Special Section
Europe and the Lost Generation

Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?

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A. Introduction

The European financial crisis has called many of the assumptions of the constitutional structure of the European Union (EU) into question. The market-based model of the European Monetary Union (EMU) led to an improper assessment of the borrowing capacity of the euro-area Member States and a mispricing of their default risk.[1] Another design flaw of the EMU that has been exposed by the crisis was the weakness of the existing framework for economic policy coordination. The factual interdependence of the participating economies in the monetary union was so strong that the denial of some form of assistance to the debt-distressed countries triggered a domino effect in the Eurozone as a whole. The quest for instruments to address the sovereign debt crisis brought a European constitutional crisis to the forefront: the EU did not possess the appropriate mechanisms to help the states in need and to guarantee financial stability in the EMU.

The urgent need to overcome this impasse led to a number of initiatives at the political and legal level that eventually led to a mutation of EU's constitutional order.[2] New instruments strengthening European economic governance were introduced, leading to a more structured and stricter surveillance of domestic policies.[3] The country-specific economic

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[1] *See* Paul De Grauwe & Yuemei Ji, *Mispricing of Sovereign Risk and Macroeconomic Stability in the Eurozone*, 50 J. COMMON MKT. STUD. 866 (2012) (discussing a systematic mispricing of sovereign risk in the Eurozone, that leads to bubbles in good years and excessive austerity in bad years).

[2] *See* KAARLO TUORI & KLAUS TUORI, THE EUROZONE CRISIS: A CONSTITUTIONAL ANALYSIS 117 (2014); Edoardo Chiti, Agustín José Menéndez & Pedro Gustavo Teixeira, *The European Rescue of the European Union*, *in* THE EUROPEAN RESCUE OF THE EUROPEAN UNION? THE EXISTENTIAL CRISIS OF THE EUROPEAN POLITICAL PROJECT 391 (Edoardo Chiti, Agustín José Menéndez & Pedro Gustavo Teixeira eds., 2012); Agustín José Menéndez, *Editorial: A European Union in Constitutional Mutation?*, 20 EUR. L.J. 127 (2014).

[3] *See generally* Edoardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 50 COMMON MKT L. REV. 683 (2013); Mark Dawson & Floris De Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 MOD. L. REV. 817 (2013); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMMON MKT. L. REV. 1777 (2011).

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governance that was applied to the Eurozone states that accepted financial assistance was subject to strict conditionality, which pressed for reforms, not only in recipient countries' economies, but also in their healthcare and pension systems, education and labour sectors.

So far this constitutional mutation has mainly been conceived as a change of EU's *economic* constitution. Yet, it has important repercussions also for other constitutional dimensions, mainly that of social policy and social rights. This paper aims to consider this social dimension of the constitutional change, using the so-called "lost generation" as an example of how austerity policies impact on the social rights of vulnerable social groups.

The term lost generation describes, young, educated Europeans from the countries in financial distress, who face unprecedented levels of unemployment, poor social security coverage, and cuts in public expenditure for their education. In the aftermath of the Eurozone crisis, the notion of the lost generation is increasingly used in the public dialogue.[4] The 2012 Joint EU Youth Report of the Council and the Commission underlined that the financial crisis threatens to transform Europe's youth into a lost generation.[5] OECD Secretary-General, Angel Gurría, warned in his speech at the Council of Europe on the real danger of a lost generation.[6] Recent reports on intergenerational justice document that austerity has had a different impact on the various generations: children and youth have been disproportionately more strongly affected and disadvantaged by the negative developments of recent years.[7]

The lost generation offers a good example for the questions investigated in this paper for two reasons. Firstly, the particularly severe and long-lasting intrusion in the social rights of young people shows that austerity cuts were not carefully targeted and not administered in a balanced way throughout the population. Secondly, the example of the lost generation best illustrates the democratic deficit of austerity measures. Due to its young age, the lost generation 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. At the same time, this particular social group appears to have been totally marginalized in the making of austerity policies.

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[4] For a Portuguese insight in the lost generation, see MIGUEL SZYMANSKI, ENDE DER FIESTA: SÜDEUROPAS VERLORENE JUGEND (2014).

[5] *See* EUR. COMM'N, 2012 EU YOUTH REPORT, 2, 144 (2012), http://ec.europa.eu/youth/library/reports/eu-youth-report-2012_en.pdf.

[6] *See* Remarks by Angel Gurría, OECD Secretary-General, delivered at the Enlarged Debate of the Parliamentary Assembly of the Council of Europe (PACE) on the Activities of the OECD, http://www.oecd.org/about/secretary-general/debate-council-of-europe.htm.

[7] Daniel Schraad-Tischler & Christian Kroll, *Social Justice in the EU – A cross-national comparison*, Bertelsmann Stiftung, 85 (2014), http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-3D2360DC-BAA13673/bst/xcms_bst_dms_40361_40362_2.PDF.

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The paper proceeds in the following three steps. Firstly, it explains why financial assistance conditionality is not just a developed form of European economic governance, but also a means of European social governance. Secondly, it assesses the compatibility of the crisis-born social governance with the Charter of Fundamental Rights of the EU (CFR or Charter), the legal document guaranteeing social rights within the EU legal order. The measures affecting the young generation are explicitly underlined. Thirdly, it discusses the arguments against the interference of courts with social policies, claiming that in times of crisis a more active stance of courts in protecting social rights of marginalized groups – such as the lost generation – would be legitimate. Finally, the paper questions the recent case law of European and domestic courts in adjudicating austerity measures, arguing that courts did not leave up to the expectations of providing a remedy to the lost generation.

B. European Social Governance in Times of Crisis

I. Financial Assistance Conditionality as a New Means of European Governance

Financial assistance to Eurozone countries facing severe financial difficulties gave the Union the opportunity to interfere, in sweeping and incisive ways, with the financial and macroeconomic policies of the recipient Member States. Common to all adjustment programmes was the use of strict conditionality: all loans awarded were made dependent on the recipient state's compliance with strictly monitored economic policy conditions.[8] From the first bilateral assistance package to Greece, to the EFSF and EFSM, and finally to the ESM, a similar scheme was followed. Domestic authorities and officials from the Commission, the European Central Bank (ECB), and the International Monetary Fund (IMF)—the so-called *Troika*—negotiated macroeconomic adjustment programmes containing the conditions of financial support. The adjustment programmes[9] were detailed in Memoranda of Understanding (MoU) and their most important elements were also included in Council Decisions directed to the respective recipient state.[10]

The assistance conditions focus primarily on economic targets regarding public spending, but are at the same time accompanied by detailed prescriptions for the measures to be taken to achieve them. These relate to wage moderation, decentralization of collective bargaining, cuts in pensions and social security benefits, reforms in public healthcare and

[8] *See* Michael Ioannidis, *EU Financial Assistance Conditionality After "Two Pack*,*"* 72 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 61 (2014).

[9] The terms "adjustment programme," "economic adjustment programme," and "macroeconomic adjustment programme" are used interchangeably in the legal documents regulating the granting of financial assistance in the euro-area.

[10] This pattern has so far been adopted for Greece, Ireland, Portugal, and Cyprus. Spain signed a MoU restricted, though, to measures concerning its financial sector.

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education. For example, the Portuguese and the second Greek adjustment programmes prescribe the reduction of pharmaceutical spending and the reallocation of human resources in the healthcare sector with the aim of reducing public healthcare expenditure.[11] With regard to the labour market, assistance was made contingent upon the reduction of the minimum wage and the suspension of collective bargaining agreements.[12]

In sum, the adjustment programmes regulate an extremely wide spectrum of social relations within the recipient Member States. According to the ESM Treaty, conditionality may range "from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions,"[13] with the only requirement that it "should reflect the severity of the weakness to be addressed and the financial assistance instrument chosen."[14] And following EU Regulation 472/2013,[15] adjustment measures "shall aim at rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets."[16] These rules neither set specific requirements or limits on the *Troika* nor do they exclude any social policy fields from the scope of conditionality.

II. Why Financial Assistance Conditionality Goes Beyond Economic Governance

The new approach to coordination of economic polices motivated by the Eurozone crisis, including the specific measures addressed to euro-area Members under financial assistance, has so far been subsumed under the label "new economic governance."[17] This

[11] *See* EUR. COMM'N, DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE ECONOMIC ADJUSTMENT PROGRAMME FOR PORTUGAL 74, 79 (June 2011), http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp79_en.pdf [hereinafter ECONOMIC ADJUSTMENT PROGRAMME FOR PORTUGAL]; EUR. COMM'N, DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE 135, 138 (Mar. 2012), http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf [hereinafter SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE].

[12] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 11, at 147.

[13] Treaty Establishing the European Stability Mechanism, art. 12, para. 1, http://www.esm.europa.eu/ [hereinafter ESM Treaty].

[14] *Id.* art. 13, para. 3, subpara. 1.

[15] Regulation 472/2013, of the European Parliament and of the Council of 21 May 2013 on the Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to Their Financial Stability, 2013 O.J. (L 140), 1 [hereinafter Regulation 472/2013]. The Regulation was set into force as part of the so-called "Two Pack" set of reforms.

[16] *Id.* art. 7, para. 1, subpara. 2.

[17] After the onset of the financial crisis, economic governance prevails in the European discourse, both in EU documents and in the literature. *See, e.g.*, *Communication from the Commission to the European Parliament, the*

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principle describes the new procedures and instruments with which the EU seeks to more closely coordinate and control European economies. These include instruments and procedures of different legal character, such as the European Semester, the Six-Pack regulations, and the Fiscal Compact.[18]

The most advanced mechanism of European economic governance is financial assistance conditionality. This is how it works: Pressured by the need for timely lending the recipient states are forced to undertake profound changes in their domestic economic and social policies. These go so far as to touch upon what one would call the core of social policy, namely employment policy, social security, public healthcare, and education. Intervention through financial assistance conditionality is indeed far more than a developed form of European economic governance. Setting upper limits to the prescription of non-generic medicine by Greek physicians,[19] for example, defies classification as economic governance. It is a deep form of regulation of the provision of a public good as important as healthcare.

