II. TESTING THE BATTLEGROUND: SOCIAL RIGHTS AND INSTITUTIONAL CHALLENGES DURING THE EUROZONE CRISIS

SOCIAL RIGHTS IN THE GREEK AUSTERITY CRISIS: REFRAMING CONSTITUTIONAL PLURALISM

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Abstract

This article examines social rights case-law by the highest European and Greek courts, as well as, Greek lower courts. The focus is placed on the measure of labour reserve, upon the constitutionality of which lower courts decided, at the same time that judges of the highest courts were deciding that the challenged austerity measures before them were in conformity with the Greek Constitution. Assessing the relevant cases, the article stresses that lower judges in Greece safeguarded social rights by constitutionalizing these rights. By assessing the unexplored clash in constitutional adjudication, which took place at a domestic level in Greece, the article proffers the reframing of constitutional pluralism in this context. The latter is understood as in hierarchy of social values and *heterarchy* of procedure. Constitutional pluralism is perceived in this sense as realizing and promoting social values

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and as defending equality and dignity that is grounded on solidarity. The article criticizes the concept of solidarity in this respect and defends an idea of solidarity that represents a fundamental constitutional principle of social justice on the scope of self-reliance and reciprocity rather than antagonism. Situating the individual within the austerity context, it claims that this was concretised within a *neo*-utilitarian, instrumentalist and individualistic ideological framework in favour of economic interests and purely efficiency parameters. It further inquiries into the nature of social rights and stresses that social rights pertain to personal integrity and autonomy and have an individual as much as a collective dimension. Ultimately, the article argues that reframing constitutional pluralism requires vigilance to the material conditions of constitutional adjudication horizontally at a national and supranational level, as well as, to the protection and interpretation of social values over economic interests.

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1. By way of introduction

In February 2017, the European Commission's President Jean-Claude Juncker in a letter addressed to the Members of the European Parliament (MEPs) stressed that national measures agreed under bailout programs "fall outside the EU legal order"[1] and do not have to comply with the European Charter of Fundamental Rights. In particular, he stated the following: "The European Court of Justice has confirmed that the Memorandums of Understanding are acts of the European Stability Mechanism (ESM)

[1] See Athens News Agency, Macedonian Press Agency, *EC spox on Juncker letter: 'Full compliance' with EU Human Rights Charter is key* (2017) available at http://int.ert.gr/ec-spox-on-juncker-letter-full-compliance-with-eu-human-rights-charter-is-key/, accessed May 7, 2017.

which falls outside the EU legal order. Therefore, when adopting national measures previously agreed in the memorandum of understanding, Greece is not implementing EU law and as a consequence, the Charter of Fundamental Rights does not apply as such to the Greek measures."[2]. Even though, the deputy spokesman for the European Commission Alexander Winterstein clarified afterwards that when implementing a memorandum, compliance with the treaties and with the spirit and the letter of the charter is key, incidents and statements of that sort reflect well by now a reality in Europe. That is, there is heavy obscurity and bafflement that revolve around the sovereign debt mechanisms and the austerity measures in bailout countries. This further manifest the profound difficulties in accurately locating and reconstructing the intricate and interconnected map of legal sources, by means of either identifying the linkages between national and supranational law, or providing effective protection of human rights[3].

In this respect, the legal reflexes by the legal community in defense of the affected parties and the respective interpretations of the austerity policies by national and supranational courts are of interest to the present analysis. Part two explores austerity judgments by the highest European and Greek courts, as well as, Greek lower courts. The focus is placed on the measure of labour reserve, upon the constitutionality of which lower courts decided, at the same time that judges of the highest national and supranational courts were deciding that the challenged austerity measures before them were in conformity with the Greek Constitution. The analysis further assesses how lower courts in Greece safeguarded social rights[4] by resorting to human rights protection and by enforcing constitutional provisions in order to constitutionalize social rights. It then juxtaposes the interpretation of austerity measures by the European and Supreme Greek Courts.

[2] Ibid.

[3] See also Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailout*s, 35 Oxf Jour Leg Stud. 2 (2015) 337, 339, 340.

[4] In this paper, the use of the term 'social rights' includes essentially labour rights within the context of the examined case law and does not engage with the subset of social rights, such as, the rights to housing, social security, health care or education. It does touch upon, though, rights, such as the right to property, which could be classified under the concept of 'economic rights' within the broader term of socioeconomic rights.

By assessing the unexplored clash in constitutional adjudication, which took place at a domestic level, the article seeks to highlight the developments in constitutional adjudication, as well as, questions of pluralism and unity that have arisen.

Part three engages with a more theoretical valuation of the examined legal events. In particular, it argues that lower judges have set forth an understanding of constitutional pluralism that is defined on shared social values and promotes the constitutional guarantee of human dignity and equality for the protection of rights and of right holders. This claim is further established by a re-assessment of heterarchy and hierarchy in the constitutional pluralism discourse. In this respect, a reading of constitutional pluralism as in hierarchy of social values and heterarchy of procedure, is suggested. The analysis then proceeds with assessing the concept of solidarity in austerity within the discourse of constitutionalization of social rights. It briefly engages with the nature of social rights and the role and reason of the state in claims of social rights protection. The positioning and the ideological and legal concealment of the subject that shaped social rights theories and formed European social policies is further criticized. To that end, it is stressed that social rights pertain to personal integrity and autonomy and have an individual as much as a collective dimension that needs to be understood under a constitutionally reviewed procedure. It is then stressed that social rights, in the absence of a social governance model in Europe with a constitutional pedigree, were concretized within a *neo*-utilitarian and instrumentalist context in favor of the protection of the market. This further provided a fertile ground for an economic analysis of law to act as modus operandi and a neoliberal managerial model of economic maximization and social inequality to prevail.

Part four takes stock and encourages the revision and reframing of constitutional pluralism in austerity Europe on the basis of unity and solidarity and for the purpose of entrenching substantive equality. It highlights the active role of judges, as it was demonstrated by lower courts in Greece. It further stresses the importance of a human-rights based judicial review in the effective protection of social rights and in the re-configuration of constitutional adjudication.

The analysis aims towards a dignity and autonomy-based theory of social rights from the standpoint of the affected individual

in austerity Europe in a, what is now already called, time of *post*-crisis legitimacy. By embracing the constitutionalization of social rights it opts for a framing of constitutional pluralism, in the sense that this is understood as the constitutional safeguard of the social individual not in a top-bottom hierarchical fashion of administrative justice, but in a constitutional heterarchy. The latter is conceived as realizing and promoting social values and as defending equality and dignity and as being grounded on solidarity. By reconciling the collective and the neglected individual aspect of social rights, constitutional adjudication is understood as not being set in a *disequilibrium* between pluralism and unity, but rather as being in symmetry and being balanced by the forces of unity *within* plurality.

2. Greek austerity measures before the courts: an unexplored clash

2.1. The domestic and supranational approaches

The Greek legal system is influenced by the civil law tradition and legal positivism, while it is built around the *summa divisio* of public and private law. Greece has no centralized constitutional adjudication and it has a diffuse system of judicial review that lacks a Constitutional Court. The diffuse, incidental and in concreto character of the Greek system of constitutionality control can rather be understood as "an original version of a mixed system that combines elements of both strong-form and weak-form review"[5]. Courts at all instances are considered competent to decide upon the constitutionality of a statute, while they can also review its compatibility with fundamental human rights provisions and European law. However, the Supreme Civil and Criminal Court of Greece (Areios Pagos) and the Hellenic Council of State (Symvoulio tis Epikrateias or Supreme Administrative Court of Greece)[6], are

[5] A. Kaidatzis, *Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It*, 13 Jus Politicum (2014) available at http://juspoliticum.com/article/07-greece-s-third-way-in-prof-tushnet-s-distinction-between-strong-form-and-weak-form-judicial-review-and-what-we-may-learn-from-it-956.html last accessed December 30, 2017.

[6] Council of State hereafter.

usually entrusted with interpreting the Constitution and with annulling statutory provisions, which are found unconstitutional.

The analysis here considers the judgement 668/2012 of the Hellenic Council of State concerning the compliance of austerity measures with the Greek Constitution, which were introduced within the domestic legal order through the implementation of the denominated Memorandum I of Understanding on Specific Economic Policy Conditionality (MoU)[7]. This decision was widely relied upon by the European Court of Human Rights[8] in the case of Koufaki and ADEDY v. Greece[9], which is of further interest to the present discourse.

