Going back to Gould's theoretical framework, in her envisioning of a transnational solidarity as an ethical norm, the philosopher places her attention on mutual concern and mutual aid as central notions of the "newer sense"[177] of transnational solidarity that she suggests. In this regard, mutual aid is taken as a general category that involves "some degree of fellow feeling and a positive moral *obligation* to act."[178] Gould acknowledges the horizontality that is implicit in mutual aid practices among individuals and associations at a grassroots level and links these practices to relations that

[172] Frega, 'Solidarity as Social Involvement' 24
[173] Ibid 9, 10, 13, 14
[174] Ibid 12, 23
[175] Ibid 23
[176] Ibid 12, 13, 16, 18, 28
[177] Gould, *Interactive Democracy: The Social Roots of Global Justice* 105 et seq. On solidarity as an ethical notion and its inherent dimensions of mutuality from a Kantian perspective, see also Eriksen 112
[178] Gould, 'Transnational Solidarities' 154; emphasis added.

are democratic in character.[179] While doing so, however, she neglects to scrutinize the forms of democratic processes that she makes mention of. That is to say, Gould does not scrutinize whether these procedures are manifestations of a representative or direct democracy and overlooks in this regard much of the historical and ideological context in which the concept of mutual aid has been instantiated. Put differently, Gould fails to mention pre-dating theoretical works to which mutual aid appeals historically and which, in principle, break ranks with state-focused and hierarchical theories of solidarity.

This is particularly interesting if we look at the concept of mutual aid as it has surfaced and has been conceptualized as a form of horizontal, non-institutional and non-state, informal solidarity in view of the austerity. Placing this type of solidarity against the backdrop of the crisis years in Europe, mutual aid has taken the form of solidarity-based mobilizations, even in countries like Greece and Portugal, where the social welfare systems in place have traditionally set the tone for a type of institutionalized 'political solidarity'[180] and have denoted skepticism towards informal types of solidarity as being voluntarist and dubious.[181] However, even in such national contexts, practices of informal solidarity and mutual aid have emerged in an effort to contest and bring forward alternatives to austerity based on horizontal, non-hierarchical arrangements of non-state, grassroots networks and political deliberations of direct democracy.[182]

Moving at a theoretical level, recent analyses coming from law and constitutionalism have drawn attention to the idea of mutual aid in its ethical and conceptual historicity, not as a derivative, descriptive[183] feature of *institutionalized solidarity* but rather as the other major ethical and ideological bascule that has been advanced by philosophical anarchism[184] in defiance of the structuralist Marxist-socialist solidarity of the

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[179] Ibid 158; Gould, *Interactive Democracy: The Social Roots of Global Justice* 112

[180] Nikos Kourachanis, Varvara Lalioti and Dimitris Venieris, 'Social policies and solidarity during the Greek Crisis' (2019) 53 (5) Social Policy & Administration, 679, 680, 688

[181] Cf. Theodoros Rakopoulos, 'Solidarity's Tensions: Informality, Sociality, and the Greek Crisis' (2015) 59 (3) Social Analysis, 93

[182] In the case of Portugal, see Catarina Frade and Lina Coelho, 'Surviving the Crisis and Austerity: The Coping Strategies of Portuguese Households' (2015) 22 (2) Indiana Journal of Global Legal Studies, 642, 643. Kourachanis, Lalioti and Venieris, argue that in Greece there has been a new type of mixed solidarity between 'institutionalized' and 'informal' versions of solidarity that placed emphasis on both state and non-state actors; see Kourachanis, Lalioti and Venieris 680, 681. Rakopoulos also documents "informal solidarity networks of mutual aid" that developed in Greece during the austerity years; see Rakopoulos, 'Resonance of Solidarity: Meanings of a Local Concept in Anti-austerity Greece' 318 et seq., 327

[183] Gould, 'Transnational Solidarities' 153

[184] The thesis at hand echoes here the analysis by Andrea Iossa, who differentiates between political anarchism and philosophical anarchism and aptly notes the following: "[A]narchism is a very wide social, political, and philosophical spectrum in which several streams, traditions, and movements coexist. Since the aim of this contribution is not to explore anarchism as a kaleidoscope of political experiences, the analysis is conducted by considering anarchist theory unitarily through the recognition of its recurrent and common features." These are, to borrow the words of Ruth Kinna, Alex Prichard and Thomas Swann, the "principles

welfare state.[185] In this accord, mutual aid stands as a distinct principle of horizontal processes of real democracy and constitutionalizing,[186] which are bereft of hierarchies, bestowed with care and cooperation, skeptical towards any externally imposed authority, and dismissive of the state as the defining and exclusive framework through which relations are organized and flourish.[187] This could be argued to further translate in two ways. At the level of the organization of society, conceptions of cooperation and mutual prosperity are not understood and substantiated through the hierarchical relationship of a granting state and the recipient subjects of welfare. At the level of ethics, mutual aid grounds an understanding of morality "without obligation or sanction"[188] and stands as a way of organizing life opposite to what has conventionally been taken as the self-evident mode endowing life based on rivalry, morality out of obligation, and power.[189]

These are not the only aspects that distinguish the notion of mutual aid when contrasted to a liberal-individualistic or social welfarist concept of solidarity. Mutual aid, as elevated in this context, proffers ontological hypotheses different to the ones examined above. That is to say, the presuppositions upon which mutual aid is grounded, fundamentally challenge long-established ontological assumptions on the alleged unsocial, antagonistic and bellicose human nature, which is further taken to be premised on egotistic impulses and inclinations,[190] and essentially on sociality understood, in its Kantian-inspired roots, as 'unsocial sociability.'[191]

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of horizontality, solidarity, mutual aid"; see Ruth Kinna, Alex Prichard and Thomas Swann, 'Occupy and the Constitution of Anarchy' (2019) 8 (2) Global Constitutionalism, 385; Andrea Iossa, 'Anti-Authoritarian Employment Relations? Labour Law from an Anarchist Perspective' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Hart Publishing 2019) 224, 233, 234

[185] Here, I refer to the manuscript by Pëtr Alekseevič Kropotkin, published in 1902 under the title *Mutual Aid*, for which Kropotkin is considered to be best known for; see Ruth Kinna, 'Kropotkin's Theory of Mutual Aid in Historical Context' (1995) 40 (2) International Review of Social History, 259, 260. Analyses on solidarity from a social welfarist state-focused perspective have stood contrary to Kropotkin's theory of mutual aid. See for instance Mitas, *Η αλληλεγγύη ως θεμελιώδης αρχή δικαίου* 28, who oxymoronically calls Kropotkin, "the anarchist Prince" and who dismisses his theory on the basis that it draws on socio-biological evidence and empirical documentation of mutual assistance cases, which are of merely anthropological interest and cannot allegedly advance a broader theoretical synthesis and a reasoned justification of solidarity.

[186] Cf. Kinna, Prichard and Swann 368, where Kinna, Prichard and Swann note that while not clearly defined, 'real democracy' is a term used to connote direct and participatory democracy and to distinguish the values of democracy from its institutionalization.

[187] Elena Loizidou, 'Planetary Confinement: Bio-Politics and Mutual Aid' (2021) 32 Law and Critique, 133, 134, 135. Kinna, Prichard and Swann 371, 385; Iossa 234

[188] Kinna 278

[189] Cf. The analysis about the differentiation of mutual aid to that of power as a way of organizing life at Loizidou 138

[190] Pëtr Alekseevič Kropotkin, *Mutual Aid: An Illuminated Factor of Evolution* (Introduction by David Graeber & Andrej Grubacic; Foreword by Ruth Kinna; Afterword by Allan Antliff, 1902 1st edn, PM Press 2021) 64

[191] Cf. Iossa 235. In the essay 'Idea for a Universal History with a Cosmopolitan Purpose' in the Fourth Thesis, Kant had described humanity's 'Unsocial Sociability' (Ungesellige Geselligkeit) as follows: "*The means which nature employs to bring about the development of innate capacities is that of antagonism within society, in so far as this*

To briefly expand on that, an enduring assumption about human sociality and the organization of society is that competition is "nature's means for the development of human faculties,"[192] while the state is considered to regulate such competition.[193] Thus, in this frame, social progress, rather than overcoming antagonism, is justified as being parasitic upon it.[194] Antagonism in this regard, is understood as the rootstock and the driver of the society. By extension, solidarity in this narrative, is taken as the cooperation and union of those having common interests in a society that is nonetheless defined by "mutual bloodletting."[195] Put differently, *conflict* in interactions is the only aspect against which social relations are measured and solidarity in the form of cooperation, is only sustained as a counterbalance to a social living, where conflict is allegedly endemic[196] and fundamentally justified upon an antagonistic and *negatively* defined sociality.

Differently to such assumptions about human nature and sociability, mutual aid submits that the conscious realization "of the close dependence of every one's happiness upon the happiness of all"[197] underpin human co-existence and solidarity.[198] In other words, a theoretical frame of mutual aid assumes that social propensity for happiness over despair and conflict is "the real principle of morality."[199] What differentiates this understanding of solidarity as mutual aid, from other accounts, is the genuine doubt and refutation of the wider emphasis on the 'unsocial' and violent propensities of human nature, which runs through Western philosophical thinking. Mutual aid surpasses in this

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antagonism becomes in the long run the cause of a law-governed social order. By antagonism, I mean in this context the *unsocial sociability* of men, that is, their tendency to come together in society, coupled, however, with a continual resistance which constantly threatens to break this society up."; emphasis kept according to the original source. See Hans Reiss (ed) *Kant: Political Writings 1724-1804* (Hugh Barr Nisbet tr, Cambridge Texts in the History of Political Thought, 2nd edn, Cambridge University Press 1991) 44. Kant's reference to man's "unsocial sociability" in the Fourth Thesis, is stated to have been of particular interest to both Hegel and Marx; see https://www.marxists.org/reference/subject/ethics/kant/universal-history.htm <last accessed 19.06.2021>

[192] Allen Wood W., 'Unsociable Sociability: The Anthropological Basis of Kantian Ethics' (1991) 19 (1) Philosophical Topics, 344

[193] Ibid

[194] Cf. Michaele Ferguson, 'Unsocial Sociability: Perpetual Antagonism in Kant's Political Thought' in Elisabeth Ellis (ed), *Kant's Political Theory: Interpretations and Applications* (Penn State University Press 2012) 166. On the inherently antagonistic structure of western ontology, see also the analysis Woods, 'Rights as Slogans: A Theory of Human Rights Based on African Humanism' 53, 54

[195] Cf. Mitas, *Η αλληλεγγύη ως θεμελιώδης αρχή δικαίου* 28, who argues that the justification of solidarity cannot be attained through a theory of mutual aid, because the latter is not capable of explaining the "mutual bloodletting" of the living world.

[196] For an analysis from a constitutional law perspective, which contends that conflict is "endemic to the process of constitutional ordering"; see Goldoni and Wilkinson 588

[197] David Graeber, *Introduction to Peter Kropotkin Mutual Aid: An Illuminated Factor of Evolution* (Introduction by David Graeber & Andrej Grubacic; Foreword by Ruth Kinna; Afterword by Allan Antliff, 1902 1st edn, PM Press 2021) 20, 21

[198] Ibid

[199] Kropotkin 228

regard, an interpretation of solidarity that is unduly insular and defined by exclusive, closed bonds of shared experience or interest, or that is "unduly political in the sense of being instrumental and strategic."[200] What is more, this conception elevates happiness over rivalry as the motive behind solidarity and recenters sociability as an essential aspect of solidary practices, which operate as fora "in which selves-in-relationality are forged."[201]

Ultimately, it could be argued that solidarity as mutual aid invites us to think of solidarity not as 'solidus,'[202] that is, as an idea of relations, which by narrowly drawing on the Latin etymological origins of the term, is cemented into a solid ground of bounded places and encased selves, who are solidary only to protect their interests from imminent or occurring threats. Understood in this way, solidarity stands merely as a reaction, that is, as a shield and sword against economic adversities, social distress and political cynicism, and as a concept that is always already negatively defined in a society that progresses through conflict.

Contrary to such socio-ontological assumptions of human social nature and of co-existence, solidarity as mutual aid conceives of human relationality and sociality as affirmative and embracing, based on agreement and empathy with the aspiration for mutual happiness. It thus fluctuates, one could say, as an idea in which generosity, friendship and trust, which have been so "stubbornly dismissed"[203] by mainstream social theories, provide a different way of understanding of social being and social reality. A social reality where solidarity is not determined by conflict, animosity and social detachment but rather by mutual understanding, rapport and social attachment.[204] Arguably, as it has been suggested in theory, the challenge posed by the idea of mutual aid "runs deeper still, as it's not just about the nature of government but also *the nature of nature*—that is, *reality*—itself."[205] For the angle of this study the enunciation of that position calls to mind the formulation of social ontology as the study of nature of social reality, which is addressed in more detail in the chapters immediately after.[206]

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[200] Bruce Jennings, 'Solidarity and Care as Relational Practices' (2018) 32 (9) Bioethics, 556
[201] Theodoros Rakopoulos, 'Solidarity: The Egalitarian Tensions of a Bridge-Concept' (2016) 24 (2) Social Anthropology, 144
[202] Cf. Jaeggi, 'Solidarity and Indifference' 288
[203] Graeber, *Introduction to Peter Kropotkin Mutual Aid: An Illuminated Factor of Evolution* 23
[204] Cf. Rakopoulos, 'Solidarity's Tensions: Informality, Sociality, and the Greek Crisis' 94
[205] Graeber, *Introduction to Peter Kropotkin Mutual Aid: An Illuminated Factor of Evolution* 19; emphasis stated as in the original.
[206] For an analysis of the social ontology question, see Part V. Chapter 10.2. Social *qua* Relational: The Question of Social Ontology.

9. Vulnerability and Social Rights

9.1. Vulnerability Theories and the Social Justice Discourse

Having assessed the notion of solidarity as an ethical foundation and justificatory basis of conceptions of social rights, in this chapter I proceed to explore vulnerability as a potential ethical framework in justifying and conceptually realizing social rights. Vulnerability is a concept that has been generally ignored or marginalized in mainstream legal theory, or when used, it is usually understood as a notion on the basis of which derivative claims to solidarity are made. It is thus approached as a concept on the basis of another concept and is rarely assessed on its own merits. In addition, vulnerability in legal contexts is usually invoked as a concept applied to only specific individuals or groups, who are classified as vulnerable groups and minorities in need of enhanced protection. In line with this, the appeal to vulnerability is usually made on the basis of a comparison, that is to say, when speaking of vulnerability, this is invoked as a comparator for people to be viewed as more or less vulnerable, or as uniquely vulnerable compared to other people.[1] In turn, social theory, when addressing the issue of vulnerability, does so by focusing on the question of identity or discrimination and not on questions of citizenship or social justice, or on wider overarching issues of ontological and epistemological nature, as will be analyzed later in this chapter.[2]

Despite this limited view on the concept of vulnerability, the latter has started to receive renewed interest in contemporary discussions, not only in moral philosophy and bioethics but also in other areas of philosophical thinking, in legal theory and in relation to questions of human rights and social justice at an academic and grassroots level.[3] During

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[1] Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 82

[2] Trudie Knijn, Tom Theuns and Miklos Zala, *Multidisciplinary Perspective on Justice in Europe (*Report written within the Framework of Work Package 2 "Justice and Fairness – Philosophical Foundations", *ETHOS Consortium European Commission Horizon 2020 Research Project, 18 October 2018)* 19, 32

[3] For instance, see Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 1. See also the conference organized at the New School for Social Research under the title "Phenomenology and Vulnerability," between May 5–6, 2016, whose aim was to showcase the importance of phenomenology in understanding vulnerability, to open up a dialogue with other philosophical fields, such as anthropology and feminist theory, among others, in assessing vulnerability, and to raise awareness on the complexity and relevance of the concept of vulnerability and endorse contemporary philosophical research on vulnerability and its potential impact on the society; see https://events.newschool.edu/event/phenomenology_and_vulnerability_conference <last accessed 12.02.2021>. For a critical assessment of vulnerability from a view from the ground see Gabriela Vera-Cortés and Jesús Manuel Macías-Medrano (eds), *Disasters and Neoliberalism: Different Expressions of Social Vulnerability* (Springer International Publishing 2020), which is based on fieldwork and historical findings in Mexico, Brazil, Italy, and the USA, and explores social vulnerability to disasters in these countries. See also how the concept of vulnerability has lately received attention in the context of queer studies, in particular concerning the notion of 'femmebodiment', understood as a daring openness of inherent, constant and continuous

the aftermath of the US-EU financial crisis and the Euro-crisis, rich and diverse scholarship coming from US thinkers on social law and vulnerability as well as from large-scale theoretical projects on the philosophical foundations of justice in Europe, its heritage and its future, have placed the notion of vulnerability at the epicenter of this undertaking.[4] The examination of vulnerability is thus deemed relevant and significant for the analysis here, because it is currently undergoing a renaissance in law and political economy studies and in legal theory, while it is further linked to social rights and social justice questions.

When looking at vulnerability from the perspective of social theory, common questions asked in relevant literature are: Why does vulnerability give rise to obligations and duties of justice and who bears primary responsibility for responding to vulnerability?[5] As the authors I will examine in this chapter help to demonstrate, the idea of vulnerability is tied to questions of social ontology and notions of interdependence and interconnectedness. Answering the question of who bears responsibility to the vulnerable or who can oblige whom to ensure justice by virtue of their vulnerability,[6] brings forward questions on who the vulnerable are, and why oneself might be considered to be vulnerable in the first place.

From a legal perspective, the discussion around vulnerability has also been recently carried out on the level of its normative force and with respect to human rights justification. In particular, some theorists assess vulnerability in relation to the well-established notion of human dignity.[7] In this respect, they argue that awareness of

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embodiment, as a queerly feminine corporeality of embodiment, see Ulrika Dahl, 'Femmebodiment: Notes on Queer Feminine Shapes of Vulnerability' (2016) 18 (1) Feminist Theory, 37.

[4] See in particular the ETHOS project, which was an EU Horizon 2020 project that ran from 2017-2019 and was developed with the aim of creating a new integrative perspective and space for thinking about justice and fairness with a particular focus on Europe and where the notion of vulnerability was deemed of particular importance "to the ETHOS project as a whole," as stated in Simon Rippon and others, *Report on the European Heritage of Philosophical Theorizing about Justice (*Report written within the Framework of Work Package 2: Philosophical Foundations for a European Theory of Justice and Fairness, *ETHOS Consortium European Commission Horizon 2020 Research Project, June 2018)* 22; for more information see the ETHOS website https://ethos-europe.eu/ <last accessed 14.03.2020> See also Trudie Knijn and Dorota Lepianka (eds), *Justice and Vulnerability in Europe: An Interdisciplinary Approach* (Edward Elgar 2020) and Victoria Browne, Jason Danely and Doerthe Rosenow (eds), *Vulnerability and the Politics of Care: Transdisciplinary Dialogues* (Oxford University Press 2021). Concerning the US-scholarship on vulnerability and social justice, see the rich and extended scholarship of legal philosopher Martha Fineman, who approaches vulnerability by endorsing a state welfarist idea of social justice, as it is analyzed in detail further in this chapter.

[5] Mackenzie, Rogers and Dodds 1

[6] Cf. Rippon and others 24; Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999) 62-64

[7] See Turner 9, where Tyler argues that"[t]here is a *foundation* to human rights—namely, our *common vulnerability*," and wishes to "develop a robust defense of universalism from the perspective of *a social ontology of human embodiment*"; See also ibid 5, where it is stressed that the author wishes to contribute to the study of rights "from the perspective of the sociology of the human body"; and ibid 6 where it is noted: "Human rights can be defined as universal principles, because human beings share a *common ontology* that is grounded in a *shared vulnerability*."; emphasis added. See also Corina Heri, 'Justifying New Rights: Affectedness,

vulnerability has contributed to the recognition of human rights over the course of years, and that legal rights and entitlements are grounded on a *common ontology* of shared human vulnerability rather than on human dignity, which has been considered the basic foundation in post-war justifications of human rights. Contrary to such an approach, which gives precedence to vulnerability over dignity, other scholars argue that vulnerability is merely "a factual *condition*,"[8] notably a descriptive feature of human beings without any normative value, and for that it is human dignity rather than vulnerability that provides for the foundation of universal human rights.

Of course, the discussion on the relation of vulnerability to rights is not a recent one. As it has been suggested in relevant scholarship, a historically common interpretation of vulnerability is found in the sense of victimhood.[9] In this regard, it has been argued that the devastating nature of the Second World War "led to a heightened awareness of human vulnerability,"[10] in European welfare states. In this European post-war framework, victimhood has been translated into vulnerability[11] in the sense that members of groups of past mass and gross injustices were considered as psychologically and materially vulnerable and acquired victim status.[12] Along these lines, vulnerability has taken the form of "a *concern,"*[13] whose purpose has been to inform the basis for legal entitlements and rights before courts and towards the establishment of an emerging post-war European value system, grounded on the acknowledgement of vulnerability and respect for human dignity.

Without focusing on the historicity of vulnerability as a term or the theoretical debate over whether human rights are grounded on dignity or vulnerability, I am rather interested in the fact that human rights justifications are sought in ontological terms and are in turn framed by means of vulnerability, with the latter being understood as a social ontology of shared human embodiment. I find this framing important because it addresses a long-standing gap in theoretical approaches to vulnerability studies and human rights,

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Vulnerability, and the Rights of Peasants' (2020) 21 (4) German Law Journal, where Heri argues that the legal-ethical concept of vulnerability can serve to craft a convincing theoretical account of human rights protections and examines this by juxtaposing it to the political science concept of affectedness.

[8] Roberto Andorno, 'Is Vulnerability the Foundation of Human Rights?' in Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer 2016) 264, 270; emphasis in original.

[9] András Sajó, 'Victimhood and Vulnerability as Sources of Justice' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 338 et seq.

[10] Andorno 264, 270

[11] Sajó, 'Victimhood and Vulnerability as Sources of Justice' 342, 343; This was not the case for the United States, however, according to Sajó, who notes the following: "The US Supreme Court hardly ever endorsed a judicial policy recognizing victim status as a means of undoing past injustice. This is consistent with the Supreme Court's general dislike towards empirically non-identifiable standards."

[12] Ibid 343; emphasis added.

[13] Ibid; emphasis added.

namely a gap resulting from the lack of scholarship which inquires into vulnerability and law from an ontological perspective or through a critical assessment of existing contributions thereof.

Bringing vulnerability to the level of social justice claims, this has been contextualized differently according to diverse historical backgrounds and it has taken multiple meanings within republican, liberal and social welfarist traditions in different parts of the world. Most of the scholars that I inquire into in this chapter assess vulnerability from a perspective that focuses on the historical, political and legal context of the United States. This is because vulnerability has been a subject-matter of interest in scholarship coming from the US to a large extent during the last decades. In this context, critique or endorsement of liberalism as a framework to social theory as well as of neoliberalism as an ideological orientation in US welfare and social policies, are encountered in relevant scholarly contributions. Within a liberal paradigm, it is held in this context that justice is a fundamentally abstract, generalized, universal construct, which is de-contextualized from concrete, situated and material particularities.[14] The neoliberal ideal is further understood to uphold the ideal of a sovereign, free, rational and paradigmatically fully-capable and functioning subject that translates in socio-economic terms into an economically independent, self-centered, invulnerable and effectively disembodied subject.[15]

Despite this historical and geographical particularity that focuses on the US social politics, several scholars stress that the above-mentioned neoliberal prescriptions have also infiltrated and have come to determine philosophical understandings of the ethical, the political and the legal in contemporary societies outside the US.[16] In this respect, it is underscored that in recent politics, which are shaped by global policies of austerity, there is a "growing fixation on personal responsibility, individual autonomy, self-sufficiency and independence,"[17] followed by a restraint on behalf of the state on social rights protection and social welfare schemes. In light of the above, 'vulnerability' as a theoretical category is considered to be fleshed out by the standards laid down by a neoliberal mode of thinking. Seen in this way, vulnerability is deemed to further evidence "the existence of a normatively

[14] Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005) 127, 128; Costas Douzinas, *The Radical Philosophy of Rights* (Routledge 2019) 44, 45

[15] For an analysis on sovereignty as a central category of modern political thought that builds on the ideas of indivisible self-mastery of the subject, the relation of sovereignty with vulnerability, and the possibility of a transformative political subjectivity of "nonsovereignty" see Athena Athanasiou, 'Nonsovereign Agonism (or, Beyond Affirmation versus Vulnerability) ' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 267-269

[16] Sigridur Thorgeirsdottir, 'Shame, Vulnerability and Philosophical Thinking' (2020) 59 (1) Sophia: International Journal of Philosophy and Traditions, 7

[17] Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 82

preferred *modus vivendi*, governed by neoliberal ideals of self-sufficiency, responsibility and *in-* rather than *inter*-dependence,"[18] in European settings as well.

Due to this influence of neoliberalism to all fields of existence and lived experience, vulnerability approaches to social justice extend beyond the Anglo-American boarders and resonate with economic policies and social welfare practices within the European context. To use the words of American legal scholar, Martha Fineman, she contends that despite the fact that the development of her theory of vulnerability "began as a stealthily disguised human rights discourse, *fashioned* for an *American audience*,"[19] this has evolved past early articulations and has acquired "some significant strength as an independent universal approach to justice, one that focuses on exploring *the nature of the human*, rather than the rights, part of the human rights trope."[20]

Building on these considerations, I proceed in this chapter with an exploration of what vulnerability means and take a critical stance towards the prevailing theories around this concept in ethics and legal theory. Against this background, I do not assess vulnerability as a terminology that is encountered in specific legal texts, treaties or judicial practices and in the rationale of courts' judgements.[21] Furthermore, I do not examine vulnerability as a legal concept invoked on the basis of structural injustices and deliberate discriminations that specific marginalized populations and individuals belonging to a protected category or minority face. Neither do I analyze vulnerability by looking at the recognition and legal protection of those groups and individuals specified in particular legal documents and human rights provisions. What I problematize instead is the notion of vulnerability and its relation to the discourse on the social ontology of law and legal

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[18] Dorota Lepianka and Trudie Knijn, 'Introduction' in Trudie Knijn and Dorota Lepianka (eds), *Justice and Vulnerability in Europe: An Interdisciplinary Approach* (Edward Elgar 2020) 11; emphasis in original.

[19] Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham [u.a.]: Ashgate 2013) 13; emphasis added. Fineman raises this point regarding her own personal writing journey.

[20] Ibid; emphasis added.

[21] See for instance Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 1 (3) Oslo Law Review; Carolina Yoko Furusho, 'The Selective Framing of 'Vulnerability' in the European and the Inter-American Human Rights Courts: A Socio-Legal Analysis of Juridical Praxis' (PhD Thesis, University of Kent at Canterbury 2020); See also Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham [u.a.]: Ashgate 2013) 147, 151-162, where Timmer, by examining case-law on persons with mental disabilities, women in domestic violence or precarious reproductive health situations and asylum seekers, among other cases, argues that "[a] revolution is quietly taking place in the case law of the European Court of Human Rights ('ECtHR', 'the Court' or 'the Strasbourg Court'). Without occasioning much comment, the Court is increasingly relying on vulnerability reasoning." On a most recent account of the treatment of vulnerability by the European Court of Human Rights, and an exploration of philosophical-legal understandings of the concept see also Heri, *Responsive Human Rights: Vulnerability and the ECtHR*

subjectivity and the latter's implications for the meaning of social justice and social rights. As it has been stressed in literature, "social theory has wrestled with ontological and epistemological dilemmas from its origins."[22] In light of this observation, I conclude the chapter by examining recent critiques, which challenge prevailing ontological assumptions informing contemporary ethical bases in social justice theories.

In particular, in the ensuing paragraphs I dwell on Michael Sandel's idea of humility and vulnerability, Martha Nussbaum's capabilities approach and its relevance to social theory and vulnerability, and Martha Fineman's vulnerability theory to social justice, which has been gaining momentum in ethics and social law studies. The aim to engage with these theoretical frameworks is twofold: first, to decipher how vulnerability as a concept relates to social justice, and second, to potentially open up a dialogue for an interpretation of social rights that incorporates but is not exclusively anchored in the notion of vulnerability.

As will be examined below, a common approach to understanding vulnerability in scholarship is by means of dividing relevant interpretations into either ontological or so-called social approaches to vulnerability. As I go along, I examine the ontological-social distinction to understanding vulnerability. However, I do not subscribe to this categorization and rather proceed with a different classification of my own. In particular, I differentiate between what I call liberal-moral approaches, critical-welfarist approaches and the widely characterized social model to vulnerability.[23] Drawing on this selective assessment, I move forward by looking at the points of intersection and divergence among these theoretical avenues. To that end, I suggest an investigation line that, while distancing itself from liberal-moral modes of thinking, simultaneously seeks to bridge critical and welfarist approaches to vulnerability with questions of ontological relationality.

In the remaining part of this chapter, I explore and bring together Erinn Gilson's and Pamela Sue Anderson's work on vulnerability. Drawing inspiration from Gilson's proposal for a reconfiguration of a new social and bodily ontology and Anderson's understanding of vulnerability as a space for transformation and relational ontology, I use these theories to navigate through potential thinking modes towards revising conceptual frameworks of social rights. Building on the discourse on solidarity that has been analyzed in the previous chapter, and relating this to 'transindividuality,' which will be assessed in

[22] Anderson, Hartman and Knijn 20

[23] The systematization of the various theories and perspectives here does not purport to typify or define those scholars' entire intellectual work, nor does it intend to reflect any potential self-characterization of those thinkers. Within the limits of this study, I cannot hope to deal adequately with the wider theoretical framework, within which these authors situate vulnerability. The engagement and selective sorting of particular viewpoints is attempted within the particular angle of the thesis at hand.

the succeeding chapter, I venture to assess these concepts under the light of relationality. The aspiration behind this endeavor is that ideas deriving from critical studies and ethics, which are circulated among hitherto disconnected avenues of exploration, can potentially become connected with social legal theory questions, so that they may in turn be channeled into new configurations and understandings of social rights at a conceptual level.

i. Vulnerability as an Ontological or Socially Constructed Concept

In approaching vulnerability as a notion, there are various ways in which it can be understood and there is surely a definitional difficulty and vagueness to the term. In its root meaning, vulnerability derives from the Latin noun *vulnus/vulnerare* ('wound/to wound,') and the late Latin *vulnerabilis,* which later became 'vulnerable.' Originally, the word was used to connote the human capacity of being physically or mentally wounded or of having the power to wound, which later became obsolete. In figurative speech, the term has also been used to hint at defenselessness against non-physical attacks. In Western philosophical tradition, vulnerability, as several commentators have pointed out, is figured as a shortcoming and a failure, while being rooted in an inherent, unprocessed experience of shame and fear, which accrues to a sense of lack of control due to the embodiment and mortality of human existence.[24] The celebration of invulnerability and the shaming and blaming of vulnerability, frames the discourse further in cultural terms within a binary logic that opposes these two conditions of human life, thus creating societal imaginaries of the mythical, heroic, invulnerable self that overcomes every hurdle in life without depending or needing anyone or anything.