The umbrella concept "economic governance," even if qualified as "new," "stricter," or "strengthened,"[20] is insufficient to describe this novelty in European governance. There is,

Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Enhancing Economic Policy Coordination for Stability, Growth and Jobs, Tools for Stronger EU Economic Governance, COM (2010) 376 final; Conclusions of the European Council, Brussels, EUCO 10/1/11 REV 1 (2011). *See* Stefan Pilz & Heidi Dittmann, *Perspektiven des Stabilitäts—und Wachstumspakts—Rechtliche und ökonomische Implikationen des Reformpakets "Economic Governance*," 15 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 53 (2012); Christophe Degryse, *The New European Economic Governance* (ETUI Working Paper 2012); Kenneth Armstrong, *The New Governance of EU Fiscal Discipline*, 38 EUR. L. REV. 601 (2013); Amy Verdun, *The Building of Economic Governance in the European Union*, 19 TRANSFER 23 (2013). Nevertheless, economic governance does not constitute a new concept. It actually describes what in the past fifty years has been called "economic integration."

[18] The European Semester is the first phase of the EU's annual cycle of economic policy guidance and surveillance. The "Six Pack" is a set of five Regulations and one Directive adopted to reinforce budgetary discipline in the EU and to introduce a form of macroeconomic surveillance. The Fiscal Compact is an intergovernmental agreement which requires contracting parties to abide by reinforced budget rules. In detail on these instruments, *see* Carlino Antpöhler, *Emergenz der Europäischen Wirtschaftsregierung—Das Six Pack als Zeichen Supranationaler Leistungsfähigkeit*, 72 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 353 (2012); Walter Obwexer, *Das System der "Europäischen Wirtschaftsregierung" und die Rechtsnatur ihrer Teile: Sixpack—Euro-Plus-Pakt—Europäisches Semester—Rettungsschirm*, 67 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 209 (2012); Peter Hilpold, *Eine Neue Europäische Finanzarchitektur—Der Umbau der Wirtschafts—und Währungsunion als Reaktion auf die Finanzkrise, in* NEUE EUROPÄISCHE FINANZARCHITEKTUR: DIE REFORM DER WWU 3 (Peter Hilpold ed., 2014).

[19] *See* EUR. COMM'N, DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE SECOND ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW 93 (Dec. 2012), http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf [hereinafter SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW].

[20] *See, e.g.*, Sonja Bekker, *The EU's Stricter Economic Governance: A Step Towards More Binding Coordination of Social Policies?* (WZB Discussion Paper 2013), http://bibliothek.wzb.eu/pdf/2013/iv13-501.pdf; Armstrong, *supra* note 17.

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of course, no bright line between the coordination of economic and social policies. Such a strict distinction is not only theoretically unattainable but also foreign to EU law itself. Labour costs and pension schemes are, for example, parameters taken into account when discussing economic and budgetary problems within the Union.[21]

Nevertheless, at this point in the history of European integration, the EU is undertaking a paradigm shift in the field of social policy. Without any formal change of its competences the EU has begun to intrude upon salient areas of domestic social policy, portraying its intervention as an inevitable part of financial condition-setting. The qualitative difference between economic and social policy requires a conceptual differentiation of the governance methods to which they are related. Allowing the EU to enter sensitive social domains via the backdoor of "economic governance" would permit the Union to escape necessary political and legal scrutiny. Although the imprecise and wide-ranging use of the phrase "economic governance" has been criticized,[22] no alternative concept has been put forward as yet to describe country-specific governance applied through financial assistance conditionality.

III. The Emergence of European Social Governance During the Crisis

In this paper, the concept of *European social governance* is suggested to describe the newly introduced, indirect way the Union has found to dictate national social policy, portraying its intervention as a financial assistance prerequisite. In this governance pattern the social policy of Member States receiving financial assistance is not directly assigned to the competences of the Union, but is indirectly defined through the emergence of an extra-regulatory European institutional framework operating above national structures. Domestic arenas are treated as spaces to be regulated and supranational arenas as processes engaged in regulating.[23] Decisions at the European level have such a profound and widespread impact on the national level of governance that domestic decisions on social policy matters cannot be assessed separately.

[21] This has been made explicit in several EU documents. *See, e.g.*, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Job-Rich Recovery*, COM (2012) 173 final, where the Commission argues that "Better EU employment governance and coordination has become essential for at least two reasons. First, labour market participation, unemployment and labour cost play a role in macroeconomic stability . . . Second, the crisis has further revealed the interdependence of EU economies and labour markets, underscoring the need to accompany the new economic governance with strengthened coordination of employment and social policies . . . " .

[22] *See, e.g.*, Desmond Dinan, *Governance and Institutions: Impact of the Escalating Crisis*, 50 J. COMMON MKT. STUD 85 (2012) (observing that the term economic governance ranges "from fiscal federalism, at one extreme, to loose intergovernmental co-ordination of various socio-economic policies, at the other").

[23] *See* Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L.J. 667, 669 (2012).

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European financial assistance conditions can be labelled as means of social governance mainly for three reasons. Firstly, due to the breath of the intervention, since the adjustment programmes regulate almost the whole spectrum of social relations within the recipient Member States. Secondly, due to the depth of the intervention, since the regulation in minute detail of social policy issues severely limits the discretion of recipient states in implementing the conditions. Thirdly, due to the duration of the intervention, since financially assisted countries are under surveillance not only during the implementation of the adjustment programme, but also under post-programme surveillance as long as a minimum of 75 % of the financial assistance received has not been repaid.[24] In fact, according to statistical data, adjustment programmes of euro area Member States last at least 2.5 years longer than similar programmes of the IMF.[25]

Labelling part of European condition-setting as European social governance has a number of advantages. Importantly, it conceptualizes the dismantling of national social guarantees as a problem with European origins and reveals the actual power exercised by European institutions in the field of social policy. At the same time, it shifts the discussion about the conformity of austerity measures with social principles from the national to the European level, opening space for critique through instruments of EU constitutional law. In this context, it brings to the foreground the Charter of the Fundamental Rights and in particular the social rights guaranteed therein as a potential counterweight to the questionable expansion of the Union in the field of social policy.

IV. The Doubtful Legality and Legitimacy of Crisis-Born European Social Governance

The crisis-born European social governance has been questioned both for its legality and its legitimacy. First of all, the question of competence is a contested one. It is doubtful whether the legal bases brought forward by the Council and the Court of Justice of the European Union (CJEU) in order to support the compatibility of macroeconomic adjustment programmes with primary EU law are sufficient.[26] Even the new paragraph 3 of

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[24] Regulation 472/2013, art. 14, para. 1.

[25] Jean Pisani-Ferry, André Sapir & Guntram B. Wolff, *EU-IMF assistance to euro-area countries: an early assessment*, 19 Bruegel Blueprint 30 (2013).

[26] The CJEU reads “strict conditionality” as a necessary requirement for financial assistance packages arising from Article 125 of the Treaty on the Functioning of European Union [hereinafter TFEU]. *See* Pringle v. Government of Ireland, Ireland and the Attorney General, CJEU Case C-370/12, paras. 136-37, 142 (Nov. 27, 2012), http://curia.europa.eu/. The Council Decisions containing the financial assistance conditions invoke as their legal basis: (1) Council Regulation 407/2010, 2010 O.J. (L118) for the countries that received assistance through this mechanism, namely Ireland and Portugal; (2) art. 126 paras. 6, 9, 136 TFEU for the countries that received loans through international mechanisms (like the EFSF or the ESM), namely Greece and Cyprus; and (3) Regulation 472/2013 for the cases of assistance given after 21 May 2013, date of adoption of the latter Regulation, for example Cyprus, Portugal and Ireland.

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Article 136 TFEU, which refers to "strict conditionality" as a financial assistance prerequisite, does not necessarily provide an adequate legal basis.[27]

Beyond the competence question, European social governance also displays profound shortcomings in terms of democratic legitimacy. It has been observed that executive power pushes aside the institutions of representative democracy in times of crisis.[28] This has been the experience also in the Eurozone crisis.[29] Decision-making is concentrated in supranational (Commission) and national (Eurogroup) executives at the European level. This is reinforced with the input of expert bodies (ECB and IMF). The big shift towards executive politics is reflected by the simultaneous decrease in power of both the European Parliament (EP) and national parliaments, which traditionally serve as checks on executive power.[30] As a result, the making of financial assistance conditions is insulated from public debate and parliamentary scrutiny.

All phases of the adjustment programme-drafting were indeed lacking in transparency and democratic oversight. From the preparatory phase of negotiations, to the development of mandates and the formulation of specific measures the European Parliament was completely marginalized until 2013.[31] On the national level, it is doubtful whether formal documents were clearly communicated to and deliberated in due time by the respective domestic parliaments.[32] Negotiations where held behind closed doors, without the presence of social partners, a deficiency explicitly criticized by the International Labour Organization (ILO).[33] In fact, the absence of prior consultation with trade union organizations has been officially admitted by the Greek government and has been ascribed to the complexity of economic and political issues and the conditions under which the

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[27] There are two main reasons for these doubts: Firstly, the binding character of conditionality, and secondly, the detailed character of its prescriptions. On the problematic legal basis of conditionality, see also Ioannidis, *supra* note 8, at 89.