International scholarly literature has approached the case of Greece, by heavily focusing at the above-mentioned cases. With respect to Greece, when mapping constitutional challenges that courts in sovereign debt states have faced, these decisions are considered up to this date as "key constitutional judgments"[10]. However, during the critical period between 2012 and 2014, when the attention was placed on the judgments of the highest Courts, there have been significant voices in constitutional adjudication at a national level relating to the so-called austerity measure of 'labour reserve'. The highest courts' judgements fall in the 'passive phase' of judicial review of the austerity measures, between 2010-2014[11]. From 2014 onwards a more active role of highest judges is identified

[7] Decision No 668/2012 of the Greek Council of State on the constitutionality of Law 3845/2010 according to which the 1st MoU was enacted (applic. date 26/07/2010; public. date 20/02/2012); For a detailed analysis of the labour reforms according to Law 3854/2010 see L. Kiosse, *6 May 2010 – 14 February 2012: A highway to the deregulation of labour rights legislation*, 71 Rev of Empl Law (2012).

[8] ECtHR or Strasbourg Court hereinafter.

[9] ECtHR I. Koufaki and ADEDY v. Greece, Nos. 57665/12 and 57657/12, (May 13, 2013), Koufaki case hereinafter; See also S. Koukoulis-Spiliotopoulos, *Austerity v. Human Rights: Measures Condemned by the European Committee of Social Rights in the light of EU law*, *Academic Network of the European Social Charter (ANESC/RASCE), Turin Conference* (2014), 2, par. 6.

[10] Cl. Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, Chapter 11 in Th. Beukers, Br.de Witte & Cl. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press (2017), 286, 297.

[11] A. Tsiftsoglou & St. Koutnatzis, *Financial Crisis and Judicial Asymmetries: The Case of Greece*, Paper presented during the 2017 ICON-S Conference (July 7, 2017), forthcoming [provided with copy by the author].

during this second phase of judicial deference[12]. There have been detailed and insightful analyses of the highest courts' judgements during the first period[13]; thus, the present article does not engage with the facts of the cases or the rationale of the decisions. The examination is rather interested in the active role of lower courts during the passive first phase of constitutional adjudication. Given the peculiarity of the judicial review system in Greece, its positivistic legal tradition and the prevalence of economic rationality in European social policy, the argument here is that lower courts reframed with their judgments the idea of social rights and constitutional pluralism in the direction of solidarity and unity.

2.1.1. Lower courts and the measure of 'labour reserve'

There has been a vast production of judgments by Single-Judge Civil Courts of First Instance (Monomeles Protodikio) adjudicating upon the measure of labour reserve in the public and wider public sector, i.e. the legal status of mandatory mobility, re-assignment or suspension of employees[14]. The staff placed on labour reserve were state employees under private law contracts of indefinite duration[15]. The suppression of the contract staff posts

[12] See also A. Marketou, *Economic Emergency and the Loss of Faith in the Greek Constitution, How Does a Constitution Function when It Is Dying?* 4 Cambridge J. Int'l & Comp. L. 2 (2015), 195-196.

[13] A. Marketou, *Greece: Constitutional Deconstruction and the Loss of National Sovereignty*, Chapter 6 in Th. Beukers, Br.de Witte & Cl. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press (2017), 308-309.

[14] Prior to the examined legislation, the labour reserve measure was introduced in Greek legal order with Law 3986/2011 via the Mid-term Fiscal Strategy Framework 2012-2015, paying 60% of basic salary to those assigned, which was applicable to employees in state-owned enterprises. Later, Law 4024/2011 (Greek Government Gazette A 226/ 27.10.2011) extended the scope of the application to cover employees in the public sector. This was a pre-retirement scheme. [See also A. Koukiadaki & U. ETUC (ed.), *Can the Austerity Measures be Challenged in Supranational Courts? The Cases of Greece and Portugal*, *ETUC Working Papers* (2014), 29]; The significant difference between legislation of 2012 (and after) and legislation of 2011, is that those placed in labour reserve during the first stage (law of 2011), they would retire on full pension at the end of the labour-reserve period. However, those placed on labour reserve in the examined time framework, i.e. 2012 onwards - which is of interest to the present article – were dismissed and lost their jobs after the end of the labour reserve period.

[15] Subparagraph Z.4 of Article 1 of Act 4093/2012 (Greek Government Gazette A 222/ 12.11.2012).

was by percentage and the work force was placed in mandatory availability with completely random criteria. Staff in labour reserve was paid at 75 percent of their basic wage for as long as they were in this status, while this was set at 12 months, after which they were dismissed without compensation. Due to further legislation[16] the following contracted staff was also made redundant: i. all staff positions on private-law open-ended contracts, who were serving as school guards in public schools; ii. all permanent posts of officials, who served in municipal police positions across the country; iii. all employees, who served as permanent staff at the secondary level of technical education, of 50 specialties in total, which were nominally abolished. The remuneration of the staff was 75 percent of their former salary and the duration of the labour reserve status was set at 8 months. Those, who were not transferred to other posts within this timespan, were subsequently dismissed after its expiration, while the abolition of posts was made by invoking the public interest argument.

According to the structural fiscal policies and reforms that the Greek government intended, the general government employment was planned to be reduced by at least 150,000 employees in the period 2011–15, a condition of the country's loan agreements. Almost half of the initial goal was reached, i.e. around 80,000 employees from the public and wider public sector were dismissed, and indeed the number of public servants in Greece fell by more than 12% to just under 567,000 from 647,000 between 2011 and 2015[17]. The Greek government expressed its commitment to "furlough enough redundant public employees into the labor reserve by end-2012 to achieve 15,000 mandatory separations (i.e. once their time in the labor reserve has been exhausted)"[18] and to

[16] Articles 80, 81 and 82 of Act 4172/2013 (Greek Government Gazette A 167/ 23.07.2013).

[17] Eurofound, *Greece: Reducing the number of public servants – latest developments* (June 23, 2016) available at https://www.eurofound.europa.eu/observatories/emcc-eurwork/articles/working-conditions-labour-market-industrial-relations/greece-reducing-the-number-of-public-servants-latest-developments, last accessed December 19, 2017.

[18] See International Monetary Fund, Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding of Greece (March 9, 2012) 7, 59, available at

augment the labour reserve scheme annually. In the course of 2012, the redundant staff of 2,000 employees were transferred to labour reserve, while there was a commitment to transfer 27,000 staff to a new mobility scheme by 2015[19]. By March 2014, 11,400 employees of the public sector were dismissed (instead of the 15,000 layoffs, which was the goal for the biennium 2013-2014), while prior to that 3,635 employees were let go (instead of the aim of 4,000 'mandatory removals', which constituted a commitment of Greece to qualify for granting the second loan by the creditors)[20].

Following the relevant legislation, the majority of staff, who was placed on labour reserve, have collectively brought individual actions in one single application against the administrative bodies that issued the mobility and suspension orders. Among the affected employees who brought an action, some initially asked for preliminary injunctions before proceeding to the main hearing of the cases, while others preferred to wait for the main trial. Accordingly, the majority of the Courts of First Instance provided immediate temporary protection in accordance to the urgency procedure and interim proceedings. The lower judges have granted the employees provisional injunctions, prohibiting in this way the application of the labour reserve measure. The judges hearing the applications for interim relief allowed the applications, as well as the actions, which were subsequently brought before the relevant courts. A minority of judges did not accept the applications for interim relief and the lawsuits afterwards, and thus the same measure of labour reserve was applied to similar staff. However, a large number of employees in the country was not placed under the status of labour reserve and has not been suspended, because the employees were protected by the judgments of lower courts. In particular, in a series of about 40 actions and applications for

https://www.imf.org/external/np/loi/2012/grc/030912.pdf, last accessed December 21, 2017.

[19] International Monetary Fund Country Report No. 13/20 (January 2013) available at https://www.imf.org/external/pubs/ft/scr/2013/cr1320.pdf, last accessed December 21, 2017.