Despite such theoretical and cultural predispositions, which prevail in modern societies and legal systems, critical philosophical dialogues in the field of vulnerability studies have come to systematically unsettle vicious cycles of dichotomizing thinking and stigmatizing vulnerability. In present ethical and legal discourses, as will be further examined in this chapter, vulnerability is presumed to be a common feature of the human condition,[25] one that is "inherent both in our physical being, our corporeality, and in our

[24] Thorgeirsdottir 5, 6; see also Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (2001) 71, where Shildrick argues that it is impossible to realize a fully developed, invulnerable self and goes on to explore questions of embodiment and subjectivity and to revise notions of normalcy, abnormality and the relationship between embodied selves and bodies within a phenomenology of the body.

[25] Cf. Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 4; Katie Oliviero, *Vulnerability Politics: The Uses and Abuses of Precarity in Political Debate* (New York University Press 2018) 23;

social being,"[26] and it is used to denote human frailty,[27] fragility and exposure to bodily and mental suffering. By virtue of our embodiment, vulnerability is argued to be "the primal human condition,"[28] where all human beings, being conditioned by vulnerability, carry "the meta-identity of a person in danger."[29] That is to say, we are increasingly susceptible to physical and emotional harms, to the natural environment, to the social and personal settings of our own making or not, and eventually, to mortality.[30]

In more detail, in current philosophical literature, two broad approaches are taken to be commonplace concerning the question of vulnerability's definition; namely, vulnerability is considered either as an absolute or a relative notion, or as it is elsewhere argued it is understood as having an anthropological or a social dimension.[31] Drawing on the etymological meaning of the word, the first approach highlights the ontological aspect of vulnerability by placing attention on the conditions of interrelatedness, dependency and connectedness among human beings.[32] Vulnerability, in this respect, is understood to be inherent, constant, pathogenic, perpetual as well as dispositional and occurrent in our corporeal, physical and social being.[33] As such, vulnerability displays a central paradox in that it is perceived as being both individual and universal.[34] Accordingly, dependency is considered developmental and biological in nature and in essence unavoidable, inevitable and univocally experienced by every human being.[35] This line of thought is encountered in

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Erinn Cunniff Gilson (ed) *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice*, vol 26 (Routledge 2014) 15

[26] Gilson 16

[27] Andorno 257

[28] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' [2017] 4 Oslo Law Review, 142; emphasis as used in the original.

[29] Anna-Maria Konsta, *Φύλο και Συγκριτικό Δίκαιο: Ο Νομικός Πολιτισμός σε Ελλάδα, Ευρωπαϊκή Ένωση και ΗΠΑ* (Sakkoulas Publishing Athens-Thessaloniki 2020) 234

[30] Mackenzie, Rogers and Dodds, 'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?' 1

[31] Ibid 4-7; Rippon and others 22-24; Miklos Zala and others, 'From Political Philosophy to Messy Empirical Reality' in Trudie Knijn and Dorota Lepianka (eds), *Justice and Vulnerability in Europe: An Interdisciplinary Approach* (Edward Elgar 2020) 48, 49; Oliviero 23; Lydia Feito, 'Vulnerabilidad-Vulnerability' (2007) 30 (3) Anales Sis San Navarra, 7. Erinn Gilson makes a different categorization of the ways vulnerability can be experienced, namely she distinguishes between an 'ontological vulnerability' and a 'situational vulnerability'. "Ontological vulnerability is an unavoidable receptivity, openness, and the ability to affect and be affected. Situational vulnerabilities are the specific forms that vulnerability takes in the social world, of which we have varied experiences because we are differently situated. These include, but are not limited to, psychological/emotional, corporeal, economic, political, and legal vulnerabilities, which can and do overlap, interacting with and reinforcing one another."; see in particular Gilson 37

[32] Rippon and others 23; Elisa Magrì, 'Empathy, Respect, and Vulnerability' (2019) 27 (2) International Journal of Philosophical Studies: IJPS, 339; Anderson, Hartman and Knijn 11

[33] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) Yale Journal of Law and Feminism, 1; see also Mackenzie, Rogers and Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* 1, 9

[34] Konsta 234

[35] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 (2) Emory Law Journal, 264

contemporary philosophical reflection that is inspired by an 'ethics of care.'[36] The latter takes as its premise that the need for care and empathy is biologically and culturally universal and humans are inherently relational, interdependent and responsive beings towards vulnerability, suffering, harm and mortality.[37]

The second approach, instead of addressing vulnerability as a condition in virtue of one's ontological individuation, bears a social or relational component,[38] in that it places the focus on particular persons or groups and how susceptible they are to harm or threat, be it natural or anthropogenic.[39] While the first perspective is tied to *the state* of our common, shared embodied humanity and equal susceptibility to harm, injury and suffering, the second emphasizes *the ways* in which inequalities of power, capacity or need render some agents susceptible or vulnerable to harm, wrongdoing or exploitation by another physical person or institutional structure.[40] In line with this, vulnerability is seen as *intrinsic*, but it is also considered *potential* in the sense that the ways in which it takes shape vary

[36] *Ethics of care*, or *care ethics*, or *ethics of caring*, refers both to ideas related to the nature of morality as well as to a normative ethical framework. The term *ethics of care* is commonly linked to the philosophical perspective that traces back to the work of ethicist, psychologist and feminist scholar Carol Gilligan, which was initially formulated in her book *In a Different Voice: Psychological Theory and Women's Development* published in 1982. There, Gilligan argued that women develop throughout their lives and speak in a different voice towards morality and decision making, specifically one that is context-bound, relational, caring, responsible and seeking to find solutions, in a context-specific way, rather than in a hierarchical and abstract manner. This 'ethics of care' stands in contrast to an 'ethics of justice,' which is shaped by an abstract, disengaged and distanced ethical paradigm; see in particular Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 63, 64-105. *Ethics of care* has also been substantively theorized in the work of American philosopher Nel Noddings, who provided for a comprehensive theory of care especially in the context of education and teaching in institutional arrangements. Noddings understood relationships as ontologically basic to humanity and identity formation and argued that caring is the foundation of morality. Noddings suggested an ethics of caring model as an antidote to "the elitism in Aristotle's ethics of virtue and the dogmatism of Christian agapism," and reversed the traditional Kantian-inspired emphasis on duty towards a relational ethic where acts are rooted in and dependent on affection and natural inclination to caring; see in particular Nel Noddings, 'An Ethic of Caring and Its Implications for Instructional Arrangements' (1988) 96 (2) American Journal of Education, 218, 219, also Nel Noddings, *Caring: A Relational Approach to Ethics and Moral Education* (2nd edn, University of California Press 2013). On that note, it has been argued that an ethics of care stands in opposition to principled ethical theories, such as Kantian-inspired deontology or liberal utilitarianism; see for more the entry 'Ethics of Care' in Robert W. Kolb, *Encyclopedia of Business Ethics and Society* (SAGE Publications 2007) 802, 803. A care ethics has been a point of interest and discussion in business ethics as well; see for instance Warren French and Alexander Weis, 'An Ethics of Care or an Ethics of Justice' (2000) 27 (1/2) Journal of Business Ethics, 125, 126

[37] Jennings 556; Held 630

[38] Martha Albertson Fineman, 'Equality and Difference - The Restrained State' (2015) 66 (3) Alabama Law Review, 614

[39] Ignacio Hugo Rodríguez-García, 'Vulnerability, Management of Volcanic Risk and Neoliberalism in Colima' in Gabriela Vera-Cortés and Jesús Manuel Macías-Medrano (eds), *Disasters and Neoliberalism: Different Expressions of Social Vulnerability* (Springer International Publishing 2020) 219

[40] Mackenzie, Rogers and Dodds, 'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?' 6; see also Andorno 258

among human beings, while the circumstances of harm are not predetermined and may or may not happen due to certain structural and systemic conditions.[41]

In other words, the fact that someone or something is inflicting a wound, gestures to how the conditions creating vulnerability are socially and structurally produced,[42] as well as unevenly generated and sustained through systemic forces and societal and institutional structures. Dependency is further seen as derivative in the sense that it is socially constructed, while being recognized as vulnerable is highlighted as key element of the relation and interdependence between human beings. Understood this way, vulnerability is perceived as being created through the relationships between individuals and with institutions. This further translates into vulnerability underlying central concepts of equality and inequality, duties and obligations, and interests and rights in ethical and social theories within legal and political discourses.[43]

In view of the foregoing considerations, the socially-inclined approach to vulnerability understands this as a social condition, which is largely generated by the social relations of production and modes of appropriating and distributing resources by social organizations and institutions.[44] Socially constructed vulnerabilities are thus 'structural vulnerabilities,'[45] as socio-legal scholar Katie Oliviero calls them, which are being shaped by institutional structures due to macropolitical forces that unevenly distribute and allocate resources within the society. Accordingly, these social or structural vulnerabilities depend on regional contexts and material particularities as well as on economic policies and socio-economic conditions, such as class, race, gender, ethnicity, employment status as well as on other factors such as age, disability, language, physical and mental health conditions, citizenship or immigration status.

The study of vulnerability in this respect helps to illustrate and understand those economic and political inequalities.[46] The social dimension of vulnerability reflects further on the bond between human beings and translates in the moral obligation of care and solidarity in social justice terms. Vulnerability positions us in relation to each other as human beings and also suggests, according to critical theorists, a relationship of

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[41] Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of our Social Responsibilities* (University of Chicago Press 1985) 112, 113
[42] Oliviero 23
[43] Gilson 15; See also Andorno 258
[44] Rodríguez-García 219
[45] Oliviero 24
[46] Gabriela Vera-Cortés and Jesús Manuel Macías-Medrano, 'Disasters and Neoliberalism' in Gabriela Vera-Cortés and Jesús Manuel Macías-Medrano (eds), *Disasters and Neoliberalism: Different Expressions of Social Vulnerability* (Springer International Publishing 2020) 8

responsibility between the state and the individual.[47] Thus, vulnerability is not merely self-evident, as it is stressed in the so-called ontological approach to vulnerability. The fact that a person or a faceless structure can inflict harm shows rather how vulnerability is context-related and structurally produced, created through existing relationships with others and in particular with the state, as will be analyzed further in this chapter.[48]

ii. Liberal-Moral Approaches to Vulnerability

Having presented the general framework around the concept of vulnerability and the two main approaches in relevant literature, I now proceed with a more focused analysis. In this section, I depart from the mainstream distinction between an ontological/social or absolute/relative approach to vulnerability. Instead, and while focusing on the discussion about vulnerability and social theory, I distinguish among the different approaches by means of the wider moral, political and ideological framework within which these are substantiated. In turn, I place these within three broader categories: first, under a general framework of *liberal-moral approaches*; second, within *a social model* of vulnerability, and third under the category of *critical-welfarist approaches*[49] to vulnerability, with a focus on Martha Fineman's rich scholarship on vulnerability and social justice.

It has been mentioned above that in lay knowledge, vulnerability is regularly associated with victimhood alongside notions of deprivation, dependency, or pathology. As we turn to other political and legal contexts outside Europe, we see that the above-mentioned traits carry a negative connotation towards the subject that is deemed to be vulnerable.[50] In particular, looking at the Anglo and North-American liberal tradition, vulnerability is largely considered as a counter-paradigm to the autonomous, free, fully-functioning and rational subject of liberal thought, whose rationality is in contrast with the subject's animality. The mind in this context is interpreted to supposedly trump the body at every crossroad. Within this fantasy of the masterful and impermeable self, corporeal and physical vulnerability is "acknowledged and then *dismissed* with the message that it's not what life hands you, it's how you handle it."[51] In line with this model of the self-mastering self, as sociologist Micki McGee points out in her research on self-help culture

[47] Fineman, 'The Vulnerable Subject and the Responsive State' 255
[48] Oliviero 23
[49] By 'welfarist' I mean here approaches that relate to the social welfare state and to the critical theory tradition as opposed to the notion of the liberal welfare state.
[50] See Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 8
[51] Micki McGee, *Self-Help, Inc.: Makeover Culture in American Life* (Oxford University Press 2005) 151, 184, 185; emphasis added.

in the US, the vulnerabilities of the body follow a tendency of being denied. In turn, forms of selfhood, which 'fail' to be self-efficient, self-reliant, and self-authoring, even in the face of unpredictable events and despite physical incapacities and exigencies of fate, are deemed defective[52] and tend to be devalued and socially ostracized.

Injuries and hazards are further constructed as a personal shortfall and as such, they remain hidden, while vulnerabilities tend to be repudiated.[53] In line with this, it is presumed that injuries and accidents can be avoided through successful self-management and by means of a heightened sense of personal responsibilization.[54] While injury is seen as a personal shortcoming and weakness, failure is also individualized.[55] Vulnerability within this model acquires the characteristics of powerlessness, passivity and dependency, as opposed to invulnerability, which reflects a morally superior self-empowered, active and self-managing subject.[56] Vulnerabilities are thus understood as personal incapacities on behalf of individuals and vulnerable subjects are criticized for being dependent on others, on public social welfare and on state remedial and assistance schemes.[57]

Surely within the different strands of liberal thought, vulnerability is a highly nuanced concept that is linked to different epistemic ideas and broader ethical and moral prescriptions. The liberal ideal of the autonomous, dominant over all other forms of life, and self-mastered subject that is epitomized in neoliberal economic policies, is criticized within the currents of liberal thinking itself. In particular, American moral and political thinker, Michael Sandel, while assessing the idea of self-mastery, control and dominion, relates vulnerability to the idea of humility in the face of human beings' natural limits.[58] Sandel pays particular attention to contemporary movements of eugenics, genetic engineering[59] and transhumanism, which are geared at overcoming human physical and mental limitations and seek genetic self-improvement, physical immortality and invulnerability by fundamentally altering the nature of human beings.

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[52] Ibid 174, 151
[53] Christina Scharff, 'Gender and Neoliberalism: Young Women as Ideal Neoliberal Subjects' in Simon Springer, Kean Birch and Julie MacLeavy (eds), *Handbook of Neoliberalism* (Routledge 2016) 223
[54] Ibid 222, 224
[55] Ibid 222
[56] Ibid 218
[57] Sanford F. Schram, 'Neoliberalizing the Welfare State: Marketizing Social Policy/ Disciplining Clients' in Damien Cahill and others (eds), *The SAGE Handbook of Neoliberalism* (SAGE 2018) 315
[58] See Michael J. Sandel, *The Case Against Perfection: Ethics in the Age of Genetic Engineering* (Belknap Press of Harvard University Press 2007) and especially 27, 46, 47, 62, 83, 85-92, 97-100; see also Peter F. Cannavò, 'Vulnerability and Non-domination: A Republican Perspective on Natural Limits' [2019] Critical Review of International Social and Political Philosophy, 5
[59] Sandel 63

In defiance of these movements, Sandel's idea of *humility* is understood in the sense of the human being's limited, vulnerable nature and constant exposure to chance and contingency. Sandel appears to be critical in this respect of genetic engineering as "a habit of mind and way of being,"[60] and of the expansion of notions such as individual responsibilization to daunting proportions. Contrary to the idea presented above, where the self-mastering, invulnerable self appears to be capable of overcoming everything beyond their natural limits and based on their own personal determination and life choices, Sandel criticizes this fixation on the idea of choice and individual responsibility. He further calls for an understanding of the human condition on the basis of its limited, vulnerable nature and capacity, and ultimately on its vulnerability and dependence on the natural world and concomitantly, on one another, which is expressed through humility, responsibility and solidarity.[61]

Staying within the confines of liberal moral theory, yet putting forward a different approach to social theory, American philosopher Martha Nussbaum places her focus on the notion of vulnerability implied by the ideas of capabilities, functionings,[62] and projects of good life. In contrast to Kantianism and to a Rawlsian version of the social contract theory,[63] as a justificatory basis to contemporary theories of justice, the capabilities approach understands the rational as simply one aspect of the animal and does not prescribe to the predominance of rationality. Rationality is neither idealized nor contrasted to animality but rationality and animality are rather seen as being thoroughly unified, while bodily need and need for care are both considered as aspects of human dignity.

In this conception of selfhood and personhood, Nussbaum suggests that human beings build in an acknowledgment that they are needy, temporal, animal beings, having growth, maturity, and decline.[64] Vulnerability is seen in this respect as being indicative of the precariousness of human life, a life that is characterized by an ever-present and constant uncertainty and instability. Acknowledging that sociability includes both

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[60] Sandel 96

[61] Ibid 86, 87, 95

[62] See Martha C. Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9 (2-3) Feminist Economics; Martha C. Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (2011) 12 (1) Journal of Human Development and Capabilities Martha C. Nussbaum, 'Human Functioning and Social Justice' (2016) 20 (2) Political Theory; See also Martha C. Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford University Press 1993) 31, where Sen notes "Perhaps the most primitive notion in this approach (i.e. the capabilities approach) concerns 'functionings'. Functionings represent parts of the state of a person - in particular the various things that he or she manages to do or be in leading a life."

[63] Martha C. Nussbaum, 'Beyond the Social Contract: Toward Global Justice' The Tanner Lecture Series on Human Values Delivered at Australian National University, Canberra November 12 and 13, 2002 and at Clare Hall, University of Cambridge March 5 and 6, 2003 424, 425, 427

[64] Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2007) 160

symmetrical and non-symmetrical relations, Nussbaum calls thus for "a society of citizens who admit that they are needy and vulnerable,"[65] and who respectively raise a claim to assistance and support in the dignity of their human need itself.[66]

Understood this way, vulnerability appears to be a fact of human life. Nussbaum, taking her cue from Aristotle's moral philosophy, contends that in the pursuit of a good life project, human life is minimally self-sufficient and bound to contingent relationships.[67] Relations among human beings are understood in this respect as being based on the idea of *externality*, in the sense that humans are considered to be bounded, demarcated, separate entities to one another, who nonetheless form webs of affect and connections with each other. That is because, as Nussbaum argues, "[l]ove is, in its very nature, a relationship with something separate and external."[68] And for that, this externality may be "essential to the benefits and value of love,"[69] but it is also "plainly, a source of great vulnerability"[70] and a risk factor for the human being. The facticity of the vulnerability of human beings in their pursuit of a good life confirms in this way the facticity and passivity of dependence, contingency and the fragility of human life.[71]

Building on Nussbaum's approach, other scholars, such as political philosopher Catriona MacKenzie, contend that the obligation to respond to vulnerability is a matter of social justice. To that end, MacKenzie opts for the capabilities approach to justice as "the most promising theoretical framework for articulating this claim and for fostering democratic equality."[72] MacKenzie and Rogers further call for attention to the social, political, legal, economic, or environmental structures that cause or exacerbate different forms of vulnerability.[73] Following a similar rationale, other moral thinkers call for the need to protect and empower vulnerable creatures through an 'ethics of care' and responsibility

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[65] Rachel Aviv, 'Martha Nussbaum: The Philosopher of Feelings' *The New Yorker* (18 July 2016)
[66] Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 159, 160
[67] Martha C. Nussbaum, 'The Vulnerability of the Good Human Life: Relational Goods' in Martha C. Nussbaum (ed), *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (2nd edn, Cambridge University Press 2001) 343, 344
[68] Ibid 354
[69] Ibid
[70] Ibid
[71] Adela Cortina and Jesús Conill, 'Ethics of Vulnerability' in Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer 2016) 52
[72] Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 35
[73] Ibid 34, 35; See also Wendy Rogers, 'Vulnerability and Bioethics' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 76

or through 'cordial ethics,'[74] which would be based on a feeling of compassion and *compassionate reason*. The latter is understood as establishing a duty to actively participate in the fate of other human beings, by not only recognizing and protecting but also by empowering them in achieving their goals.

Being equally critical of the utilitarian liberal paradigm and its portrayal of selfhood as a rational, self-interested and self-involved agency, political philosopher Eva Kittay places her own idea in stark contrast. In particular, her idea of the 'transparent self,'[75] denotes an agent who is attuned to the interests of others and sees the needs of the other first, and for that reason it may seem, as Kittay stresses, they are "too servile to be the autonomous agent of moral action."[76] Situated within an 'ethics of care,' Kittay's idea of the self is understood as being inherently relational and responsive, while moral reasoning is context-based, rather than based on "a calculus performed on rights or utilities."[77]

Equally skeptical to a Kantian-inspired deontology and moral theory and to the liberal, contractual model of social relations,[78] political and social philosopher Virginia Held, examines in depth the potential of the ethics of care[79] for dealing with social issues, taking into consideration the aspects of need and vulnerability. Bringing this to the level of social rights as part of a broader inquiry into the philosophical foundations of human rights, even though Held stands in favor of an 'ethics of care' approach, she nonetheless suggests that such potential is not yet realized at a social rights level. To the end, she crucially points out that economic and social rights "are much closer to the concerns of care, but they are *still individualized*, whereas care understands how often the issues concern groups, collectivities, and *relations* between persons."[80]

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[74] Cortina and Conill 52, 57, 59
[75] Kittay 52
[76] Ibid 51
[77] Ibid 53
[78] Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press 2005) 80 et seq.
[79] *Ethics of care* has been applied in juridical studies and human rights cases, where an 'ethics of care' and a so-called 'ethics of justice' have been compared in the context of judicial interpretative modes. Ivana Radacic in juxtaposing these ethical approaches in the context of the caselaw of the ECtHR has noted: "Ethics of care represents the contextual approach to moral problems, which values empathy and care and recognizes our relational nature, while ethics of justice involves abstracting moral problems from interpersonal relationships and balancing rights in a hierarchical fashion."; Ivana Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19 (4) European Journal of International Law 855, 856
[80] Held, 'Care and Human Rights ' 635; emphasis added.

iii. The Social Model of Vulnerability

Having assessed interpretations of vulnerability either by means of the natural limits discourse or the good life and capabilities approach, I now turn to scholars who suggest different readings to vulnerability. These approaches take an equally critical stand towards the neoliberal model, yet they do not directly fall under an 'ethics of care' approach and lay outside the liberal tradition of moral theorizing.

In more detail, Matthew McLennan in his vision of a 'philosophical anthropology'[81] of vulnerability, contends that *exposure* to accident and *finitude* are the two most basic aspects of human vulnerability, which are as much innate to human nature as they are socially mediated. Following this mode of thinking it appears that injury, hazard or accident are recurrent points of deliberation, as in the liberal discourse on vulnerability. However, McLennan's understanding of finitude and accident differs from that of liberal moral ethicists such as Sandel and Nussbaum. Vulnerability, according to McLennan is not reduced simply to the fragility of the material human body, nor is it a matter of how adeptly a person is capable of 'functioning' in a particular environment.[82] Vulnerability, construed in terms of finitude, boundedness, and exposure to accident and the vicissitudes of good or bad luck, is not solely or "perhaps even centrally a matter of the fragile materiality of the living human body."[83]

McLennan acknowledges the precarity and indeterminacy of the human condition and the fact that existential possibilities are always open to contingency and are always logically limited, that is, limited in time and scope, while human beings navigate the unexpected. However, his suggestion does not amount to "a lament for human fragility,"[84] neither it is a testament to the vision that human beings are only bearers of negatively defined traits and limitations.[85] Being equally critical of the neoliberal vision of human beings as uniquely capable and masterful beings, McLennan rather suggests what he calls a "social model of vulnerability."[86] The latter is exemplified as an interpretative framework that understands vulnerability in a way that is more inclusive of the multitude of differences, limitations and level of needs and exigencies among human beings.[87]

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[81] Matthew R. McLennan, *Philosophy and Vulnerability: Catherine Breillat, Joan Didion, and Audre Lorde* (Bloomsbury Academic 2019) 44, 58
[82] Ibid 48, 53
[83] Ibid 45
[84] Ibid 60
[85] Ibid
[86] Ibid 50
[87] Ibid 59, 60

In a similar vein, political philosopher Todd May suggests an understanding of human vulnerability that is not merely focused on the body, the vulnerability of the body and the body's material fragility, but it is rather interested in understanding suffering in physical and psychological terms from a place of acceptance rather than abjection and repudiation.[88] In this context, May proceeds in making a distinction between what he calls *vulnerabilism* and *invulnerabilism,* in sketching his idea of vulnerability as a theory. By critically building his thought around the mainstream philosophical dualism of vulnerability and invulnerability, he argues that "vulnerability is our natural state"[89] and invulnerability is "a project," namely a project that individuals find themselves compelled to invest in while navigating through life. Invulnerability or 'invulnerabilism,' as May calls it, is the goal to becoming and staying immune to the misfortunes that await ahead of life, a goal that is so deeply embedded in oneself that it ends up becoming a *state of mind* and molding the core of one's being.[90]

May does not directly address vulnerability in political or ideological terms, and rather seems to put forward what appears to be a psychological assessment of the state of vulnerability. However, it could be assumed that his analysis hints at that which has been examined above, namely the long-standing, dichotomous, liberal rhetoric of the masterful, rational, invulnerable self on the one hand and the inadequate, impulsive, vulnerable self on the other. In this context, May portrays invulnerabilism as a place of detachment and "distance between us and what happens to us such that, although we might be affected to a certain degree, we remain *unmoved* at the core of our being."[91] Invulnerabilism, May clarifies, does not mean that one is oblivious of or denying vulnerability. Instead invulnerability is rather one recognizing the little control they have over their life's multiple mishaps and misfortunes and seeking to render themselves *unaffected* and *untouched* to that suffering and agony "precisely on the basis of that recognition."[92] Similarly to what has been analyzed above as the neoliberal fantasy of the masterful self, invulnerabilism as a project falls thus again within the same liberal rationale, that is, that vulnerabilities are recognized and are in turn dismissed.

In contrast to such an understanding of the detached, always agonizing to succeed, invulnerable self, May puts forward an idea of vulnerability or vulnerabilism, which

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[88] Todd May, *A Fragile Life: Accepting Our Vulnerability* (The University of Chicago Press 2017) 5, 64, 156, 176, 204, 205
[89] Ibid 159, 160
[90] Ibid 7
[91] Ibid 37
[92] Ibid

embraces a way of living that allows one to be vulnerable to suffering, or better yet to be shook to their own core by that suffering.[93] Recognizing oneself as vulnerable does not amount in this respect to admitting suffering or need in negative or eschatological terms, while constantly trying to surmount vulnerability, positing oneself as invulnerable by reaching equanimity.[94] What May rather suggests is that it is much more fruitful and realistic to *accept* the diversity in the ways one lives and by extension in the ways one suffers, rather than to simply recognize these and then dismiss them.[95] Acceptance, instead of mere recognition of the limits and anguish that vulnerability supposedly carries with it, is the distinguishing feature of the social model when being juxtaposed to liberal-moral conceptualizations of vulnerability that we have discussed above. This concept of acceptance will be revisited later in this chapter when the theoretical frameworks of Erinn Gilson and Pamela Sue Anderson will be assessed.

iv. Critical-Welfarist Approaches to Vulnerability

Following the liberal-moral approaches and social model to vulnerability discussed so far, this section explores the problématique of vulnerability through the lens of social justice, as it is developed primarily by American legal theorist and political philosopher Martha Fineman. The focus is placed on Fineman's work, because she has been among the first scholars that envisioned and brought forward a theory of vulnerability, which answers primarily to legal theory, political equality and social justice, influencing in this way other critical scholars and gradually opening up a dialogue in legal philosophy and political economy, while drawing attention to the dynamics of vulnerability specifically.[96]

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[93] Ibid 7, 37, 38, 161
[94] Ibid 176
[95] Ibid 163, 176, 203
[96] Cf. Judith Butler, Zeynep Gambetti and Leticia Sabsay, 'Introduction' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 11 where the authors note the following: "Inspired by Fineman's perspective, the "Vulnerability and the Human Condition" Initiative, hosted at Emory University, is dedicated to envisioning models of state support and legal protection on the grounds of subjects' vulnerability conceived as a human feature." With regard to the *Vulnerability and Human Condition Initiative: Exploring Vulnerability, Resilience, and the Responsive State*, see https://web.gs.emory.edu/vulnerability/about/index.html <last accessed 16.02.2021>. See in particular the *Mission* statement, which partly reads as follows: "The *Vulnerability and the Human Condition Initiative* has created an academic space within which scholars can imagine *models of state responsibility* that focus on the universal and constant vulnerability of human beings and their consequential and inevitable *reliance* on social relationships and institutions over the life course. These *imperfect* institutions and relationships are *created* and *maintained by* and *through law*, and, as such, their operation and effects on society should be viewed as at least partly the *on-going responsibility* of *those who govern our societies*. When *they are failing individuals*, those institutions and relationships should be assessed, and when necessary, adjusted so as to ensure a *just* and *defensible distribution* of social and economic privilege and power. In that assessment, the first consideration should be the *nature* and *abilities* of the individual legal subject, a consideration that should shape the subsequent

Concerning Fineman's vulnerability theory, I discern two major pillars in her analysis, with further supplementary notions that shape her analytical framework. In particular, Fineman links vulnerability to what she calls *a responsive state*, while making a strong statement against the 'liberal legal subject' and opting for the 'vulnerable legal subject' instead. In more detail, Fineman challenges "the static figment of the liberal imagination"[97] and argues in favor of a socially and materially dynamic vulnerable subject, based on a more comprehensive account of how peoples' realities are shaped by a constant state of vulnerability across their life-span. Fineman contends that liberal legal theory paints a limited and inaccurate vision of legal subjectivity by defining the legal subject on the basis of rationality and liberty, rather than vulnerability and need.[98] For this, her approach challenges the dominant conception of the universal legal subject as an autonomous, sovereign, independent and fully functioning adult, and "seeks to replace the rational man of liberal legal thought with the vulnerable subject."[99]

In contrast to the liberal vision of selfhood and personhood, vulnerability theory recognizes that human beings are *embodied* beings and social beings *embedded* in lived actualities and material conditions, realized through relationships, societal structures and social institutions.[100] Writing from a US-perspective, Fineman directly criticizes the ideological substrate of the political reality in the United States, which she identifies as being mandated by neoliberalism.[101] According to her analysis, bodily vulnerability can be actualized either in the form of dependency upon others for assistance, care and cooperation, or by means of dependency on social arrangements and structures.[102] Vulnerability, whether obvious or latent, realized or not realized, stands in this context as a universal, constant and inexorable aspect of the human condition. In turn, recognizing the realities of human vulnerability, bodily fragility, material needs and messy dependency[103] reveals the fallacies inherent in the ideals of autonomy, independence, and

understand of state responsibility. The Initiative offers the "vulnerable legal subject" to *displace* the liberal legal subject that currently dominates law and policy."; emphasis added.