[28] Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MKT. LAW REV. 1, 2 (2014).

[29] On a general assessment of executive dominance in the contemporary EU, see *id*.

[30] *See* Dawson & De Witte, *supra* note 3, at 832.

[31] This observation is reaffirmed by the EP itself. *See* Resolution on Employment and Social Aspects of the Role and Operations of the Troika (ECB, Commission and IMF) with Regard to Euro Area Programme Countries, EUR. PARL. INI 2014/2007, para. 2 (2014). Generally on the EP's position in the new economic governance, see Cristina Fasone, *European Economic Governance and Parliamentary Representation. What Place for the European Parliament?*, 20 EUR. L.J. 164 (2014).

[32] *See* Resolution on the Enquiry on the Role and Operations of the Troika (ECB, Commission and IMF) with Regard to the Euro Area Programme Countries, EUR. PARL. INI 2013/2277, para. 30 (2014).

[33] *See* INTERNATIONAL LABOUR OFFICE, 365TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, CASE NO. 2820 (GREECE), REPORTS IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENTS, conclusions, para. 1002 (2012).

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European support mechanism for Greece was formulated.[34] The adoption of EU Regulation 472/2013 does not bring adequate change in this regard, because the rights to information and discussion awarded to the EP and the domestic parliaments do not amount to rights to participation in the decision-making process.[35]

During the crisis even more intense distrust was shown towards forms of direct popular participation. The unpredictable announcement of the Greek Prime Minister, George Papandreou, to call a national referendum on the second Greek bailout programme in October 2011 took national and international actors by surprise. Pressured by the French and German Prime Ministers to change the referendum's wording to "in or out" of the euro, Papandreou withdrew his plan. Killing the referendum idea meant also the end of Papandreou himself, since European actors favored a technocrat to take over from Papandreou in a national unity government.[36]

The loss of democratic oversight is also evident in the increasing tendency towards informal governance.[37] The outcome of staff-level meetings was often decided beforehand in bilateral meetings of the most important players. Even more strikingly, national authorities seem to have received the implementation guidelines on conditions included in the MoU through simple email exchange with the *Troika*.[38] Such opaqueness and informality excludes the transparency and consultation necessary for the genuine involvement of citizens and social partners in EU social policy-making. Therefore, the EP has repeatedly called for transparency in the MoU negotiations.[39]

In sum, the institutional framework for awarding financial assistance shows profound structural shortcomings in terms of democratic legitimacy. By the expansion of democratically questionable supranational decision-making, social interests are extremely marginalized and certain views, such as those of social partners, are profoundly underrepresented.

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[34] *See id.* at para. 967.

[35] For a description and a critical appraisal of the parliamentary involvement after the adoption of Regulation 472/2013, *see* Ioannidis, *supra* note 8, at 100.

[36] For a detailed recreation of these events, *see* the first of a series of Peter Spiegel, *How the Euro was Saved*, FINANCIAL TIMES (May 11, 2014), http://www.ft.com/indepth/how-euro-was-saved.

[37] On general patterns, *see* Thomas Christiansen & Christine Neuhold, *Informal Politics in the EU*, 51 J. COMMON MKT. STUD. 1196 (2013).

[38] *See* Ioannidis, *supra* note 8, at 99.

[39] *See* Resolution on Constitutional Problems of a Multitier Governance in the European Union, EUR. PARL. INI 2012/2078, paras. 36, 72 (2013); EUR. PARL. Resolution INI 2013/2277, supra note 32, paras. 37, 48, 66, 94, 107 (2014).

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The emergence of European social governance and the opaqueness through which it is practiced challenges basic assumptions of European constitutional law. The critique of the Union's democratic deficit is not new.[40] The nexus between that critique and the marginalization of the "social question" at the European level suggests that we revisit the concept of EU social rights.[41] The initial exclusion of social policies from the Union's field of influence and the alleged limited direct interference with redistributive policies were the main arguments put forward to justify the marginalization of social-justice considerations in the Union's operation. The Union's hesitation towards the recognition of social rights was based on similar grounds. It was regarded as superfluous to award to the EU citizen rights (read social rights) in a field where the Union had limited or no competence at all (read social policy).[42] Even if they finally found their place in an EU legal document, namely the Charter of Fundamental Rights, social rights were regarded as having a weak legal character.

In the following, the paper presents two central issues relating to rethinking social rights in the differentiated constitutional environment triggered by the crisis. Firstly, the doctrinal argument is made that the Charter of Fundamental Rights is applicable to the EU institutions partaking in the making of austerity measures. Secondly, the normative argument follows, that a more active stance of domestic and European courts in adjudicating social rights in times of crisis is also desirable.

C. EU Social Rights in the Context of Austerity

I. The Relevance of the Charter of Fundamental Rights

Since the Charter was made formally binding by the Lisbon Treaty in 2009, it has been given prominence in a growing number of cases before the CJEU, gradually developing into the main human rights instrument within the Union.[43] At the same time, the Charter is the

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[40] Distrust to the Union's ability to address the social question range from the critical appraisal of the side-lining of social justice considerations in the operation of the common market, *see* Giandomenico Majone, *The European Community Between Social Policy and Social Regulation*, 31 J. COMMON MKT. STUD. 153 (1993); to the exclusion of the possibility of the EU to become a social market economy, *see* Fritz Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a 'Social Market Economy,* 8 SOCIO-ECONOMIC REV. 211 (2010).

[41] On the depoliticization of the social question in the process of European integration, *see* Floris De Witte, *EU Law, Politics and the Social Question*, 14 GERMAN L.J. 581 (2013).

[42] This argument was put forward in the discussions held within the European Convention, the body confined with the drafting of the Charter of Fundamental Rights.

[43] *See* Gráinne De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168 (2013). The normative quality of the Charter reaches even beyond the EU legal order because it gradually influences the interpretation of the European Convention on Human Rights (ECHR). *See* Jörg Gundel, *Der Wachsende Einfluß des EU-Rechts auf die Auslegung der EMRK—und*

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main legal document guaranteeing social rights in the EU legal order. The question of the applicability of the Charter in the context of austerity measures is not adequately studied.[44] So far the major focus has been on the conformity of domestic austerity-implementing legislation with national constitutional rights.[45] But holding only the national authorities responsible for implementing austerity policies does not respond to the lending reality.[46] Attempting to fill this gap, this paper will attempt to appraise the assistance conditions from the perspective of EU constitutional law and EU social rights in particular.

The first issue to be considered when questioning the conformity of financial assistance conditions with EU social rights is whether the Charter is applicable. Article 51 paragraph 1 CFR addresses the Charter's provisions to the institutions and bodies of the Union, and to the Member States, when they are implementing Union law. Hence, the Charter establishes a fundamental rights commitment for both European and domestic actors. The legal responsibility of domestic actors and the related question, whether national austerity legislation can be interpreted as implementation of EU law in the meaning of the Charter,[47] is outside the scope of this paper. Instead, this paper is concerned with the appraisal of *European* social governance. In order to assess the legal responsibility for the observance of the Charter at a European level, one has to distinguish out of the complicated practice of financial assistance the EU institutions and the acts that are legally relevant.

The institutional framework of assistance to Eurozone members, gradually developed during the crisis, is based on two parallel sets of rules. Firstly, it is based on the

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Seine Strukturellen Grenzen, in EUROPÄISCHES RECHT ZWISCHEN BEWÄHRUNG UND WANDEL: FESTSCHRIFT FÜR DIETER H. SCHEUING 58 (Peter-Christian Müller-Graff, Stefanie Schmahl & Wassilios Skouris eds., 2011).

[44] Apart from ANDREAS FISCHER-LESCANO, HUMAN RIGHTS IN TIMES OF AUSTERITY POLICY: THE EU INSTITUTIONS AND THE CONCLUSION OF MEMORANDA OF UNDERSTANDING (2014) and Kostas Chryssogonos & Triantafyllos Zolotas, *Excessive Public Debt and Social Rights in the Eurozone Periphery: The Greek Case* (2014), http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-chryssogonos&zolotas.pdf, no significant studies in this field have been made.

[45] *See* for example for the Greek case, Dimitris Travlos-Tzanetatos, *Die Tarifautonomie in kritischer Wende. Das Beispiel Griechenlands*, *in* FESTSCHRIFT FÜR FRANZ JÜRGEN SÄCKER ZUM 70. GEBURTSTAG 325 (Detlev Joost, Hartmut Oetker & Marian Paschke eds., 2011); Aristea Koukiadaki & Lefteris Kretsos, *Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece*, 41 INDUS. L.J. 276 (2012).

[46] On a critical appraisal of the alleged domestic ownership of austerity measures, *see* Ioannidis, *supra* note 8, at 91.

[47] The legal assessment of national legislature implementing the adjustment programmes as to its conformity with CFR is an understudied and open question as well. CJEU Case C-128/12, Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA (Mar. 7, 2013), http://curia.europa.eu/, where the Court, in response to the reference of a Portuguese court, ordered that the Charter is not applicable because the national law in question was not implementing EU law, cannot serve as a negative precedent for this question, since the Portuguese court failed to demonstrate the relation between the Portuguese MoU and the national law.

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intergovernmental framework of the ESM and the EFSF Agreements.[48] Secondly, it is based on the EU framework of the Regulation 472/2013.[49] EU institutions are involved in two ways in this institutional architecture. Firstly, the Commission and the ECB are entrusted by both frameworks with formulating and monitoring the conditions of loan arrangements as constituent parts of the *Troika*.[50] In particular the Commission has the additional role of signing the MoU on behalf of the lenders, in which the conditions are set out.[51] Secondly, the adoption of a Council Decision containing the conditions to financial assistance was made obligatory by Article 7 paragraph 2 of EU Regulation 472/2013. Thus, the Council is obliged to approve the macroeconomic adjustment programme, prepared by the recipient state and the *Troika*, in the form of a Council Decision.