[20] See Editorial, Ethnos, The Timetable for 11.400 layoffs: Who is dismissed from the Public Sector in 2014 (January 17, 2014) available at www.dikaiologitika.gr/eidhseis/dhmosio/23316/11-400-apolyseis-dimosion-ypallilon-to-2014 and www.real.gr/DefaultArthro.aspx?page=arthro&id=290546&catID=108, last accessed May 09, 2018.

interim measures, which were documented covering a period of two years (2013 – 2014)[21], in only eight of them the measures were found in conformity with the Greek Constitution[22], while three of the cases were dismissed on admissibility grounds[23].

In several proceedings for interim measures[24] the courts ordered that the mandatory availability and labour reserve plan was in violation of the Greek Constitution, the European Social Charter[25] and the European Convention on Human Rights[26]. Lower courts found in this respect that the challenged austerity measure violated a number of provisions of the Greek Constitution, i.e. the right to a decent living (article 2 par. 1), the principle of equality to public charges (article 4 par. 5), the right to property (article 17), the principle of proportionality (article 25 par. 1), and the right to work (article 22 par. 1)[27]. In addition, it was stressed that the measure disregarded several provisions of the ESC, including the right to work and to the fair remuneration of workers that would provide them and their families with a decent standard of living (article 1 and 4 par.1). Last but not least, in some cases the judges underlined that the contested measure violated specific provisions of the

[21] As documented in legal journals and the online Greek legal database of national scope NOMOS, available at https://lawdb.intrasoftnet.com/.

[22] See Decisions on interim measures No 387/2013 First Instance Court of Xanthi; No 1705/2014 First Instance Court of Thessaloniki; No 5026/2014 First Instance Court of Thessaloniki; No 186/2014 First Instance Court of Ioannina; No 324/ 2014 First Instance Court of Kavala; see also Decisions No 729/2013 Administrative Court of Appeals of Athens; No 215/2014 District Civil Court of Patras; No 1845/2014 Administrative Court of First Instance of Thessaloniki.

[23] See Decisions No 67/2013 First Instance Court of the Aegean; No 298/2013 First Instance Court of Alexandroupolis; No 1705/2014 First Instance Court of Thessaloniki.

[24] See Decisions on interim measures No 37/2013 First Instance Court of Chios; No 90/2013 First Instance Court of Xanthi; No 1759/2013 First Instance Court of Athens; No 63/2013 First Instance Court of Mesologgi; No 4916/2013 First Instance Court of Thessaloniki; No 494/2013 and No 202/2014 First Instance Court of Patras; No 2700/2013 First Instance Court of Piraeus; No 13915/2013 and No 13917/2013 and No 7809/2014 First Instance Court of Athens.

[25] ESC hereinafter.

[26] ECHR hereinafter.

[27] See Decisions No 09/2014 First Instance Court of Xanthi; No 324/2014 First Instance Court of Kavala; No 333/2014 First Instance Court of Chios; No 46/2014 First Instance Court of Orestiada; See Decisions No 1240/2014 and No 1951/2014 First Instance Court of Athens.

ECHR[28], such as the right to property, as it is enshrined in article 1 of Protocol 1 to the ECHR.

In some instances, lower courts found that the austerity measure of the mandatory placement of employees in labour reserve was opposed to the protection of human dignity of the involved individuals and did not ensure their personal and professional development. Lower judges stressed that this austerity measure constituted effectively a *sui generis* dismissal procedure[29]. They further pointed out that the legislator acted in a flattening and levelling way, violating in this way human dignity and the constitutionally protected principles of equality and of respect and protection of the value of the human being[30].

The judges placed in this respect particular emphasis on the concerned individuals, who were affected by the measures; they underscored that "irrespective of the effectiveness and the suitability of the measure, behind numbers specific individuals do exist, whose life is drastically overturned and, who are sacrificed for the sake of the government's economic goals and the reduction of state spending, while those [i.e. economic goals] are proclaimed as overriding public interests by putting the human being on the brink and by transforming the human being into the means to achieving the desired goal."[31].

In some of the actions brought before the lower courts, the issue of legality and proper incorporation of the contested measures in the Greek legal order was also raised, since it was argued that constitutional provisions on the proper procedure of the passing of

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[28] Cl. Kilpatrick, Br. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI Department of Law Research Paper No. 2014/05, 8.

[29] See Decision No 117/2014 First Instance Court of Preveza. See also M. Yannakourou, *Austerity Measures Reducing Wage and Labour Costs before the Greek Courts: A case law analysis*, 11 Irish Empl Law J. 2 (2014), 41.

[30] Article 2, para.1 of the Basic Provisions of the Greek Constitution on the Form of Government reads as follows: "Respect and protection of the value of the human being constitute the primary obligations of the State." available at http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf, last accessed May 26, 2017.

[31] Excerpt taken (with author's translation) from Decision No 117/2014 First Instance Court of Preveza, which was published on 17.03.2014; the same rationale was reiterated in the Decision No 33/2014 of the First Instance Court of Chios; see 10th and 11th sheet of the judgment, publ. date 18.11.2014 [in Greek].

the contested laws were violated[32]. The judges have ruled respectively that the relevant austerity legislation violated the rule of law and the principle of legality and good administration[33].

The lower courts' positive judgments were heralded by public opinion and created political friction. Being followed one after another, those decisions stood as the material evidence of the unconstitutionality of the austerity measures and of the opposition and deep anxiety of the society towards them. Following the change of government in January 2015, the provisions on labour reserve were repealed and all sectors, departments and specialties of the staff, who have been placed on labour reserve and whose posts were abolished, were re-established. In particular, in March 2015, i.e. only one and a half month after the Deputy Minister of Interior and Administrative Reconstruction came into office, the relevant draft law regarding the abolishment of the labour reserve measure was put into public deliberation under the striking title "restoration of injustices"[34]. According to the law that was enacted in May 2015, the personnel were reinstated, and 3.900 employees returned to their former posts[35].

Before the repeal of the labour reserve law the contribution by lower courts was initially decisive so that employees wouldn't

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[32] See Articles 72, 74 and 76, Chapter 5 of the Greek Constitution on the Legislative Function of the Parliament under the following link provided in an official translation in English by the Hellenic Parliament, available at http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf, last accessed March 16, 2017.

[33] See Decision No 09/2014 First Instance Court of Xanthi on the unconstitutionality of labour reserve on the basis that this violates the principle of proportionality, equality and meritocracy in public administration, in conjunction with the rule of law and the principles of legality and good governance.

[34] Act 4325/2015 (Greek Government Gazette A 47/11/05/2015) "Democratization of the Administration - Fighting Bureaucracy and eGovernment. Restoration of injustices and other provisions" and in particular Chapter 4 "Restoration of injustices, staff reset and mobility", Articles 17, 18, 19 and 21, available at http://minfin.gr/web/guest/nomiko-plaisio1/-/asset_publisher/VonrJHbeXk5J/content/nomos-4325?inheritRedirect=false, last accessed December 12, 2017.

[35] Aftodioikisi, *With the ballot of the Parliament the re-employment of employees in the Public sector* (May 5, 2015) available at http://www.aftodioikisi.gr/proto-thema/kai-me-ti-voula-tis-voulis-oi-epanaproslipseis-sto-dimosio-157-nai-apo-siriza-anel-sto-nomosxedio-katrougkalou/, last accessed December 21, 2017 [in Greek].

find themselves unemployed literally "overnight". A two-speed category was created between citizens, namely those affected by the relevant legislation, and employees who were protected by lower courts. A fracture was encountered within the polity by means of inequality among people, i.e. those who remained in their positions and those who lost their jobs. Those whose actions and applications for interim relief were successfully heard before the First Instance Courts managed to maintain and secure their work positions and suffered no reduction of their salary as they were not affected by the enforcement of the measure of labour reserve. The rest, however, who had not exercised their right to interim protection or have not filed an action, were immediately affected by the measure, and were either forced to retire or to accept to be placed in reserve, followed by their dismissal. As a result, social cohesion was impaired and there has been no unity in constitutional adjudication or constitutional harmony between the judicial and legislative power.

In addition, the contribution of lower courts has been significant in the sense that these contributed[36] in the subsequent adoption of 'the law of return' of the employees to the positions they formerly held. The enactment of the new law of return of *all* employees was inevitable so as to restore justice and constitutional unity, since most of the staff enjoyed the protection granted to them by judicial decisions and held their positions, while others were affected by the law. Therefore, the adoption of the new law was not only the product of political commitment, but it was mainly the product of the positive judgments of the courts of First Instance, which have previously invalidated the austerity measures in effect. In the course of a broad 'constitutional deconstruction'[37] that has been following the financial crisis that erupted in Greece, lower courts have, thus, restored with their contribution some faith in the Constitution.