97 Martha Albertson Fineman, 'Introduction' in Martha Fineman, Ulrika Andersson and Titti Mattsson (eds), *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective* (Routledge 2017) 3

98 Fineman, 'Vulnerability and Social Justice' 356

99 Ibid 342, 356

100 Fineman, 'Vulnerability and Inevitable Inequality' 143; See also Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 89; See also Anna Grear, 'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject ' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 49

101 Fineman, 'Vulnerability and Social Justice' 347-350

102 Fineman, 'Introduction' 3

103 Fineman, 'The Vulnerable Subject and the Responsive State' 263

individual responsibility, which lie at the heart of neoliberalism and have replaced "an appreciation of the social."[104]

In further outlining her theory, I single out two[105] sub-notions that Fineman places particular focus on, namely autonomy and resilience. These are linked with her idea of the responsive state that I consider a second major pillar in her work. Concerning autonomy, Fineman assesses this notion in the context of the United States, as she clearly states in her various writings, by looking at it on an ideological and policy level.[106] Autonomy, Fineman contends, "is the term we use when describing the relationship between the individual and the state."[107] In this regard, she stresses that the state in the US is restrained from interference and intervention in the name of a political dogma that valorizes autonomy, individual liberty, and self-sufficiency, while it is based on principles such as freedom of contract, protection of private property and freedom of action.[108] The sacredness of autonomy, independence, and self-sufficiency are the "core components of America's founding myths,"[109] Fineman strongly suggests. They are the "ideological placebos"[110] that have been ossified in the US political reality, begetting in this way profound consequences for its social and welfare policies. Moreover, questions on the relation between vulnerability and equality or social welfare protective schemes are usually relegated to the private sphere and dealt on the basis of identity claims, rather than on the basis of the right to citizenship and social justice.[111]

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[104] Fineman, 'Vulnerability and Social Justice' 354; Fineman, 'The Vulnerable Subject and the Responsive State' 261

[105] Fineman has also written extensively on dependency and its relation to vulnerability as well as on issues around gender equality and vulnerability and the public-private divide relating to issues of family law and market regulation. For the purposes of the present analysis, I only selectively focus on the issues of autonomy and resilience and how they relate to the above-mentioned subject matters of Fineman's research.

[106] Martha Albertson Fineman, *Autonomy Myth: A Theory of Dependency* (New Press 2005) 9, 10

[107] Ibid 20

[108] Fineman, 'The Vulnerable Subject and the Responsive State' 251, 252, 259

[109] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' in Fineman Martha Albertson and Dougherty Terence (eds), *Feminism Confronts Homo Economicus* (Cornell University Press 2018) 181. Martha Fineman has written about 'America's founding myths,' as she calls it, in her article published under the same title in 1999; See Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (1999) 8 (1) The American University Journal of Gender, Social Policy & the Law, 16

[110] Fineman, *Autonomy Myth: A Theory of Dependency* 189, 190; See also 11, where Fineman clarifies that by 'myth' she means 'a legendary story that invokes *gods* and *heroes* and explains a cultural practice or phenomenon'. On a similar note about the god-like, heroic, mythical connotation ascribed to invulnerability and the victimhood that shadows the notion of vulnerability, see also Thorgeirsdottir 5, where it is stated "And how can philosophical thinking that has its point of departure in vulnerability, neither in the sense of the *victim* nor the *hero* but as *a self-conscious emotion*, lead to philosophical dialogues that can unsettle vicious cycles of shaming and blaming and are productive for deepening philosophical reflection?"; emphasis added.

[111] Deborah Dinner, 'Vulnerability as a Category of Historical Analysis: Initial Thoughts in Tribute to Martha Albertson Fineman' (2018) 67 (6) Emory Law Journal, 1157; This is particularly relevant in the context of the social protection and welfare schemes in the United States that Martha Fineman examines in her various

Autonomy, understood as economic self-sufficiency and as the absence of economic dependency on the government, connotes that an individual "is both freed *from* the prospect of regulatory governmental action and freed *through* governmental structures from interference by other private actors."[112] The autonomous individual is expected in this way to be self-sufficient and dependent on its own powers and resources. Thus, resorting to the state for assistance or remedy through means-tested social welfare programs carries the stigma of laziness and incompetency for those who failed to live up to the individual responsibility of financially supporting themselves. Ultimately, penury and social disparity are taken as a resultant of individual failing rather than structural engineering.[113] For that, Fineman observes there is "little or no room for an affirmative reconciliation of this understanding of individual autonomy with concepts such as dependency or vulnerability."[114]

Along these lines, Fineman is critical of social contractarianism, which she understands as giving a pivotal role to the notions of individual autonomy and the restrained state, while defining individual identity and public policies. Put another way, the liberal social contract in the US tradition testifies to a preexisting societal arrangement and historically agreed upon restraint of governmental regulation, control or interference in order to realize the ideal of the independent, self-sufficient, autonomous individual.[115] In light of this, Fineman takes a critical stance towards the limits of formal equality[116] and the "dominant lens of autonomy,"[117] through which issues of equality are assessed in liberal social welfare policies broadly and in US anti-discrimination law in particular.

Understanding autonomy by maintaining the hierarchy of autonomy over equality is, according to Fineman "a narrow and impoverished understanding of autonomy,"[118] one that takes for granted an *equality of position* among individuals and their different living experiences. What Fineman proposes instead is not formal equality, but "equity."[119] In this respect, she places her focus on the revision of the equal protection law in the US in

writings. However, the theoretical angle of Fineman's criticism on the identity politics and equality discourse can also be relevant for the discussion on vulnerability within the political reality in Europe.

[112] Fineman, *Autonomy Myth: A Theory of Dependency* 9

[113] McBride and Mitrea critically assess a similar point about dependence, translating to "laziness" and being considered as "an immoral individual failing"; see McBride and Mitrea, 'Internalizing Neoliberalism and Austerity' 100, 103

[114] Fineman, 'The Vulnerable Subject and the Responsive State' 259

[115] Martha Albertson Fineman, 'Contract and Care' (2001) 76 (3) Chicago-Kent Law Review, 1416; Fineman, 'The Vulnerable Subject and the Responsive State' 258. See also Konsta 234

[116] Fineman, 'Vulnerability and Inevitable Inequality' 134; Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 74, 75

[117] Fineman, 'The Vulnerable Subject and the Responsive State' 262

[118] Ibid 258

[119] Ibid 148

particular by factoring in an enhanced understanding of vulnerability,[120] while on a more theoretical level, she suggests an understanding of autonomy in parity with equality and not in isolation from this. Autonomy, seen through the lens of substantive equality, may elicit criticisms for defending an image of a deeply self-involved, egocentric subject. However, as it is underlined in Fineman's theory, this need not be confused with such an account of subjectivity, where attention is placed on one's own life's circumstances and material particularities, but it rather needs to be seen as raising reciprocal and mutual duties for one another within the society.[121]

In line with this, Fineman proceeds with the notion of resilience, which is of central importance to her theory. Resilience in this regard is understood not as something that human beings are born with, but rather as a condition that is largely dependent on the resources that individuals have at their disposal, as well as on the social structures and conditions that they are faced with during their lifespan. Human beings show different levels of resilience and this "inequality of resilience"[122] is at the heart of Fineman's vulnerability theory because it bridges the divide between the public and the private sphere by placing the attention on society, social institutions, and social relationships. Resilience further manifests one's ability to respond and adapt to the impediments and harmful situations that they are inevitably encountered during their lives.[123] This does not mean, however, that the degree of resilience one manifests is merely the consequence of an individual's own capacity and personal responsibility. Lack of resilience is not deemed to exist due to individual failure, but rather represents the unequal allocation of structural privileges and power as well as unequal access to those social structures. Lack of resilience thus constitutes a failure on the part of those institutions and societal structures in building social and individual resilience.[124] Read along these lines, when they are not capable of maintaining a status of invulnerability and social resilience, *individuals* are not *failing themselves*, but rather institutions and social relationships are the ones to be held accountable for *failing individuals*.[125]

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[120] Daniel Engster, 'Care Ethics, Dependency, and Vulnerability' (2019) 13 (2) Ethics and Social Welfare, 101

[121] Fineman, 'The Vulnerable Subject and the Responsive State' 261

[122] Fineman, 'Introduction' 3

[123] Fineman, 'Vulnerability and Social Justice' 362, 363

[124] Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 87; Fineman, 'Equality and Difference - The Restrained State' 622, 624, 625

[125] See the *Mission* statement at The *Vulnerability and Human Condition Initiative* website, available at https://web.gs.emory.edu/vulnerability/about/index.html <last accessed 12.02.2021>

In this respect, the state is rendered responsible in facilitating the acquisition of resilience by establishing and monitoring those institutions and relationships,[126] which mitigate vulnerability and determine the level of resilience an individual acquires and demonstrates throughout life. Fineman stresses that vulnerability "is posited as the characteristic that positions us in relation to each other as human beings,"[127] and seeks to develop a language of state or collective responsibility towards a more responsive state and a more egalitarian society.[128] Since human beings are always dependent upon institutions and societal structures,[129] Fineman's vulnerability theory raises thus questions that are structural[130] and have an institutional focus. That is to say, her theory acknowledges, as opposed to the mainstream liberal vision, the "many ways in which societal relationships and institutions are shaped, reinforced, and modified in and through law, and she argues that the state is always actively involved in the allocation, preservation, or maintenance of privilege and disadvantage."[131]

What Fineman ultimately proposes in her vulnerability approach to social justice is that our vision of the contemporary political and legal subject needs to evolve as collective knowledge, realizations, aspirations, and circumstances change.[132] A contemporary vulnerability and social justice theory, Fineman stresses, needs to recognize "that the relationship between the individual and the society is *synergetic*,"[133] and that the liberal paradigm of the antagonistic, self-sufficient, autonomous subject needs to be reconstructed into the vulnerable subject in law. In line with this, Fineman warns about the existing tensions between societal change and the rigidity of the social contract tradition, which render the latter anachronistic and impossible to perform within the current societal reality.[134] For that, she suggests that the liberal social contract paradigm needs to be reworked by taking into consideration nonmarket values, such as care and dependency, while "the society is confronted with the implications of change."[135]

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126 Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' 73
127 Fineman, 'The Vulnerable Subject and the Responsive State' 255
128 Fineman, 'Vulnerability and Social Justice' 342; Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 1
129 Fineman, 'Vulnerability and Inevitable Inequality' 146
130 Ibid 145
131 Fineman, 'Introduction' 4
132 Fineman, 'Vulnerability and Inevitable Inequality' 142, 143
133 Fineman, 'Vulnerability and Social Justice' 368; emphasis added
134 Fineman, 'Contract and Care' 1408, 1414, 1415, 1416, 1421
135 Ibid 1439, 1440

9.2. Towards a Transformation of Vulnerability Theory: Critique and Proposal

i. Challenging Theses on Vulnerability

In the previous sections, I have endeavored to outline and assess some of the prevalent theses in the wide array of liberal and critical approaches to vulnerability and social theory. In the subsequent paragraphs, I proceed to explore common critiques that are advanced towards these approaches and raise further points of criticism. Following that, I will examine Erinn Gilson's and Pamela Sue Anderson's analytical frameworks for the idea of vulnerability. The chapter draws a conclusion by assessing these theories while aiming to potentially provide for an overarching frame of reference in reconfiguring vulnerability and situating this in the social rights discourse.

It has been presented above that a common path taken to explore vulnerability is to use a two-pronged approach, namely by looking at it as an ontological and absolute condition of the human existence, or by considering it as a socially-forged and context-related construct and thus a relative notion. For the purposes of the present analysis, I have taken these lines to be not all too clear, since an ontological approach can easily fall under the ambit of a socially constructed, interpretative framework to vulnerability and vice versa. For this, I opted for a different grouping of the various trajectories to understanding vulnerability, based on the underlying political and philosophical predispositions sustaining these frameworks.

The reason behind this is that in the vast theoretical landscape of vulnerability scholarship, I identify two tendencies when dealing with questions of vulnerability and social theory. On the one hand, in liberal-moral approaches, as I have classified them, I take that vulnerability is interpreted within an ethical-ontological framework that challenges neoliberal apprehensions of personhood and legal subjectivity as well as social contractarianism theories. However, those frameworks still assume a liberal political and legal subjectivity, where vulnerability is understood in limiting and negative terms, while appeals to need and dependency are raised independently of broader social, political and historical considerations. On the other hand, in critical approaches to vulnerability, the latter is interpreted within welfarist attempts to reposition this in the social justice discourse, by putting forward demands for a responsive state and while challenging the imaginary of the autonomous, self-sufficient and independent liberal subject. Vulnerability in this context, as it has been examined above, touches upon broader issues of the nature of the human being. Even so, in these critical accounts of vulnerability, the latter's

ontological foundations are located in the embodiment and materiality of the human being, which are *predetermined* and profoundly affected by societal institutions and structures. Thus, in these approaches, the emphasis is placed on predefined structures rather than on the interactions among human beings and the relational aspect of human existence and social life.

The above-mentioned observations are further linked to the vulnerability discourse in my view in two additional ways. First, characterizations of vulnerability in absolutist-ontological terms as well as interpretations of vulnerability as a socially-mediated construct are associated with an ethics of care or with social welfarist ethics accordingly. To be more specific, positions expressed by Nussbaum, Kittay, MacKenzie and Rogers fall within the broader ambit of an 'ethics of care' or 'cordial ethics' tradition. Diversely, Fineman's or Grear's theses do not apply to care ethics, but rather advocate an approach to vulnerability that has its theoretical output in historical materialism and critical theories of the state.[136]

This theoretical angle translates in turn in that the debate around questions of social justice is built around a dichotomous thinking of *recognitive* or *redistributive* social justice models.[137] In this regard, liberal recognitive models of social justice animate concerns for claims to social rights protection which are dependent on individual morality, personal initiative and voluntarism and for this reason they are criticized for predicating on the discretion and good grace of the individual.[138] On the flip side, social welfarist

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[136] Engster 101

[137] It is not within the scope of the present thesis to engage with the debate on the redistributive or recognitive models of social justice as these have been developed within the streams of Rawlsian distributive theory and Hegelian-inspired social theory of recognition. For a discussion see Fraser and Honneth 35, 93, where Fraser to redress what she diagnoses as the current decoupling of claims for recognition from claims for redistribution, proposes "a perspectival dualist understanding of redistribution and recognition," as she calls it, that is, a 'two-dimensional' conception of justice that encompasses claims of both types *without reducing* either type to the other, but treats both as distinct perspectives on, and dimensions of, social justice within a broader overarching framework." See also, Renante D. Pilapil, 'Suffering Poverty: Towards a Global Recognitive Justice' in Gottfried Schweiger (ed), *Poverty, Inequality and the Critical Theory of Recognition* (Springer International 2020) 175, where Pilapil discusses the potential of what she calls "global recognitive justice," as being distinct from a global distributive justice paradigm, and identifies three relevant principles, namely the principles of love, respect, and esteem as serving the model of global recognitive justice. See also Trudie Knijn and Jing Hiah, 'Just Care for the Elderly and Disabled' in Trudie Knijn and Dorota Lepianka (eds), *Justice and Vulnerability in Europe: An Interdisciplinary Approach* (Edward Elgar 2020) 167

[138] Kittay 61, 62, 67; Casey Rebecca Johnson, 'Epistemic Vulnerability' (2020) 28 (5) International Journal of Philosophical Studies: IJPS, 678. On voluntarism see also Goodin 110-117; Goodin's scheme of moral obligation is twofold, namely he discerns between the *voluntarism model* of moral obligation and the *vulnerability model* of moral obligation. The justificatory basis of the *vulnerability model* arises from the exposure of one party to the vulnerability of another party and from the capacity of the first party to respond to such vulnerability. This stands in contrast to what Goodin and Kittay identify as the *voluntarism model* or *voluntaristic model* of moral obligation, which translates in a moral obligation being incurred on the basis of one's voluntarism and self-binding *promise* made to another party. In other words, the voluntarism model assumes, according to Kittay, "individuals who act out of an elevated self-interest, who are rational and mutually disinterested, and who are equally situated to engage in moral interactions with each other."; See Kittay 69

redistributive models are challenged for generating entitlements that are directed entirely towards the state or the federal government and its institutions, perpetuating in this way unsustainable social welfare protection schemes.

Building on these positions, the concept of vulnerability in philosophical articulations of the good life and theories of social justice, as analyzed above, is understood as a condition *external to* the human being, as a condition that fragments people and takes the state of need and dependency that they are in as a *passive* state. Similarly, in critical and welfarist accounts of vulnerability theory, the focus on human embodiment and the mediation of need and dependency through institutional and societal structures, sees vulnerability from the points of *externality* and *limitation*, while it remains fixated on a preconceived *negative* status of individuals.

Evidently, these interpretations take a critical stance towards theories of social contract, while they elevate concerns regarding the Kantian ontological model of the self, as an autonomous rational invulnerable self. Be that as it may, the liberal and welfarist approaches that we have seen above simultaneously concretize the human being as a subject that is limited, always negatively defined,[139] and not simply informed by history but essentially predetermined by history. In turn, these approaches sustain an ontology of social relations that is based on intersubjectivity through ties to reciprocally recognitive or redistributive modes of social justice, as it has been examined in the previous chapter.[140] That is to say, different theses to vulnerability, which emanate from either a liberal or social welfarist standpoint, presuppose a social ontology of *intersubjectivity* between already constituted, fully formed, and, critically, bounded individuals. However, from an ontological point of view, social beings within this intersubjective model of social relations, merely interact with each other in institutionalized and structured forms of relations, which are static and *freeze-framed* in time.[141] That is to say, they do not possess any element or potential of processual development and eventually, as it has been stressed in theory, the ontological contingency of existence becomes masked and social beings are *reified*.[142]

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[139] On the negativistic approach and understanding of Marx of human rights and dignity, see Georg Lohmann, 'Human Dignity and Socialism' in Dietmar Mieth and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 129, 130, 131, 133

[140] See Part V. Chapter 8. Solidarity and Social Rights in Post-Crisis Social Europe.

[141] On the reification, objectification and concealment of social contingency under institutionalized norms and social structures in critical , which "tend to "freeze" our way of life"; see the analysis by Italo Testa, 'Ontology of the False State: On the Relation Between Critical Theory, Social Philosophy, and Social Ontology' (2015) 1 (2) Journal of Social Ontology, 295

[142] On this reification being "not as an epistemic, nor as a moral, but first and foremost as a socio-ontological" notion; see the analysis by ibid 285, 295 et seq.

Understood this way, social relations are reduced to simple interactions and exposure to one another, which is either conditioned upon external factors of risk and hazard or it is taken to be predetermined due to preexisting structures and power dynamics. To elaborate further on this, liberal approaches to vulnerability on the one hand, may be critical of the neoliberal paradigm of personhood and subjectivity, but they nonetheless assess ontological matters without relating these with questions of institutional accountability and collective responsibility. On the other hand, in social welfarist and materialist approaches to vulnerability, the system as a whole and the structures and apparatuses by which it is comprised, are posited as an ontological entity in themselves, while the ontological justification of the subject is simply undertaken on the basis of a mediated embodiment through structures.[143]

That is to say, advocates of such an analysis, argue that awareness about the inherently vulnerable human condition, provides "distinct ontological grounds"[144] for an understanding of the state as an entity that has an affirmative public responsibility. Seen that way though, the ontological focus is not only placed but it is essentially exhausted on the state as an entity, while there is a deafening silence on the questions pertaining to the ontology of the human being. This is of course not to suggest that these are not significant contributions to re-configuring and linking vulnerability to social justice claims past an individualistic model. However, in my understanding, theses as such constitute a meta-level of ontological inquiry that does not touch upon preceding questions about the ontology of relatedness as such and the very mode of relationality among human beings.

The above-mentioned criticism is further linked with questions of how both liberal and social welfarist approaches to vulnerability understand the concept of selfhood and if we bring this to the level of legal rights and duties, the concept of autonomy. Surely, it has been presented above that Fineman's account of vulnerability theory is heavily colored by her long-standing skepticism towards autonomy as such. To that end, some commentators criticize Fineman for taking autonomy and vulnerability to be as oppositional and incompatible concepts to each other,[145] while others stress that she is not opposing autonomy per se.[146] Instead, Fineman is argued to be concerned about autonomy being favored over substantive equality, allowing in this way for structural inequalities and

[143] See also Barrow W. 97, where Barrow raises a similar point regarding post-Marxist systems-analysis.
[144] McCluskey, Keren and Donyets-Kedar
[145] Nina A. Kohn, 'Vulnerability Theory and The Role of Government' (2014) 26 (1) Yale Journal of Law and Feminism, 14; See also Rippon and others 24
[146] Kohn 14

existing disadvantages to perpetuate in the name of respecting individual autonomy.[147] Even so, conceptualizations of autonomy in both social welfarist and liberal approaches appear to be problematic, as these reflect on wider questionable ontological assumptions about selfhood and the relationality of human beings with one another.

The observations of Günter Frankenberg in his article *Why Care - The Trouble with Social Rights*, are enlightening and lucidly articulated in this respect:

> "Liberal as well as welfarist concepts of rights share a radically *pre-social* notion of autonomy as a property of *isolated* and *centered actors*. Consequently, even welfarist attempts to overcome the *social blindness* of liberal legal formalism generally *remain fixated* on the *negative status* of individuals and are preoccupied with the question whether and which social entitlements are necessary to generate private autonomy."[148]

Following up on the criticisms raised to the presented vulnerability theses, another common critique held towards both Nussbaum's capabilities approach and Fineman's vulnerability theory, is that these analytical frameworks can potentially justify state paternalism, patronization, essentialism, or false universalism.[149] In particular, Martha Nussbaum's universalist ethics and capabilities approach is criticized for implicitly giving rise to institutional and culturally homogenizing paternalism and perfectionism.[150] Similarly, Martha Fineman's vulnerability theory to social justice is challenged in that notions such as vulnerability and protection have been used historically and could be used again "to justify coercive or objectionably paternalistic social relations, policies, and institutions."[151] In other words, Fineman's proposal for reconceiving the legal subject of rights on the basis of vulnerability and for placing the responsibility on the state so as to mitigate social vulnerabilities, is criticized for potentially facilitating state paternalism and for concealing institutional errors, already existing systemic inequalities and resource imbalances.[152]

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147 Ibid 22

148 Frankenberg 1381, 1382; emphasis added.

149 Erinn Cunniff Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' (2018) 49 (3) Journal of the British Society for Phenomenology, 232

150 See S. Charusheela, 'Social Analysis and the Capabilities Approach: A Limit to Martha Nussbaum's Universalist Ethics' (2009) 33 (6) Cambridge Journal of Economics, 1136, 1137; Rutger Claassen, 'Capability Paternalism' (2014) 30 (1) Economics and Philosophy, 57, 61-63, where Claassen addresses the criticisms of paternalism and perfectionism in Nussbaum's capabilities approach, by focusing on the objections to paternalism, which he contends can be justified in some instances. As a definition of paternalism Claassen uses the following: "A theory (or a policy based on it) is paternalist when it interferes with the liberty of a person in order to prevent him from harming himself, either when he would harm himself voluntarily or when he would do so involuntarily."; See also Cannavò 7, 8

151 Mackenzie 35

152 Butler, Gambetti and Sabsay 11; see also Konsta 235. For a view which contrasts this and also defends Fineman's vulnerability theory as not being paternalistic see Kohn 23.

Furthermore, in recent contributions to scholarship on vulnerability, the notion of resilience is contested in its existence. To recall Fineman's argument, it has been examined above that the author sought to re-signify resilience in her theory as a condition that is contingent on the resources that individuals possess and the structural dynamics to which they are exposed to. When submitting such account, however, I take that Fineman looks at resilience from an external point of reference to the human being's psyche. Differently to social determinism and contrary to a position that takes the inevitability of resilience as if it were some self-evident truth, other critical voices call for a complete demystification and debunking of the notion of resilience instead of a potential positive re-signifying.

In this connection, Julian Reid and Brad Evans challenge for instance the supposed necessity and positivity of human exposure to danger, which they argue, has become fundamental to the new doctrine of 'resilience' and to the neo-shaped myth of the autonomous neoliberal subject being transformed into the resilient subject.[153] In a similar vein, Sarah Bracke opines that 'resilience' constitutes the new moral code in the neoliberal project that produces notions of subjectivity and agency, where resilience is another word for quiet, forbearing self-coping and self-reliance at the face of conditions of increasing societal inequality and precarization.[154]

Taking these criticisms into consideration, in what follows I suggest a line of investigation into vulnerability and social justice that distances itself from liberal-moral modes of thinking but also seeks to bridge critical approaches with questions pertaining to the ontology of selfhood and relationality. Looking at the theoretical trajectories of Erinn Gilson and Pamela Sue Anderson, I venture to carve out a space for reimaging an ontology of social relations with the purpose of understanding social rights past its negative signification and coupling with exclusively distributional concerns. Going past intersubjectivity and social determinism, what is proposed below rather moves towards understanding vulnerability through a relational ontology, an approach that will be linked to the concept of *transindividuality* in the next chapter.

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153 For a critique of the notion of resilience in the vulnerability discourse see Julian Reid and Brad Evans, 'Dangerously Exposed: The Life and Death of the Resilient Subject' (2013) 1 (2) Resilience; see also David Chandler and Julian Reid (eds), *The Neoliberal Subject : Resilience, Adaptation and Vulnerability* (Rowman & Littlefield International 2016) 25 et seq.

154 Bracke highlights that "resilience means different things in different geopolitical contexts and according to different positionalities."; see Sarah Bracke, 'Bouncing Back: Vulnerability and Resistance in Times of Resilience' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 71, 72. See also Marianne Hirsch, 'Vulnerable Times' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 82, where Hirsch notes that "resilience" comes from the Latin *resilere*, "to recoil or leap back" and it "is a form of suppleness and elasticity that enables adaptation and recovery from shocks, surprises, or even slowly evolving changes or negative factors."

ii. Vulnerability as a Process

A point of intersection that has been identified between the approaches already presented is an understanding of vulnerability as a source of limitation, negativity and relationality among human beings on the one hand, and as a state of affairs among separate, fully-formed, already constituted individuals on the other. Recent voices in philosophical thinking have come to challenge the premise that human beings bear an inherently negative predisposition in their sociality altogether and that vulnerability is a negative term in itself. In particular, in contemporary analyses, such as that of Matthew McLennan examined above, it is stressed that human beings need to be understood as more than bearers of negatively defined traits, instabilities and limitations.[155] Moreover, it is underscored that ethical and political readings of vulnerability need to challenge liberal theories that rest upon the rejection of vulnerability and seek the pursuit of invulnerability.[156]

In this respect, it has been argued in theory that casting human beings ontologically as vulnerable and invulnerable sustains a hierarchical vision of humans as either triumphants, meaning those being invulnerable, or victims, notably those being vulnerable.[157] Contrary to such a polarizing opposition between vulnerability and invulnerability, a different reading of vulnerability suggests that these two concepts rather coexist and complement each other. In line with this, contemporary philosophical voices have challenged the parochial understanding of vulnerability as something stigmatizing and shameful and have underlined instead that vulnerability "is neither good nor bad"[158] and that it merely denotes the fact of being dependent on others and exposed to others. In other words, vulnerability has been taken to possess neither a positive nor a negative connotation. Instead, it has been submitted in scholarship that vulnerability is "a neutral and descriptive term"[159] that reflects on a self-conscious emotion, that does not further entail a value judgement of one being neither the victim nor the hero.[160] In addition, allocating the concept of vulnerability to the fragile materiality of the living human body

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155 McLennan 60
156 Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 86
157 McLennan 45, 48, 53
158 Thorgeirsdottir 7
159 Ibid 13
160 Charles Foster and Jonathan Herring, *Human Thriving and the Law* (Springer 2018) 57, where Foster and Herring argue against the viewpoint that vulnerability is a source of shame and a state that one needs to overcome. They claim contrariwise that vulnerability is "the core of a thriving life."; See also Lepianka and Knijn 11, which reads "the numerous examples of resistance and coping and attempts to redefine the dominant discourse prove that a conceptualization that reduces 'the vulnerable' to mere 'victims' of *circumstance* and *state (in)action* constitutes a *harmful simplification* and is in itself an *act of misrecognition*"; emphasis added.

and depicting dependency and need as a passive state in human life have been perceived as reductions of the human condition.