1. The Applicability of the Charter to the Commission and the ECB

The role of the fundamental rights in financial assistance programmes has received increased attention both in the political and legal discourse. Indicative is the 2013 European Parliament investigation about the role of the *Troika* in euro-area programme countries. Both the ECB and the Commission were explicitly questioned whether they assess the consistency of the measures negotiated with the Member States with EU fundamental rights obligations referred to in the Treaties.[52] Interestingly, their answers differ.

The ECB responded that, "it remains the responsibility of the Member State concerned to ensure the compliance of its national law and administrative practices with EU law. By the same token it is the responsibility of the Commission to initiate an infringement procedure against a Member State which it considers has failed to fulfil its obligations under EU law."[53] With this response the ECB renounces for itself and the Commission any

[48] The ESM has replaced the EFSF since October 8, 2012.

[49] *See* Regulation 472/2013, *supra* note 15.

[50] ESM Treaty art. 13, para. 3, 7; Regulation 472/2013, art. 7, para. 1 subpara. 1, para. 4, subpara. 1.

[51] ESM Treaty art. 13, para. 4; Regulation 472/2013, art. 7, para. 2, subpara. 2.

[52] *Questionnaire supporting the own initiative report evaluating the structure, the role and operations of the 'troika' (Commission, ECB and the IMF) actions in euro area programme countries, No. 18, http://www.europarl.europa.eu/document/activities/cont/201401/20140114ATT77313/20140114ATT77313EN.pdf*. The same question addresses the conformity of decisions arising out of the MoU with the national law of the Member States concerned. In this paper, reference is being made only to the part of the question addressing EU law fundamental rights obligations.

[53] *ECB's Replies to the Questionnaire of the European Parliament Supporting the Own Initiative Report Evaluating the Structure, the Role and Operations of the 'Troika' (Commission, ECB and the IMF) Actions in Euro Area Programme Countries*, 7, http://www.europarl.europa.eu/document/activities/cont/201401/20140114ATT77317/20140114ATT77317EN.pdf.

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responsibility to ensure the consistency of conditionality with EU law, recognizing the role of the Commission as the sole guarantor of the Treaties against the Member State concerned. The Commission, however, expressed a more positive approach, responding that "[w]hen negotiating the conditionality, the Commission [also] has a role in ensuring that the 'acquis communautaire' is respected. It has also made sure that fundamental rights were complied with."[54] Thus, the involved EU institutions seem to have different understandings of their commitments under the Charter in the context of financial assistance.

In legal discourse, the relevance of the Charter for the MoU concluded with Member States in financial distress may be questioned for two reasons. Firstly, on the ground that the Commission and the ECB generally did not act under the mandate of the Treaties.[55] With the exception of the EFSM,[56] EU institutions acted under powers conferred on them by intergovernmental agreements. Secondly, because the character of the MoU as binding legal agreements is disputed. If the MoU are not binding legal documents, how could they be subsumed under the Charter? However, as will be shown, none of these reasons suffice to rule out the commitment of the Commission and the ECB to EU fundamental rights.

Firstly, the scope of the Charter is defined in Article 51 paragraph 1 CFR. This reads as follows:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

From the text of the provision follows, that the condition of implementing EU law applies only to Member States. On the contrary, EU institutions are bound by the Charter regardless of whether they are acting under Union law or fulfilling tasks delegated to them by international organizations. The obligation to respect fundamental rights stems from their legal system of origin[57] and therefore is relevant for all forms of their action, even beyond the EU legal system. Therefore the Commission and the ECB need to abide by the

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[54] *Questionnaire supporting the own initiative report evaluating the structure, the role and operations of the 'troika' (Commission, ECB and the IMF) actions in euro area programme countries,* 12, http://www.europarl.europa.eu/document/activities/cont/201401/20140114ATT77315/20140114ATT77315EN.pdf.

[55] *See* KAARLO TUORI & KLAUS TUORI, *supra* note 2, at 237.

[56] *See* Council Regulation 407/2010, 2010 O.J. (L 118) 1.

[57] Art. 6 para. 1 Treaty on the European Union, [hereinafter TEU] reads "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

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Charter when participating in drafting the MoU, even if in the context of the ESM, the EU institutions are lawfully "borrowed" and the Union itself is not an ESM member.

This interpretation was indeed followed by Advocate General Kokott in her opinion on *Pringle*. Kokott emphasized that "[T]he Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Law, including the Charter of Fundamental Rights."[58]

Moreover, even if it is generally claimed that no conclusions can be drawn from *Pringle* on the pertinence of the Charter to EU institutions' action,[59] in this case the CJEU ruled that:

> By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law.[60]

Since the Charter is clearly part of EU law, it would be safe to conclude that the Court entrusts the Commission with the responsibility of ensuring the consistency of the MoU with the Charter. Moreover, the CJEU observed that "[T]he Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM . . . ".[61] This finding assesses the applicability of the Charter only in relation to the Member States actions within the ESM. Therefore, is does not preclude the relevance of the Charter for the EU institutions and their action within the ESM.

Moreover, the adoption of EU Regulation 472/2013 creates a direct link between financial assistance mechanisms und EU law. EU Regulation 472/2013 codifies the preparation and the procedure of providing financial assistance to Member States in distress. Hence, even though the ESM itself still falls outside the EU legal order, the assignment of specific tasks to EU institutions is explicitly spelled out in secondary EU law.[62] Therefore, the Commission

[58] *See* Opinion of Advocate General Kokott at para. 176, Pringle v. Government of Ireland, Ireland and the Attorney General, CJEU Case C-370/12 (Oct. 26, 2012), http://curia.europa.eu/.

[59] *See* KAARLO TUORI & KLAUS TUORI, *supra* note 2, at 238.

[60] *Pringle*, CJEU Case C-370/12, at para. 164.

[61] *Id.* at para. 180.

[62] *See* Regulation 472/2013, art. 7, 13.

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and the ECB may act on behalf of the ESM, at the same time though, they do implement secondary EU law.

The second objection, regarding the binding character of the MoU, is also not enough to reject the applicability of the Charter. In view of the absolute and unconditional fundamental rights commitment of the EU institutions, the Charter applies regardless of the particular legal character of their actions.[63] In the scope of the Charter do fall both formal legal acts as well as non-binding or real acts of the EU institutions.[64] Once it is established that an act is promulgated by an EU institution it is incontrovertible that it must comply with the Charter. The classification of the act is indifferent. Hence, regardless of the classification of the MoU as international agreement, gentlemen's agreement, or real act,[65] the participation of EU institutions in formulating and signing them allows for the applicability of the CFR. The fundamental rights commitment of the EU institutions irrespective of discrete contexts was also stressed by the European Parliament in its resolution following the investigation on the role of the *Troika*. The EP noted that "[T]he European institutions need to respect Union law, including the Charter of Fundamental Rights of the European Union, under all circumstances."[66]

Having accepted the applicability of the Charter, the next question that arises is: what does the commitment to the Charter consist of in the context of austerity measures? In *Pringle* the CJEU explicitly instructed the Commission to "ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law."[67] This requirement can effectively be met only if it is given both a positive and a negative dimension. When participating in the drafting of the MoU, the Commission and the ECB should not propose any condition that does not conform to the Charter provisions

[63] *See* WALTER FRENZ, EUROPÄISCHE GRUNDRECHTE para. 217 (2009); THORSTEN KINGREEN, EUV/ AEUV KOMMENTAR, CFR, art. 51, para. 5 (Christian Calliess, Matthias Ruffert & Hermann-Josef Blanke eds., 2011); ARMIN HATJE, EU-KOMMENTAR, CFR, art. 51, para. 12 (Jürgen Schwarze ed., 2012); MARTIN BOROWSKY, CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION, art. 51, para. 12 (Jürgen Meyer ed., 2014).

[64] WALTER FRENZ, EUROPÄISCHE GRUNDRECHTE para. 218 (2009).

[65] Thorough research has been done on the legal character of the MoU in the context of the IMF. *See* Joseph Gold, *The Legal Character of the Fund's Stand-By Arrangements and Why it Matters*, (IMF Pamphlet Series 1980). After the conclusion of MoU in the context of the Eurozone crisis, a similar discourse was launched, especially in states receiving financial assistance. *See, e.g.*, Antonis Manitakis, *The Constitutional Aspects of the Memorandum*, 51 DIKAIOMATA TOU ANTHROPOU 689 (2011) [in Greek]; George Katrougalos, *Memoranda sunt servanda? The Constitutionality of the Law No. 3845/2010 and of the Memorandum for the Application of the Agreements with the IMF, EU and ECB*, 2 EFIMERIDA DIOIKITIKOU DIKAIOU 151 (2010) [in Greek]. From the English literature, *see* FISCHER-LESCANO, *supra* note 44, at 56; Roberto Cisotta & Daniel Gallo, *The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal*, *in* SOCIAL RIGHTS IN TIMES OF CRISIS IN THE EUROZONE: THE ROLE OF FUNDAMENTAL RIGHTS' CHALLENGES 85, 88 (EUI WORKING PAPER LAW 2014/05) (Claire Kilpatrick & Bruno De Witte eds., 2014).

[66] *See* EUR. PARL. Resolution INI 2013/2277, supra note 32, para. 81 (2014).

[67] *Pringle*, CJEU Case C-370/12, at para. 164.