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[36] See Report of the Scientific Council of the Hellenic Parliament on Act 4325/2015 available at http://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/e-dioikisi-epi.pdf accessed December 26, 2017, par.7. a., 14 [in Greek].

[37] See A. Marketou, *Greece: Constitutional Deconstruction and the Loss of National Sovereignty*, cit. at 13, 189, 190, 194, 198; also A. Marketou, *Economic Emergency and the Loss of Faith in the Greek Constitution, How Does a Constitution Function when It Is Dying?*, cit. at 12 on constitutional faith.

2.1.2. Highest national and European courts

The Hellenic Council of State in its landmark decision 668/2012 in the so called "Trial of the Memorandum"[38] found that overall the austerity measures were in conformity with the Greek Constitution[39], while it considered that those were justified on the basis of the overriding public interest rationale for the purposes of the common good. The Council of State stressed that the austerity measures have been prescribed by an urgent social need and that the reforms were dictated by an immediate need for serving the public interest.

Following the negative decision 668/2012[40] of the Council of State, two out of the more than thirty applicants, who filed the petition examined by the Council of State, i.e. Mrs. Ioanna Koufaki and the Greek Confederation of Public Sector Trade Unions (ADEDY), also brought their cases before the Strasbourg Court. In the joint examination of the petitions of Koufaki and ADEDY v. Greece[41] concerning the applicability of the austerity measures in Greece and in particular the reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, the Court rejected the case on admissibility grounds. The Strasbourg Court by acknowledging that the adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history[42], reiterated *en masse* the argumentation of the Hellenic Council of State and restated that the notion of "public interest" in this context is necessarily extensive,

[38] See P. Pikrammenos, *Public Law in Extraordinary Circumstances from the Point of View of the Administrative Procedure for Annulment*, 71 Rev of Empl Law (2012), 385 [in Greek].

[39] For a provision-by-provision assessment of the compatibility of austerity measures with social rights provisions in cases brought before the Greek Council of State and the European Committee of Social Rights, see International Legal Research Group on Social Rights Final Report, *Austerity Measures and their Implications: The Role of the European Social Charter in Maintaining Minimum Social Standards in Countries Undergoing Austerity Measures* (2015), 721-724.

[40] See above Decision 668/2012 of the Hellenic Council of State.

[41] ECtHR I. Koufaki and ADEDY v. Greece, Nos. 57665/12 and 57657/12, (May 13, 2013), Koufaki case hereinafter; See also S. Koukoulis-Spiliotopoulos, *Austerity v. Human Rights: Measures Condemned by the European Committee of Social Rights in the light of EU law*, at fn 9 above, 2, par. 6 (2014).

[42] ECtHR I. Koufaki and ADEDY, cit. at 41, para. 36.

while it handed a wide margin of discretion to the national legislator in implementing social and economic policies[43].

Prior to that, the austerity measures in Greece had been assessed by the General Court of the European Union (GC) after the launch of two actions for annulment by ADEDY against Council Decisions including financial assistance conditionality. The General Court did not accept that the criterion of 'direct concern' was met, since the clause in the MoU was not sufficiently determinate,[44] and thus declined to go into the merits by dismissing the actions. The GC stressed that the basic act was too indeterminate in the sense that it did not give details of the proposed reductions, the manner in which these would be implemented and the categories of civil servants who would be affected[45]. It further handed a wide margin to the Greek authorities by means of determining the final objective of reducing the excessive fiscal deficit[46]. That is to say, both the ECtHR and the Court of Justice of the European Union[47] handed wide margins of discretion to the national authorities and have either deferred to them or declined to review the measures altogether.

2.2. An assessment of the judicial responses to the Greek austerity crisis

The European and Greek highest Courts have been criticised for displaying timidity in their judgements, and for having endorsed a procedural turn in legal thinking and having created legal confusion and stasis[48]. The austerity case-law in Greece has been assessed as being rather asymmetric, since courts have not been consistent when reviewing the relevant measures by means of applying different levels of scrutiny on the examined policies and

[43] Ibid, para. 39, 43, 44.
[44] See ADEDY et al. v. Council, GC Case T-541/10 (November 27, 2012), para. 70.
[45] A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding*. Legal Opinion commissioned by the Chamber of Labour, the Austrian Trade Union Federation, the European Trade Union Confederation (ETUC) & the European Trade Union Institute (ETUI), Vienna (2014), 32, 54-55.
[46] ADEDY et al. v. Council, GC Case T-541/10, par. 84; also ADEDY et al. v. Council, GC Case T-215/11 (November 27, 2012), para. 81, 84, 97.
[47] CJEU hereinafter.
[48] Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, cit. at 3, 340.

by adhering to a statist understanding of the economy[49]. In the Council of State's judgment at hand, the concept of emergency has been channelled indirectly through the public interest argument by implicitly resorting to the concept of exceptional circumstances. In line with this, it has been explicitly expressed by the Council of State that the austerity measures have been prescribed by an urgent social need for the purposes of addressing a severe budgetary and financial crisis[50]. Interestingly, this was further justified on the basis of the required budgetary discipline for the preservation of the stability of the Eurozone in its entirety[51]. The rhetoric of fiscal emergency was paramount in the way that austerity measures were justified in the Explanatory Reports of national laws that introduced them and which stressed that the austerity measures were taken in the context of the most severe crisis of public finances of the last decades in the history of the country. This economic emergency discourse has not been embraced, though, only by national highest courts, but it was also adopted by the ECtHR, which relied heavily on excerpts from the Explanatory Report and adhered almost entirely to the findings of the Hellenic Council of State in the Koufaki case[52]. The Strasbourg Court, in this sense, by acknowledging that the measures were justified by the existence of an exceptional economic crisis, it reiterated the argumentation of the Hellenic Council of State and has set aside individuals, while it justified austerity measures on the basis of the general fiscal interests of the state[53]. It thus adopted a similar rhetoric of the 'law of emergency', while it revealed in this way an informalised emergency practice at a supranational level[54]. By adhering to the overriding and abstract general interest of the state and by asserting

[49] See A. Tsiftsoglou, LSE Greece@LSE Blog, *Beyond Crisis: Constitutional Change in Greece after the Memoranda* (March 09, 2017) available at http://eprints.lse.ac.uk/79256/, assessed June 3, 2017.
[50] See Council of State Plenary Decision 668/2012 (20 February 2012), para. 35, 38.
[51] Ibid, par. 35.
[52] A. Dimopoulos, *Constitutional Review of Austerity Measures in the Eurozone Crisis*, SSRN Journal (2013) 10, available at http://dx.doi.org/10.2139/ssrn.2320234, accessed April 26, 2017.
[53] I. Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR or the Polarization of a Democratic Society*, 5 Cambr Jour of Intern and Compar L. 1 (2016), 117.
[54] Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, cit. at 3, 329.

legality, the judiciary has put forward an understanding of a sort of a *légalité élargie*[55], both in procedural and substantive terms, and gave to "a challenged system the imprimatur of the rule of law by identifying that rule with the rule of law"[56].

What is more, in the case that was brought before the Council of State by various applicants (among them by Mrs. Koufaki and by ADEDY), the applicants requested that this court would apply for a preliminary ruling from the CJEU on the question whether the measures taken by the Greek Government in application of the Memoranda were in compliance with EU primary law[57]. However, interestingly enough the Council of State not only abstained from addressing this request[58], but it completely disregarded this and did this silently without providing any reasoning. However, neither did the ECtHR go into evaluating this lack of action by the Hellenic Council of State and it did not judge on either one of the complaints raised by the applicants, i.e. that article 6 par. 1 concerning the right to a fair trial was violated[59].

At the European front, the GC of the Union demonstrated a timid approach when it refrained from going into the merits; the Court thus abstained from addressing the conformity of the austerity packages with the core social values of the European Union, while it refrained from protecting the groups, which were affected by the measures[60]. In addition, the ECtHR has also been criticized for being extremely reserved in its judgments on austerity policies[61]. The Strasbourg Court in the Koufaki case did not take

[55] P.M. Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, 12 Eur Const Law Rev. (2016), 269.

[56] Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailout*s, cit. at 3, 347.