Going past these two conventional dualisms of vulnerability, namely of positivity versus negativity as well as between activity versus passivity, ethics philosopher Erinn Gilson, seeks to develop a pervasive idea of vulnerability as a form of openness, inclusiveness and receptivity that also evades the pitfalls of paternalism, essentialism, or false universalism.[161] Contrary to such interpretations, Gilson submits in her analysis that perceiving all vulnerability as threatening and passive or as a limitation hinges on a reduction, namely, a diminutive sense of vulnerability.[162] Instead, what Gilson underscores is that vulnerability needs to be understood not as a reductively negative term but rather as *a relational capacity*.[163]

Essentially how Gilson envisions vulnerability encompasses the following *four* features:[164] *first,* vulnerability is *a condition for relationality*, namely it is the capacity to and necessity of being and entering into formative relation with others.[165] Understanding oneself as vulnerable therefore involves an understanding of the self as being construed through its relationships to others, where dependency on others is considered as sustaining and facilitating the development of oneself into a more interdependent being on whom others can also depend.[166] At the level of corporeality and human embodiment, this bears a resemblance to what has been emphasized by Martha Fineman and Anna Grear about human embodiment and interdependency as a shared condition among people. That is to say, as it is ventured in Grear's analysis, even if we as human beings were to isolate ourselves from other human beings, "our bodies always remain ontologically open, porous,

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161 Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 128, 129, 132-133

162 Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' 230; Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 22; ibid; Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' 230; Erinn Cunniff Gilson, 'Vulnerability, Ignorance, and Oppression' (2011) 26 (2) Hypatia, 312; On the idea of relationality and its connection to the vulnerability see Corine Pelluchon, 'Taking Vulnerability Seriously: What Does It Change for Bioethics and Politics? ' in Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Springer 2016) 305; Pelluchon notes: "Such an embodied, born and hungry self, that is always *a relational subject*, does live a *dual existence*."; emphasis added. See also Julian Reid, 'Embodiment as Vulnerability' in David Chandler and Julian Reid (eds), *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (Rowman & Littlefield International 2016), where Reid raises a similar point on the relational aspect of vulnerability: "Vulnerability is not something that we can simply claim that we are, but something that we are *called upon* to *demonstrate* ourselves *as being*, individually and collectively, in our *relations* with ourselves and others"; emphasis added

163 Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' 232

164 Magrì 339

165 Ibid; Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' 240

166 Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 22

living circuits of inter-relationality."[167] Put differently, a living socio-material reality of our existence is that we are carnally inter-formed and interrelated, not only to each other in the form of an ontological co-constitution, but also in the coproduction of the world.[168]

Second, vulnerability according to Gilson is *a form or condition for potential*, in the sense that vulnerability does not only limit us but is also a condition that enables and empowers us.[169] To be vulnerable means to be open to alteration, and this condition of openness translates to one being affected and to affect in turn. Third, vulnerability is *situational* in that it is differently experienced due to different circumstances in life and for this vulnerability is a condition of ambivalence and ambiguity. Fourth, vulnerability is a *primary common condition*. Vulnerability in this respect may be a fundamental shared and common condition but it is also *ambivalent* in the sense that "simply because it is shared does not mean that it is experienced in the same ways."[170] By means of experience, Gilson does not only consider material conditions but she also takes affective experiences as being equally significant in shaping one's sense of self and dignity, and to that end, she calls for respect at the level of empathy and recognition.[171]

In developing her idea of vulnerability, Gilson is particularly critical of the negative connotation of vulnerability as a concept, as it has been hinted above. In its more fundamental sense, Gilson contends that conceiving vulnerability as solely negative structurally produces and maintains ignorance of what vulnerability entails. Gilson stresses in this sense that vulnerability and invulnerability are not only matters related to the state of being but also of knowledge and ignorance.[172] Gilson asserts that the disavowal of vulnerability is a central feature of subjectivity "privileged in capitalist socioeconomic systems, namely, that of the prototypical, arrogantly self-sufficient, independent, invulnerable master subject"[173] that solidifies an illusory sense of full mastery and complete control. Whether it is the pursuit of physical or emotional invulnerability, Gilson argues that being invulnerable is a construed attitude and position of cultivated ignorance in life, which is structurally shaped and accentuated within societies, whereas being vulnerable opens up a genuine possibility for knowledge and learning. To that end, Gilson stresses

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167 Grear 57, 58
168 Anna Grear, 'Human Rights and New Horizons? Thoughts toward a New Juridical Ontology' (2018) 43 (1) Science, Technology, & Human Values, 138; emphasis added.
169 Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 135, 136
170 Gilson, 'Vulnerability, Ignorance, and Oppression' 310
171 Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' 338, 339
172 Gilson, 'Vulnerability, Ignorance, and Oppression' 312
173 Ibid

that destabilizing such deeply rooted positions is necessary an encourages a different attitude, namely the adoption of, what she calls, an *epistemic vulnerability*.[174]

In illustrating what this epistemic vulnerability encompasses as an attitude, Gilson identifies the following aspects, which are informed and enrich her broader vision of vulnerability. In particular, epistemic vulnerability starts from the premise of being open to both knowing and not knowing, as opposed to invulnerability, which is portrayed as the image of a closed, impermeable self, who is either unwilling to know or is afraid of being the one not knowing. Epistemic closure is understood in this respect as refraining from interaction and dialogue, whereas openness translates in being receptive to the possibility of not knowing. Being the one not knowing, and thus being the potentially uncomfortable party is entangled in the condition of being epistemically vulnerable. This is crucial, Gilson asserts, because without "an acceptance of the genuine *value* of *discomfort* and the real *necessity* of *immersing* oneself in situations in which one does not normally find oneself, *learning does not happen*."[175] It may be the case that in this process of learning, one may stand unsure and not in control of the end result. This is part of being epistemically vulnerable, Gilson notes, in the sense that one is not open just to new ideas and possibilities, but also stands *susceptible* to the ambivalence of their own affective and bodily responses when confronted with the unknown and when reflecting on those responses.

Effectively, what Gilson criticizes are the mainstream long-established ontological assumptions, which inform our understanding of individual and collective existence and relationality, and which in turn, determine the foundations of our theoretical justifications for social justice and ethical practices in social protection schemes. In this respect, Gilson critically observes that our existing ontological assumptions rely "on a faulty metaphysics,"[176] which takes for granted that we are configured in terms of bounded *places*

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[174] For a different approach to epistemic vulnerability see Johnson and in particular 684-685. Johnson, drawing on Eva Kittay's work, understands epistemic vulnerability in the sense that agents have *epistemic needs,* that is, information that one needs but may not be capable of accessing on their own. Those agents require this knowledge in order to achieve certain goals or acquire certain goods that will help them live reasonably well in life. In this respect, one of the key observations of *social epistemology*, according to Johnson, is that epistemic agents are dependent on one other for accessing and acquiring knowledge. This interpretation of epistemic vulnerability per Johnson and Kittay looks at vulnerability from a negative and *external* point of reference, i.e. from a point of externality and separation from the other agent, who has the knowledge one lacks, and thus renders the one lacking to be the one that is vulnerable. Differently to such an understanding, Gilson's epistemic vulnerability understands the latter by looking at it from an affirmative and *internal* point of reference, that is, from the place in which one finds oneself and does not mind in doing so. According to Gilson's account, epistemic vulnerability is thus the kind of vulnerability that one not only recognizes but genuinely accepts and might even seek for the purpose of generating a genuine process of learning.

[175] Gilson, 'Vulnerability, Ignorance, and Oppression' 326

[176] Gilson, 'Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security' 239, 240

and *selves*, as clearly defined and demarcated substances and properties. In this respect, Gilson hints at the idea of the liberal, sovereign subject that was examined above, and the analogies that have been drawn to related macro entities, namely the sovereign state and broader society. Put differently, Gilson recognizes a state of "*isomorphism* between the self and places, specifically the places we call states, and their idealized form: as stable, fixed, impermeable, and invulnerable."[177] How the psychic and somatic boundaries of the self are imagined and delineated as predetermined, irremovable and resolute, and how the macro entities to which oneself is related – namely the society and the state – are also fabricated in the same way, manifest in turn how certain ontological assumptions about the nature of places and selves are sustained and constantly transposed onto one another.[178]

Subsequently, these boundaries are perceived as a source of fear and anxiety and vulnerability is apprehended as tantamount to violation and as a threat in itself, while preservation of security and control are elevated as conditions of foremost importance. Gilson perceptively notes that understanding vulnerability in these negative terms constitutes "a *closure* to a certain understanding of the nature of relations with others as well as to features of the self; it is *a closure to change* that alters the *meaning of the self* and the interpretations we have *formed of ourselves*."[179]

Contrary to such closed imaginary of the self and of social relationality, Gilson's *relational ontology* centers on the notions on vulnerability, precariousness and interdependence.[180] According to such an account, vulnerability takes the meaning of oneself being aware of the *processes* of the constitution of being, and susceptible to the processes of being affected and of affecting others by being in relation to them. Awareness, susceptibility and acceptance of vulnerability as a process of learning and knowledge, are thus distinctive features in what Gilson envisions in her approach. What is more, however, is that in Gilson's idea of *relational vulnerability,* one needs to be and remain "open to altering not just one's ideas and beliefs, but *one's self* and *sense of one's self*."[181]

Building on that assertion, Gilson alerts that as much as we hypothesize theories of relational ontology "we still, for the most part, operate in accord with dominant liberal

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[177] Ibid 237
[178] Ibid
[179] Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 86; emphasis added.
[180] Ibid 40-68 and in particular, the conclusive comments, where Gilson draws inspiration from Judith Butler's work on vulnerability but distances her approach from that of Butler in that she finds that Butler's concept of vulnerability is too theoretical and attached to the notion of violence. On Gilson endorsing a concept of *relational ontology*, see also Elodie Boublil, 'The Ethics of Vulnerability and the Phenomenology of Interdependency' (2018) 49 (3) Journal of the British Society for Phenomenology, 188, 189
[181] Gilson, 'Vulnerability, Ignorance, and Oppression' 326

norms of personhood and individuality, norms that urge us to disregard the bonds that shared vulnerability forges among us."[182] For that, she goes on to suggest that what is required is "a *transformation* in our ontology,"[183] one that needs to take place not only at the level of practice but at the level of thought as well. Gilson submits that the articulation of a "new bodily ontology,"[184] will inform an ethics of vulnerability that will not only be relevant to one's own individual living and needs but will also be disseminated at a practical level and will create the conditions for "more just and equitable social relationships."[185]

Towards a new ethical philosophical imaginary of vulnerability *as a space* for transformation, philosopher Pamela Sue Anderson also redirects her previously Kantian-influenced thinking. A Kantian ontological and epistemological paradigm is understood in this respect as being grounded on the ontological assumptions of a transcendental, hyper-rational, autonomous, masterful and disembodied self that exists prior to one's knowledge and experience and prior to any form of relations.[186] Anderson describes this space of vulnerability as a space before a 'threshold,' a temporary opening to move through, a space where one is neither here nor there, and thus finds oneself in a space of reflection, angst and discomfort.[187] This space, which would otherwise be considered a space of vulnerability is rather, according to Anderson, a margin where all circumstances can be seen as opportunities for creation and transformation. It is a liminal period "where we are no longer what we were but are in the *process* of becoming something different."[188]

In a like manner to that of Gilson's epistemological vulnerability, Anderson draws her inspiration from Judith Butler's idea of 'a constitutive sociality' and endorses an understanding of vulnerability "as a mode of relationality."[189] The latter suggests that our relationally, or our "socially" constituted bodies, exist prior to an "I," which means "that relationality is prior to a self."[190] By being skeptical of the standard dismissal in mainstream approaches of our affective, cognitive and conative relations in our implicit understanding

[182] Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 63
[183] Ibid
[184] Ibid 43, 63
[185] Ibid 74
[186] Grear, 'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject ' 12, 45, 46
[187] Laurie Anderson Sathe, 'Vulnerability as a Space for Creative Transformation' (2020) 25 (1-2) Angelaki: Journal of Theoretical Humanities, 59; emphasis added.
[188] Ibid 60; emphasis added.
[189] Pamela Sue Anderson, Sabina Lovibond and A. W. Moore, 'Towards a New Philosophical Imaginary' (2020) 25 (1-2) Angelaki: Journal of Theoretical Humanities, 10
[190] Ibid

of vulnerability, Anderson seeks to open up a space for a new philosophical imaginary, where vulnerability is conceived anew as a capability for *openness* to mutual affection.[191]

Turning to Butler's work, it is submitted that we are socially constituted bodies, attached to and exposed to others and that these social conditions of our embodiment need to be considered when articulating autonomy.[192] Bodily life carries, according to Butler, a physical and social vulnerability and "this *disposition* of ourselves *outside* ourselves"[193] ascribes to our bodies an invariably public dimension. Vulnerability, claimed by Butler, may emerge with life itself and may be a shared and common condition among human beings but it also crucially "precedes the formation of "I"."[194] When we think of who we "are," Butler stresses, we cannot posit ourselves as merely bounded beings,[195] but the borders once thought to contain and bound us are rather the borders that we share and which *confound* us.

Bringing this to the level of legal entitlements, Butler also deftly points out that within the "legal framework ensconced in *liberal versions* of *human ontology*,"[196] the *language* of rights that is employed, portrays human beings as bounded beings, namely distinct, delineated, recognizable subjects standing as such before the law so as to secure their legal rights and protection.[197] However, now that the "topographies have shifted,"[198] Butler contends that, what makes us humans "is precisely that we are able to be "confounded" by each other."[199] As we live in a political community, wrought from social ties that "tear us from ourselves, bind us to others, transport us, undo us, implicate us in lives that are not our own,"[200] we thus need to think of ourselves as open to unbinding that which has bound us to social stereotypes and conventional ontological truths.

Having assessed Butler's, Anderson's and Gilson's incisive critiques and visions of conceptualizing vulnerability under the prism of relational ontology, this study stands among those who favor such an approach to the concept. In hindsight, throughout this chapter I attempted to highlight some aspects of the highly nuanced discourse surrounding vulnerability and social theory. I took these aspects to be useful in potentially approaching

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191 Ibid 8, 19; emphasis added.
192 Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004) 26
193 Ibid 25, 26
194 Ibid 31
195 Ibid 28
196 Ibid 24, 25; emphasis added.
197 Ibid
198 Simone Drichel, 'Reframing Vulnerability: "so obviously the problem..."?' (2013) 42 (3) SubStance, 22; Butler 49
199 Drichel 22; see also Butler 49, where Butler soulfully writes "For if I am *confounded* by you, then you are already of me, and I am *nowhere* without you."; emphasis added.
200 Butler 24, 25

broader questions of social justice and social rights meaning in particular. Earlier it has been examined how social rights are commonly conceptualized within a conventional legal dichotomy of positive versus negative rights and are substantiated on the basis of a pre-social, negative status of individuals as bounded, fixed, and delimited in time and space, political and legal subjects. Drawing on that ontological assumption, vulnerability has thereby been perceived in a negative, passive and limited sense.

Contrary to such portrayal of vulnerability, as it has been examined above, recent critical voices have called for the need to articulate a new language and vocabulary. Martha Fineman placed the focus on the role of the state when she stressed that social justice advocates need a new vocabulary that will recover and redefine state or governmental responsibility.[201] In a similar vein, Anna Grear drew attention to the excision of embodiment and socio-materiality of the human being, while she underscored that the "liberal capitalist law remains *inhospitable*, at a fundamental level, to the vulnerable complexity of the human embodied personality and her inextricable intimacy with her needs, locations and environments."[202] Identifying the production of an alienated subject in articulations of liberal subjectivity, Grear has put forward the prospect of a dynamic, open inter-coupling of human beings with each other and with their surroundings.[203]

If we envisage an ontology of relationality by means of Grear's *inter-permeation* where the other dwells within the self, Butler's *confounding* of selfhood, Anderson's new philosophical imaginary of *mutual affection*, and Gilson's *transformation of ontology* and *epistemic vulnerability*, these theoretical proposals stand as vigorous and thought-provoking visions towards the re-configuration of vulnerability and social theory. The aforementioned theses further allude to the pleas advanced in theory for vulnerability to be understood and employed as an open *process* of inclusivity, acceptance and plasticity. Opting for relationality as a term does not signify an ending to this theoretical journey, however. Rather, to echo Butler's insights to the matter, another language and thinking about the ways in which we are constituted and related to each other is *still* much needed and *yet* to be articulated.[204]

The analytical contributions that we have examined thus far are significant in that they conjecture vulnerability as being co-extensive with the subject's *individuation*,[205] and comprehend this as taking shape in the form of *process*. As much as these theoretical

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[201] Fineman, 'Vulnerability and Social Justice' 354; emphasis in original.
[202] Grear, 'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject ' 44, 45
[203] Ibid 50
[204] Butler 24
[205] Boublil 186

frameworks analyze vulnerability by means of individuation, though, they seem to do so under the shadow of negativity as a long-held philosophical prescription, and from a point of exteriority to selfhood rather than interiority, sustaining in this way binarily conceived thought-processes and articulations. Surely, imagining vulnerability as an open *process* among human beings and grasping relationality as part of a transformative, kinetic and dynamic individuation is a significant contribution to revising vulnerability as a concept in connection with social justice and conceptualizations of the social in further conceptions and groundings of social rights. Meanwhile, however, when employing these frameworks of vulnerability, be it personal and affective or socio-material and embodied, they appear to navigate in binarily-framed terms and fragmented constellations, which in turn are not necessarily linked to wider political, social, historical and geographical concerns pertaining to structural injustices and extant situated inequalities.[206]

Following this, in the next chapter I seek to explore and associate the aforementioned ideas with the idea of *transindividuality*. Through an examination of this philosophical concept, I venture that the language and frame of thinking that we are looking for might be that of 'transindividuality' as a model of individuation and social relationality in recasting conceptions of social rights. The latter is envisaged from the perspective of an ontologically mutual constitution of individuality and collectivity, affirmative processual transformation based both on immaterial flows of ideas and material practices, and last but not least, through the assemblage[207] of configurations and modalities of both interiority and exteriority[208] to selfhood and to social relationality.

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[206] See also Pelagia Goulimari, 'Love and Vulnerability: Thinking with Pamela Sue Anderson' (2020) 25 (1-2) Angelaki: Journal of Theoretical Humanities, 2

[207] Gilles Deleuze and Félix Guattari place the notion of assemblage as central to their ontology and note in this regard that: "An *assemblage*, in its multiplicity, necessarily acts on semiotic flows, material flows, and social flows simultaneously"; see Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Brian Massumi tr, 1980 1st edn, University of Minnesota Press 1987) 22, 23. Deleuze and Guattari emphasize the "dynamic process rather the final product itself" and take that assemblages are historicized through combination, they are open to unpredictability and new valorizations and they possess agency; see the analysis Fensham and Heller-Nicholas 30

[208] For a succinct commentary of the basic antinomies in ethics and metaphysics between the interior and the exterior, and *a priori* and *a posteriori* understandings, among others, which in turn "always subordinate the intelligence of individuation or ontogeny to the definition of individuality as an ideally stable form" and for an analysis of Simondon's work in this connection, as an "original attempt to redefine the ontological foundations of human sciences"; see Étienne Balibar, *Spinoza, the Transindividual* (Mark G. E. Kelly tr, Edinburgh University Press 2020) 80, 81 note 13

10. Social Rights as Transindividual Rights: A Proposal

According to Richard Rorty, notes, philosopher Chiara Bottici, "philosophy is most of time the result of a contest between an entrenched vocabulary, which has become a nuisance, and half-formed new vocabulary which vaguely promises great things."[1] Having inquired into the ideas of *intersubjectivity* and *relational ontology*, the study proceeds in this concluding chapter to explore transindividuality as not only a *new vocabulary* but most significantly as "another model of thought"[2] and as a potentially new idea[3] in conceiving the 'social' and in subsequently grounding conceptions of social rights.

In assessing the concept of transindividuality, the research proceeds in *two* ways. *First*, it sketches in broad strokes the idea of transindividuality as this has emanated and continues to be shaped in scholarly discussions arising from the original philosophical writings of Baruch Spinoza's ontology and Gilbert Simondon's theory of individuation, and from the respective readings of these works in secondary literature. *Second*, the analysis considers and summarizes ontological and ethical frameworks in conceiving social rights, which have been examined throughout this study. In this regard, the analysis identifies that either atomist or holistic ontologies have steadfastly provided "the most basic and opposed models through which relations among citizens, and relations of citizens to governments, have been conceptualized."[4] Contrary to such epistemological models of social ontology, the thesis proposes a transindividual model of a processual social ontology of relationality in conceiving social rights. The project seeks for a vision of social reality and relationality past a "negative social ontology"[5] of reductionisms and dualist thinking and towards an understanding of a transindividual social ontology of assemblage and polygonal configuration. In this respect, this study favors scholarly insights which highlight that the notion of the transindividual, "is above all *proposing* a new manner of *conceiving* what is very inadequately called the relation between individual and society."[6]

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[1] Chiara Bottici, 'From the Imagination to the Imaginal Politics, Spectacle and Post-Fordist Capitalism' (2017) 3 (1) Social Imaginaries, 61; emphasis added.
[2] Cf. Muriel Combes, *Gilbert Simondon and the Philosophy of the Transindividual* (Thomas La Marre tr, Cambridge, Mass: MIT Press 2013) 8
[3] Legal scholars have called for the need for "new ideas" in envisioning human rights and constitutional theory against Europe's multiple crises; see, indicatively, Jan Komárek, 'Waiting for the Existential revolution in Europe' (2014) 12 (1) International Journal of Constitutional Law, 191; Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies and the Other' October 2019 University of Copenhagen Faculty of Law iCourts Working Paper Series, No 172, 2019 IMAGINE Paper No 1 2, 5, 6; Ferrera 235
[4] Frega, 'The Social Ontology of Democracy' 161.
[5] Cf. Testa 287
[6] Combes 42; emphasis added.

10.1. *Transindividuality*: Introduction and Background to the Concept

The concept of transindividuality draws on Spinoza's ethics and philosophy of ontology,[7] but Gilbert Simondon is the thinker who coined the term 'transindividual' in his work[8] *L'individuation psychique et collective (Psychic and Collective Individuation)* in the second half of the last century. During the last decades, the scholarship engaging with the philosophical notion of transindividuality has presented great flourishing and several thinkers,[9] among whom Étienne Balibar, Bernard Stiegler and Paolo Virno, have bestowed their intellect and time in understanding and developing this idea. The study here does not approach the philosophy of the *transindividual* in its infinite potential and conceptual depth[10] as this has been circulated and reformulated in different paths of philosophical thought. Instead, the idea of transindividuality outlined here, canvasses the relevance of transindividuality as a mode of thinking and as a concept in understanding sociality and the relation of the individual with the society towards recasting an alternative reading to social rights. In this regard, in what follows, the study echoes recent voices that call for an ontological shift towards transindividuality as the prism through which a new language and thought process of social relationality and individuality could be recasted. Due to this targeted angle, the thesis delves selectively into transindividuality as this has been crafted in the meticulous works of Gilles Deleuze, Muriel Combes, Jason Read and Chiara Bottici, among others. In line with this, the research proceeds to make a *preliminary* examination and *partial* application of transindividuality in the social ontology discourse of social rights.

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[7] Cf. Benedictus de Spinoza, *The Collected Works of Spinoza*, vol I (Edwin Curley ed, Edwin Curley tr, Princeton University Press 1985); Benedictus de Spinoza, *The Collected Works of Spinoza*, vol II (Edwin Curley ed, Edwin Curley tr, Princeton University Press 2016) as cited and analyzed in Balibar, *Spinoza, the Transindividual* 3 et seq.

[8] The philosophical work *L'individuation psychique et collective (Psychic and Collective Individuation)*, constitutes the third and last part of Gilbert Simondon's major and minor theses. Simondon's main doctoral thesis is titled *L' individuation à la lumière des notions de forme et d'information (Individuation in Light of the Notions of Form and Information)*. The other two parts are: the first, Gilbert Simondon, *L' individu et sa genèse physico-biologique: l'individuation à la lumière des notions de forme et d'information* (Presses Universitaires de France 1964) (transl. *Individuation and its Physico-Biological Genesis: Individuation in Light of Notions of Form and Information*). For a published translation in English, see Gilbert Simondon, *Individuation in Light of Notions of Form and Information* (Taylor Adkins tr, Minnessota Univ. Press 2020). The second part is *Du mode d'existence des objets techniques (Of the Mode of Existence of Technical Objects)*, for which Gilbert Simondon is most well-known for in information theory and technics. Cf. David Scott, *Gilbert Simondon's Psychic and Collective Individuation: A Critical Introduction and Guide* (Edinburgh University Press 2014) 1, 2; Mark Hayward and Bernard Geoghegan, 'Introduction: Catching Up With Simondon' (2012) 41 (3) Substance, 4, 9 et seq. According to commentators, Simondon denied the proximity of his work to the ethics of Spinoza; see Balibar, *Spinoza, the Transindividual* xiv, 45

[9] Selectively, G. E. Kelly Mark and Dimitris Vardoulakis, 'Balibar and Transindividuality' (2018) 2 (1) Australasian Philosophical Review; Bernard Stiegler, *Technics and Time, 1: The Fault of Epimetheus* (Richard Beardsworth and George Collins trs, Stanford University Press 1998); Matt Bluemink, 'On Psychic and Collective Individuation: From Simondon to Stiegler' (*Epoché (ἐποχή) Philosophy Magazine Issue #40* 2021)

[10] The analysis does not engage with the ideas of the 'pre-individual' and of 'transduction,' which are central in Simondon's theory of individuation; for an analysis see Combes 2, 3 et seq., 6 et seq.

Transindividuality is understood in this endeavor as a concept in progress as individuation and knowledge are as well, and hence, it makes little sense to frame this "as a contained entity."[11] In sketching the contours of transindividuality, I shall briefly assess secondary interpretations of transindividuality by some of the most careful readers and avid interlocutors of Simondon's theory of individuation and Spinoza's ontology. Gilles Deleuze, being one of those thinkers, pins down two critical theses of Gilbert Simondon and his philosophy of individuation in which transindividuality is situated. In this respect, it is crucially stressed that Simondon takes off from two critical observations. *First*, according to traditional social theories, the principle of individuation is modeled on an already constituted, completed and given individual, one who is an already individuated and fully formed being and is anterior to the process of its individuation.[12] *Second*, the individual by succeeding the very process of its becoming, can only reflect upon an *image* of the already individuated and practically *completed* process of its individuation which does not and cannot generate any new processes. That is to say, becoming *has become* and the individual is considered to be an unaltered, static, unmodified entity in time and space.

Contrary to such vision, Simondon, according to his readers, puts forward two central postulates in his reconceptualization of epistemology and ontology as *ontogenesis*.[13] With respect to ontology, the operativity of relation and the apprehension of collectivity, both lie at the heart of Simondon's intellection.[14] The philosopher starts from the question 'what is an individual?' and proceeds in answering this by submitting that an individual is not a given entity, but a continuous process in constant movement.[15] In this connection, individuation posits as process, while the individual emerges out of all that precedes it, hence individuation and individuality are *indefinitely* transformed one into the other.[16] As Deleuze assuredly emphasizes "in reality, the individual can only be contemporaneous with its individuation, and individuation, contemporaneous with the principle: the principle must be truly *genetic*, and not simply a principle of reflection."[17] Subsequently, *being* in a transindividual syllepsis posits as an *infinite* being, as a consequence of the infinite webs of

[11] Here, I paraphrase the words of Kimberlé Crenshaw: "Understanding intersectionality as a work-in-progress suggests that it makes little sense to frame the concept as a contained entity."; see Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' 304
[12] Cf. Gilles Deleuze, *Desert Islands and Other Texts: 1953 - 1974* (David Lapoujade ed, Michael Taormina tr, Semiotexte 2004) 86; Scott 31
[13] Cf. Hayward and Geoghegan 4
[14] Combes Preface, xiv
[15] Cf. the analysis at Paola Maria De Cuzzani and Kari Hoftun Johnsen, 'Pragmatic universalism – A basis of coexistence of multiple diversities' (2015) 10 (2) Nordicum-Mediterraneum ; Chiara Bottici, 'Imagination, Imaginary, Imaginal: Towards a New Social Ontology?' (2019) 33 (5) Social Epistemology, 439
[16] Cf. Combes Preface, xiv
[17] Deleuze 86

relations[18] that individuals form with each other and essentially as an "open infinity of relations."[19] Hence, an individual is never given once and for all, it is not a predetermined *subject*, a bounded and alienated atom or a self-enclosed *entity* of "an ideally stable form."[20]

Following this, a transindividual philosophy appears to be critical not just of the reduction of collectivity to individuality, but of the reduction of individuality to collectivity, as well.[21] In this regard it breaks with perceptions of the individual and the collective as being mutually exclusive and rather makes the case for the conjunct existence of the individual and the collective, without the one being reducible to the other.[22] Transindividuality is understood in this way as standing opposite notions of *intersubjectivity*, or the reduction of the transindividual relation to the relation between already constituted, pre-defined individuals; *totality*, or the reduction of the individual to some other type of greater individual; and *social determinism*, or the assumption that the individual is simply an effect of history or some type of singular structure, such as the economy.[23]

Concerning epistemology, many analyses take at face value notions such as that of the individual and understand being "on the *model of the One*"[24] pushing thought into dualism, essentialism and substantialism. Contrary to such substantialist and essentialist metaphysics, transindividual ontology is ontogenetic in the sense that it seeks to propose a different humanism, where the human is "social, psychosocial, psychic, somatic, without any one of these aspects to be taken as fundamental."[25] Transindividuality is characterized by a "systemic movement"[26] that is contingent upon the reality of relation and of individuation itself. Transindividual being emerges in this regard, as "an individual and other than an individual."[27] The idea of relation is at the heart of a transindividual reconsideration of epistemology and ontology.[28] In this generative and process-oriented ontology, it is not individuals that create relations, but individuals are themselves relations that constitute relations.[29] Transindividuality consists in this vein of two processes of

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[18] Bottici, 'Imagination, Imaginary, Imaginal: Towards a New Social Ontology?' 438, 439
[19] Scott 182
[20] Balibar, *Spinoza, the Transindividual* 80, 81 note 13. See also the analysis at De Cuzzani and Johnsen 16, 17
[21] Read, *The Politics of Transindividuality* 114
[22] Cf. Ibid 115; Jason Read, 'Affective Reproduction: Thinking Transindividuality in an Age of Individualism' (*Unemployed Negativity* 2015)
[23] Read, *The Politics of Transindividuality* 115, 132, 139. On 'the individualist model of intersubjectivity'; Morfino 10
[24] Combes Preface xiv
[25] Scott 135
[26] Combes Preface xiv
[27] Read, *The Politics of Transindividuality* 111; Read specifically refers here to subjectivity and notes that the "subject is an individual and other than an individual."
[28] Combes Preface, xiv
[29] Cf. Hayward and Geoghegan 3; Scott 134

individuation, an interior, which is the psychosocial, and an exterior which is the collective.[30] Seen this way, the human being exists as a permanent mixture of the common and the singular,[31] that is to say, elements of being overcome "a disparation"[32] in such a way that "what is interior is also exterior."[33] Critically, this idea of individuals as relations connotes that transindividuality "is nothing other than [the] *articulation* of the individual."[34]

Drawing on the above, alterity is considered to be at the core of the self[35] and transformation happens not in the form of an event, but in the sense of a process that takes place at an *infra*-, *inter*- and *supra*-individual level.[36] In this respect, transindividuality is both structural and dynamic, actual and metastable[37] and it necessitates a complex schema of non-linear or transitive causality.[38] To put this differently, in a transindividual model knowing and the product of knowing are conceived in the same way that being is understood. Namely, information as individuation is too "never a given thing."[39] Rather information and knowing is in motion, is being continuously generated and essentially "is only possible because it too undergoes an ontogenesis, it too is individuated."[40] In this regard, a transindividual ontology crucially suggests that we understand the individual through the process of individuation rather than individuation through the individual.[41] Following that, the individual "is not just a result, but an *environment* of individuation."[42] In other words, individuation appears as a solution, but it is a solution in the sense that it *resolves* the tension between different affects, perceptions, and reasonings. It is a solution that is constantly being put to question itself.[43] The individual thus is the result of an *operation* of individuation that is always moving, processing and generating and is contingent on the *encounter* itself.[44]

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30 Scott 42, 107, 151, 156, 161
31 Cf. Paolo Virno, 'Reading Gilbert Simondon - Transindividuality, Technical Activity and Reification' [2006] (136) Radical Philosophy, 35
32 Elizabeth Grosz, 'Identity and Individuation: Some Feminist Reflections' in Alex Murray, Arne De Boever and Jon Roffe (eds), *Gilbert Simondon: Being and Technology* (Edinburgh University Press 2012) 50
33 Deleuze 87. Cf. also Combes 20, 23, 41; Scott 103, 188; Grosz 50, 51
34 Jason Read, 'The Production of Subjectivity: From Transindividuality to the Commons' (2010) 70 New Formations: A Journal of Culture/Theory/Politics, 119
35 Read, *The Politics of Transindividuality* 111
36 Bottici, 'Imagination, Imaginary, Imaginal: Towards a New Social Ontology?' 438, 439
37 Cf. Read, *The Politics of Transindividuality* 109, 268, 277, 282; Read, 'The Production of Subjectivity: From Transindividuality to the Commons' 118, 122
38 Cf. Read, *The Politics of Transindividuality* 128, 264, 277; Balibar, *Spinoza, the Transindividual* xiv, 3 et seq., 47
39 Gilbert Simondon, 'The Position of the Problem of Ontogenesis' (2009) 7 Parrhesia: A Journal of Critical Philosophy, 10
40 Grosz 56
41 Cf. Gilbert Simondon, 'The Genesis of the Individual' in Jonathan Crary (ed), *Incorporations* (2nd print. edn, Zone 1995) 300
42 Deleuze 86
43 Read, 'Affective Reproduction: Thinking Transindividuality in an Age of Individualism'
44 On the idea of the 'encounter,' see Morfino 9 et seq., 44, 64, 83 et seq.