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(negative dimension). Furthermore, the EU institutions should also refuse to consent to any condition put forward by other actors participating in the negotiations, for example the IMF, that undermines the EU fundamental rights standards (positive dimension).[68] Acting in this way, the Commission would further live up to its declared dedication to the effective implementation of the Charter and to the promotion of a "fundamental rights culture" in the Union.[69]

2. The Applicability of the Charter to the Council of the EU

The adoption of Council Decisions reproducing the backbone of the lending conditions, and their amendments according to the outcome of the monitoring, was the consistent practice of the Union in all cases of financial assistance during the Eurozone crisis.[70] Given the fact that these Decisions are adopted by an EU institution and, thus, indisputably fall under EU Law, it is surprising how little attention they have attracted in the European financial-assistance discourse.[71] Their adoption subsequent to the conclusion of the respective MoU, and their shorter length in comparison to the latter, may account for them being overlooked. In any case, the Decisions of the Council are unilateral EU decisions and, as such, fall under the scope of the Charter.[72] The fact that their content arguably reflects a negotiated agreement between different actors, does not impact their legal character as secondary EU law.

The relevance of the Charter and in particular of its social rights provisions in the context of EU financial assistance conditionality, is further demonstrated by EU Regulation 472/2013, which explicitly requires that adjustment programmes are drafted with respect given to some basic social standards. The Regulation requires that the Council and the Commission, in applying this Regulation, and the draft macroeconomic adjustment programme shall fully observe Article 152 TFEU and Article 28 of the CFR (right of collective bargaining and

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[68] Considering the positive and the negative dimension of the fundamental rights commitment, it is a shortcoming of the EP to stress, on the one side, the obligation of the EU institutions to respect the Charter and, on the other side, to exclude the adjustment programmes from the scope of the Charter. *See id.* at paras. 80 and 81.

[69] *Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, at 3, COM (2010) 573/4 final (Oct. 19, 2010).

[70] The initial Council Decisions addressed to the recipient state concerned are the following: Council Decision 2010/320/EU, 2010 O.J. (L 145/6); Council Implementing Decision 2011/77/EU, 2011 O.J. (L30/34); Council Implementing Decision 2011/344/EU, 2011 O.J. (L 159/88); Council Decision 2013/236/EU, 2013 O.J. (L 141/32). Amending Decisions to incorporate changes in the assistance conditions followed.

[71] In the thorough and systematic research of FISCHER-LESCANO, *supra* note 44, the Decisions of the Council are remarkably absent.

[72] On the decision as a legal form of EU law, *see* MATTHIAS VOGT, DIE ENTSCHEIDUNG ALS HANDLUNGSFORM DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS (2005).

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action).[73] Moreover, the draft macroeconomic adjustment programme should take into account the practice and institutions for wage formation and the national reform programme of the Member State concerned in the context of the Union's strategy for growth and jobs,[74] as well as the need to ensure sufficient means for fundamental policies, such as education and health care.[75]

In sum, financial assistance conditions included in the MoU and/or in the respective Council Decisions fall under the scope of Article 51 paragraph 1 CFR, and have thus to be assessed as to their compliance with the social rights premises set out in the Charter.

II. Social Rights in Peril—The Making of a Lost Generation

Since the Charter is indeed applicable in the context of financial assistance conditionality, the next step is to identify whether the social rights provisions of the Charter are affected. This seems likely because some financial assistance conditions are not only broad in scope, but also go deep into regulating details of economic and social activity in the recipient states.[76] The following investigation will use the "lost generation" as an example of a social group composed of persons who are particularly vulnerable and face many simultaneous challenges in their social rights, such as cuts in their social benefits and severe difficulties to enter the labour market.

1. Labour and Trade Union Rights

Financial assistance conditionality contains detailed provisions relating to labour market and working conditions. In particular, assistance was made contingent upon reductions in the minimum wage level,[77] cuts in the monthly wages of employees in the public sector,[78] and the restriction on collective bargaining autonomy through the introduction of

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[73] Regulation 472/2013, art. 1, para. 4; art. 7, para. 1, subpara. 5.

[74] *Id.* art. 7, para. 1, subpara. 4.

[75] *Id.* art. 7, para. 7, subpara. 2.

[76] For a descriptive and factual account of the threat on social rights during the Eurozone crisis, *see* the various contributions in CLAIRE KILPATRICK & BRUNO DE WITTE, SOCIAL RIGHTS IN TIMES OF CRISIS IN THE EUROZONE: THE ROLE OF FUNDAMENTAL RIGHTS' CHALLENGES (EUI Working Paper LAW 2014/05, 2014).

[77] *See* EUR. COMM'N, DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE SECOND ADJUSTMENT PROGRAMME FOR IRELAND 63 (Feb. 2011). ("Reduce by €1.00 per hour the nominal level of the current national minimum wage."), http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf [hereinafter SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND]; SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 11, at 147 ("The minimum wages established by the national general collective agreement (NGCA) will be reduced by 22% compared to the level of 1 January 2012.").

[78] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW, *supra* note 19, at 250.

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temporal, spatial, and personal restrictions on collective bargaining agreements.[79] According to OECD data, Greece experienced one of the largest falls in real wages across OECD countries (more than 5% per year on average) since the first quarter of 2009.[80] The private sector was hit by wage cuts of -3.4% per year and the public sector of -1.9% per year. Furthermore, the ILO Committee on Freedom of Association expressed concern about repeated and extensive interventions into free and voluntary collective bargaining, as well as an extensive deficit of social dialogue in austerity measures taken in Greece.[81] At the same time recipient states were obliged to lower the protective standards against unfair dismissal,[82] to reduce the unemployment benefit,[83] and to introduce sanctions for beneficiaries not complying with job-search conditionality.[84]

Moreover, in the case of Greece, a series of financial assistance conditions were especially addressed to the labour rights of the young generation, introducing differentiated treatment on the ground of age. In both the first and the second economic adjustment programmes, the Greek government assumed the responsibility to introduce sub-minima wages for groups at risk such as the young people.[85] Minimum wages established by the national general collective agreement had to be reduced by 22%, for youth though—namely for ages below twenty-five—wages had to be reduced by 32%.[86]

The formal justification of these measures and in particular of the differentiated treatment of the young generation was to boost competitiveness and productivity. The empirical

[79] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 11, at 147. For a general overview of the impact of the MoU on the collective bargaining agreements in the different countries, *see* BERND WAAS, *Tarifvertragsrecht in Zeiten der Krise*, *in* ANFORDERUNGEN AN EIN MODERNES KOLLEKTIVES ARBEITSRECHT – FESTSCHRIFT FÜR OTTO ERNST KEMPEN 38 (Jens M. Schubert ed., 2013).

[80] *See* OECD EMPLOYMENT OUTLOOK 2014, HOW DOES GREECE COMPARE? (2014).

[81] *See* ILO, 365TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, supra note 33, paras. 995, 1003.

[82] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW, *supra* note 19, at 223; ECONOMIC ADJUSTMENT PROGRAMME FOR PORTUGAL, *supra* note 11, at 78.

[83] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 11, at 78.

[84] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND, *supra* note 77, at 63.

[85] *See* EUR. COMM'N, DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE 68 (May 2010), http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf. The same clause was also included in art. 2 para. 3 lit. d. Council Decision 2010/320/EU.

[86] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 11, at 147. This further 10% reduction of the minimum wage of young Greek people was presented as a means to reduce the gap in the level of the minimum wage relative to peers (Portugal, Central, and Southeast Europe), to help address high youth unemployment, as well as employment of individuals on the margins of the labour market, and to encourage a shift from the informal to the formal labour sector.

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depiction, though, was the spike in seasonally adjusted unemployment, and particularly in youth unemployment in countries under financial assistance programmes. According to the latest Eurostat statistics, in May 2014 the highest unemployment rates were recorded in Greece (27.2%) and Spain (24.5%).[87] In these countries, this situation has additionally developed into an extremely high rate of long-term unemployment (Greece 18.6% and Spain 13%).[88] This is particularly worrisome given that long term unemployment figures among the greatest risk factors for poverty and social exclusion.[89]

The highest rates of youth unemployment (people under twenty-five) were also observed in crisis-hit countries, namely Spain (53.8%), Greece (53.1%), and Italy (42.9%).[90] Strikingly, the risk of unemployment has affected mostly higher educated young people. Especially in Greece, Italy, Cyprus, and Portugal graduates are at a greater risk of unemployment than young people with lower qualifications, including those who have not completed secondary education.[91] The main difficulty for those who are better qualified is the mismatch between skills and jobs. In fact many young people entering the labour market are "overqualified" in the sense that their acquired level of education or skills is higher than required. The highest proportions of overqualified young people are in Spain, Cyprus, and Ireland, in which almost one in three young are employed in a position which does not require their tertiary qualifications.[92]

At the same time young people are more likely to be employed involuntarily on part-time or temporary basis. In Greece, Spain, Italy, and Cyprus over half of young people under twenty-five work part-time because they cannot find full-time employment.[93] Temporary employment has also been growing among people of young age. From 2008 to 2011, the percentage of young people in the EU with temporary employment contracts rose to 42.5%.[94] Temporary contracts may serve as stepping-stones to permanent jobs; however, they are also indicative of insecure jobs. Temporary employees face a worse social security coverage and more precarious working conditions. Young people also more commonly

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[87] *See Euro Area Unemployment Rate at 11.5%*, EUROSTAT NEWS RELEASE (Aug. 29, 2014).

[88] Daniel Schraad-Tischler & Christian Kroll, *supra* note 7, at 47.

[89] *Id.* at 11.