[57] N. Gavalas, *The Memorandum Between a Rock and a Hard Place: From the Council of State to the European Court of Human Rights*, 72 Rev of Empl Law (2013) [in Greek], 756 par. 3, 760 par. 16.

[58] R. Bellamy, *Rethinking Liberalism*. Continuum International Publishing, 71 (2000); see also in E. Christodoulidis, *The European Court of Justice and "Total Market" Thinking*, 14 German Law Journal (2013), 2015.

[59] N. Gavalas, *The Memorandum Between a Rock and a Hard Place: From the Council of State to the European Court of Human Rights*, cit. at fn 57, 763 par. 22. στ)/ f).

[60] A. Poulou, *Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?*, 15 German Law Journal (2014), 1172-1173.

[61] A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding*, cit. at 45, 56.

into consideration the number of people, who were represented by the trade union and who were potentially affected by the cuts in public spending. The counterargument to this claim, could be that the concerned applicants were unable to substantiate the degree to which their personal interests were affected by the contested austerity measures. As a matter of fact, the application brought by ADEDY arguably suffered from a rather abstract and weak argumentation, as ADEDY filed an individual petition on behalf of *all* its members, i.e. both those with high incomes and those with low ones[62]. ADEDY in this respect failed to name or identify the affected individuals, nor did it provide an approximated account of the extent and the magnitude of the damage these people suffered in qualitative or quantitative terms. The ECtHR found accordingly that the applicants had not invoked in a particular and precise manner how their living standard has deteriorated and how their welfare has been compromised[63].

Taking aside this line of defense, though, the quantitative factor "was consciously ignored [and] the ECtHR overlooked the humanitarian aspects of the economic crisis in Greece, as it did not confer a subsistence quality to the right to property"[64]. In a display of institutionalised destitution[65] the highest national and supranational Courts when balancing social rights within the crisis-related context of the Greek case, disregarded the interests of the affected persons from the social equation and promoted the general interest of the state in an abstract and moralistic way[66]. The European and Greek Supreme Courts fell short in this way in

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[62] A. Koukiadaki & U. ETUC (ed.), *Can the Austerity Measures be Challenged in Supranational Courts? The Cases of Greece and Portugal*, cit. at 14, 33.

[63]This unfortunate line of defense was highlighted by various scholars; see for instance N. Gavalas, *The Memorandum Between a Rock and a Hard Place: From the Council of State to the European Court of Human Rights*, cit. at 57, 758, para. 8; I. Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR or the Polarization of a Democratic Society*, cit. at 53, 118-119.

[64] I. Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR or the Polarization of a Democratic Society*, cit. at 53 (2016), 138.

[65] Ibid, 114.

[66] See A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 The Modern Law Rev. 5, 671, 675 (1999); also K. Moller, *Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights*, 29 Oxf Jour of Leg Stud. 4 (2009) 758, 761, 765, 773.

fulfilling the legitimate expectations that individuals have placed in them and in safeguarding the principle of legal certainty[67], while they evidenced a malfunctioning of judicial and administrative review of the bailouts[68].

The courts at the highest level of adjudication, being perceived as *quasi*-Constitutional Courts in the public conscience[69], reinforced a system of 'Bi-Constitutionality'[70] by applying only a marginal judicial review of the legislative acts in question instead of a much-anticipated social constitution. Furthermore, the highest courts at a national level handed a wide margin of discretion to the administration for implementing the austerity policies in order to uphold the imposition of the measures. In determining the provisions' agreement with the Greek Constitution, the national highest courts applied in this respect a "presumption of constitutionality"[71] of the law, i.e. they applied the *in dubio pro lege* principle, which translates that in case of a Court's doubt on the constitutionality or not of the law, the law is considered to be constitutional.

Lower domestic judges followed a different path in their judgements and line of reasoning. By asking the question of labour law as a question of constitutional law[72] the lower courts applied the levels of protection ensured by constitutional status to labour

[67] See also P.M. Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, cit. at 55.
[68] Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailout*s, cit. at 3 (2015), 32.
[69] See G. Ulfstein, *The European Court of Human Rights as a Constitutional Court?*, 14 PluriCourts Research Paper 08 (2014); A. Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 Global Constitutionalism (2012), 82; A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 Indiana Journal of Global Legal Studies 2, Article 11 (2009), 645.
[70] D. Travlos-Tzanetatos, *Judicial Autonomy or Judicial Restraint? Article 249 of the Greek Code of Civil Procedure in Appeal Proceedings According to the Recent Jurisprudence of the Court of Cassation*, 73 Rev Empl Law 18 (2015) [in Greek], 1184.
[71] D. Travlos-Tzentatos, "*State of Emergency", Public Interest and Constitutional Review: On the Occasion of Decision No 2307/24 of the Plenary Session of the Greek Council of State*. 74 Rev Empl Law 1 (2015) [in Greek], 16.
[72] E. Christodoulidis, *Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot*, 19 Social and Legal Studies (2010), 217-252.

rights[73] and protected with their judgments the direct interests of individuals, while they acted as the interpreter of the will of people. Lower courts by resorting to a combination of constitutional principles and fundamental rights in order to safeguard social rights protection, paved the way for the protection of fundamental rights of individuals through the constitutionalisation of labour rights[74] and reinforced the re-configuration of a more resilient constitutional paradigm for the protection of social rights.

Lower judges by acknowledging the right to property as a means of subsistence in times of deep financial recession and by entrancing this as a constituent to a life with dignity, addressed social rights not under purely managerial or utilitarian parameters, but instead stroke a fair balance between efficiency and the constituencies affected. Contrary to an impoverished and narrow conception of value, being equated to economic value, lower judges prioritized individualized concerns over mere arithmetical aggregates[75]. Opposite to a 'de-constitutionalisation' of labour rights, it seems as if lower judges have put forward a 're-constitutionalisation' of labour rights, without regarding efficiency or aggregate utility as the *be*-all and *end*-all of public social policy[76]. Furthermore, lower courts, while in the process of evaluating social policy, have taken individuals seriously[77] and have defended an idea of the public interest argument that is not squared merely with fiscal or economic interests.

In doing so, lower courts pointed also towards the dual nature of social rights as having not only a collective, but an individual aspect, as well. By interpreting the constitutional right

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[73] N. Busby, R. Zahn, *The EU and the ECHR: Collective and Non-discrimination Labour Rights at a Crossroad?*, 30 International Journal of Comparative Labour Law and Industrial Relations 2 (2014), 154-155.

[74] Ibid, 154.

[75] J. Waldron, *Socioeconomic Rights and Theories of Justice*, New York University Public Law and Legal Theory Research Paper Series, Working Paper No 10-79 (2010), 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699898, accessed May 10, 2017.

[76] L.D. Sánchez, *Deconstitutionalisation of Social Rights and the Quest for Efficiency*, in Cl. Kilpatrick, Br. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI Department of Law Research Paper No. 2014/05, 116, 120.

[77] J. Waldron, *Socioeconomic Rights and Theories of Justice*, cit. at 75, 4.

to the decent standard of living as a threshold to the legislator's power to social rights curtailments, the judiciary casted light to the individual dimension of the social. What is more, though, by linking the respect and protection of the value of the human, which is a primary obligation of the State[78], to social rights protection, lower courts associated social justice with the concept of solidarity. By opting for a plurality in legal sources and values of substantive equality and fraternity for the effective protection of social rights, lower judges gave a new reading to constitutional pluralism and pluralism as such. The judiciary by attesting that it is difficult to reconcile social justice with the neo-liberal values of economic maximization and profit motive[79], and by safeguarding at the same time social rights through the overarching and pluralistic framework of constitutional and human rights protection, it re-conceptualized the notion of social rights and substantive unity in constitutional terms.