10.2. Social *qua* Relational: The Question of Social Ontology

The question of social ontology has been a recurring and implicit one throughout the present study. In what follows, I proceed with reflecting on underlying ontological assumptions that have been discussed and explored throughout this thesis and I make the case for a potential conceptualization of social rights on the basis of a transindividual social ontology of processual relationality. Before applying the idea of transindividuality, as it has been briefly delineated in the foregoing paragraphs, the ontological models and structures that have been encountered in this study and the underlying question of social ontology attached to them require for further assessment.

i. Ontological Models of Social Rights: A Critique

Throughout this study, ontological structures and implicit ontological assumptions have been presented and assessed regarding conceptual frameworks of social rights. In addressing those assumptions, scholarly voices have already drawn attention in that political and legal theory have "remained captive of the dualistic split between *atomist* and *holistic* ontologies."[45] Consistent with this dualist split, conceptualizations of social rights, I would argue here, tend to be located either at the level of the individual, or at that of institutions and structures,[46] while, as it has been stressed in scholarship "the intermediate dimension of patterns of *social interaction* has systematically been neglected."[47]

To briefly elaborate on the above observations, it has been submitted in relevant literature, that liberalism on the one hand "tends generally to espouse atomistic assumptions concerning the psychological, moral, and legal priority of individuals."[48] Following from that, *atomism* is considered to convey an interpretation of the society as a composite of individuals,[49] who are *disrelated* to each other. Accordingly, within a liberal model that is informed by an atomist ontology, society is understood as an aggregate of individuals, where social relations are reduced to *self-relations* with one another. Notably, in this framework, relations are considered relations of oneself with other individuals,

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[45] Roberto Frega refers to political theory but I take that these observations can be extrapolated to legal theory; see Frega, 'The Social Ontology of Democracy' 161; emphasis added. Julie Zahle discerns between the classic methodological individualism-holism debate in social sciences and rejects both such methodological frameworks; see Julie Zahle, 'The Level Conception of the Methodological Individualism-Holism Debate' in Miguel Garcia-Godinez, Rachael Mellin and Raimo Tuomela (eds), *Social Ontology, Normativity and Law* (De Gruyter 2020) 27 et seq. See also Balibar, *Spinoza, the Transindividual* xv, xvi, where the ontological dualism is identified in Spinoza's ethics in "individualism versus holism (or organicism)."

[46] Frega, 'The Social Ontology of Democracy' 161

[47] Ibid

[48] Ibid

[49] Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* 106

whereas the vantage point is always placed on the individual and its actions alone, and not on human relationality and sociality.[50] Building on that, and as it has already been addressed earlier,[51] a liberal individualistic ontological model endorses the centrality of the individual and sustains the opposition between the individual and the society.

Linking the above to the recent austerity policies or looking broadly at modelling methods of social reality in modern economics, scholars have stressed that neoclassical economics commit to the view that "social reality consists of a ubiquity of *closed* systems of *isolated atoms*."[52] Such atoms, meaning the human persons, are ontologically taken to be naturally constituted as self-interested actors, who use their rationality to instrumentalize and maximize their personal utility. Consequently, the "normative effect of these ontological and methodological moves is profound,"[53] since these atomistic-based models not only destabilize institutions "which permit human agency in the first place, including the legal system,"[54] but they also entrench an idea of social reality that is driven by public affects of distrust, competition and social detachment.

On the other hand, *holistic* ontological theories are taken to portray society as a collective entity endowed with structures and properties that shape and predetermine the subjectivity of its members.[55] In this framework, the individual is referred in the abstract and is subsumed in the collective, while it is exhaustively grounded on the economic base, a base that further defines later individuations.[56] Bringing this to the level of social welfarist models, individuals appear only "as recipients/clients of the welfare bureaucracy who are more or less entitled to a share of a public good or of special social services."[57] Social relations within this model are reduced to mere relations of production or economic relations, which are mediated through structures, while any conception of relationality is understood as the product of such structures leaving thus out of the equation whatever cannot be classified as production in economic terms.

Bringing these observations at the level of social rights, social welfarist approaches, which have been examined in this study, explicitly place emphasis "on the *material* content

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[50] On that point, see also the analysis at Corinna Elsenbroich, 'Relationship Thinking: Agency, Enchrony, and Human Sociality' (2015) 1 (2) Journal of Social Ontology, 385

[51] See Part V. Chapter 9.1. ii. Liberal-Moral approaches to Vulnerability.

[52] Lawson; emphasis added.

[53] Simon Deakin, 'The Path Back to the Law' (*VerfBlog*, 2020)

[54] Ibid

[55] Cf. Frega, 'The Social Ontology of Democracy' 161; Christodoulidis and Goldoni, 'Marxism and the political economy of law' 109

[56] Read, *The Politics of Transindividuality* 139

[57] Cf. Frankenberg 1382. Frankeberg refers to 'citizens' in his analysis; I expand this observation to 'individuals.'

of social rights, that is, the substantial governing arrangements that regulate them as essential building blocks of societal reproduction."[58] Conceptual and methodological approaches to social rights from a system-analytic welfarist perspective focus on the political economy of social rights, while it has been stressed that "it is not possible to have an accurate understanding of social rights without a proper analysis of their *material* dimension."[59] In this connection, the meaning of the social is exhausted on how the society materially reproduces itself. Placing this discussion against the backdrop of the austerity reforms examined earlier and the retrenchment of the social welfare model, legal scholars have even gone so far to suggest that "since *welfare reform* implicates everything, it is the *very core* of the web of *social relationships itself*."[60]

It could be argued here that this exclusive focus on the state is prescribed by a consequentialist ethics that denies any intent, agency or free will of the subject and is conceivably consistent with hard determinism. Stated differently, systems-theoretical analyses, which tend to view economic activity as the only social relevant activity, fail "to see the role of *human action* behind production even where self-regulating systems coordinate it,"[61] while they further fall short in seeing the production of knowledge as being in itself a form of creative activity.[62] The latter could be linked with the discussion on mutual aid and the mixed type of non-state and state coordinated initiatives of horizontal solidarity, which have been set up in the face of the implementation of austerity policies in financial assisted countries.[63]

Building on the afore-mentioned, it could also be said that social welfarist approaches to social rights in legal analyses, which have largely been elevated from a post-Marxist systems theory standpoint, tend to ontologize the state apparatus. That is to say, in systems-analytic approaches "the system as a whole posits as an *ontological entity* – real in itself – which produces consequences through institutions."[64] Accordingly, it could be said, that these analyses endorse "a personifying account of the state,"[65] by placing outer structural tendencies and institutional characteristics at the epicenter of their theoretically

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[58] Christodoulidis and Goldoni, 'The political economy of European social rights' 242; emphasis in original.
[59] Ibid; emphasis added.
[60] King, 'Social rights and welfare reform in times of economic crisis' 215
[61] Craig J. Calhoun, *Critical Social Theory: Culture, History, and the Challenge of Difference* (Blackwell 1995) 126 note 114; emphasis added. Calhoun argues that this is a particularly "disturbing" tendency, which practically *reifies* accounts of economic activity and poses problems for relevant orthodox Marxist accounts.
[62] Ibid
[63] See Part V. Chapter 8.3. ii. Solidarity and Mutual Aid.
[64] Barrow W. 97; emphasis added.
[65] Here, I expropriate this phrasing from Murphy's analysis on the international obligations of states in international human rights protection; see Liam Murphy, 'International Responsibility' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 313

constructed *ideal* types of understandings of social reality. In this regard, it can be recalled,[66] that concepts such as that of solidarity and collective self-determination are considered to be exclusively achieved "through some sort of institutional mediation, such as welfare state institutions, redistributive policies, or legal infrastructures."[67]

Following on from that, we have seen that in the broad spectrum of critical legal studies, the ontological assumptions upon which understandings of relationality are grounded, draw largely on the idea of intersubjectivity. As it has been examined earlier in this study,[68] intersubjectivity is closely linked to the idea of recognition, which is taken to designate "an ideal reciprocal relation between subjects in which each sees the other as its equal and also as *separate* from it."[69] In this regard, the reciprocal relation is considered to be constitutive for subjectivity, in the sense that "one becomes an individual subject only in virtue of recognizing, and being recognized by, another subject."[70] Crucially, "it is *only through the State* that individuals acquire the capacities to recognize others and accept the responsibilities of the social order,"[71] suggesting in this way that the individual is fully submerged and individuated through the state.[72] Furthering that thought, accounts of human action and reason in these frameworks "are always abstracted from cultural or social particularities and identities,"[73] while "social relations are prior to individuals and intersubjectivity is prior to subjectivity."[74]

Accordingly, in social welfarist models, broadly defined, "the real protagonists of history are the social relations of production,"[75] while "the biological men"[76] are only considered to be the bearers of the characteristics "assigned to them by the *structure of relations* in the social formation."[77] Substantially, these theoretical accounts stand in conformity with the eminent assertion of structural Marxism that "history is a process

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[66] See Part V. Chapter 8.2. Thinking of Solidarity *Midst* and *Post* Crisis.
[67] Frega, 'Solidarity as Social Involvement' 12
[68] See Part V. Chapter 8.3. i. Reciprocity and Self-Reliance
[69] Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 10; emphasis added.
[70] Ibid
[71] Fredman 64; emphasis added, capitalization kept as stated in the original.
[72] Ibid
[73] Calhoun 206
[74] Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 10
[75] Cf. Louis Althusser and others (eds), *Reading Capital: The Complete Edition* (epub edn, Verso 2016) 1261
[76] Cf. Ibid 1262
[77] Cf. Ibid; emphasis added.

without a subject,"[78] according to which, subjectivities[79] are construed without capacity for historical agency. Despite of this bold proclamation of "the death of the subject"[80] or the negation of the modern subject as a co-creator of history and society,[81] which follow these analyses, it appears nonetheless that assertions of that sort are symptomatic of the philosophical problematic of transcendental subjectivity,[82] which persists in the intellectual *imaginary*[83] of social welfarist approaches.

Building on the afore-mentioned observations and reflecting upon points that have been elevated throughout this study, it could be argued that conceptions of social rights are commonly formulated in legal analyses on the basis of the perennial dilemma of agency-structure, which is sequentially transplanted in the all-too-common dichotomies of the individual versus the state, the individual versus the society or the individual versus the collective. Consequently, as we have seen throughout this thesis, analyses on the conceptualization of social rights constantly fall back on the restrictive or protective character of state social structures on the one hand or on the self-interested, voluntaristic individual agency of individuals or the inability of individuals to have agency at all on the other hand.[84] However, as it has been stressed in theory, despite the weariness that the dilemma of structuralism versus agency engenders, the discussion has nowhere else to go from there.[85] What is more, analyses which go past the structure versus agency dichotomy do not seem to reflect on the nature of the individual itself and its formation within social reality. Instead, in social theoretical schemes it is assumed that the individual is either an isolated atom or a subjected *inter* being, meaning a being *between* structures, and in any case, it is taken as an entity that is always reduced to the status of an already constituted structure

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[78] This renowned phrase belongs to Louis Althusser, who has been an intellectual figure of structural Marxism. The exact phrasing reads as follows: "History really is a "process without a Subject or Goal(s)", where the given *circumstances* in which "men" act as subjects under the determination of social *relations* are the product of the *class struggle.* History therefore does not have a Subject, in the philosophical sense of the term, but a *motor* : that very class struggle."; capitalization and emphasis kept as in the original, see Louis Althusser, *Essays in self-criticism* (Grahame Lock tr, NLB 1976) 99

[79] It is worth noting here that a differentiation between the 'individual' and the 'subject' is clearly marked in liberal and social welfarist models of social rights theories respectively. It is beyond the scope of this study to engage with the subtleties of this highly nuanced differentiation. For an excellent analysis on liberal and welfarist concepts of social rights and a brief remark on the distinction of subjects and individuals, the former connoting the inclusion of human persons in the "domestic sphere of the State rather than the civil society"; see Frankenberg 1374 et seq.

[80] Cf. Laclau 83

[81] Cf. the analysis at Christos Boukalas, 'The Prevent paradox: destroying liberalism in order to protect it' (2019) 72 (4) Crime, Law and Social Change, 467, 479

[82] Cf. Roitman 113; Laclau 83

[83] On the idea of the imaginary, see VI. Postscript: Some (Non-)Conclusive Considerations.

[84] Cf. the analysis at Boukalas, 'Politics as Legal Action/Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering' 400. See also Part I. Chapter 1.5. ii. Contribution to the Literature.

[85] Ibid; Boukalas makes a similar argument about the weariness on the debate between structure and agency which translates on the debate on structuralism versus constructivism.

itself. Lastly but equally significantly, even though recent legal analyses call attention to the "processes of subjectivation"[86] and alert that actors must not "be reduced to the status of already constituted or abstract objects (or institutions)"[87] these analyses adhere to a materialist theory of social reality and place their entire focus on issues of materiality.

Oddly (or not), despite the fact that social rights float like empty signifiers, as most of the concepts that are used to define them (such as that of justiciability or costs or solidarity), these rights remain static in character. That is to say, common expositions of social rights, seem to be cemented on the institutional and structural embodiment of the political economy associated with such rights or the individualistic bias diagnosed in them. Theorizing social rights in this regard, is exhausted to the layered order of the institutions and structures of the society and their politics,[88] while an affront to lived experiences and human interactivity is displayed, since these are taken as non-legally relevant subject matters that cannot be attributed to rights and duties. Interestingly, these limitations and consolidations in political conceptions of social rights, could be explained by the highly instrumental use of these rights. In other words, the fact that these rights remain a dependent variable of political intention results in that these rights are defined ex post after a specific meaning of economic nature has been ascribed to them and not because a certain notion of *sociality* stands for itself as an inherent element of social rights.

Drawing on the above, whether rights are tied to a liberal model of individuality, where persons are self-sufficient and self-interested, or whether they are seen under a social welfarist lens, as being prescribed by a shared social bond and commitment, in both occasions rights are always regarded "as *things* that are allocated or distributed."[89] That is to say, rights are conceived as being "primarily *against* others: governments, and other persons,"[90] whereas social reality is effectively construed "primarily as one of conflicting interests where your gain is my loss and my gain is your loss"[91] and social theory, as it has been examined earlier in this study, "presupposes and articulates a theory of *social conflict*."[92]

Subsequently, these presuppositions have two significant effects on theorizing social rights. *First*, human beings are considered as already individuated, closed systems

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[86] Goldoni and Wilkinson 587
[87] Ibid
[88] Browne 153
[89] Frankenberg 1381, 1382
[90] Held, 'Care and Human Rights ' 635
[91] Ibid
[92] Frega, 'Between Pragmatism and Critical Theory: Social Philosophy Today' 63, 71 et seq. For the presumption that conflict is a defining aspect of human nature and of conflict being a defining element of social and constitutional theory, see also Part V. Chapter 8.3. ii. Solidarity and Mutual Aid.

and practically, as bounded, static *structures* themselves. *Second*, human nature is assumed to rely exhaustively on a "putative asociality"[93] or "asocial sociality"[94] or in a different reading it is assumed to be based on an 'unsocial sociability'[95] in Kantian terms or a 'pre-social'[96] individuality in Hegelian terms, where relationality is ontologized through oppositional forces and "human being-together can never completely forego violence."[97] Essentially, liberal and social welfarist approaches to social rights share a pre-social,[98] naturalistic notion of individuality that remains fixated on the negative status of individuals. However, a collection of individuals all pursuing their own interests, or rationally contracting with each other or bonding with each other out of necessity in counteracting social conflicts in a social reality that is always already pre-defined as negative "do not make a state or a society, or a world willing to respect the human rights of all."[99]

Social theorists being aware of these challenging areas of rights theorizing have proceeded in making their proposals in reconceptualizing social rights. Among such contributions, already back in 1941, jurist and sociologist George Gurvitch suggested in his essay *The Problem of Social Law*[100] to conceive social rights on the basis of *transpersonalism*. In the theoretical framework that he proposed, Gurvitch explicitly acknowledged "social law in its various forms of *sociality*"[101] and emphasized that social law always reflects the identity of the social group.[102] While envisaging a transpersonalistic idea of social law, Gurvitch defined the latter as a synthesis of the equivalence of the value of each person, the value of the whole and their mutually generating character, the unity of which arises from the variety of their conflicts and interactions.[103] Skeptical of state structures, Gurvitch has drawn attention in this regard to the continuous changing character of *human relations*, while he emphasized in his writings that "the future of democracy lies in the universality

[93] Gould, 'A Social Ontology of Human Rights' 177
[94] Cf. Murray and Schuler 124. See also Part I. 1.1. Framing the Questions and Contours of the Research.
[95] Reiss 44. See also the analysis on 'unsocial sociability at Part V. Chapter 8.3. ii. Solidarity and Mutual Aid.
[96] Cf. Drucilla Cornell, 'Fanon Today' in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 124, where Cornell challenges such interpretation of Hegelian ontology of social individuality as "the beginning of relationality."
[97] Ibid 123, 124. On the teleology of violence in Marx and Hegel, see also Morfino 113, 116, 117 et seq.
[98] Frankenberg 1381, 1382; emphasis added.
[99] Held, 'Care and Human Rights ' 640, 641
[100] Georges Gurvitch, 'The Problem of Social Law' [University of Chicago Press] 52 (1) Ethics
[101] Jr Angelo Golia and Gunther Teubner, 'Societal Constitutionalism (Theory of)' 14 March 2021 Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 2021-08 5 citing Georges Gurvitch, *L' expérience juridique et la philosophie pluraliste du droit* (Pedone 1935); emphasis added.
[102] Golia and Teubner 5; emphasis added.
[103] Gurvitch, 'The Problem of Social Law' 26,27

and multiplicity of its faces, in its *polyhedral* character"[104] and in those very relations of human beings which go beyond the limits of political organizations.

Coming to recent years, it can be recalled,[105] that Virginia Mantouvalou in searching for a conceptual justification of social rights has also drawn attention to the *relational* dimension of freedom in providing for an intellectual justification to an integrated approach to social rights.[106] The most systematic work on a theorization of social rights, seen at the level of relations, social ontology and sociality, has been admittedly carried out, though, by philosopher Carol Gould. In her comprehensive theoretical scheme, aspects of which have already been assessed earlier in this thesis,[107] Gould highlighted the centrality that sociality has in her intellection of individuality and self-development. Placing the principle of equal positive freedom of the individual as the endpoint of a social ontology of rights, Gould stressed that sociality is composed of not only reciprocal interactions but also takes the form of common or joint activities.[108] For Gould individuals "are to be understood ontologically as *individuals-in-relations* or as *social individuals*,"[109] in the sense that the characteristic mode of being of these individuals is that their activities involve their relations with others. In this respect Gould appeared to be aware and critical of the individualistic bias of liberal theory and her emphasis on sociality seemed her way of deviating from such paradigm. That is to say, by placing the focus on individuality, understood from a perspective of *internal* relations, Gould has drawn a distinct separation line from "*externally* related individuals characteristic of traditional liberal theory."[110]

This internal dimension that the philosopher illustrated in her theoretical framework of a social ontology of rights has not been the defining one of her work, however. Instead, Gould highlighted in her research "the relation between an open conception of *agency* as characteristic of each individual."[111] Notably, the philosopher underscored the aspect of active agency of each individual in relating to others, that is, the *freedom* to choose the relations an individual forms or not. The latter has been a point of criticism in Gould's work. In more detail, the philosopher may have placed sociality at the center of her analysis and may have understood the mode of being as an *in-relation* process.

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[104] Golia and Teubner 5; emphasis added.
[105] See Part IV. 7.2.i. The Interdependence and Indivisibility Thesis.
[106] Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' 552, 553
[107] See Part V. Chapter 8.3.i. Reciprocity and Self Reliance and ii. Solidarity and Mutual Aid.
[108] Gould, *Globalizing Democracy and Human Rights* 33, 120
[109] Ibid
[110] Ibid 63
[111] Gould, 'A Social Ontology of Human Rights' 193

However, the focus of her social theory remained nonetheless on the individual and its discretion to opt in or out of relations. That is to say, individuals have been considered to be free to choose what relations they form and how they relate to others. And this "compromise between the individual and the social,"[112] is what made Gould's approach, according to commentators of her work, to be "strongly individualistic,"[113] at the end.

In hindsight, the focus on the idea of *relation* in theorizing conceptions of rights in the aforementioned theoretical undertakings, has been grounded on the value of freedom or liberty, as these have been used interchangeably. Despite the different readings of this notion within liberal legalism, whether from a politically social welfarist or a liberal welfarist approach, liberty has been the cornerstone of ethical justifications and the one concept that all other concepts ultimately resorted to. That is to say, as it has been stressed in theory, fundamental rights, and by extension social rights, have been "built on a single value – the principle of freedom."[114] The latter has been exemplified in previous chapters,[115] where we have seen that the trope of liberty has maintained its allure in a lineage of liberal and critical thinkers, who have suggested theoretical frameworks in justifying the foundations of social rights. Put differently, as much as theoretical appraisals of social rights have put forward different approaches in analyzing social rights, the lens through which these have been fundamentally grounded upon remained the same. Namely, models of thought in conceiving social rights have all essentially grounded such rights and addressed the 'sociality' conundrum, by having recourse to the value of freedom or liberty, which in its notional merits, whether positive or negative, has been "already naturalized in liberal terms."[116] Freedom and liberty have thus been depicted in examined liberal or critical legal analyses, as the "singular value of modernity that is universally accepted."[117]

Whether the language of freedom or liberty and the understanding of this as value is a sufficient foundation to ground social rights is a separate and controversial story that is beyond the scope of this research. The intellectual confusion coming from appeals to the idea of freedom, the criticism of the veracity of categories such as positive freedom as well as the tautological fallacy deriving from claims to the natural dimension of rights,[118]

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[112] William J. Talbott, 'Reviewed Work(s): Globalizing Democracy and Human Rights' (2007) 116 (2) The Philosophical Review, 294

[113] Ibid

[114] On that point, see also the analysis at Loughlin 201

[115] See Part IV. Chapter 7.1. The Relation of Rights with Costs and 7.2. The Relation of Rights with Rights; Part V. Chapter 8.3. In Search of Ethical and Ontological Answers.

[116] Sabsay 299

[117] Browne 147

[118] On the criticism of naturalistic claims as being tautological and fictional, see Loughlin 201; for the tautologies inherent in nebulous appeals to the notion of freedom and regarding the veracity of

have all been at the epicenter of philosophical critique and certainly surpass the angle of this study. For the analysis here, suffices to note that articulations of relationality in otherwise individualistic or substantialist ontological models of social reality, which have been consolidated on the notion of freedom or liberty as a value, appear inadequate to explicate the idea of the *social* and the notion of *sociality* in conceptions of social rights. That is because, anchoring the conceptualizing of social rights on values, ultimately poses to be limiting[119] because a value is an attribute and by being an attribute it can only contain a rudimental sketch of the ontological and ethical conditions of social nature. Hence, it cannot provide for a comprehensive model of thought and apprehension of social reality. With those observations in mind, the thesis proceeds with drawing a transindividual model of relationality as a *non-conclusive* framework in recasting conceptual schemes of social rights.

ii. Towards a Transindividual Social Ontology of Relationality

The question of social ontology is not only relevant but it appears as a centrifugal force in the formulation of social theories and in conceptions of social rights.[120] In recent years, the problématique of social ontology has surpassed the expanse of social philosophy and scholars have started to draw attention to its relevance to economics and to law itself. The latter is particularly significant for the purposes of this study, since scholars assessing austerity models in the wake of the global financial crisis have specifically emphasized that existing theories of law may be inadequate to address current or chronic societal problems. That is to say, it has been stressed in legal critiques that recurrent critical phases which are now posing at the level of existential risks for democratic polities and for the humanity can be retraced to the social ontology of law, namely to the implicit ontological assumptions that legal theories make about social reality and to the methods they use for understanding it.[121] No matter whether a theory espouses a liberal hierarchization and normative priority of the individual,[122] or if it subscribes to "a Marxist predilection for structural forms of societal organization,"[123] it has already been emphasized in scholarship, that "a social

categorizations of positive freedom, see, indicatively, Browne 166; Cornelius Castoriadis, 'Democracy as Procedure and Democracy as Regime' (1997) 4 (1) Constellations 6, 16, 17

[119] Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' 769 citing Michael J. Sandel, *Liberalism and the Limits of Justice* (Reprint. edn, Cambridge University Press 1989) 60

[120] On the relation of social ontology with social research, see Given 579, 580

[121] Deakin

[122] Frega, 'The Social Ontology of Democracy' 159

[123] Ibid

ontology, is always assumed, often without a serious examination of its conditions of validity and of its theoretical implications."[124]

Following on from these observations, the study weaves an understanding of transindividuality, as it has been outlined above, in the sense of a processual individuation of infinite being together with a relationally processual social ontology[125] as opposed to atomist or holistic ontologies that are implicit in legal theories of social rights. To that end, the thesis suggests that conceiving *social rights* as *transindividual rights* has the potential to overcome a series of conventional antitheses that cut across current conceptions of social rights, namely the social versus individual, the collectivity versus individuality and the society versus individual dichotomy, moving towards an alternative ontology of the transindividual.[126] The study further submits that such a transindividual conception has the potential to enrich our understanding of social rights as mutually individual and collective, on the basis of relationality and of sociality as processual notions.[127] Set within this framework, social rights are taken to be spatio-temporally situated in the social whole, allowing us to explore how social reality changes during crises, which are considered, as it can be recalled from earlier in the analysis,[128] not as single, momentary, naturalized events but rather as protracted, critical phases pervading interactions structures.

Before moving along with our claim about a transindividual, processual social ontology in recasting conceptions of social rights, a clarification on what is understood by social ontology in the present undertaking is deemed necessary. In relevant scholarship, it has been observed, that even though social ontology is a budding branch of philosophy "there has been little consideration of what exactly social ontology is."[129] In recent years, scholas from across various fields concerning democratic theory as well as social theory and law and political economy, have put forward a plethora of explanations. Among these different formulations, ontology[130] can be broadly found to refer to the study of the nature

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[124] Ibid

[125] Renault 20 et seq.

[126] Cf. Bottici, 'Imagination, Imaginary, Imaginal: Towards a New Social Ontology?' 433, 437; Chiara Bottici, 'From the Transindividual to the Imaginal: A Response to Balibar's 'Philosophies of the Transindividual: Spinoza, Marx, Freud" (2018) 2 (1) Australasian Philosophical Review, 73

[127] On sociality as "a processual notion"; see Rakopoulos, 'Solidarity: The Egalitarian Tensions of a Bridge-Concept' 145

[128] On an interpretation of crises *from within*, namely as phases pervading structures and interactions and not as being isolated phenomena and momentary events, see Part II. 2.2.1. ii. Interim Conclusive Remarks.