[90] *See* EUROSTAT NEWS RELEASE, *supra* note 87. On the definition and the methods of measuring youth unemployment, *see* Hans Dietrich, *Youth Unemployment in the Period 2001-2010 and the European Crisis—Looking at the Empirical Evidence*, 19 TRANSFER 305 (2013).

[91] EUR. COMM'N, 2012 EU YOUTH REPORT, *supra* note 5, 169 (2012).

[92] *Id.* at 178.

[93] *Id.* at 174.

[94] *Id.*

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have jobs with atypical and unusual schedules, including shifts and weekend or night-time work. In 2011, 42.9% (almost twice the EU-27 average) of young employees in Greece worked in the evening and 54.9% of them worked on Saturdays.[95]

These measures obviously touch upon the EU "labour constitution"[96] and, in particular, the right of collective bargaining and action (Article 28 CFR), the right to protection in the event of unjustified dismissal (Article 30), and the right to fair and just working conditions (Article 31 CFR). Furthermore, the differentiated treatment of young workers only on the ground of age infringes the provisions protecting young people at work (Article 32 CFR) and the rule of non-discrimination (Article 21 CFR).[97]

Article 28 CFR establishes both an individual and a collective right, guaranteeing the freedom of collective bargaining. It provides protection against direct and indirect infringements of collective agreement guarantees.[98] Article 30 CFR recognizes the right of workers against unfair dismissal, including employment relationships in the private sector.[99] According to this right, the Union is not allowed to hinder the Member States in providing adequate protection against unfair dismissal. Article 31 CFR guarantees a minimum level of fair working conditions, which include a minimum level of job security, a fair wage, the minimisation of work-related risks, and the entitlement to rest periods and paid annual leave. Article 32 CFR requires that young people admitted to work enjoy working conditions appropriate to their age and are protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development.

These norms do not change the EU system of competences (Article 51 paragraph 2 CFR). And the EU itself has limited powers in those areas under Article 153 TFEU. But the EU institutions are prohibited by the provisions of the Charter from undermining efforts of domestic legal orders to establish minimum guarantees of labour and trade union rights.

The European Committee of Social Rights (ECSR) ruled in its decision 66/2011 that the differentiated reduction of the minimum wage of people under 25 constitutes a violation of Article 4§1 (right to a fair remuneration) of the European Social Charter (ESC) read

[95] *Id.* at 176.

[96] On the concept, *see* Florian Rödl, *The Labour Constitution*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 623 (Armin von Bogdandy & Jürgen Bast eds., 2010).

[97] The differentiated treatment of the younger generation is also incompatible with secondary EU law, like the Council Directive 2000/78/EC, 2000 O.J. (L 303) establishing a general framework for equal treatment in employment and occupation.

[98] HANS D. JARASS, CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION art. 28 CFR, para. 3 (2013).

[99] *Id.* at para. 8.

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together with the non-discrimination clause of the Preamble to the ESC, which correspond to Article 31 and 21 CFR. In that case, the ECSR found a disproportionate discrimination against young employees, whose minimum wage were reduced below the poverty level.[100]

2. Education

Assistance conditions include further structural reform measures in the educational systems of the recipient states, especially involving the reduction of public expenditure. The relevant provisions prescribe the reduction in the number of teachers,[101] the streamlining of educational grants,[102] and the increase in student contributions.[103] Public expenditure on education was reduced in all countries receiving financial assistance. In 2011, there was a decrease of over 19% in Greece and around 5% in Portugal and Ireland.[104] In 2012, Cyprus experienced a budget decrease of almost 15%, mostly due to cuts in tertiary education of almost 30%.[105] In the same year, Greece had a subsequent decrease of almost 10% and Italy and Portugal displayed a decrease of around 5%.

Reductions were achieved, through cuts in the salaries of teachers, but also through the reorganisation of schools with mergers and closures. Teachers' salaries were significantly affected in Greece, Ireland and Spain. In Greece, various reductions in teachers' benefits and allowances reduced teachers' fell by 17%, in real terms, between 2009 and 2011.[106] In Ireland, teachers' salaries were reduced as part of a public service-wide reduction in pay. In addition, young teachers who entered the profession after 2011 are paid according to a new salary scale which is 10% lower than the one applied to those recruited prior to that.[107] Moreover, in Greece, successive budget cuts threatened the survival of scientific

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[100] EUR. COMM. SOC. RIGHTS, *Decision on the Merits: General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011* para. 65, 68–69 (May 23, 2012).

[101] *See* EUR. COMM'N, DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE ECONOMIC ADJUSTMENT PROGRAMME FOR CYPRUS 80 (May 2013), http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp149_en.pdf [hereinafter ECONOMIC ADJUSTMENT PROGRAMME FOR CYPRUS].

[102] *See id.* at 102.

[103] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND, *supra* note 77, at 54.

[104] *See* EUR. COMM'N, FUNDING OF EDUCATION IN EUROPE 2000-2012: THE IMPACT OF THE ECONOMIC CRISIS 32 (2013), http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/147EN.pdf.

[105] *Id.* at 34.

[106] OECD, EDUCATION AT A GLANCE 2013: OECD INDICATORS 385 (2013).

[107] *Id.*

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and technological institutions, causing a remarkable call for financial support from renowned international scientists.[108]

While public expenditure on education is decreasing significantly, the young generation of the countries under financial assistance choose to prolong their stay in education. Discouraged by extremely high rates of youth unemployment, young people between twenty and twenty-four increasingly devote a longer time to education and training exclusively.[109] Hence, the economic stagnation exacerbated the situation of "overqualified" graduates, who then have difficulties in finding good working positions in their field of expertise. Indeed, around half (47%) of the young Greeks, Italians, Spaniards and Portuguese who have completed tertiary education are indicating a lack of good job opportunities in their field of study.[110]

In response, vast numbers of them have left for other countries, notably Germany, UK, the Netherlands, Sweden, and Belgium.[111] This loss of human capital, usually referred to as brain drain, deprives the countries in financial distress of taking advantage of their skilled and educated young generation. It is also devastating in economic terms, since these countries educate highly qualified professionals, providing them with costly tertiary education, who then immigrate to countries offering them better career prospects. In this way, the return on this investment, namely educating highly qualified professionals, realises in other countries.

All in all, cuts in the funding of the educational sector affect the right to education, provided by Article 14 CFR, which guarantees non-discriminatory access to education, free compulsory education, and vocational training. This right provides for unhampered access to educational establishments and protects against interference with access to education. The Union's obligation under this right is not to raise obstacles to the Member States guaranteeing the right to education.

3. Social Security

Financial assistance was also made dependent on reductions of social benefits in the recipient states. The conditions require drastic cuts in pensions[112] and the reduction or

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[108] *See* Harald Zur Hausen, *Support for Greece*, 336 SCIENCE 978 (2012).

[109] EUR. COMM'N, 2012 EU YOUTH REPORT, *supra* note 5, 162 (2012).

[110] *Id.* at 171.

[111] For precise migration statistics, *see* OECD, INTERNATIONAL MIGRATION OUTLOOK 2013.

[112] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 11, at 133; SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR IRELAND, *supra* note 77, at 60, 66.

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even removal of family benefits, unemployment benefits, and other welfare payments.[113] In Greece, for example, the UN expert on foreign debt and social rights, Cephas Lumina, noted cuts in pensions on the basis of the MoU that resulted in a reduction up to 60% of the higher pensions and between 25-30% of the lower pensions.[114] The young generation is also affected, since high rates of temporary employment among youngsters are combined with poor social security coverage.[115]

These conditions affect the entitlement to social security and social assistance protected by Article 34 CFR. Article 34 paragraph 1 CFR recognises the entitlement to social security benefits and social services providing protection in case of maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment. Article 34 paragraph 2 CFR guarantees the non-discriminatory access to these benefits. Article 34 paragraph 3 CFR declares the respect to social assistance, as a means to combat social exclusion and poverty.

These norms require a minimum level of social security and protect participation in social security schemes.[116] Even if the EU lacks the power to fulfil these commitments, it is obliged to respect and protect the structures guaranteeing them. Therefore the Union, should abstain from impelling the Member States to dismantle their social security and assistance facilities by hindering citizens' access to social security systems.

4. Healthcare

Financial assistance conditionality obliges the recipient states to implement health sector reforms with the objective of reducing public expenditure. In this regard the conditions impose reductions of the number of employees in the health sector,[117] restrictions on exemptions for treatment costs,[118] and restrictions on the introduction of extra payments for hospital visits and medication.[119]

[113] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW, *supra* note 19, at 252.

[114] *See* United Nations, *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, Mr. Cephas Lumina: Mission to Greece* 22–26 April 2013 (Apr. 26, 2013).

[115] EUR. COMM'N, 2012 EU YOUTH REPORT, *supra* note 5, 175 (2012).

[116] *See* JARASS, *supra* note 98, art. 34 CFR.

[117] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW, *supra* note 19, at 210.

[118] *See* ECONOMIC ADJUSTMENT PROGRAMME FOR CYPRUS, *supra* note 101, at 83.

[119] *See* SECOND ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, FIRST REVIEW, *supra* note 19, at 251.