3. Social rights and constitutional pluralism in the austerity context

3.1. Hierarchy *in* heterarchy

There is a plurality of pluralisms against different backgrounds let alone of legal pluralisms[80] or constitutional pluralisms as such. Legal pluralism as opposed to legal centralism[81], exists whenever social actors identify hybrid legal spaces where more than one source of "law" or legal orders occupy one social space[82] and acknowledges the plurality of legal systems. John Griffiths, in his seminal article of 1986 "What is Legal Pluralism?"[83], has set forth the concept of legal pluralism that is adopted by most scholars in the field, only to announce more than

[78] Article 2, para. 1 of the Greek Constitution.
[79] N. Busby, R. Zahn, *The EU and the ECHR: Collective and Non-discrimination Labour Rights at a Crossroad*, cit. at 73, 159.
[80] B.Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 Journal of Law and Society 2 (2000), 297.
[81] J. Griffiths, *What is Legal Pluralism?*, 24 Journal of Legal Pluralism and Unofficial Law (1986), 3, 5.
[82] B.Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global,* 30 Sydney Law Review (2008), 36; P. Berman, *The New Legal Pluralism*, 5 Annual Review of Law and Social Science (2009), 226.
[83] J. Griffiths, *What is Legal Pluralism?,* cit. at 81, 1.

two decades after that, owing to its insoluble conceptual problem, legal pluralism should be discarded[84] or should be better conceptualized as "normative pluralism"[85]. To the testament of that conceptual problem, legal pluralism is confronted with many questions: the definitional one, which is translated to what law, really is; the culturalist lodestar, which responds to whether and how law reflects cultural practices and the functionalist one that relates to the fundamental question of why law has been created and what is the ultimate purpose[86]. Legal pluralism has also been criticized at large for having been used as an epiphenomenon[87] for political power and a resource for explaining larger issues, like power or domination forgetting in this way law as a topic in its own right[88].

Turning to the concept of constitutional pluralism, this is confronted with many of the above-mentioned questions that legal pluralism is encountered with, and to some extent it is intricately connected to the latter. An assessment of those questions along with an elaborate account of the arguments of those in favour or those criticizing this theory requires an analysis on its own merits, which is beyond the scope of this article. Against the various criticisms of the constitutional pluralism model, as being an oxymoron[89] or an intellectual fudge that is inherently unsustainable and should be put to an end[90], the present analysis stresses that constitutional pluralism is not dead[91] and rather reflects on a new reading and conceptualisation of this idea.

Even though there has not been a uniform understanding or definition of constitutional pluralism, when looking at the wider

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[84] B.Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, cit. at 82, 3.

[85] Ibid, 34, 35.

[86] See B. Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices*, 1 European Journal of Legal Studies 1 (2007), 302-305.

[87] P. Berman, *The New Legal Pluralism*, cit. at 84, 229.

[88] B. Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices*, cit. at 86, 312.

[89] M. Loughlin, *Constitutional pluralism: An Oxymoron?*, 3 Global Constitutionalism 1 (2014), 9-30.

[90] D. Kelemen, *On the Unsustainability of Constitutional Pluralism*, 23 Maastricht Journal of European and Comparative Law 1 (2017), 136-150, 139.

[91] A. Bobic, *Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice*, 18 German Law Journal 06 (2016).

European system, this by being comprised of discrete national and Treaty-based hierarchies[92] is considered to be pluralistic. Indeed, there is pluralism in the European legal edifice in the sense that by means of the European regime of the European Union and the Council of Europe, it is difficult to devise one European legal order. In this respect, legal and constitutional pluralism by means of the plurality of legal sources between different legal orders[93] proves to be a fact for Europeans and their judges, be it national or supranational. Constitutional pluralism[94] represents, thus, a systemic condition[95] and a structural characteristic of the European legal system[96]. But is the latter really pluralistic or does a structural bias towards centralism exist in the name of pluralism that renders the latter a euphemism for a new, but in fact, old type of hierarchy, i.e. of the stronger versus the weaker?

It has been stressed in theory that the relationship between national and supranational law, when primarily understood within a conventional hierarchical mind-set, presupposes the prioritization of national over supranational law and vice versa in a vertical or hierarchical relationship according to the idea of dualism or monism. Constitutional pluralism generates a shift from the hierarchical model of interaction between legal orders by collapsing the verticality of the relationship between state and supranational law to one of horizontality in a heterarchical rather than hierarchical fashion[97]. By encouraging this form of interaction from a vertical to a horizontal one, or even to both in a three-dimensional relationship kind of way of hierarchy in heterarchy, as it is suggested below, constitutional pluralism provides in this way,

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[92] A. Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, cit. at 69, 61.

[93] M.P. Maduro, *Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism*, 1 European Journal of Legal Studies 2 (2007), 137-152, available at http://www.ejls.eu/2/25UK.pdf, accessed March 23, 2017.

[94] A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 633.

[95] Ibid.

[96] A. Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, cit. at 69, 60.

[97] Mac Amhlaigh, Cormac S., *Pluralising Constitutional Pluralism*, pp. 64-89, in N. Roughan, A. Halpin (eds), *In Pursuit of Pluralist Jurisprudence*, Cambridge University Press (2017).

a more nuanced approach to legal thinking in the emergent settings of global disorder.

The discourse on hierarchy and heterarchy besides reflecting at a normative level it also draws back on the discussion about the relationship of economic liberalism and pluralism at a conceptual level. Griffiths has long ago referred to legal centralism as an ideology[98]; what we have come to see is that legal pluralism in the neoliberal discourse is an ideology in itself that is premised in the very same ideology legal centralism is based upon, namely hierarchy and supremacy, either by means of a state-type or any other form of supremacy such as economic supremacy in terms of economic neo-liberalism. Michaels summarises sharply the incompatibility of pluralism with neo-liberalism when he stresses that the latter as "a theory of relentless competition"[99] puts different legal systems under constant pressure to justify themselves against the forces of competition and it implies the likelihood that dominant legal systems, which in neo-liberalism is, eventually, some global economic law, will come to dominate weaker ones[100].

Looking at the austerity context at hand, the interpretations of the measures by lower domestic courts reflect on the rejection of a hierarchical model of adjudication at a symbolic and a pragmatic level. The recourse of lower judges to a plurality of constitutional and human rights provisions in order to safeguard social rights, attested on the one hand to the practical collapse of hierarchy for the sake of hierarchy within the national and supranational legal order. That is to say, lower judges sought to provide substantive protection to the affected individuals by looking at national constitutional and European legal provisions, instead of following a type of authority imposed from above or conforming to the blind legality of the principle of primacy of the highest courts, as the final arbiters. Thus, lower judges have employed a type of 'interpretative pluralism'[101], which is based on different constitutional sources and

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[98] J. Griffiths, *What is Legal Pluralism?*, cit. at 81, 3, 5.

[99] R. Michaels, *On Liberalism and Legal Pluralism* (2014), 142 in M. Maduro, K. Tuori & S. Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press (2014), 142.

[100] Ibid.

[101] See M. Avbelj & J. Komárek (eds.), "*Spaces of Normativity" Four Visions of Constitutional Pluralism* – 2 Symposium Transcript, European Journal of Legal Studies 1 (2008), 330-331, available at

claims in a non-hierarchical manner. On the other hand, at a symbolic level, this judicial practice brought forward the clash of an ideal for a Social Europe that postulates social justice, equality and solidarity, with the policies, which are currently pursued and are neoliberal in their orientation by being premised on economic maximization, inequality and antagonism.

In light of the above, a content-based hierarchy of norms was employed by lower courts that has advanced a hierarchy of values contrary to a purely procedure-based hierarchy, introducing in this way another reading of constitutional pluralism[102]. The latter calls for hierarchy to be justified in the name of substantive equality[103] for the safeguard of social values over private, economic interests, while the quest for the effective protection of those values needs to be traced to the material aspects of domestic constitutional development. Constitutional pluralism stands as an opportunity for unity by generating a shift towards understanding heterogeneity[104] rather than imposing homogeneity. In this sense, the recourse to heterarchy and constitutional pluralism in the European legal context should not be used eventually opposite the principle of primacy of EU law, so as to elevate national identities or economic interests as the ultimate arbiter and voice of authority; if this happens it will eventually lead to a discourse of domination and supremacy of the stronger over the weaker, which again will be a counter-pluralist claim. Heterarchy in constitutional pluralism should rather be understood as being concerned with the protection and interpretation of social values by being vigilant to the material conditions of constitutional adjudication horizontally[105] and by exploring not only the interaction of state and *supra*-state Courts, but of *inter*-state Courts, as well, i.e. of different state courts within the same domestic legal order. Understood in this way, there will

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http://cadmus.eui.eu/bitstream/handle/1814/10154/EJLS_2008_2_1_11.pdf?sequence=1&isAllowed=y, accessed March 27, 2017.