[129] Lynne Rudder Baker, 'Just What is Social Ontology?' (2019) 5 (1) Journal of Social Ontology, 2

[130] Social ontology and ontology are either used interchangeably, see Given 578; Deakin, or it is taken to be a domain-specific subfield of ontology that examines social individuals or social collectives, see Baker 7

of social reality[131] and the structures, entities and relations of social life,[132] or it is taken to describe the basic categories through which "our understanding of the world is shaped."[133]

Mindful of the above, the present study is inclined towards an understanding of social ontology that goes past a strict connection to matters of structure and their relation to legal concepts and forms under the lens of a 'closed systems' theory.[134] The research here does not approach social ontology by placing its focus on the social reality of institutions and categories and the methodization of knowledge in this regard. It does not exclusively attach the meaning of social ontology to a materialist theory of social reality and to the material functions of institutions.[135] Instead, following an idea of a transindividual ontology, where the very idea of information is processual as such, social ontology, within the premises of this study, takes the meaning of not only describing social reality and its structures.[136] Instead, by looking at social reality as processual and individual as much as collective, social ontology is taken in this endeavor to signify the *process* of the *formation* of *being* as a *relational* being.[137] In other words, this study considers individuation as continuously configuring social reality, since individual and collective co-evolute

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131 Carol Gould remarks that 'social ontology' is a term that she coined in 1975 in a series of lectures at the C.U.N.Y. Graduate Center under the title "Marx's Social Ontology"; see Gould, *Globalizing Democracy and Human Rights* 32 note 35. Lisa Given makes the same point about Gould coining the term; see Given 578. Carol Gould systematized her research a few years later and argued that social ontology can be defined in two senses, namely, *first* social ontology can be taken as "a *metaphysical* theory of the nature of social reality" providing for a systematic account of the fundamental entities and structures of social existence, and *second,* social ontology can be defined as the "study of reality that reflects on the social roots of the conceptions of this reality"; see Carol C. Gould, *Marx's Social Ontology: Individuality and Community in Marx's Theory of Social Reality* (Repr. edn, MIT Press 1980) xi, xv.

132 Tony Lawson, together with other scholars, run *The Centre for Social Ontology*, based at the Grenoble Ecole de Management which focuses on the study of social ontology in relation to issues of social justice, human flourishing, and purposeful collective action; see https://socialontology.org/about/ <last accessed 03.09.2021>. The *Cambridge Social Ontology Group* (*CSOG*) is a group formed with the aim for the systematic study of the nature and basic structure of social reality; https://www.csog.econ.cam.ac.uk/ <last acceded 03.09.2021>. The Cambridge Group focuses on the "study of the social realm" from a philosophical standpoint of ontological naturalism and realism; see Tony Lawson, 'A Conception of Social Ontology' in Stephen Pratten (ed), *Social Ontology and Modern Economics* vol 37 (Routledge 2015) 30 et seq.; Tony Lawson, 'Cambridge social ontology: an interview with Tony Lawson' (2009) 2 (1) Erasmus Journal for Philosophy and Economics, 103. See also the *Social Ontology Research Group (SORG)*, which focuses on the social nature of institutions and organizations https://socialontologyglasgow.wordpress.com/ <last accessed 03.09.2021>. For an introduction to the SORG research agenda, see Miguel Garcia-Godinez, Rachael Mellin and Raimo Tuomela (eds), *Social Ontology, Normativity and Law* (De Gruyter 2020)

133 Frega, 'The Social Ontology of Democracy' 159

134 Cf. Simon Deakin, 'Juridical ontology: the evolution of legal form' (2015) 40 (1) Historical Social Research, 174 et seq.

135 This argumentative approach is found in a systems theory and autopoietic analysis of law and it has been related to the study of social ontology of law; see, indicatively, Simon Deakin, 'Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law' 41 (5) Cambridge Journal of Economics, 1505, 1520, 1521

136 On the relation of social ontology with legal theories, see Deakin, 'The Path Back to the Law'

137 Morfino notes that "[p]roperly speaking, the term 'ontology' refers to philosophical knowledge taken to be the *discourse on beings or on being*" that is "dispersed in time or, better, into spatio-temporal situations"; see Morfino 57; emphasis in original.

together and infinitely shape social reality. Inherent in this formulation is the question of human nature as a question that is not only preoccupied with the concept of individuality but it also addresses sociality and how human beings relate with each other and the world.

In light of the previous, social ontology is understood in this undertaking not only as an inventory of social phenomena and the study of the nature of those phenomena as constructions.[138] It is neither just about the reality of institutions and macrostructures nor simply about interactions as mere practices external to the self. Instead social ontology being understood as the process of individuation of social being, is an ontology that highlights the relational and processual nature of being as a fundamentally social being. In this regard, and echoing voices of other scholars, social rights are considered to be based on sociality and "are themselves fundamentally social or *relational conceptions*, in ways that existing interpretations of them most often fail to recognize."[139]

Crucially, this differentiates a processual social ontology from essentialist or substantive ontologies,[140] which not only base their methodization of knowledge "by assigning explanatory priority to either individual or structural entities"[141] but most significantly "assume a primacy of substance over relations and becoming."[142] Moreover, and while looking back at previous chapters, we can recall that in *crisis theory* or theories of *solidarity*, social reality and the prospect of social progress, are understood by means of contradictions and conflict or they assume change in the form of an event or a moment.[143] Going past such principles of social reality, a processual social ontology thinks of social reality not as in a static, bounded form of being, that is generated in the form of single, momentary events, but it rather understands social reality in terms of an open, ontogenetic and dynamic configuration of the individual and the social together.

Applying this to the level of rights, a processual social ontology does not adopt the classical liberal assumption that human rights are "essentially moral rights possessed by all

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138 Cf. Gould, *Globalizing Democracy and Human Rights* 4; Baker 4 et seq.; Brian Epstein, 'Social Ontology' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Plato Stanford 2018)

139 Gould, 'A Social Ontology of Human Rights' 177; emphasis added. Gould makes this argument regarding human rights more broadly, but I narrow this down to social rights.

140 The Cambridge Group of Social Ontology generally espouses a 'substantive theory' and 'substantive theorizing and ethics', see Stephen Pratten, 'Introduction' in Stephen Pratten (ed), *Social Ontology and Modern Economics* vol 37 (Routledge 2015) 2; Lawson, 'A Conception of Social Ontology' 42. Simon Deakin also characterizes the ontological framework used in Lawson's research as one "of a substantive ontology of social forms"; Deakin, 'Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law' 1521

141 Frega makes this claim in favor of a 'social interactionalist ontology' that he proposes; see Frega, 'The Social Ontology of Democracy' 163

142 For an analysis between the differences of 'a substantial' and 'a processual ontology', as he calls them, see Renault 20 et seq. Renault does not refer to the usual 'substantive ontology' distinction but rather phrases this as 'substantial'.

143 Cf. Ibid 30, 31

human beings *simply* in virtue of their *humanity*."[144] Human beings are neither considered to "operate in the social realm by virtue of being 'positioned'," [145] a social positioning that by extension attributes to human persons rights and obligations in the form of "positive and negative positional powers."[146] In summation, neither a naturalized idea of humanity nor an idea of positioning in the social context, invested with positive or negative power, is what ontologically grounds social rights within a processual transindividual ontology. Rather human beings, in the social ontology that this study embraces, are considered to co-form and acquire social rights by virtue of their relational nature, that is to say, human beings operate by virtue of not being simply *positioned* but by being *related*.

Drawing on that, at an epistemological level, a transindividual processual social ontology seeks to comprehend how social reality exists in a genuine, non-redundant and ineliminable manner.[147] This involves the ways through which our understanding of the world is shaped[148] by way of a situated knowledge and information through constant, processual individuation. This knowledge is not historically uprooted but it is placed within a historically informed continuum which acknowledges pre-existing structures but it is also synchronized with and attuned to the social reality within which it continues to be shaped. That is to say, the way social ontology is conceived in the endeavor at hand, places itself in what could be described as "an enchronic perspective"[149] of a dynamic sequence of social relationality, meaning it is situated within multiple causal frames of reference, including diachronic and synchronic, past, present and interval temporal sequences. In this frame, "human lived time"[150] is not taken as the exclusive referent, but rather the notion of temporality is pluralized and is understood as assembling lived and previously experienced temporalities, agencies and spatialities. Understood this way, a transindividual processual social ontology bridges lived experiences with diachronic structural forms. Crucially, a transindividual social ontology assembles semiotic with material analyses, that is, matter and meaning are inter-permeated and "the materio-semiotic is thus always intrinsic to spatio-temporal assemblages."[151]

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144 Besson and Tasioulas 24; emphasis added. Also Tasioulas, 'On the Foundations of Human Rights' 45, 50
145 Deakin, 'Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law' 1506
146 Ibid; emphasis added.
147 Cf. Baker 5, 7, 10, 12; Lawson, 'Cambridge social ontology: an interview with Tony Lawson' 104
148 Cf. Frega, 'The Social Ontology of Democracy' 159
149 Cf. N. J. Enfield, *Relationship Thinking: Agency, Enchrony, and Human Sociality* (Oxford University Press 2013) 28, 29, 31, 32
150 Cf. on that point the analysis on 'spatio-temporality' in legal theory by Anna Grear, "Anthropocene "Time"?' – A reflection on temporalities in the 'New Age of the Human' " in Andreas Philippopoulos-Mihalopoulos (ed), *Routledge Handbook of Law and Theory* (Routledge 2018) 299
151 Ibid

VI. POSTSCRIPT: SOME (NON-) CONCLUSIVE CONSIDERATIONS

Negativity, *boundness*, *staticity*, *finitude*. These appear as the ontological assumptions, which legal and political theoretical schemes have implicitly or explicitly employed to explain social reality, the social nature of being and human relationality, and to formulate accordingly social theories upon which conceptions of social rights have been grounded. In defying such presumptions of social ontology and ethics, this study has sought to explicate the idea of transindividuality as a *concept*, a *language* and a *model of thought*. In this conclusive chapter the analysis proceeds in weaving together a wide range of reflections on different aspects of the discourse on social rights, and of crisis and austerity theory with the idea of a processual social ontology towards redacting and articulating a *non-conclusive* and tentative proposal for a transindividual model of relationality to conceive social rights. This model will hopefully pose as a way of understanding social reality and sociality, and effectively as a mode of thinking that could be expanded in understanding social rights as part of a processual and relational ontological frame of thought.

The aim of this proposal is consistent with the idea of *process* that has traversed the entirety of the present endeavor. That is to say, the objective of this postscript is much more exploratory than conclusive. What is sought here is to illustrate what renders transindividuality – applied to the frame of a processual social ontology – a possible breeding ground to consider questions on the conception of social rights, rather than to answer these questions by advancing a conclusive and definitive framework. In sketching this transindividual model, I single out a few notions and postulates that could be argued to shape this configuration in the ensuing paragraphs. I further relate these to aspects of the social rights discourse, as these have been highlighted in the course of this study and proceed to draw some broad reflections. The notions and conjectures of a transindividual social ontology are limned as follows:

First, a transindividual model casts its deep skepticism towards both an individualistic or a consequentialist and exhaustively structure-mediated understanding of social relations and human sociality. While questioning both these ways of perceiving relations, a transindividual understanding of social ontology deflects attention from a conception of social rights through their attachment to another concept or structure, where the 'social' in the social rights diptych ends up being only a derivative notion. Instead, the focus is rather shifted to the concept of *relationality* as such, where 'social' is not interceded by singular structures.

In this connection, discussing social rights through a lens turned on the state or on the individual is considered here to run the risk of delimiting questions of social rights to an ontological *étatisme*, where the state is ontologized, or to mere *individualism*, where the individual places itself at the centre of all social reality. Contrary to such a social vision, a transindividual model of processual social ontology understands social rights as being crystallized around the idea of relationality. This is neither reduced to a *self-ended* idea of personal relations, where the social is simply a projection of the individual and the former is constantly mediated through the latter. Nor does relationality merely translate to the "*politically* organized relations of production and reproduction of the societal order,"[1] being exclusively attached to the material aspects of social reality.

Second, moving in tandem with the unit of observation and not preceding this, a transindividual model does not consider social ontology to take off from pre-determined physical or non-physical entities and structures, but it takes individuation to be processual, unbound and constantly generating. In this frame, "physical and collective individuations are modes of emergence"[2] and not of reduction that challenge received ways of thinking about structure and form. Interiority and exteriority in this relational transindividuation are not separated but are rather assembled in their tensions and resolutions in the sense that what is interior is at the same time exterior.[3]

The latter is crucial in differentiating the proposed transindividual social ontology from recent suggestions in favor of "interactionalist social ontologies"[4] in social and political theory. To clarify this, whereas an *interactionalist social ontology* shares the assumption that "relations are internal rather than external,"[5] transindividuality by contrast perceives internal and external relations as being co-individuated at the same time from the vantage of relation, movement and assemblage itself. That is to say, individuals do not simply interact as pre-structured and fully-formed entities from an external point of reference but are rather "transformed *through* one another"[6] and are constantly structured and restructured through the process of relating. Stated differently, an emphasis on relationality in the frame of a transindividual social ontology does not simply imply an emphasis on interactions of already individuated actors, but rather relations are formed as individuation moves, alters and generates itself, meaning as individuals co-individuate each other.

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[1] Christodoulidis and Goldoni, 'The political economy of European social rights' 242; emphasis in original.
[2] Grosz 50. On "the process of emergence," see also Combes 84, 87
[3] Deleuze 87; See also Part V. Chapter 10.1. Transindividuality: Introduction and Background to the Concept.
[4] Frega, 'The Social Ontology of Democracy' 162
[5] Ibid 163
[6] Cf. Bernard Stiegler and Irit Rogoff, 'Transindividuation' (*e-flux Journal*, 2010); emphasis added.

Linked to the above, yet also distinct in its discursive subtleties, a transindividual framework of processual social ontology is also diverse from a theoretical model of *relational ontology* as this has been assessed as part of the vulnerability and social theories examination.[7] That is to say, a transindividual model understands the ontological shift required in theoretical appraisals not in the sense of a bodily ontology of the self that focuses on the materiality of the body, but envisages this as an ontology that cuts across the dualism of mind and matter and rather puts forward an assemblage of both the embodied and psychic self and of interiority and exteriority in their wholeness.

Adding to that, a transindividual ontological model proposes a different understanding of relation to that, which has been examined earlier, where *social individuals* relate to each other by *choice*. That is to say, a transindividual relationality does not envisage our social selves as related, yet self-enclosed entities that can *opt in* and *out* of their relations according to preference. Rather, relationality is part of the very process of individuation itself. Hence, the choice is not on the fact of being related but rather it is on the way of being related. Grasping relationality as transindividual relationality, the individual is thus not perceived in individualistic and egotistic terms as lonesome and isolated in their existence but is rather understood as a human being, who is shaped by the mutual constitution of individuality and collectivity, not in some kind of pre-given, static, eternal essence, but on the basis of individuation as being an open, porous and ongoing process.

Critically, this assumption forms a *third* postulate of the transindividual model that is significant for the purposes of the analysis here in conceptualizing social rights. A vision of transindividuality as recognizing the collective and individual co-formation of being breaks with the longstanding binary that sees the relationship between individual and collective existence as a zero-sum game,[8] forming in this respect what Chiara Bottici has insightfully portrayed as the *imaginal*. The imaginal, being defined as "a space that is both social and individual,"[9] enables us to go beyond the acute opposition between the 'individual' and the 'society' or the 'individual' and the 'social.' To phrase this differently, in Bottici's evocative words, "whereas the imagination is a faculty that *we possess*, and the imaginary is what *possesses us*,"[10] the imaginal is the space of our transindividual nature.

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[7] See Part V. Chapter 9.2.Towardsa Transformation of Vulnerability Theory: Critique and Proposal.
[8] Read, *The Politics of Transindividuality* 6, 105, 114
[9] Bottici, 'From the Transindividual to the Imaginal: A Response to Balibar's 'Philosophies of the Transindividual: Spinoza, Marx, Freud" 75; see also Chiara Bottici, *Imaginal Politics: Images Beyond Imagination and the Imaginary* (Columbia Univ. Press 2014) 66, 70, 71
[10] Bottici, 'From the Transindividual to the Imaginal: A Response to Balibar's 'Philosophies of the Transindividual: Spinoza, Marx, Freud" 75; emphasis added.

In this connection, transindividuality could be used to conceive an ontology of relations that recognizes the collective and individual basis of our social reality. In line with this, a reading of social reality under a *transindividual imaginal* is understood as encompassing psychic phenomena and social structures, personal strivings, affects, political emotions, perceptions and knowledge, and as taking place at the level of personal and collective imagination.[11] Transindividuality, in this regard, is not just something that takes place in those moments that are easily described as social.[12] Instead it is "the intimacy of the common,"[13] as Muriel Combes notes, that is to say, the common is present in the constitution of intimate life and vice versa, or to use Jason Read's illustrative phrasing, transindividuality "is the sociality at the heart of isolation."[14]

The aforementioned postulates and notions are not the high abstractions that they may seem to be at first sight. The relevance of social ontology not only to social reality but exigently to legal practice and legal theory has started to attract attention not just from within social philosophy but from law as well, as it has been examined above.[15] The compelling necessity that social philosophy articulates its ontological assumptions and that critical theory makes "its socio-ontological commitments explicit,"[16] has been underscored in theory as well. At the same time, whether legal scholars have identified a *lost utopia*[17] or looked for *new utopias*[18] in the aftermath of the crisis, the operation of 'big politics' and the implementation of austerity policies in Europe, or whether they have systematically sought to answer the social rights question by resorting to policy and governance analyses, the social question and the question of law for that matter, seemed to have always come back to our relationship with each other, to existential questions concerning our humanity and social reality,[19] and ultimately to "who we really are."[20]

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[11] Read, *The Politics of Transindividuality* 119, 135, 266
[12] Ibid 113
[13] Cf. Combes 51 et seq.; Read, *The Politics of Transindividuality* 135
[14] Read, *The Politics of Transindividuality* 113
[15] Cf. Deakin, 'The Path Back to the Law'; see also Part I. Chapter 1.5. ii. Contribution to the Literature and Part V. Chapter 10.2. i. Ontological Models of Social Rights: A Critique.
[16] Testa 272. See also the analysis on how social philosophy requires a social ontology, Frega, 'Between Pragmatism and Critical Theory: Social Philosophy Today' 67 et seq.
[17] Cf. Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies and the Other' 4, 5 et seq.
[18] Cf. Ruth Houghton and Aoife O'Donoghue, "Ourworld': A Feminist Approach to Global Constitutionalism' [2019] Global Constitutionalism, 1, 10 et seq.
[19] Cf. Komárek, 'Waiting for the Existential revolution in Europe' 209, 210 et seq. Simon Deakin drew attention to the social ontology of legal theories against the backdrop of the financial crisis and the austerity, which pose "existential risks for democracy, and indeed, humanity"; see Deakin, 'The Path Back to the Law'
[20] Ruth Houghton and Aoife O'Donoghue, 'A Manifesto for Feminist Global Constitutionalist Order ' (*Critical Legal Thinking*, 2018). Akritas Kaidatzis in theorizing on social rights during the implementation of the MoU-mandated austerity measures in Greece, notes that the 'big politics' within which social rights challenges have arisen, have all been implicated with "the big issues that concern us as a society: *who we are*

Bringing these strands of scholarship together, this study has sought to illustrate how ontological and ethical assumptions that answer questions about our social nature have come to the fore during the austerity crisis. During that time, social law in its discursive practices, namely through legal mobilization and advocacy or on the terrain of judicial practice, has been tied to ontological understandings and articulations regarding our social reality and societal co-existence. In this regard, crisis narratives have developed largely around the idea of social transformation as a naturalized or conflictual event happening in the form of an *instant*. Human actors have been depicted as either rationalized, self-interested, utility maximizing, bounded entities or as passive, predefined entities with no agency. In all cases, human *sociality* has been outwardly neglected in social rights analyses and individuality has been assessed in either individualistic or socially deterministic terms. Equally crucially, analyses about social reality have portrayed democracy as a negative value[21] sustained by the "three great negatives of Peace, Freedom and Justice"[22] that a government must provide, and they have grounded social ontology to a negative dialectics of opposition, separation and conflict.

Contrary to such a social imaginary, this study sought to sketch a different vision of a mutually individual and social ontology as an expression of our social nature and in perceiving social rights. The pivot in configuring social rights under this transindividual, processual imaginal that is both social and individual, as juxtaposed to the earlier examined liberal and social welfarist approaches, does not suggest an epistemic erasure that would truncate contributions coming from both such traditions to the study of social rights. Rather, transindividuality as a language and as a way of thinking suggests a way of conceiving our social nature and relationality in the knowledge of existing epistemic reductions and towards recasting such delimiting frameworks.

Transindividuality, as it has been examined above, by being processual, conceives of our ontology and sociality as processual too, while being generated upon knowledge and information. That means that in a transindividual ontology, as opposed to ontological narratives of instant, momentary change, change is rather pervasive, constant and ongoing. In the prolegomena to this thesis, it has also been stated that ethics are interlinked with social ontology. Nearing a closing to this writing, *ethics* within an understanding of a transindividual ontology, culminate in an understanding of ontology itself.

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and where *we are going*"; emphasis added, Akritas Kaidatzis, "Μεγάλη πολιτική' και ασθενής δικαστικός έλεγχος. Συνταγματικά ζητήματα και ζητήματα συνταγματικότητας στο 'Μνημόνιο" (2012) 1 Το Σύνταγμα, 268

[21] F.A. Hayek, *Law, Legislation and Liberty: A new statement of the liberal principles of justice and political economy* (Routledge 1982) 133

[22] Ibid 131

In a transindividual ontology "ethics is the movement"[23] which, instead of leaving behind what it cannot resolve and incorporate, it rather includes this in its tensions and potential. Seen this way, the *social* in a transindividual model of social ontology does not imply standing *against* others or being related while staying *separate* from others. Moreover, the *social* is neither a structure nor a form and being is neither intersected nor singular.[24] Instead, by understanding our social reality as a common milieu that environs us in its limitations and yet in its infinite potential, the 'social' takes the meaning that we come together in the ways in which we are attached to each other, while being individuated.

Drawing on the above, the question of *ethics* and law has been approached in this endeavor as a question of the actualization of knowledge.[25] Critically, this realization of information and emplacement in the reality we cohere, does not make a transindividual idea of our ontological condition a mere criticism of existing socio-ontological frameworks that have been normalized in conventional social theories. A transindividual imaginal, in conceiving our social nature past a fixation with a negative individualistic or structurally-mediated status, is not a testament neither to an ideal theory of high abstraction nor to cultural relativism. Instead, by perpetually changing, transindividuality is imbued with the intensity of experienced and infinite meaning that arises from our relational nature and outstrips any purely intellectual and theoretically confined understanding.

In socio-economic analyses it has been suggested that "when the idea that social reality is processual and relational in nature is emphasised, the suggestion is seemingly never opposed."[26] Raising those claims against the backdrop of economists' wide-scale social policies modelling, it has been stressed that commitments to preconceptions of isolated atoms persist, simply because of the lack of ontological reflection placed upon such matters.[27] Keeping in mind the analysis that preceded on austerity policies, how these have been drafted primarily by economists and how they have had a grave social impact on a wide range of not only public social practices but on the lives of people, acknowledgments of that sort are particularly significant. That is because social rights are crucially dependent on ontological assumptions that consistently implicate and determine the discussion, and evidently in the case of austerity reforms this has also been the case, even if such socio-ontological considerations remain largely out of theoretical scrutiny.

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[23] Grosz 50, 51
[24] Ibid
[25] Ibid
[26] Cf. Lawson, *The Nature of Social Reality: Issues in Social Ontology* 6, 7. See also on a similar point, Frega, 'The Social Ontology of Democracy' 157
[27] Cf. Lawson, *The Nature of Social Reality: Issues in Social Ontology* 6, 7

Coming to an end, this thesis has imagined and sought to depict the potential that can arise from approaching social ontology in legal analyses under the philosophically unending notion of *transindividuality*. In the exposition of legal contributions dealing with the social ontology question, it can be recalled that these tended to concentrate on the social reality of institutions and structures and did not reflect on the social nature of actors as not only holding but as effectively shaping their rights. Moreover, in literature, even when appeals to 'a processual social ontology' have been made, these have not been related to the inherently processual notion of transindividuality. Mindful of the above, I would be fortunate to think that the approach followed in this thesis and the proposal that has been advanced, of the combined notions of transindividuality and social ontology could be one to be revisited and further discussed. Developing this proposal, while the social ontology discussion gains momentum in law, is a prospect that this study wishes for in opening further theoretical avenues concerning the highly intricate social rights discourse.

In the pages that have closed behind us and in the ideas that remain open in front of us, this writing has unfolded from a standpoint of genuine problematization about our social existence, and the way we socially relate to each other and legally theorize such relation. The research kept moving not out of criticism for the sake of criticism but out of a necessity for understanding. After all, as David Graeber has insightfully remarked, "if all you're willing to talk about is that which you claim to stand against, if all you can imagine is what you claim to stand against, then in what sense do you actually stand against it?"[28]

The present non-conclusive proposal for a transindividual social ontology has been the product of this problematization and searching. This study has sought to contribute to a possible way of reconceiving long-lasting ontological assumptions and methodological narratives that inhere our understanding of social rights. Thinking of the ethics and ontology of the *social* from within a transindividual imaginal, this thesis, at the heart of it, has aspired to conjure up a vision of hope and potential *eutopia.* One that conceives of our relational nature, our sociality and our social reality, not as being negative, static and finite but as being *assembling* in its tensions and potentials, *moving* and *infinite*.

So that in the face of the ever-present social crises that we encounter, our words, thinking and practices move "to make hope possible, rather than despair convincing."[29]

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[28] Graeber, *Introduction to Peter Kropotkin Mutual Aid: An Illuminated Factor of Evolution* 23

[29] Cf. Phil O'Brien (ed) *Williams, Raymond Culture and Politics: Class, Writing, Socialism* (Verso 2021); E. San Juan, 'Raymond Williams and the Idea of Cultural Revolution' (1999) 26 (2) College Literature, 134

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Special Court (hearing cases on salaries of Justices) as stipulated by Article 88 para 2 of the Constitution of Greece

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Greek Single-Judge Civil Courts of First Instance (Μονομελές Πρωτοδικείο) Decisions on Interim Measures

- No 37/2013 First Instance Court of Chios
- No 67/2013 First Instance Court of the Aegean
- No 298/2013 First Instance Court of Alexandroupolis
- No 63/2013 First Instance Court of Mesologgi
- No 2700/2013 First Instance Court of Piraeus
- No 90/2013; No 09/2014; No 387/2013 First Instance Court of Xanthi
- No 494/2013 and No 202/2014 First Instance Court of Patras
- No 215/2014 Basement Court of Patras
- No 1759/2013; No 13915/2013; No 13917/2013; No 1240/2014; No 1951/2014 and No 7809/2014 First Instance Court of Athens
- No 729/2013 Administrative Court of Appeals of Athens
- No 1705/2014; No 5026/2014; No 4916/2013 First Instance Court of Thessaloniki
- No 1845/2014 Administrative Court of First Instance of Thessaloniki
- No 186/2014 First Instance Court of Ioannina
- No 324/ 2014 First Instance Court of Kavala
- No 46/2014 First Instance Court of Orestiada
- No 117/2014 First Instance Court of Preveza

Treaties

United Nations

- Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; 6 ILM 360 (ICESCR)
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; 6 ILM 368 (ICCPR)

Council of Europe

- European Social Charter, collected texts (7th edition) Updated: 1st January 2015
- European Convention on Human Rights as amended by Protocols Nos 11 and 14 supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16

European Union

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- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2016, OJ C 202/1; Articles 2 and 3 paras 3, 5 TEU C 202/17
- Resolution of the European Council on the Stability and Growth Pact Amsterdam, (1997) OJ C 236/1
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- Treaty Establishing the European Stability Mechanism (2011) T/ESM 2012-LT/en 1
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 2007, OJ C 306/11
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- Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012 not published in the Official Journal (TSCG)
- Treaty on the Functioning of the European Union, 2016, OJ C 326/49

Projects and Research Initiatives

- *Cambridge Social Ontology Group* (*CSOG*) (Cambridge University); https://www.csog.econ.cam.ac.uk/ last acceded 03.09.2021
- *Constitutional Change through Euro-Crisis Law*, (European University Institute January 2013 to December 2015) https://eurocrisislaw.eui.eu/ last accessed 12.08.2021
- *ETHOS* Consortium Integrative European Theory of Justice and Fairness (EU Horizon 2020 Project 2017-2019) https://ethos-europe.eu/ last accessed 14.03.2020
- *GOCOBA EU Economic Governance and impact on National Collective Bargaining Systems Project* (Trade Union Research Institutes AK Vienna, ABT Rome, IRES, ISCTE-IUL Lisbon, ISTUR Sofia, and INE-GSEE Athens - EU DG Employment, Social Affairs and Inclusion) https://www.fondazionedivittorio.it/sites/default/files/content-attachment/GOCOBA_Final%20report.pdf last accessed 16.11.2018
- *IMAGINE* European Constitutional Imaginaries Utopias, Ideologies and the Other (iCourts Centre of Excellence for International Courts, University of Copenhagen; February 2019-2021) https://imagine.sites.ku.dk/ last accessed 24.08.2021
- *Law and Political Economy* (LPE) Project https://lpeproject.org/ last accessed 07.09.2021
- *PLATO The Post-Crisis Legitimacy of the European Union* (PLATO Innovative Training Network (ITN) EU Horizon 2020 Marie Skłodowska-Curie Actions 2017-2020) https://www.plato.uio.no/ last accessed 11.09.2020
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VIII. DEUTSCHE ZUSAMMENFASSUNG DER DOKTORARBEIT (Summary of the doctoral thesis in the German language)

Die vorliegende Dissertation bewertet Konzeptionen sozialer Rechte aus ethischer und ontologischer Perspektive vor dem Hintergrund der Austeritätspolitik, die in Griechenland und Portugal als Reaktion auf die nationalen Finanz- und Schuldenkrisen im Zuge der Finanzkrise in Europa von 2008 umgesetzt wurden. Dabei lenkt die vorliegende Arbeit die Aufmerksamkeit gezielt auf soziale Rechte im Hinblick auf die Sozialontologie und auf Fragen nach *Relationalität* und *Sozialität* als Fragen, die für die Konzeption sozialer Rechte entscheidend sind. In dieser Hinsicht führt die Arbeit das philosophische Konzept der „Transindividualität" ein und verwendet es, um *soziale Rechte* als *transindividuelle Rechte* neu zu begreifen. Denn dieser ontologische Rahmen hat das Potenzial, eine Reihe konventioneller Antinomien zu überwinden, die die gegenwärtigen Konzeptionen sozialer Rechte durchziehen, nämlich die Dichotomie von Sozialem und Individuum, die Binarität von Kollektivität und Individualität und die Antithese von Gesellschaft und Individuum. Eine vielversprechende Anwendung dieses Vorschlags besteht darin, dass Transindividualität einen fruchtbaren theoretischen Rahmen für die Vorstellung von sozialen Rechten bieten kann, der sowohl eine individuelle als auch eine kollektive Dimension hat. Dies basiert auf Relationalität als einem Prozess, der zugleich durch Strukturen und durch individuelles Handeln vermittelt wird und der in einem Kontinuum von historischem Wissen und gelebter Erfahrung besteht.