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Recent academic research has indicated that there is a causal link connecting developed public healthcare systems and high expenditure to high levels of citizens' health.[120] UN human rights expert Cephas Lumina was very critical of the consequences of the Greek MoU with respect to the right to health, observing that "the public health system has become increasingly inaccessible, in particular for poor citizens and marginalized groups, due to increased fees and co-payments, closure of hospitals and health care centres and more and more people losing public health insurance cover, mainly due to prolonged unemployment."[121] Weakened mental health, substance abuse, and swelling suicide rates have also been strongly connected with economic crises.[122] According to WHO, hardest hit are vulnerable groups, such as young and unemployed people. Unemployment contributes to depression and suicide, and young unemployed people have a higher risk of getting mental health problems than young people who remain employed.[123]

At the EU level, the right to healthcare is protected by Article 35 CFR, which guarantees the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices.[124] The Union is thus obliged not to impede access to healthcare facilities ensured by the Member States.[125]

In sum, the EU assistance conditions outlined above prompt justifiable concern regarding their compliance with the social rights secured by the Charter. A valid assessment of this question would require a detailed study of each right, including the application of the proportionality doctrine, which is outside the scope of this paper.[126]

In any case, in order to allow the expression of social groups most affected by the austerity measures, such as the young generation, it is especially important that the Charter is made applicable. The institutions primarily responsible to fulfil this task would be domestic and European courts assessing financial assistance conditions. This is easier said than done. In fact, assigning to courts the legal appraisal of complex financial assistance conditions

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[120] *See* DAVID STUCKLER & SANJAY BASU, THE BODY ECONOMIC: WHY AUSTERITY KILLS (2013) (pointing out a correlation between austerity and bad health).

[121] *See* United Nations, *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, Mr. Cephas Lumina: Mission to Greece* 22–26 April 2013 (Apr. 26, 2013).

[122] *See* WHO, REGIONAL OFFICE FOR EUROPE, IMPACT OF ECONOMIC CRISES ON MENTAL HEALTH (2011).

[123] *Id.* at 6.

[124] For recent developments on the right to healthcare, *see* Scott L. Greer & Tomislav Sokol, *Rules for Rights: European Law, Health Care and Social Citizenship*, 20 EUR. L.J. 66 (2014).

[125] *See* JARASS, *supra* note 98, art. 35 CFR.

[126] For a detailed legal appraisal, *see* FISCHER-LESCANO, *supra* note 44, at 42.

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resulting from long and tedious negotiations raises one major question. Are courts the appropriate *fora* to be entrusted with the power to review such decisions? Can they provide for a conduit of democratic participation for the lost generation?

The reasons why adjudicating social rights can raise legitimacy concerns will be presented in Section D.I. Then Section D.II argues that in the special context of financial assistance conditionality courts may legitimately claim a more active role in adjudicating social rights and giving voice to the lost generation. Finally, it is argued in Section D.III that, until now the lost generation has been absent from the courts litigation: courts were reluctant to review conditionality-driven decisions over social policy issues and thus shied away from providing an adequate counterweight to the democratically questionable constitutional mutation that occurred in the EU due to the Eurozone crisis.

D. Courts and Crisis Management: The Unheard Voice of the Lost Generation

I. Adjudicating Social Rights as a Question of Legitimacy

The tension between judicial enforcement of fundamental rights and democracy is old and well-researched.[127] The claim is that by adjudicating fundamental rights, politically unaccountable judges enjoy the power to overrule majoritarian decisions of democratically elected representatives.[128] These general concerns about courts competing with other decision-making institutions for the ultimate say are intensified when it comes to protection of social rights, due to alleged inherent characteristics of social rights. Courts, the argument goes, should refrain from encroaching upon the power of political bodies to decide questions of social policy, such as the proper level of public healthcare.

The first conceptual peculiarity attributed to social-rights adjudication relates to the association of the fulfilment of social rights with positive and costly state action. Social rights cases are perceived as having greater implications for national budgets than civil and political rights cases.[129] Secondly, given the finite nature of public budget, recognizing social rights' claims to a social group, may result in depriving another from receiving public funding. Judicial decisions that have complex and unpredictable repercussions, which extend beyond the parties to an unknown number of actors, were described by Lon Fuller

[127] *See, e.g.*, Michael J. Perry, *Protecting Human Rights in a Democracy: What Role For the Courts?*, 38 WAKE FOREST L. REV. 635 (2003); Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675 (2009).

[128] On the counter-majoritarian concern, *see* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW U. L. REV. 933 (2001).

[129] This longstanding assumption that only social rights are costly to implement has been meanwhile rejected, *see*, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 465 (1992); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 16 (2003).

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as polycentric.[130] Building on this concept, disputes concerning the allocation of financial resources, like social rights cases, are regarded as predominately polycentric.[131]

Perceived as a resource-related and polycentric task,[132] decision-making over social issues is thought to be little suitable for judicial determination. The legitimacy of courts to deliberate over social rights is questioned because judges seem to be lacking two essential qualifications: expertise and political accountability. Firstly, enforcing social rights may entail the discretion to choose among several policy options of public expenditure allocation. Judges seem to be ill-suited to discharge this overwhelming task, because they do not possess the epistemic qualities to decide in matters with complex budgetary consequences. Besides, even if judges would try to go into the assessment of the macroeconomic impact of their decision, the limited evidence before a court may inadequately reflect the many competing interests implicated by a polycentric issue.[133]

Secondly, especially when courts review parliamentary decisions, their lack of political accountability raises much more substantial legitimacy concerns than in other cases. The fact that courts' authority cannot be traced back to processes to which the affected subjects can participate and influence, challenges a central premise of democratic accountability. Judges are therefore warned against interfering with collective social policy decisions, which are better suited for politically accountable *fora*, such as parliaments, which are equipped with a better capacity to consider the affected interests.

II. Adjudicating Social Rights in Times of Crisis: Potential Remedy for the Lost Generation?

The general rule of task-distribution between constitutional institutions, courts and parliaments, applies, however, in times of proper functioning of democracy. During the current Eurozone crisis though, the constitutional balance between the different institutions has been significantly altered. As noted above, financial assistance conditionality resulted in intrusive social governance, left at the discretion of executives, and insulated from public debate and parliamentary scrutiny. Traditional *fora* of deliberation, such as parliaments, where social policies could be defended, are substantially weakened. In this context, the basic premise of democratic legitimacy, that

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[130] Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

[131] Marius Pieterse, *Coming to Terms With Judicial Enforcement of Socio-economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 393 (2004); PAUL O'CONNELL, VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES 13 (2012).

[132] This perception is not confined to the social rights adjudication, but can apply also to the adjudication of civil and politic rights. For a detailed defence of this claim, which exceeds the scope of this paper, *see id*.; Mureinik, *supra* note 129.

[133] *See* Pieterse, *supra* note 131, at 393.

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binding collective decisions should result from procedures that allow for the effective and equal participation of the largest possible number of the actors affected, is frustrated.[134]

The democratic deficit is even more intense with regard to the young generation due to its age. Firstly, as shown above, the repercussions of austerity measures for younger people are much more important than for other segments of the population. They face higher obstacles entering the labour market and reduced public expenditure regarding their education. Secondly, they did not have a say in the making of the decisions that contributed to the crisis, such as high public spending, over-indebtedness, and corruption, and they cannot be held responsible for the maladministration of their economies. Thirdly, they did not partake to the benefits accruing from the unsustainably high public spending of the past. Previous generations did sometimes benefit from finding a position in the oversized public sector of some of the crisis countries or enjoying high transfer payments. But not the lost generation.

Under these circumstances, applying the general rule that courts should not interfere with choices of political bodies regarding social policy and resource allocation, would mean that the exclusion of subjects affected and the eventual violation of their social rights, would be left without any effective remedy. In a situation where the conduits of democratic participation are blocked or ineffective, courts should thus actively undertake the task to review the procedural conditions of the decisions that, originating from financial assistance conditionality, drastically interfere with social rights. That is, whether these decisions emerged from deliberative and inclusive procedures, which included the views of those affected.[135] Courts should particularly provide a remedy for the concerns of the excluded and muted lost generation. This role of courts should not be understood as simply a scrutiny of procedural conditions of bare majoritarianism. Through this scrutiny, courts ensure that rights of minorities and politically marginalised groups, such as the young generation, are not violated by majoritarian decision-making.

The relevance for the legal assessment of the participation or not of the affected actors is further reflected in five decisions of the ECSR concerning pension schemes in Greece. The ECSR explicitly included the democratically questionable procedures to a factor that contributed to the violation of the Social Charter, noting that the Greek government has not discussed the pension reforms with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue.

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[134] On the understanding of legitimacy as a democratic process for the genesis of law, *see* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 106 (1989); JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 321 (1997).

[135] On the democratic legitimacy of judicial review, *see* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); DAHL, *supra* note 134, at 188; CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 236 (2007).

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Thus the ECSR ruled that, even though the controversial restrictions would under certain conditions not breach the Charter, "due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place," they do amount to a violation of the right to social security (Article 12 paragraph 3 ESC).[136]

Moreover, EU Regulation 472/2013 explicitly requires the involvement of social partners and relevant civil society organisations in the preparation of the adjustment programmes, with a view to contributing to building consensus over its content.[137] In view of the many austerity measures affecting the young generation, student unions or youth-based NGOs could make use of these provisions to press for more active participation in the preparation of reforms affecting them.

III. What Courts Didn't Do: The Lost Generation's Omitted Voice

Turning now to courts actual practice, the question arises: Did courts live up to the expectations of providing a corrective to the democratic deficit and a counterweight to the economic rationale dominating the post-crisis social economic governance? Austerity measures have been brought before both European and domestic courts. The courts of the Union have been confronted with the substantive assessment of austerity measures in two types of cases: after the launch of actions of annulment against Council Decisions containing financial assistance conditionality[138] and after the quest for preliminary rulings on national law implementing EU conditionality.[139] In both sets of cases both the CJEU and

[136] *See* EUR. COMM. SOC. RIGHTS, *Decision on the Merits: Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012* para. 83 (Dec. 7, 2012); EUR. COMM. SOC. RIGHTS, *Decision on the Merits: Panhellenic Federation of Public Service Pensioners (POPS) v. Greece, Complaint No. 77/2012* para. 79 (Dec. 7, 2012); EUR. COMM. SOC. RIGHTS, *Decision on the Merits: Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece, Complaint No. 78/2012* para. 79 (Dec. 7, 2012); EUR. COMM. SOC. RIGHTS, *Decision on the Merits: Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece, Complaint No. 79/2012* para. 79 (Dec. 7, 2012); EUR. COMM. SOC. RIGHTS, *Decision on the Merits: Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece, Complaint No. 80/2012* para. 79 (Dec. 7, 2012).