[102] C. Pinelli, *Theories Concerning the Hierarchy of Norms*, Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL] (2016), para. 5, 16, 17, 31-3, available at http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e307#law-mpeccol-e307-div1-1, accessed December 11, 2017.

[103] M.A. Wilkinson, *Constitutional pluralism: Chronicle of a death foretold?*, 23 Eur Law J. 3-4 (2017), 219.

[104] See also D. Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*', 31 N.Y.U. Review of Law & Social Change (2007), 8,12.

[105] Ibid, 214.

be room for hierarchy within heterarchy, in the sense that hierarchy will only exist to serve content and social equality of people. Hierarchy *in* heterararchy will, thus, mean, in Pierdominici's apt wording, "hierarchy of shared values, heterarchy of voices and institutions"[106].

3.2. Solidarity and the individual aspect of social rights

There is a flawed premise in the pluralism discourse of the European multilayered legal order. One that has to do with the misconception of its nature as being pluralist by means of the plurality of legal sources and another that has to do with economic neo-liberalism as the ideological substrate of the European social edifice, which translates into wealth maximization as a value and requires its preponderance over other values in a formalistic, purely procedural and efficiency-oriented manner. This illiberal liberalism[107] demands further that strong states "protect a 'sound economy' against the irrationality of social-democratic pressure and solidaristic reactions"[108] within the constellation of states. Due to this deep structural tension the relations between social and market justice, as well as, solidarity and individualism are in an increasing disequilibrium[109]. Within the widely accepted premise that the social structure is antagonistic there is an internal struggle for reconciliation between the individual and the social and another antagonism of the social within the social. In addition, within the neoliberal context of individual utility maximization[110] and efficiency calculation, solidarity ends up being measured on pure economic terms within a cost-benefits analysis that insists on monetarization means and attributes a financial value to solidarity, for which no market price exists whatsoever.

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[106] L. Pierdominici, *The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?*, 9 Perspectives on Federalism 2 (2017), 129, 146 available at https://www.degruyter.com/downloadpdf/j/pof.2017.9.issue-2/pof-2017-0012/pof-2017-0012.pdf accessed December 29, 2017.

[107] A. Phillips, *Feminism and Liberalism Revisited: Has Martha Nussbaum Got it Right*, 8 *Constellations* 2 (2001), 252.

[108] M.A Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?,* 21 Eur Law J. 3 (2015), 315, 335.

[109] Ibid, 337.

[110] K. Mathis, D. Shannon (transl.), *Efficiency Instead of Justice: Searching for the Philosophical Foundations of the Economic Analysis of Law*, 84 Law and Philosophy Library, Springer (2009), 11, 46, 47.

Looking at the cases at hand, fiscal and financial objectives were prioritized to the detriment of fundamental social values[111] and an economic analysis of law acted as the modus operandi in the austerity discourse. This took place by putting forward the dominance of a free market rather than of a social market economy[112]. In this respect, economic interests trumped the interests of the affected individuals and social rights protection was curtailed on the basis of both social homogeneity and assimilation to a rigid economic model, that serves the corresponding value of wealth maximization and efficiency according to an economic reading of the law and its foundations[113]. The sustainability of the measures was used thereby to reinstate public order according to preference, from an account of authority based on formal agency, which was found insensitive to social justice[114].

This lack of a social compass in Europe is not sustained only by the forceful framework of ordoliberal policies, where rule is expanded beyond the exclusive corporate-economic interests over the general economic good of the market society, which in turn must be politically entrenched by constitution-like rules[115]. As much as the discourse about pluralism and unity is associated with constitutionalism and European integration, this is also intricate to issues of definition of those in need of protection. Critical legal thinkers have long ago raised concerns on the absence of a definition of 'who the subject is' in the human rights discourse, while a broader critique pointed at the usual and problematic

111 See also Greek National Commission for Human Rights (GNCHR) latest Urgent Statement on labour and social security rights in Greece (April 28, 2017) available at http://nchr.gr/images/English_Site/NEWS/GNCHR%20Statement_labour_social%20security_2017.pdf, accessed May 19, 2017.

112 M. Salomon, *Of Austerity, Human Rights and International Institutions*, 2 LSE Working Papers (2015), 26.

113 See R.A. Posner, R.A., *Economic Analysis of Law*. 9th ed. Aspen Publishers (2014).

114 M.A Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, cit. at 108, 318.

115 M. Ryner, *Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and its Management*, 22 Journal of European Public Policy 2 (2015), 281, 282.

exclusion of the concept of the individual from jurisprudential study within a positivistic analysis of law[116].

In the absence of a theory and justification of the subject in the countries were austerity measures have been imposed, coupled with an economic analysis of the law and a positivistic legal tradition, which understands the subject as a product of law at an abstract level and being irrelevant to the course of politics, had repercussions on the social rights front. Situating the individual within the austerity context, the latter by being constantly an elusive term that is perceived in positivistic terms as an artefact by a concise, coherent and rational law that transcends politics, was concretised within a *neo*-utilitarian, instrumentalist and individualistic ideological framework in favour of economic interests and the protection of the market.

In the examined judgments of the highest courts, the role and reason of the state stood beyond the reason of the individual and the dignity and autonomy of the person was associated with the interests of the state, which were translated in the language of general fiscal interest. That is to say, when it came to social rights the individual dimension was neglected, as those rights are considered to be collective rights that are identified to the state's interests. Staying mired in this misconception of the public/private divide, the individual was thus negated in the name of being protected. By exercising formal agency the state forced unity through questionable legislative procedures and highly contested austerity measures, while it elevated itself to the proper expression of the reason for individuals. In the examined cases of the highest courts, the people within the polity were viewed as 'a political community of fate'[117], bound together by the power of shared fate and belonging. The type of equality that was put forward in this sense was not horizontal and inclusive, but it was rather hierarchical and exclusive, and it was subjugated to a market constitutionalism logic that was indifferent to the impact that the deterioration of social conditions had on individuals themselves.

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[116] J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, Faculty Scholarship Series Paper (1993), 273.

[117] Phrase accommodated for the purposes of the present context; for the original context see article of S. Benhabib, *On Michel Rosenfeld's The Identity of the Constitutional Subject*, 33 Cardozo Law Review 5 (2012), 1907.

However, social rights are individual rights as much as they are collective rights; they are not solely individual entitlements, but instead they are trans-individual requests that can advance collective claims on the basis of "a transpersonalistic ideal of the law"[118]. They are not mere institutionalized policies for the redistribution of social wealth; instead they have a core basis that pertains to the autonomy and integrity of the social individual and relate to constitutional and fundamental rights protection. The justiciability of social rights is not "a dead end" [119] in this respect under the conditions that the MoU pose. The fact that the legislator may have limited scope to exercise social policy in order to implement social rights by being restricted by state budgetary commitments and fiscal constraints, does not presuppose that social rights can be counter-prioritized and curtailed. That is because social rights entail an individual aspect that inheres with the individual's autonomy and well-being and with their human dignity; social rights protection is thus not balanced against the fiscal and economic interests of the state and it's not measured according to the extent of the state's financial and budgetary capabilities alone. The constitutionalizing of social rights by lower judges pointed to that direction and demonstrated how these rights can be used to safeguard and entrench the individual aspect of these rights by nonetheless attesting to their social necessitation.

4. Revisiting the idea of constitutional pluralism

If we are to acknowledge constitutional pluralism beyond a legalistic and narrow understanding, a re-reading of the latter in the sense of a hierarchy of values and heterarchy of courts could offer a useful alternative. Linking this conceptualisation of constitutional pluralism to the austerity discourse, the value of social equality should be the purpose of the protective forces of constitutional order for the sake of the wider public interest contrary to attempts of dominance or exclusion, which are prone to narrow political interests without political legitimacy deriving from the people. In doing so, judicial review through the active role of judges at all

[118] G. Gurvitch, *The Problem of Social Law*, 52 Ethics 1 (1941), 27-28.

[119] A. Kaidatzis, *Do Social Rights Exist during the Times of the Memoranda?*, Keynote Speech at the Association's 'Aristovoulos Manesis' Conference 'What type of Constitution for the Next Day?' (2017) [in Greek], 8, 12.

instances, is an issue of reflection that could help safeguard social rights.