Unter Europa werden dabei nicht nur staatliche oder überstaatliche Strukturen und Institutionen verstanden, sondern auch die diese umgebenden Interaktionen, gelebten Erfahrungen und Verwirklichungsprozesse innerhalb der geografischen Grenzen des europäischen Kontinents und der gewachsenen historischen und kulturellen Eigenheiten. Darüber hinaus bedeutet die Berufung auf Europa hier keine einheitliche, kohärente und prägnante Rechtsordnung, sondern spielt vielmehr auf die vielschichtige Menschenrechtsarchitektur an, die die Europäische Union (EU), den Europarat und die verbindlichen internationalen Menschenrechtsverträge der Vertragsstaaten ausmacht.

Ziel dieser Untersuchung ist nicht eine vergleichende Bestandsaufnahme der Sparreformen in Griechenland und Portugal zu geben, die als europäische Länder finanziell unterstützt wurden. Vielmehr wurden Griechenland und Portugal aufgrund der historischen, politischen, rechtlichen und austeritätspolitischen Besonderheiten dieser beiden Länder ausgewählt. Insbesondere sind beide Länder einen ähnlichen historischen

Weg nach einer Diktatur gegangen, indem jeweils ein sozialistisches System nach einer Diktatur ein Sozialdienstleistungsmodell etablierte, das als eine soziale Errungenschaft angesehen wurde. Marxistische Theorien des Sozialstaats und ein sozialistisch inspiriertes Solidaritätsverständnis sind jeweils tief verwurzelt und treten in Kombination mit einem amerikanisch anmutenden Justizsystem mit gemischter Normenkontrollkompetenz und einer deutsch geprägten Rechtstradition auf. Im Folgenden wird die These vertreten, dass beide Länder eine fruchtbare Grundlage für normative Bewertungen des Schutzes sozialer Rechte bereitgestellt haben und als echte Beispiele gedient haben, in denen *ethische* und *ontologische* Postulate sozialer Gerechtigkeit durch soziale Rechte verwirklicht wurden.

Wenn sich Forschung mit Fragen der Rechtswissenschaft und doktrinären Aspekten des Diskurses befasst, werden soziale Rechte so verstanden, dass sie als Kategorie die folgenden Rechte umfassen, aber sich nicht darauf beschränken: das Recht auf Gesundheitsversorgung, das Recht auf Wohnung, das Recht auf Zugang zu Wasser und sanitären Einrichtungen, das Recht auf einen angemessenen Lebensstandard bezüglich Ernährung, das Recht auf Bildung und das Recht auf soziale Sicherheit und Sozialhilfe. Darüber hinaus bezeichnen soziale Rechte als Unterkategorie Arbeitsrechte, die sich weiter in das Recht auf Arbeit, das Recht auf Gründung und Mitgliedschaft in einer Gewerkschaft, das Streikrecht und das Tarifrecht aufteilen. Soziale Rechte werden jedoch innerhalb der Grenzen einer rechtlichen Einordnung nicht erschöpfend erfasst. Für eine theoretische Auseinandersetzung reicht es nicht, die sozialen Rechte als Teil des sozialen Integrationsprojekts der Europäischen Union und als konstitutives Element eines vorläufig zwischenstaatlichen Gemeinwohlsystems zu erfassen. In dieser Arbeit die verschiedenen Theorien der politischen Ökonomie, seien sie neoliberal oder sozialdemokratisch, nicht als Angelpunkt für die Konzeption sozialer Rechte herangezogen.

Auf der Grundlage der obigen Ausführungen vertritt die vorliegende Arbeit die Auffassung, dass die anhaltenden Debatten über soziale Rechte, die während der letzten Finanz- und Schuldenkrise wieder auflebten, im Allgemeinen auf den Schutz sozialer Rechte und die Rolle von Staaten und deren positiven Verpflichtungen beschränkt waren. Diese Debatten, so die These, wurden durch die Linse des politischen Liberalismus oder des sozialen Wohlfahrtsstaates betrachtet, und auf der Ebene des Rechts verfolgten sie entweder einen normativen, doktrinären und gerichtsorientierten Ansatz oder sie waren eher staatszentriert und haben sich auf Fragen der Transformation des Sozialmodells konzentriert. In der Literatur zu sozialen Rechten wird entweder ein Recht und politische

Ökonomie Analyse kombiniert oder es wird Finanzregulierung und Bankrecht als Ausgangspunkt der Analyse genommen. In diesem Fall wird die Schnittmenge dieser mit dem Recht der Europäischen Union untersucht oder mit Fragen der Wirtschaftspolitik auf der Ebene der beteiligten souveränen Staaten der Europäischen Währungsunion.

Diese Untersuchung betrachtet die sozialen Rechte nicht als ein Budgetproblem oder als ein Problem eines normativ defizitären Schutzrahmens und zielt nicht darauf ab, normative Empfehlungen zu geben. Statt einer Problemlösung ist das Ziel dieser Untersuchung eine echte Problematisierung der ontologischen und ethischen Annahmen, auf denen die sozialen Rechte beruhen. In diesem Sinne argumentiert diese Arbeit, dass wissenschaftliche Kritik aus der Perspektive des liberalen Rechtsskripts selbst oder externe Kritik, welche die politische Ökonomie des Neoliberalismus aus einer sozialstaatlichen Perspektive in Frage stellen, die ethischen und ontologischen Prämissen, auf denen die sozialen Rechte konzeptionell gegründet sind, nicht untersucht.

Endsprechend wird in dieser Arbeit argumentiert, dass rechtstheoretische Analysen zu sozialen Rechten eine fehlende Auseinandersetzung mit ontologischen und ethischen Fragen aufweisen, während sie immer wieder in den konzeptionellen Gegensatz zwischen sozialen Strukturen und individuelle Handlungsfähigkeit *(agency)* zurückfallen. Die Arbeit weist zudem darauf hin, dass jener Mangel an theoretischer Reflexion angesichts der Realität der Krise und der auferlegten Sparmaßnahmen in den finanziell unterstützten Ländern in Europa noch drängender geworden ist. Der Grund dafür liegt darin, dass auf Elemente der übersehenen Diskussion über die konzeptionelle Fundierung sozialer Rechte auf verschiedenen Ebenen während der Umsetzung der Austeritätspolitik mit Nachdruck kritisch hingewiesen wurde, nämlich in Gerichtsprozessen, bei der staatlichen Durchsetzung des Schutzes sozialer Rechte und bei den sozialen Auswirkungen, die diese Maßnahmen hatten.

Dabei fehlt im theoretischen Diskurs über soziale Rechte nicht nur eine tatsächliche Untersuchung der zugrundeliegenden ontologischen Struktur der liberalen Sozialtheorie, sondern auch der Versuch, eine solche Untersuchung in das Krisen- und Austeritätsnarrativ einzubeziehen. Demgegenüber wird hier die These vertreten, dass eine bloße Theoretisierung der Beziehung zwischen Staat und Individuum unser Verständnis von sozialen Rechten behindert. Eine Reflexion über die ontologischen und ethischen Annahmen ist unabhängig davon erforderlich, ob soziale Rechte in einem liberalen oder einem sozialstaatlichen Modell verwirklicht werden. Um diese Lücke in der Literatur zu schließen, lenkt diese Arbeit die Aufmerksamkeit auf ein Problem der Ethik und der

sozialen Ontologie, das die Forschung im bisherigen Diskurs über soziale Rechte vernachlässigt hat: Wie wird das „Soziale" in den sozialen Rechten konzipiert und wie kam dies während der Krise und vor dem Hintergrund der Austerität juristisch zur Geltung? Welche sozio-ontologischen und ethischen Annahmen haben die Konzeptionen der sozialen Rechte während der Krise geprägt und wie hat das Recht durch seine diskursiven Praktiken diese Annahmen theoretisiert?

Zur Beantwortung dieser Forschungsfrage zum „Sozialen" in sozialen Rechte konzentriert sich diese Dissertation auf zwei erkenntnistheoretische Hauptachsen, nämlich auf die soziale Ontologie und die Ethik, wobei die erstere als Grundlage für die letztere dient. Auf der Suche nach der Bedeutung des „Sozialen" baut die Analyse auf drei zentrale Begriffe auf. Es handelt sich hierbei um die *Relationalität* und die *Prozessualität*, die zusammen den Begriff der *Sozialität* prägen, auf dem das Verständnis der sozialen Rechte beruht. Was die soziale Ontologie betrifft, so geht diese Arbeit über eine enge Bedeutung hinaus, welche mit der Untersuchung der soziale Realität von Institutionen und Strukturen und der Methodisierung von Wissen verbunden ist. Stattdessen wird Sozialontologie hier als der *Prozess* der *Formung* des Seins als ein *relationales Sein* verstanden. Implizit ist in dieser Formulierung die Frage nach der menschlichen Natur als eine Frage, die sich mit dem Konzept der Sozialität als inhärentem Teil der Individualität befasst. Es sind diese ontologischen Annahmen über die menschliche soziale Natur, welche die philosophischen Prämissen prägen, auf denen Sozialtheorien aufgebaut sind und daher die Interpretationen der sozialen Rechte in der Rechtspraxis bestimmen. Hinsichtlich der Achse der Ethik wird in dieser Arbeit grundsätzlich zwischen Ethik und Moral unterschieden. Damit soll nicht gesagt werden, dass hier die übliche Unterscheidung zwischen „legalen Rechten" (*legal rights*) und „moralischen Rechten" (*moral rights*), übernommen wird, die häufig in Rechtskommentaren verwendet wird. Die Studie geht über ein Verständnis von Ethik auf der Ebene des persönlichen Verhaltens und des Eigeninteresses hinaus, indem sie Ethik im weitesten Sinne als Erkenntnistheorie betrachtet, welche die grundlegenden ontologischen Bestandteile von Sozialtheorien organisiert und formt, d.h. die ontologische Struktur einer solchen Theorie bereitstellt.

In methodologischer Hinsicht ist diese Arbeit theoretisch und kritisch, vergleichend und interdisziplinär angelegt. Dass der Ansatz primär analytisch-theoretisch ist, hat zur Folge, dass sich die Arbeit nur insoweit mit der empirischen Rechtsanalyse beschäftigt, dass sie ausgewählte Rechtsurteile zur Austerität heranzieht und hinsichtlich ihrer ethischen Basis zu sozialen Rechten bewertet. Zugleich schlägt die Arbeit eine Brücke

zwischen sozialer Ontologie, Ethik und gelebter Erfahrung und fördert so letztlich Interdisziplinarität, indem sie kein selbst-referentielles Verständnis von Recht zum Ausgangspunkt nimmt. Das heißt, diese Studie betrachtet Methodik als einen Prozess, bei dem sich Wissen nicht aus einer einzigen Quelle speist, sondern durch Synergien zwischen verschiedenen Wissensgebieten entsteht. Die Frage nach sozialen Rechten wird nicht über die mittlerweile übliche Kopplung von Analysen zu politischer Ökonomie und der Governance mit der Rechtslehre adressiert, sondern die Sozialphilosophie kritisch aus ethisch-ontologischer Perspektive als Grundlage verschiedener Wissensgebiete, einschließlich des Rechts, betrachtet.

Daran anknüpfend versteht die vorliegende Studie das Recht nicht einfach als Kodifizierung von Regeln, die statisch und zeitlos sind, und geht auch nicht davon aus, dass das Recht von Natur aus nur eine soziale Institution ist. Stattdessen betrachtet sie das Recht als ein umfassendes soziales Phänomen, das die zugrunde liegenden ethischen und ontologischen Voraussetzungen in sich trägt, auf denen die Rechtsregeln und -praktiken basieren, die im Laufe der Zeit entwickelt und benutzt werden. Darüber hinaus wird die soziale Ontologie als methodologisches Werkzeug und erkenntnistheoretische Quelle herangezogen, um sie mit dem neuen Materialismus in einen Dialog zu setzen. Letzterer wird als eine Methode verstanden, die sich von den großen Abstraktionen wie der reinen Textualität, der strengen Normativität, dem idealen Denken und der dekontextualisierten philosophischen Forschung insgesamt freihält. Gelebte Erfahrung (*lived experience*) wird darin nicht als eine rein deskriptive Aufgabe verstanden, die auf empirische Beobachtungen angewiesen bliebe. Vielmehr verfolgt die Untersuchung selektiv Fälle von Austeritätspolitik im Rahmen eines heuristischen Ansatzes, der eine wertende und vergleichende Beurteilung wirklicher gesellschaftlicher Phänomene ermöglicht. An verschiedenen Stellen der Arbeit stellt die Analyse Studien in Frage, die universalistische Schlussfolgerungen aus großen Jurisdiktionen ziehen, wobei insbesondere die Vereinigten Staaten von Amerika als Bezugspunkt genommen werden, indem also *Ad-hoc* Erfahrungen aus einem einzigartigen und besonderen Kontext verallgemeinert werden. In dieser Hinsicht versucht diese Studie, die Diskussion sowohl weg vom Fokus auf Metropolen als auch weg von hoch abstrakten theoretischen Modellen und universellen Prinzipien zu tragen. Stattdessen lenkt sie sie in Richtung des Verständnisses gelebter Erfahrungen und von „situiertem Wissen" *(situated knowledge)* kleinerer Jurisdiktionen, wie eben Portugal und Griechenland, die dennoch für die Sozialforschung als kritische Propädeutik relevant sind.

Auf erkenntnistheoretischer Ebene wird in dieser Dissertation die Sozialontologie als Mittel eingesetzt, um zu verstehen, wie das soziale Sein auf eine echte, nicht redundante und unauslöschliche Weise existiert. Dabei geht es um die Art und Weise, wie das Verständnis unserer sozialen Natur durch ein situiertes, materielles, verortetes und empfundenes Wissen und als Teil einer ständig generativen und prozessualen Individuation in einem unendlichen Netz von Beziehungen geformt wird. Wissen ist insofern nicht ahistorisch, sondern wird gerade als ein historisch geprägtes Kontinuum verstanden, indem vorher bestehende Strukturen berücksichtigt und auf die jeweilige gesellschaftliche Wirklichkeit abgestimmt werden, innerhalb derer es fortwährend geformt wird. Wissen ist insofern ein Prozess, der das Ontische und das Epistemische durch das Erfinden und Kombinieren von Methoden zusammenführt. In dieser Hinsicht wird die Sozialontologie in einer *dynamischen* und *enchronischen* Perspektive konzipiert, d.h. sie ist in diachronem und synchronem, vergangenem, gegenwärtigem und raumzeitlichem Bezugsrahmen eingebunden. In Anbetracht dessen werden Ontologie und Epistemologie gleichzeitig als individuiert angesehen, was es ermöglicht, lang gepflegte Annahmen über die soziale Natur zu durchbrechen und Abgrenzungen bzw. Dualismen in der Sozialtheorie wie etwa Handlungsmacht und Struktur, Körper und Seele oder Geist und Materie aufzulösen. Infolgedessen versucht dieser Forschungsansatz, mit dichotomem und hierarchischem Denken insgesamt zu brechen und anstelle eines binären Rahmens in der Theoriebildung und Rechtspraxis ein „*mehrachsiges*" und „*polygonales*" Denken einzunehmen.

Strukturell gliedert sich diese Arbeit in *fünf* Teile mit jeweils *zehn* Kapiteln. Der *erste* Teil ist eine Einführung in die Analyse und führt die These ein. In diesem ersten Kapitel es werden die Forschungsfragen formuliert und die Hauptthemen und schon erwähnten theoretischen Muster skizziert, um die herum sich die Analyse entfaltet. Anschließend wird die Fokussierung auf Griechenland und Portugal als Fallstudien erläutert sowie die Auswahl bestimmter Fälle vor nationalen und supranationalen Gerichten begründet, inwiefern sie als beispielhaft für theoretische Fragen zur Konzeptualisierung sozialer Rechte gelten können. Danach wird der methodische Ansatz der Analyse zur Beantwortung der Forschungsfragen und der Aufbau der Arbeit erläutert, wobei der Umfang und die Ziele jedes Teils einzeln zusammengefasst werden. Der einleitende Teil schließt mit einem kritischen Überblick über die vorhandene Literatur zu sozialen Rechten ab. Vor dem Hintergrund der Unzulänglichkeiten der Literatur in konzeptionellen Fragen zu sozialen Rechten und der betreffenden Austeritätsperiode wird der innovative Ansatz

der Dissertation verdeutlicht. Dabei werden die ontologischen und ethischen Annahmen veranschaulicht, auf denen die Konzeptionen sozialer Rechte beruhen.

Der *zweite Teil* besteht aus den Kapiteln zwei und drei und widmet sich der Analyse der Begriffe Krise und Austerität in Verbindung mit der vorliegenden Forschungsfrage. Im *zweiten Kapitel* versucht die Studie darzulegen, wie die Idee der Krise auf abstrakte Weise in verschiedenen interdisziplinären Ansätzen konzeptualisiert wurde, und zudem zu veranschaulichen, wie verschiedene Krisentheorien vor dem Hintergrund der Austerität in den Diskurs über soziale Rechte eingesickert sind und diesen geprägt haben. Zunächst wird untersucht, wie „Krise" aus verschiedenen erkenntnistheoretischen Perspektiven theoretisiert wird. Anschließend wird dies auf die europäische Ebene übertragen und erläutert, wie die Austeritätspolitik auf institutioneller Ebene umgesetzt und auf theoretischer Ebene kommentiert wurde. Zu letzterem identifiziert dieser Studie sechs vorherrschende Diskurse zur Krisentheorie, die sich aus dem Naturalismus, Realismus, Konstruktivismus oder dem historischen Materialismus ergeben: *Erstens* ist eine Krise natürlich oder sozial konstruiert; *zweitens* ist eine Krise einer gegebenen Struktur äußerlich oder ihr inhärent; *drittens* ist eine Krise zufällig oder systematisch; *viertens* ist eine Krise vorübergehend oder ein permanenter Zustand; *fünftens* wird eine Krise synchron als Teil eines statischen Systems konzipiert oder als Prozess diachron erzeugt; und *sechstens* wird eine Krise als objektive Bedingung verstanden, die reaktiv Anpassung verlangt, oder sie ist ein umstrittenes diskursives Konstrukt, das aus sich heraus Brüche generiert, die zu Transformation führen.

Durch die Auswertung relevanter Literatur aus einem breiten Spektrum von Teilbereichen des Rechts, wie Völkerrecht, Rechtssoziologie und die Relation von Recht und Governance sowie von Analysen aus der Geschichtswissenschaft, Politologie und Bank- und Finanzwissenschaft, stellt die Studie fest, dass sich diese Hypothesen zur Krise auf das konzeptionelle Dipol des freien Willens und des sozialen Determinismus stützen, was sich dann im Gegensatz zwischen individueller Handlungsmacht (*individual agency*) und struktureller Dynamik (*structural dynamics*) niederschlägt. In diesem Sinne wird behauptet, dass die Krisentheorie dazu neigt, entweder das Individuum als aktiven, eigennützigen Akteur zu ontologisieren oder den Staat und die zugrunde liegenden institutionellen Strukturen und systemischen Machtdynamiken, denen das menschliche Leben unterworfen ist. Die Studie legt nahe, dass eine dieser beiden vorherrschenden Arten der Krisentheorie im Krisendiskurs im breiteren europäischen Kontext angewendet wurde.

Im Gegensatz zu einer Interpretation der Krise *von innen*, nämlich von einem Ort der Krise im Kontext, plädiert die Analyse für Ansätze, die nahelegen, dass wir einen Einblick in dieses Forschungsgebiet gewinnen, wenn wir die Krise *als* Kontext betrachten, d.h. als ein Terrain des Handelns und der Bedeutung anstatt einer Abnormität. Damit vermeidet es der hier gewählte Ansatz, Krisen als momentane und isolierte Phänomene oder als singuläre Ereignisse zu definieren. Stattdessen werden kritische Zustände als durchdringende Kontexte gefasst, die sich in allen Strukturen und Prozessen manifestieren. Krisen als Kontext zu betrachten, bedeutet jedoch gerade nicht, dass sie in den ganzheitlichen, homogenisierenden Begriffen von Uniformität und Essentialismus gesehen werden. Vielmehr wird in dieser Arbeit argumentiert, dass Krisen als kontingentes Ergebnis einer komplexen Abfolge von Umständen eher in ihrer Spezifität und Einzigartigkeit untersucht werden, während sie innerhalb der breiteren Strukturen bewertet werden, in denen sie sich befinden. Insbesondere wenn „Krise" oder „Eurokrise" verwendet wird, schreibt die Analyse diesen Begriffen keine enge finanzielle Bedeutung zu. Sie bringt eine soziale Krise nicht mit dem guten Funktionieren der Märkte sowie der Verteilungs- oder Umverteilungspolitik des Staates in Verbindung. Im Gegensatz zu solchen Ansätzen geht die Dissertation davon aus, dass die Krise aus der Perspektive der sozialen Rechte einen systematischen Mangel an Auseinandersetzung mit den ethischen und ontologischen Annahmen bedeutet, auf denen die sozialen Rechte konzeptionell beruhen und die im Zusammenhang mit den in Griechenland und Portugal durchgeführten Sparmaßnahmen empirisch veranschaulicht worden sind.

Anschließend wendet sich die Analyse in *Kapitel drei* dem Konzept der Austerität zu, indem sie kurz den historischen Hintergrund dieses Begriffs darstellt und seine Entwicklung vom „Washington-Konsens" über den „Post-Washington-Konsens" bis hin zu dem, was in letzter Zeit als „Berlin-Washington-Konsens" bezeichnet wurde, darstellt und untersucht. Austerität wird für den Zweck dieser Arbeit als relevant angesehen, da sie soziale Interaktionen und damit die sozialen Parameter der kontinuierlichen konzeptionellen Verwirklichung sozialer Rechte nicht nur vermittelte, sondern auch prägte und weiterhin prägt. Damit nähert sich die Studie Austerität als gesellschaftliches Phänomen, genauer als ökonomisches Instrument und als politischen und moralischen Diskurs und untersucht darüber hinaus die Erscheinungsformen der Austerität auf der Ebene gelebter Erfahrung. Die Dissertation verdeutlicht, wie Sparmaßnahmen durch die Anwendung von Gesetzen erleichtert und verankert wurden. Ferner wird untersucht, wie sich die Austeritätspolitik während der Eurokrise auch als Quelle der Rechtslehre etabliert

hat und auf diese Weise die Diskussion um soziale Rechte beeinflusst hat, insbesondere in Fragen des Inhalts, der Justiziabilität und des wirksamen Schutzes. Im Einklang damit werden zudem die sozialen Auswirkungen der Austeritätspolitik auf breiterer Ebene und in den betroffenen Ländern Griechenland und Portugal dargestellt und bewertet, insbesondere da diese gemäß den vereinbarten Absichtserklärungen für eine spezifische wirtschaftspolitische Konditionalität (sog. Memoranda of Understanding on Specific Economic Policy Conditionality – MoUs) umgesetzt wurden. Abschließend werden die sozialen Auswirkungen der Umgehung oder der Einschränkung des Schutzes sozialer Rechte während der Sparmaßnahmen insoweit skizziert, wie diese Politik und die Maßnahmen auf theoretischer und praktischer Ebene angefochten worden sind.

Der *dritte Teil* der Analyse untersucht, wie die Fälle im Zusammenhang mit der Umsetzung von Sparmaßnahmen in Griechenland und Portugal auf den verschiedenen Ebenen der rechtlichen Auseinandersetzung bewertet wurden, d. h. sowohl in Gerichtsurteilen als auch durch juristische Interessenvertretung (*legal advocacy*). Zu diesem Zweck untersucht die Arbeit in *Kapitel vier* zunächst die Debatte um die Justiziabilität sozialer Rechte und prüft die juristisch erhobenen Argumente sowohl gegen als auch für die Einklagbarkeit sozialer Rechte. Die Studie skizziert auf diese Weise die Grenzen und Konturen der Justiziabilitätsdebatte, um diese später mit der untersuchten Austeritätsrechtsprechung zu verknüpfen. Hinsichtlich der Einwände gegen die Einklagbarkeit sozialer Rechte lässt sich die relevante Literatur in vier weit gefasste Kategorien einteilen: In der *ersten* werden Argumente bewertet, die sich auf den anspruchsvollen und kostspieligen Charakter der Durchsetzung staatlicher Maßnahmen zum Schutz sozialer Rechte beziehen. Die *zweite* befasst sich mit der allgemeinen Kritik an der demokratischen Legitimität, die sich an der Doktrin der Gewaltenteilung orientiert. Die *dritte* Gruppe von Einwänden konzentriert sich auf verfahrensrechtliche Aspekte des Gerichtsprozesses. Insbesondere befasst sie sich mit Kritik an dem institutionellen Vermögen von Gerichten und der epistemischen Kompetenz von Richtern, über Fälle sozialer Rechte zu entscheiden. Die Analyse schließt mit der Würdigung eines *vierten* Kritikpunkts ab, der die Umsetzbarkeit und die Erfolgsquote der staatlichen Vollstreckung von sozialrechtsbezogenen Gerichtsurteilen in Frage stellt.

Auf der Grundlage der theoretischen Untersuchung widmet sich die Analyse in *Kapitel fünf* den Rechtsurteilen zu Sparmaßnahmen von Gerichten in Griechenland und Portugal sowie von europäischen Gerichten und untersucht den Zusammenhang mit sozialen Rechten. Insbesondere interessieren hier die weitreichenden Debatten, die diese

Urteile im Bereich der Sozialtheorie ausgelöst haben. Die untersuchten Urteile und die Gerichte, die sie erlassen haben, werden dabei als eine diskursive Praxis des Rechts betrachtet, in denen verschiedene Auffassungen von sozialen Werten in Frage gestellt und in Bezug auf das Konzept der sozialen Rechte artikuliert wurden. Zusätzlich zur Behandlung der Fälle, die jeweils vor den obersten Gerichten verhandelt wurden, lenkt die Arbeit die Aufmerksamkeit auch auf weniger bekannte Urteile, die von griechischen Gerichten in erster Instanz gefällt wurden. Der Grund dafür ist, dass diese Urteile als Gegenbeispiel zur sonst verbreiteten, allgemein so erachteten sparfreundlichen Rechtsprechung betrachtet werden, was der gesamten griechischen Rechtspraxis der ersten Krisenjahre zugeschrieben wird. Darüber hinaus werden diese Urteile daraufhin untersucht, ob sie sich in ihrer Argumentation auf nationale verfassungsrechtliche Garantien von sozialen Rechten und internationale Menschenrechtsbestimmungen berufen. Schließlich werden diese Urteile bewertet, weil sie als anschauliches Beispiel dafür dienen, wie gesellschaftliche Werte und soziale Dynamiken vor dem Hintergrund der Austerität reflektiert wurden.

Nach den Gerichtsbeispielen aus Griechenland und Portugal zur Austerität stehen anschließend Gerichtsverfahren zu sozialen Rechten im Mittelpunkt, und zwar sowohl hinsichtlich des Rechtsbeistands zur Einklage sozialer Rechte als auch der richterlichen Argumentation. An ihnen untersucht die Arbeit in *Kapitel sechs* die konzeptionellen Grundlagen der ethisch inspirierten und politisch aufgeladenen Begriffe der „aktivistischen Rechtsverteidigun“ (*activist lawyering*) und des „richterlichen Aktivismus“ (*judicial activism*). Genauer untersucht die Studie zunächst die Bedeutung des „*cause lawyering*“, wie es an seinem intellektuellen Geburtsort, nämlich den Vereinigten Staaten von Amerika, entstanden ist und wie es sich innerhalb des besonderen amerikanischen Rahmens hinsichtlich des Schutzes sozialer Rechte entwickelt hat. Anschließend wird herausgearbeitet, wie die Rolle der Anwälte in den untersuchten Fallstudien aus Griechenland und Portugal vor, während und nach der Krise angesichts der Tatsache wahrgenommen wurde, dass durch die MoUs eine Austeritätspolitik vorgeschriebenen wurde. Dabei ist zu klären, ob die Rechtspraxis in den untersuchten Sozialrechtsfällen der von den Vereinigten Staaten inspirierten Typologie des „*cause lawyering*“ und der „strategischen Prozessführung“ (*strategic litigation*) entspricht. In dieser Hinsicht ist die hier vorliegende Untersuchung skeptisch gegenüber der Verwendung dieses Vokabulars zur Beschreibung der europäischen Rechtspraxis.

Gleichzeitig stellt sie in Frage, dass die Rolle von Anwälten bei der Durchsetzung sozialer Rechte rundweg abgelehnt wurde. In diesem Sinne hebt die Studie die Art und Weise hervor, wie Anwälte während der Krisenjahre in den beiden finanziell unterstützten Ländern versuchten, soziale Rechte zu schützen, indem sie sich auf den internationalen Menschenrechtsschutz beriefen, und wie sie den von Sparauflagen betroffenen Menschen eine Stimme gaben. Die Analyse legt nahe, dass eine sogenannte „prozessuale Theorie" zur sozialen Anwaltschaft die Herausforderungen des hochgradig politisierten und monosemantischen Cause-Lawyering-Diskurses bewältigen könnte. In diesem Sinne begreift die Studie anwaltliche Interessenvertretung als eine Tätigkeit, die sich weder auf die Mikroebene, d.h. auf die Erfahrung der Interaktion zwischen Anwalt und Mandant, noch auf die Makroebene, also Fragen der Governance, beschränkt. Stattdessen wird der Anwaltsberuf als konzeptionelles Bindeglied zwischen gesellschaftlichen Interaktionen und Strukturen betrachtet, um verschiedene soziale Prozesse einzubeziehen und die Bedeutung sozialer Rechte wirksam zum Ausdruck zu bringen.