[137] Regulation 472/2013, art. 8.

[138] The Greek Civil Servants' Confederation ADEDY launched an action for annulment against Council Decisions 2010/320/EU and 2011/57/EU including financial assistance conditionality (art. 263 TFEU). The General Court held that the challenged provisions were indeterminate and left a margin to the Greek state as to the way of their implementation and thus could not themselves directly affect the applicants. As a result both actions were rejected as inadmissible. *See* ADEDY et al. v. Council, GC Case T-541/10 (Nov. 27, 2012), http://curia.europa.eu/; ADEDY et al. v. Council, GC Case T-215/11 (Nov. 27, 2012), http://curia.europa.eu/.

[139] Two Portuguese courts referred to the CJEU, asking whether radical reforms in national labour law where compatible with the Charter of Fundamental Rights. The inadequately drafted order for reference failed to express the links between national reforms and EU conditionality. As a result, the CJEU did not perceive domestic austerity measures as part of a European assistance package and declined to go into the merits of the case. *See* Sindicato dos Bancários do Norte and Others v. BPN - Banco Português de Negócios, SA, CJEU Case C-128/12 (Mar. 7, 2013), http://curia.europa.eu/; Sindicato Nacional dos Profissionals de Seguros e Afins v. Fidelidade Mundial, CJEU Case C-264/12 (Jun. 26, 2014), http://curia.europa.eu/.

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the General Court (GC) declined to go into the merits and thus abstained from taking a clear stance on the conformity of austerity measures with fundamental social values of the Union and from protecting vulnerable social groups affected, like the young generation.

Domestic courts have obviously dealt more often than the courts of the Union with the legal assessment of austerity measures launched in the wake of the public debt crisis. Nevertheless, their decisions display two important shortcomings. Firstly, they do not assess domestic austerity legislation as implementing EU law. Secondly, in their rulings they do not seem to accommodate the lost generation's concerns.

Although the challenged national laws were adopted in order to meet budget deficit targets set in the adjustment programmes, domestic courts did not explicitly address them as implementing EU law. The Greek Supreme Administrative Court denied the application of the CFR on the ground that the challenged laws were allegedly purely domestic policy measures, enforced by institutions of the Greek state on the basis of national law. According to the court, the participation of the Commission and the ECB in the preparation of the economic programme of the Greek government did not trigger the applicability of the Charter.[140]

The Portuguese Constitutional Court, which had from the beginning a more active stance regarding austerity measures,[141] failed to efficiently connect in its case law the national with the European legal orders. Even if it affirmed the binding character of the Portuguese Memorandum and the fact that domestic cuts in public expenditure resulted from the need for compliance with that,[142] it missed to the opportunity to address the national measures as implementing EU law. In the absence of a connection between national and European measures, the legal appraisal was restricted to the ambit of the national law and the social rights included in the Charter of Fundamental Rights found no entrance in the courts' reasoning. Both courts did neither invoke EU social rights, nor attribute responsibility to EU institutions.

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[140] *See* Symboulio tis Epikrateias [StE] [Supreme Administrative Court] 1285/2012 and 1286/2012, para. 21 (Greece).

[141] On the Portuguese constitutional court, *see* Christina Akrivopoulou, *Striking Down Austerity Measures: Crisis Jurisprudence in Europe*, BLOG INT'L J. CONST. L. (June 25, 2013), http://www.iconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-Europe/; Gonçalo de Almeida Ribeiro, *Judicial Activism Against Austerity in Portugal*, BLOG INT'L J. CONST. L. (Dec. 3, 2013), http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/; Roberto Cisotta & Daniel Gallo, *The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal in Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* 85 (EUI Working Paper No. 2014/05).

[142] *See* Acordão No. 396/2011 (Portugal); Acordão No. 353/2012, July 5, 2012 (Portugal); Acordão No. 187/2013, Apr. 5, 2013 (Portugal).

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Courts challenging austerity measures seem unwilling to successfully indulge with the lost generation's concerns. In fact the lost generation is either absent or even impaired from the courts' rulings both in procedural and substantive terms.

Looking at the cases that came before domestic courts, one finding is evident: the lost generation is not among the litigants. The Portuguese litigants were MPs or Bank Workers Unions. The Greek applicants were mainly trade unions, such as the Greek Civil Servants' Confederation ADEDY, the Athens Bar Association, and the Retired Officers Association. All of them represent groups with vested interests in the existing system of power. No student union or youth-based NGO did address their concerns to the courts. Not interested in restoring the old balance of powers, the young generation chose to exit rather than voice itself in traditional institutional *fora*.[143] Youngsters from countries under financial assistance prefer to migrate to other countries offering them better quality of life and job opportunities rather than stay in their own countries, where their prospects are limited.

As to the substantive concerns of the young generation, domestic courts did not manage to provide an adequate counterweight to the democratically questionable exclusion of the lost generation. After a period of judicial self-restraint, the Greek Supreme Courts recently launched a more active jurisprudence. The Greek Supreme Administrative Court ruled that the cuts in the wages and pensions of officers and policemen were incompatible with the Greek constitution.[144] The same decision, regarding cuts in the wages and pensions of judges, was taken by the Greek Supreme Court of Audit.[145] The main justification was that these social groups belong to the "core of the state" and therefore deserve a higher pay. On the other hand, the Greek Supreme Administrative Court held the cuts in wages of university faculty members as compatible with the Greek constitution.[146] The reason was that university faculty members do not belong to the "core of the state," like judges or officers, even though they are public servants according to Greek law.[147] In view of this case law, the Greek Supreme Courts seem to prioritise the budget allocation to national security and the judiciary rather than to education. This deeply affects the possibility of the young generation to enjoy an educational system of high quality and even accentuates the before mentioned brain drain phenomenon.

[143] For the classical argument on the alternatives of voice and exit, *see* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[144] S*ee* Symboulio tis Epikrateias [StE] [Supreme Administrative Court] 2192-96/2014 (Greece).

[145] *See* Elegktiko Synedrio [ES] [Court of Audit] 2/2013 (Greece).

[146] *See* Symboulio tis Epikrateias [StE] [Supreme Administrative Court] 2705/2014 (Greece).

[147] *See also* Symboulio tis Epikrateias [StE] [Supreme Administrative Court] 574/2014 and 575/2014 (Greece).

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Another decision of the Greek Supreme Administrative Court was also rather hostile towards the young generation. The reduction of 32% of the minimum wage of employed persons under the age of twenty-five and their differentiated treatment on the ground of age was challenged before the Court as incompatible with the Greek constitution. In its decision the Greek Supreme Administrative Court held that this provision is part of a reform package that aims at restoring the public finances. Due to the technical and high political character of the reform package the Court deferred to the decision of the legislature and found the challenged provision to be constitutionally bearable.[148] Hence, in the sole case directly connected to austerity measures violating the labour rights of young employees the Court failed to protect the young generation. The stance of the Court is even more striking considering ECSR decision 66/2011 mentioned above, which found that the differentiated reduction of the minimum wage of people under 25 constitutes a violation of Article 4§1 ESC (right to a fair remuneration) read together with the non-discrimination clause of the Preamble to the ESC.[149]

E. Outlook: The Case for More Active Courts and Effective Social Rights

Although some courts may be more active than others, the general pattern in times of crisis is that courts shy away from the difficult task to review conditionality-driven decisions over social policy issues. Even worse, most courts fail to protect deeply affected social groups, such as the young generation. It is here argued that the reluctance of courts to review such decisions does not take proper account of the constitutional mutation that occurred in the EU due to the Eurozone crisis. The weakening of parliamentary controls and the marginalization of big segments of the society, such as the young generation, constitutes an extraordinary development of the European constitutional architecture that calls for a new positioning of social rights and courts adjudicating them. In this new context, the character of social rights as a “weak” constitutional regime and the ordinary arguments against the interference of courts with social policies do not hold anymore.

Courts should embrace a more active role that makes a connection between the doubtful democratic credentials of austerity measures and more intrusive control on the basis of social rights of the social groups affected. This would require them to delve into the complex procedures though which austerity measures are produced and calibrate their standard of review accordingly. The assessment of non-adequate compliance with procedural requirements, would entitle courts to proceed with the stricter substantial review of the financial assistance conditions. Courts would ask the decision-maker responsible for a tolerable justification of the measures adopted and of the discarding of alternative, less intrusive options.

[148] *See* Symboulio Epikrateias [StE] [Supreme Administrative Court] 2307/2014, para. 23 (Greece).

[149] EUR. COMM. SOC. RIGHTS, *supra* note 100, para. 65.

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This could have a double effect that might counterbalance the executive-expertise bias of the constitutional mutation described in Part B.IV above. Firstly, it might induce the actors preparing and enforcing adjustment programmes to adopt more inclusive and responsive procedures, actively engaging civil society actors and social partners. Secondly, courts would thus function as *fora* where arguments of the lost generation and other marginalised groups can be voiced that are muted in the processes of conditionality negotiations, where points of economic expediency take precedence. In this way, decisions on substantive social issues would in principle remain at the disposal of the respective political institution, which would bear the weight of defending them before the judiciary. Courts would be reviewing social policy choices, not making them.

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