Den richterlichen Aktivismus bewertet die Analyse nicht unter dem Gesichtspunkt der Gewaltenteilung, wie es in den verschiedenen Strömungen der liberalen Rechtstradition und in der Debatte über die richterliche Kontrolle (*judicial review*) vorausgesetzt wird. Stattdessen wird der richterliche Aktivismus als Teil der weitreichenden Diskussion über soziale Rechtsstreitigkeiten und über die Rolle, die Richter bei der Zuschreibung von Bedeutung für soziale Rechte spielen, insbesondere in Zeiten einer Finanz- und Steuerkrise, behandelt. Dafür gibt die Studie zunächst einen Überblick über die historischen Ursprünge des Begriffs des richterlichen Aktivismus im verfassungsrechtlichen Diskurs der Vereinigten Staaten von Amerika und über dessen Adaption in anderen liberalen Rechtstraditionen. In diesem Zusammenhang konzentriert sich die Analyse auf den Diskurs über den sozialen Wandel sowie den Diskurs über die richterliche Zurückhaltung von Beurteilungen bei Ansprüchen auf soziale Rechte. In Bezug auf das erste Thema argumentiert die Arbeit, dass die Frage nicht sinnvoll ist, ob Gerichte tatsächlich einen politischen Wandel in Form einer Neuordnung der Gesellschaft von oben nach unten – gemäß eines hierarchischen Verständnisses gesellschaftlicher Machtstrukturen – herbeiführen können. Eine solche Kritik würde die Diskussion über soziale Rechte verfälschen, indem sie die Aufmerksamkeit von den grundlegenden Fragen der ontologischen und ethischen Prämissen sozialer Rechte nimmt und diese Probleme auf ein staatsorientiertes und institutionelles Verständnis dieser Rechte als den einzig relevanten Bezugsrahmen verkürzt.

In diesem Sinne plädiert die Studie für eine *aktive*, aber nicht aktivistische richterliche Haltung in ihrem Potenzial, konzeptionelle Grundlagen sozialer Rechte praktisch zu verankern. In dieser Hinsicht werden Richter als zeitlich, historisch, geografisch und sozial verortet verstanden, und zugleich sozial verankerte Urteile fällen, die unweigerlich bestimmte Aspekte gesellschaftlicher Werte in der öffentlichen Kultur verarbeiten und in den Vordergrund stellen. In diesem Sinne geht die Studie davon aus, dass Richter, indem sie über den relationalen Charakter sozialer Rechte nachdenken, dadurch nicht zu Aktivisten werden, sondern aktiv sind im Sinne einer Auseinandersetzung mit der gelebten Erfahrung. Eine aktive Geisteshaltung von Richtern meint grob gesagt, ein offenes Ohr für gesellschaftliche Überzeugungen und Praktiken sowie für die in ihnen verkörperten Werte zu haben. Dieses Verständnis der richterlichen Tätigkeit ähnelt einem prozessualen Ansatz der Rechtsvertretung, in dem die sozialen Rechte als ein dialogischer Prozess begriffen werden, der sich durch alle Rechtspraktiken zieht.

Auf der Grundlage dieser Erkenntnisse kommt die Studie zu dem Schluss, dass sich die Gerichte im Falle Portugals und Griechenlands bei ihrer Rechtssprechung zur Austerität innerhalb der Grenzen der ihnen zugewiesenen Rolle bewegt haben. Sie haben juristische Standardargumente verwendet und stellen somit keine genuinen Beispiele für richterlichen Aktivismus und „*cause lawyering*" dar. Zudem bestätigt die Analyse nicht die Standardkritik, dass die Gerichte das Gleichgewicht der staatlichen Verteilungsleistungen zugunsten der bereits bevorzugten Mittelschicht und nicht zugunsten der am wenigsten Begünstigten und der Armen verschoben haben. Vielmehr legen die Ergebnisse nahe, dass liberale oder sozialistische wohlfahrtsstaatliche Ansätze der Kritik um soziale Rechte, die Armut nur auf der politischen Ebene untersuchen, die mit diesen Begriffen verbundenen ethischen und ontologischen Annahmen hinterfragen müssen. Eine dieser Voraussetzungen ist die übliche Gegenüberstellung sozialer Werte und wirtschaftlicher Ziele bei der Konzeption sozialer Rechte. Aber nicht nur durch wirtschaftliche Beziehungen und entsprechende Strukturen wird die soziale Existenz vermittelt, sondern sie betrifft tatsächlich alle Aspekte der gelebten Erfahrung. Die soziale Existenz ist von der Idee der *Relationalität* in ihren materiellen und nicht-materiellen Dimensionen geprägt.

Im *vierten Teil* der Arbeit wird eine Analyse der sozialen Rechte auf konzeptioneller Ebene vorgenommen. Ausgehend von der analytischen und empirischen Beurteilung der Rechtsprechung zur Austerität wird in *Kapitel sieben* ein Panorama der Standardansätze bei der Theoretisierung sozialer Rechte skizziert. Daraus werden zwei Hauptwege identifiziert, auf denen Wissenschaftler solche Rechte üblicherweise konzeptualisieren. Der *erste* Weg

basiert auf der herkömmlichen Dichotomie von *negativen* und *positiven* Rechten. Bürgerliche und politische Rechte gelten als negative Rechte, während wirtschaftliche und eben soziale Rechte als positive Rechte angesehen werden. In dieser Hindsicht geht die Analyse der Frage nach, wie die positive/negative Unterscheidung von Rechten mit öffentlichen Kosten und Dienstleistungen in Verbindung gebracht wird und wie sie diesen Aspekt zu einem bestimmenden Bestandteil der Vorstellungen von sozialen Rechten gemacht hat. Der *zweite* Ansatz stützt sich auf die seit langem etablierte theoretische Unterscheidung zwischen sozialen und wirtschaftlichen Rechten einerseits und bürgerlichen und politischen Rechten andererseits, die historisch und theoretisch im Kontext des internationalen Rechts zur Gewähr der Menschenrechte zu verorten sind. In diesem Zusammenhang untersucht die Analyse die Thesen der „Interdependenz" (*interdependence*) und der „Unteilbarkeit" (*indivisibility*). Die wirtschaftlichen, sozialen und kulturellen Rechte, wie sie im Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte („WSK-Rechte"- ICESCR) verankert sind, und die bürgerlichen und politischen Rechte, wie sie im Internationalen Pakt über bürgerliche und politische Rechte („Zivilpakt" - ICCPR) festgelegt sind, werden in dem Sinne als „unteilbar" erachtet, dass beide Gruppen von Rechten voneinander abhängig und miteinander verbunden sind. Abschließend werden theoretische Darstellungen zu sozialen Rechten in den finanziell unterstützten Ländern am Beispiel der griechischen Wissenschaft kritisch untersucht. In wissenschaftlichen Beiträgen für Griechenland argumentierten einschlägige Analysen, um das so genannten nationalen „social acquis" argumentiert, dass soziale Rechte das Ergebnis umfassender gesellschaftlicher Kämpfe und Errungenschaften in Form bereits etablierter und verfassungsmäßig verbriefter sozialer Ansprüche sind, die nicht eingeschränkt oder beschnitten werden können.

Diese Ansätze werden anschließend mit einer Reihe von kritischen Einwänden konfrontiert. Der *erste* Einwand betrifft die Konzeptualisierung von sozialen Rechten als kostenverursachende Rechte. Hier argumentiert die Arbeit, dass ein ausschließlich budgetabhängiges und kostenorientiertes Verständnis sozialer Rechte in einem politischen Klima, das individualisierte Verantwortung und die Konsolidierung einer Austeritätspolitik anstelle des Sozialstaates forciert, nicht nur auf der praktischen Ebene der institutionellen Mittelverteilung, sondern auch auf der Ebene des Denkens Auswirkungen hat. Denn diese begriffliche Rahmungen prägen das Verständnis davon, wie Menschen zueinander und zu den Gesellschaften, die sie bilden, in Beziehung stehen, und bestimmen wiederum ihrerseits, wie soziale Rechte konzipiert und theoretisiert werden. Der *zweite* Einwand liegt

in der Art und Weise, wie soziale Rechte durch die normative Entkategorisierung der verschiedenen Gruppen von bürgerlichen und politischen Rechten und wirtschaftlichen, sozialen und kulturellen Rechten theoretisiert werden. Eine wissenschaftliche Kritik hat, so das Argument, der Entdichotomisierung verschiedener Gruppen von Rechten die Aufmerksamkeit zu stark auf Doktrin und Methode gelenkt. In Anbetracht dessen stellt die Arbeit einen Mangel an wissenschaftlicher Auseinandersetzung mit den ontologischen und ethischen Prämissen fest, die die Konzeptionen sozialer Rechte durchdringen und das Verständnis des *Sozialen* prägen. Soziale Rechte erscheinen so als lediglich abgeleitete Konzepte, d.h. als leere Signifikanten, die ihre Bedeutung von der Bedeutung anderer Konzepte ableiten, namentlich in Relation zu Kosten, anderen Rechten, dem Staat oder dessen Abwesenheit stehen. Vor diesem Hintergrund unterstreicht die Arbeit, dass die Bewertung der ontologischen und ethischen Annahmen, die liberalen und sozialstaatlichen Maßnahmen zugrunde liegen, von entscheidender Bedeutung ist, um zu verstehen, was der Begriff „Sozial" in den sozialen Rechten bedeutet, und um die individuellen und kollektiven Dimensionen dieser Rechte in Einklang zu bringen.

Im Anschluss an diese Untersuchung geht die Studie im *fünften Teil* auf die ontologischen und ethischen Annahmen ein, die der Konzeption sozialer Rechte entgegenstehen. In der vorliegenden Arbeit werden nicht die Begriffe Würde, Freiheit und Staatsbürgerschaft untersucht, die im liberalen Rechtsdenken üblicherweise als Grundlage für die sozialen Rechte angesehen werden. Stattdessen konzentriert sich die Analyse auf Solidarität und Vulnerabilität sowie die philosophische Idee der Transindividualität als potenzielle Rechtfertigungsgrundlagen für soziale Rechte und untersucht die philosophischen Voraussetzungen, die diesen Begriffen zugrunde liegen.

Hinsichtlich der Solidarität vermeidet die Analyse in *Kapitel acht* die Diskussion, die sie als monetäre Solidarität zwischen den Mitgliedstaaten der Europäischen Union fasst, die als Förderung von Mechanismen der länderübergreifenden Finanzhilfe zwischen Ländern in Zeiten von Finanz- und Wirtschaftskrisen verstanden wird. Stattdessen wird in der Analyse skizziert, wie Solidarität als grundlegender Verfassungswert in der EU theoretisch und normativ verankert wurde, und wendet sich der Frage zu, wie Solidaritätsansprüche in den Fallstudien zu Griechenland und Portugal konkret vor Gericht verhandelt wurden. Anschließend untersucht die Studie, wie Solidarität im Kontext der späten Eurokrise theoretisiert wurde und entweder im Rahmen eines sozialdemokratischen oder eines liberalen Wohlfahrtsmodells konzipiert wird. Diese intellektuellen Versuche, Solidarität ethisch zu rechtfertigen und zu konzeptualisieren,

beruhen, so die Analyse, auf den philosophischen Ideen der „Reziprozität“ (*reciprocity*), der „Anerkennung“ (*recognition*) und der „Selbstständigkeit“ (*self-reliance*). Bei der Untersuchung der ethischen Voraussetzungen, die dem Konzept der Solidarität zugrunde liegen, geht die Studie nicht vom Standpunkt der Demokratietheorie und des Regierens aus. Stattdessen wird die Solidarität unter dem Blickwinkel der Sozialität und der Relationalität untersucht und diese Begriffe auf einer ontologischen und ethischen Ebene erfasst. In diesem Zusammenhang wird die These vertreten, dass der Begriff der Solidarität aus einer liberal-individualistischen oder sozialstaatlichen Sichtweise gemeinhin ein ontologisches Register voraussetzt, das immer negativ und antagonistisch ist und separiert wirkt. In diesem Sinne nimmt die Solidarität, so die These, die Form der Kooperation auf Grundlage gemeinsamer Interessen an. In dieser Form dient sie als Gegengewicht zu einem sozialen Leben, in dem Konflikte angeblich endemisch sind und wird damit durch eine antagonistische und negativ definierte Vorstellung von Sozialität gerechtfertigt.

Anschließend wendet sich die Analyse der Idee der „gegenseitigen Hilfe“ (*mutual aid*) zu, die in den Jahren der Sparmaßnahmen wieder aufgetaucht ist. Sie untersucht, wie sich Solidarität und gegenseitigen Hilfe konzeptionell überschneiden und voneinander unterscheiden. Gegenseitigen Hilfe begreift menschliche Beziehungen und Sozialität als bejahend und sich gegenseitig umfassend, die auf Zustimmung und Empathie im Streben nach gegenseitigem Glück beruhen. Dies steht im Gegensatz zu einer Interpretation von Solidarität als isoliert und instrumentell, die durch geschlossene Verbindungen aus geteilter Erfahrungen oder gemeinsamen Interessen definiert wird. Die Untersuchung bietet demgegenüber eine Lesart von gegenseitigen Hilfe als einen anderen Weg an, soziales Sein und soziale Realität zu verstehen. Gegenseitigen Hilfe als Solidarität in diesem Sinne fördert eine Vorstellung von menschlicher Sozialität, die nicht durch Konflikt, Feindseligkeit und soziale Distanz bestimmt ist, sondern durch gegenseitiges Verständnis, Bezugnahme und soziale Verbundenheit. Sie hebt die Idee des gegenseitigen Glücks als Motiv hinter solidarischen Praktiken hervor und betont die *relationale* Natur des Menschen.

Im Anschluss an die Analyse der Solidarität werden in dieser Arbeit weitere neuere wissenschaftliche Beiträge untersucht, die eine andere Lesart der Relationalität ermöglichen. Dabei wendet sich die Arbeit in *Kapitel neun* zeitgenössischen Analysen zu, die den Begriff der Vulnerabilität vorschlagen, und eine Revision der etablierten ethischen und ontologischen Annahmen, die den vorherrschenden Sozialtheorien zugrunde liegen. Zum Zwecke dieser Untersuchung wird Vulnerabilität in Beziehung zum Diskurs über die soziale Ontologie und dessen Auswirkungen auf die Konzeptionen der sozialen Rechte

und der Sozialtheorie problematisiert. Entsprechend Vulnerabilität wird nicht in der Weise thematisiert, wie dies in Gesetzestexten, Verträgen oder in den Urteilen supranationaler und nationaler Gerichte auf der Grundlage struktureller Ungerechtigkeiten und Diskriminierungen, denen bestimmte marginalisierte Personen und Minderheiten ausgesetzt sind, angeführt wird. Bei der Untersuchung des Konzepts der Vulnerabilitäts und seiner Verbindung zur Sozialtheorie befasst sich die Analyse mit Beiträgen, die im Wesentlichen aus drei Literatursträngen stammen. Dabei handelt es sich *erstens* um die Tugendethik und die liberale Moraltheorie, *zweitens* um den historischen Materialismus und weiterer kritischer Ansätze des Rechts und der politischen Ökonomie sowie *drittens* um die kritische Sozialtheorie, die sich auf die Idee der „relationalen Ontologie" bezieht. Im Einzelnen befasst sich die Analyse mit Michael Sandels Idee von Demut und Verwundbarkeit, mit Martha Nussbaums „Capabilities-Ansatz" in seiner Bedeutung für das Konzept der Vulnerabilität und die Sozialtheorie insgesamt sowie mit Martha Finemans „Theorie der Vulnerabilität" in ihrer Bedeutung für soziale Gerechtigkeit, die in der Rechtswissenschaft und der politischen Ökonomie an Bedeutung gewonnen hat.

Die einschlägigen wissenschaftlichen Arbeiten zu Theorien über Vulnerabilität verfolgen entweder einen ontologischen oder einen so genannten sozialen Ansatz der Vulnerabilität. Die Analyse folgt jedoch nicht dieser üblichen Unterscheidung und schlägt stattdessen eine andere Klassifizierung vor, die zwischen liberal-moralischen Ansätzen, kritisch-wohlfahrtstaatlichen Ansätzen und dem weithin als sozial bezeichneten Modell der Vulnerabilität aus der philosophischen Anthropologie unterscheidet. In Bezug auf den liberal-moralischen Ansatz stellt die Analyse fest, dass liberale Vorstellungen von Individualität und Vulnerabilität auf der Grundlage eines entkörperten, hyperrationalen, unabhängigen, auf sich zentrierten und eigennützigen Selbst verstanden werden. Zugleich versteht die liberale Tugendethik Individualität als Bedürftigkeit, Abhängigkeit und Verletzlichkeit in Form von Begrenzung und Passivität. In Abgrenzung zu liberalen Individualitätskonzepten betonen Analysen aus der kritischen Rechtswissenschaft und dem historischen Materialismus die gegenseitige Abhängigkeit der Menschen und die Bedingtheit des menschlichen Lebens durch bereits bestehende Strukturen und materielle Kräfte. In diesem Zusammenhang wird in der Arbeit Finemans These vom „verletzlichen Rechtssubjekt" (*vulnerable legal subject*) im Gegensatz zum liberalen Verständnis des Rechtssubjekt näher untersucht. Nach Finemans Sozialtheorie werden Menschen als verkörperte Wesen betrachtet, die in soziale Institutionen und Beziehungen eingebettet

sind. Verletzlichkeit und Resilienz werden ihr zufolge durch den bedarfsorientierten Charakter des Staates anerkannt und geschützt.

Trotz der Unterschiede der genannten Ansätze besteht insgesamt ein gemeinsamer philosophischer Topos darin, dass die menschliche Natur und die soziale Realität auf der Grundlage einer reduktiv-negativen sozialen Ontologie verstanden werden, die immer in Form von passiven, begrenzten, vorbestimmten Orten konfiguriert ist, die das Selbst eindeutig als abgegrenzte Substanzen und Eigenschaften definiert. Damit verengen Analysen dieser Art die menschliche Ontologie auf Individualität als einer idealiter stabilen und endlichen Form, die immer schon vor dem Prozess der Individuation besteht. Dieser theoretische Ansatz gibt in einer hierarchischen Denkweise den materiellen Bedingungen und der körperlichen Verletzlichkeit des Seins den Vorrang gegenüber einer Gesamtheit der Seinsbedingungen in ihrer ungebundenen und unerwarteten Natur.

Die Arbeit steht diesen Ansätzen skeptisch gegenüber und untersucht kritische Beiträge, die Verletzlichkeit aus der Perspektive der „relationalen Ontologie" erklären. Besonders inspirierend dafür ist Pamela Sue Andersons Verständnis von Vulnerabilität als Raum für Transformation. Zudem wird Erinn Gilsons Vorschlag für eine Neukonfiguration einer neuen sozialen und körperlichen Ontologie geprüft, der eine Transformation nicht nur der sprachlichen Konventionen verspricht, sondern vor allem des Denkens und insbesondere der Art und Weise, wie wir unsere Ontologie als einen offenen *Prozess* der Inklusivität, Akzeptanz und Relationalität begreifen. Diese Beiträge sind insofern von Bedeutung, als dass sie Verwundbarkeit als gleichumfänglich mit *Individuation* betrachten und letzteres als einen *Prozess* begreifen, der Gestalt annimmt. Die vorliegende Studie stellt jedoch fest, dass diese theoretischen Positionen die Vulnerabilität zwar mittels der Individuation als einem dynamischen und kinetischen Prozess analysieren, jedoch im Schatten der Negativität als philosophischer Vorannahme verbleiben. Sie gehen die Verletzlichkeit eher von der Äußerlichkeit des Selbst als von der Innerlichkeit her an. Auf diese Weise halten sie binär konzipierte Annahmen und Denkprozesse über die menschliche Ontologie und Sozialität aufrecht, die ihrerseits Vorstellungen von sozialen Rechten auf der Grundlage einer negativen sozialen Ontologie prägen.

In Anbetracht der Grenzen dieser theoretischen Ansätze über Solidarität und Vulnerabilität geht die Studie im letzten *Kapitel zehn* dieser Arbeit dazu über, den philosophischen Begriff der „Transindividualität" zu untersuchen. Damit wird nicht nur ein neues Vokabular eingeführt, sondern auch ein anderes Denkmodell und ein übergreifender Rahmen für die Konzeption des *Sozialen* und die anschließende

Begründung des Verständnisses von sozialen Rechten gegeben. Zunächst wird skizziert, wie die Idee der Transindividualität aus der Ethik von Baruch Spinoza und aus der Individuationstheorie von Gilbert Simondon hervorgegangen ist und wie sie in der Literatur sukzessive Gestalt annimmt. Die Analyse hebt hierbei bestimmte Aspekte dieses philosophischen Begriffs hervor, die eine Konzeptualisierung der sozialen Rechte aus einem anderen Blickwinkel ermöglichen. Denn Transindividualität rückt die Idee der *Relationalität* und des *Prozesses* in den Mittelpunkt einer Neuformulierung von Epistemologie und Ontologie. In dieser Beziehung veranschaulicht die Arbeit, wie in einer transindividuellen Ontologie nicht Individuen Beziehungen schaffen, sondern Individuen selbst als Beziehungen betrachtet werden, die wiederum Beziehungen erzeugen und somit niemals ein für alle Mal gegeben sind. Entsprechend kommt Individualität nicht nach der Individuation, sondern Individuation und Individualität werden gleichzeitig und unendlich erzeugt. In dieser Hinsicht unterscheidet sich die Transindividualität von theoretischen Rahmen des Idealismus, der Teleologie, des Essentialismus oder dem Interaktionismus.

Die Arbeit positioniert sich zugunsten einens Begriff von Transindividualität, der sie in Gegensatz erstens zum Begriff der *Intersubjektivität* bzw. der Reduktion der transindividuellen Beziehung auf die Beziehung zwischen bereits konstituierten Individuen bringt, zweitens zur *Totalität* bzw. der Reduktion des Individuums auf eine andere, größere Art von Individuum und drittens zum *sozialen Determinismus* bzw. der Annahme, dass das Individuum einfach eine Resultant der Geschichte oder einer Art von singulärer Struktur – wie etwa der Wirtschaft – ist. Der Begriff der Transindividualität stellt auf diese Weise sowohl die Reduktion von Kollektivität auf Individualität als auch von Individualität auf Kollektivität in Frage. Folglich steht diese Idee im Widerspruch zu den vorherrschenden Hypothesen in den Sozialtheorien, die das Individuum und das Kollektiv als sich gegenseitig ausschließend betrachten. Demgegenüber unterstreicht diese Untersuchung, dass Transindividualität einen Rahmen für die Verbindung von Innerlichkeit und Äußerlichkeit und für die gegenseitige Konstitution von Individuum und Kollektiv bietet, ohne dass das eine auf das andere reduziert werden kann.

Daran anknüpfend wird die Idee der Transindividualität mit einem bestimmten Verständnis von prozessualer Sozialontologie verbunden, um bei der Konzeption sozialer Rechte Sozialität als Relationalität neu zu fassen. Um die Idee der Transindividualität als ontologisches Modell für die Konzeption sozialer Rechte anzuwenden, fasst die Analyse die ontologischen und ethischen Rahmenbedingungen zusammen, die den Konzepten sozialer Rechte zugrunde liegen, wie aus der vorliegenden Studie hervorgeht. In diesem

Zusammenhang stellt die Analyse fest, dass *atomistische* und *holistische* Ontologien die basalen Modelle liefern, durch die die soziale Beziehungen konzeptualisiert wurden. In Übereinstimmung mit dieser dualistischen Einteilung tendieren solche Konzeptionen sozialer Rechte dazu, entweder auf der Ebene des Individuums oder auf der Ebene von Institutionen und Strukturen zu argumentieren, während die dazwischen liegende Dimension der Beziehung als ontologischer Frage systematisch vernachlässigt wird. Einerseits wird in einem liberalen Modell der sozialen Rechte, das von atomistischen Annahmen ausgeht, die Gesellschaft als ein Verbund von Individuen verstanden, die praktisch von Beziehungen entbunden sind. Beziehungen werden in diesem Rahmen lediglich als Beziehungen zu sich selbst und zu anderen Individuen betrachtet, wobei der Blickwinkel immer nur auf das Individuum und seine Handlungen gerichtet ist und nicht auf die Beziehungsfähigkeit und Sozialität der menschlichen Natur. Auf diese Weise unterstützt ein liberales individualistisches ontologisches Modell die Zentriertheit auf das Individuums und hält den Gegensatz zwischen Individuum und Gesellschaft aufrecht. Andererseits stellen holistische ontologische Theorien die Gesellschaft als ein geschlossenes, mit Strukturen und Eigenschaften ausgestattetes System dar, das die Subjektivität seiner Mitglieder vorbestimmt. In diesem Rahmen wird das Individuum abstrakt betrachtet und unter das Kollektiv subsumiert, das ausschließlich durch seine wirtschaftliche Basis definiert ist, die spätere Individuationen bestimmt. Im Gegensatz zu solchen ontologischen Modellen, die bei der Konzeption und Theoretisierung sozialer Rechte implizit sind, verwebt diese Studie ein Verständnis von Transindividualität im Sinne einer prozessualen Individuation unendlicher Bezogenheit mit einer prozessualen Sozialontologie der Relationalität.

In Anbetracht all dessen hält diese Untersuchung auf Grundlage eines lebendigen Stranges der Literatur zu Sozialontologie und Rechten Folgendes fest: Jede Sozialtheorie, ob sie nun ein liberales Verständnis hat, das dem Individuums den Vorrang vor der Gesellschaft einräumt, oder eine wohlfahrtsstaatliche Vorliebe für institutionelle Strukturen gesellschaftlicher Organisation hat, ist ontologisch an die Art und Weise gebunden, wie sie soziale Beziehungen und die Idee der Bezogenheit konzipiert. Dies gilt unabhängig davon, ob deren Gültigkeit geprüft wird oder nicht, und unabhängig davon, ob die Implikationen einer solchen Bindung erkannt werden oder nicht. Daraus folgt, dass die sozialen Rechte ontologisch weder auf Bedürftigkeit oder Abhängigkeit noch auf Eigeninteresse oder Selbständigkeit beruhen, sondern auf dem Konzept der Relationalität als Bedingung der relationalen Natur des Seins. Vereinfacht ausgedrückt wird in dieser

Arbeit die Behauptung aufgestellt, dass Relationalität soziale Rechte hervorbringt. In diesem Zusammenhang macht die Studie einen Vorschlag für eine transindividuelle soziale Ontologie, die die kollektive und individuelle Grundlage der Sozialität als eines offenen, kontinuierlichen Prozesses zwischen unendlich individuierten Menschen anerkennt.

Wenn alle Erkenntnisse und Überlegungen darüber, wie die Begriffe *Prozess* und *Relationalität* mit dem Konzept des *Sozialen* verbunden sind, zusammen genommen werden, werden in dieser Arbeit *soziale Rechte* als *transindividuelle Rechte* neu definiert. Indem soziale Rechte als transindividuelle Rechte verstanden werden, schlägt die These vor, dass dieser ontologische Rahmen den Begriff des *Sozialen* bei der Konzeptualisierung sozialer Rechte von einer bloßen Verteilungsforderung an andere oder an den Staat oder von der utilitaristischen Ausrichtung eines individualistischen Modells von Rechten befreit. Darüber hinaus löst sie den Begriff des *Sozialen* von einer leiblichen Ontologie des Selbst, die sich ausschließlich auf die Materialität des Körpers und die materiellen Bedingungen konzentriert, und schlägt stattdessen eine Kombination aus dem verkörperten und dem psychischen Selbst sowie aus materiellen und nicht-materiellen Aspekten des Ontischen vor. In dieser Arbeit wird vorgeschlagen, die sozialen Rechte im Rahmen einer transindividuellen Sozialontologie zu konzipieren, die die individuelle und die kollektive Dimension des *Sozialen* auf der Grundlage der Relationalität in Einklang bringt.

Damit geht diese Studie über ein ontologisches Modell des liberalen politischen Denkens hinaus, das die Zentralität des Individuums bekräftigt und die Opposition zwischen Individuum und Gesellschaft aufrechterhält, oder über ein soziales Wohlfahrtsmodell, das die Idee von Individuum und Staat vertritt. Innerhalb des Untersuchungsrahmens der vorliegenden Arbeit steht diese Idee einer transindividuellen sozialen Ontologie im Einklang mit einem Verständnis der Krisentheorie, das Krise nicht als ein einzelnes, momentanes, naturalisiertes Ereignis, sondern als eine langwierige, kritische Phase begreift, die menschliche Interaktionen und institutionelle Strukturen in Form eines fortlaufenden Prozesses durchdringt und verbindet. Indem sie eine transindividuelle Sozialontologie vorschlägt, übernimmt diese Studie nicht die ethische, klassisch-liberale Annahme, dass soziale Rechte Menschenrechte sind, die allen Menschen allein aufgrund ihres Menschseins oder aufgrund ihrer Unterwerfung unter bereits bestehende Strukturen besitzen. Vielmehr sie die *sozialen Rechte* als *transindividuelle Rechte* begreift, geht diese Studie davon aus, dass weder ein naturalisiertes Menschenbild noch ein struktureller sozialer Determinismus die sozialen Rechte ontologisch begründen, sondern die Idee der Relationalität als ontogenetischer Prozess.

SELBSTÄNDIGKEITSERKLÄRUNG

Hiermit erkläre ich, Kyriaki Pavlidou, dass ich die vorliegende Arbeit mit dem Titel "Social Rights as Transindividual Rights: A Law and Ethics Approach to the European Social Crisis" selbstständig verfasst und keine anderen als die angegebenen Quellen und Hilfsmittel verwendet habe. Alle sinngemäß und wörtlich übernommenen Stellen aus anderen Werken habe ich als solche kenntlich gemacht. Die Dissertation ist in keinem früheren Promotionsverfahren angenommen oder abgelehnt worden.