There is a structural deficiency by means of the structure of constitutionalism and the plurality and hypertrophy of values that Europe purports to defend in theory but falls short to do so in practice. Framing the question of social rights protection as a question of constitutional law and constitutional adjudication may have positive outcomes for the discourse. By asking the question of social rights as a question of constitutional law[120], this brings forward questions of social power and represents a striving for legitimation[121] and pluralism in terms of both procedure and substance[122]. For that, the evolution of constitutionalism "is largely a narrative of constitutional pluralism"[123] and while exploring the structure of constitutionalism this reflects on the principles of democracy itself.

If we are to ask ourselves about questions of plurality and unity in the adjudication of legal matters, we have to inevitably position law within the present political and ideological forces that run through it. That is because, constitutional pluralism engages with the "deeper seam of political thought and praxis"[124] and addresses the political dynamics and questions which underpin the legal domain and thus should be considered a matter of political theory as much of legal theory[125].

Understanding law as being produced diachronically in the course of politics raises crucial constitutional questions, which

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[120] See also E. Christodoulidis, *Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot*, 19 Social and Legal Studies, cit. at 72, 217-252.

[121] Fl. Rodl, *Re-thinking Employment Relations in Constitutional Terms* in E. Christodoulidis, R. Dukes, *Dialogue & Debate: Labour Constitution and A Sense of Measure: A Debate with Alain Supiot*, cit. at 72, 242.

[122] K.D. Ewing, *'The Sense of Measure': Old Wine in New Bottles, or New Wine in Old Bottles, or New Wine in New Bottles?* in E. Christodoulidis, R. Dukes, *Dialogue & Debate: Labour Constitution and A Sense of Measure: A Debate with Alain Supiot*, cit. at 72, 234-235.

[123] A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 633.

[124] N. Walker, *Constitutional Pluralism Revisited*, 22 Eur Law J. 3 (2016), 349.

[125] See also D. Bello Hutt, *Against Judicial Supremacy in Constitutional Interpretation*, 31 Revus Journal for Constitutional Theory and Philosophy of Law (2017), 13, 15.

cannot be answered in any fixed or pre-determined way[126]. Legal and constitutional pluralism, like law itself, cannot be *achronical* and abstract, but it is situated and constructed within the operation of the political system[127]. Constitutional pluralism understood and institutionalized as a realized principle of knowledge rather than a mere principle of procedural order, posits a constructivist approach to law. This occurs by bringing unity in the diversity of sources of law and by formulating the purpose or meaning of the applicable laws in terms of the social objectives which are pursued. This approach asks the courts to acquire an aesthetic knowledge of law[128] by realizing the rational and the *arrational*[129], and to adopt an ethics of care[130] by means of embracing a more contextual and sensitive approach to social matters and social experiences, instead of following a strict and sterilized thinking of high legal abstraction.

Turning to the austerity case-law, it has been stressed that the highest courts immunized states from judicial review and oversight when they took preemptive measures to curb the exercise of social rights protection. However, where constitutional review systems are relatively effective, judges can safeguard the effective protection of individuals' rights through their decisions[131] especially in times of procedural abnormality. A rights-based judicial review can echo a desired rights-based approach in financial policies and regulations[132], that will shield social rights protection. Weak judicial review does not replace in this sense legislative discussions and decisions. It can rather act, as it was manifested in the case of lower courts, as the guardian of social

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126 A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 634.

127 A. Kaidatzis, *Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It*, cit. at 5.

128 For an insightful analysis of the aesthetic knowledge of law see A. Fischer-Lescano, *Sociological Aesthetics of Law*, Law, Culture and the Humanities (2016), 2.

129 A. Fischer-Lescano, *Sociological Aesthetics of Law*, cit. at 128, 4, 12, 18.

130 I. Radaric, *Critical Review of Jurisprudence: An Occasional Series, Gender Equality Jurisprudence of the European Court of Human Rights*, 19 Eur J of Intern Law 4, 856 (2008).

131 A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 641.

132 K. Housos, *Austerity and Human Rights Law: Towards a Rights-Based Approach to Austerity Policy, a Case Study of Greece*, 39 Fordham International Law Journal 2 (2015), 444-445.

rights through constitutional protection so that objectionable legislative measures are eventually changed and so that the legislator and the state representatives move within their constitutional limits[133]. In this respect, adopting a system of rights-based judicial review could be seen as enhancing the participatory aspect of democracy and decision-making by providing additional means for the implementation of the will of the people[134]. That is to say, the value judgements of the people constitute the informed basis for judicial decisions. Judges, who engage in an active role when interpreting the law *in the now*, reflect and show responsiveness to social practices and to the values embodied in them[135]. And thus, this is another form of participation of the people[136].

Constitutional review of the austerity legislation needs to provide the criteria for the validity of power and not act in favor of mere commands, which are not called to answer to the people and which are unconstitutionally enforced through extra-parliamentary arrangements so as to secure political conveniences. In the examined context, austerity law was legitimated based on its legality, which was defined merely in terms of procedural requirements and reasons of efficacy and was imposed by emergency, formalized procedures. Achieving formal unity by forcing economic rationality for the implementation of merely fiscal goals, brings forward an instrumentalist use of law that renders the subject of judicial interpretation into being the object. However, as lower judges stressed in the examined cases, the subject of law understood as the constituent individual that has been affected, cannot be considered as a means towards any end, let alone a fiscal end, and it is rather an end in itself.

In the same vein, social rights protection needs to guarantee self-respect[137] and the basic subsistence needs and well-being of the individuals in their own right and as members of the society. Social

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[133] Cl. Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, cit. at 3, 310.

[134] A. Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 Law and Philosophy 3/4 (2003) 248, 249.

[135] Ibid, 260.

[136] Ibid, 257.

[137] See also J. King, *Judging Social Rights*, Cambridge University Press (2012), 31, 32.

rights need to be understood under a pluralist vision and constitutionally reviewed procedure, as pertaining to personal as much as collective autonomy. They need to be taken under consideration in the formation of policies for the preservation of public goals within the framework of social administrative governance[138] and need to be endorsed by a rigorous, constitutionally informed, rights-based judicial review.

Constitutional plurality in Europe is a tale of unity and solidarity that needs to balance two fundamental principles, as Wilkinson brilliantly points out. These are, "equality of persons and equality of states"[139]. When constitutionalizing social rights, solidarity can be understood as entailing more than a financial value and as being in fact a source of social integration[140]. Solidarity entrenches social recognition within the transnational order on the basis of reciprocity and mutuality. It represents a fundamental principle of social justice and a derivative constitutional principle[141] or constitutional value[142] that implies that the individual is social, as well as, autonomous. That is to say, the individual is sovereign and self-reliable against any domineering antagonism that would give access to superiority claims and commodification and that would place oneself under domination. In line with this, the solidarity principle partakes of a fundamental condition of shared liberty of all people[143], independent of state compulsion that simulates a "total market thinking" [144], which involves the yielding of the social to the economic "through market discipline rather than

[138] L. Feldman, The Banality of Emergency: On the Time and Space of "Political Necessity", in A. Sarat (eds.), *Sovereignty, Emergency, Legality*, Cambridge University Press (2010), 93.

[139] See the analysis of M.A. Wilkinson, *Constitutional pluralism: Chronicle of a death foretold?*, cit. at 103, 231.

[140] S. Sciarra, *Social Law in the Wake of the Crisis*, Centre for the Study of European Labour Law "Massimo D'Antona" Working Paper, INT 108 (2014) 17, available at http://csdle.lex.unict.it, accessed May 7, 2018.

[141] See article 25 para. 2 and 4 of the Greek Constitution.

[142] E. Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement*, 44 Journal of Law and Society 1 (2017), 128, 140, 149.

[143] See St. Mitas, *Solidarity as a Fundamental Legal Principle*, Karagiorgas Foundation Publishing (2016) [in Greek].

[144] E. Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement*, 44 Journal of Law and Society 1 (2017), cit. at 142, 134.

through political routes"[145]. Understood as a legal principle, on the scope of self-reliance and reciprocity rather antagonism, solidarity could further provide for a content of social rights and their normative and effective value through constitutional safeguard[146]. Constitutionalizing solidarity by means of social rights, is to consider this as an axiomatic and dogmatic legal resource[147] and to establish this against the market thinking of austerity and the mathematical rationale of its budgetary and fiscal programs[148].

What we live nowadays in Europe is not a clash of pluralism – be it legal or constitutional – with unity. What we experience is a clash of pluralism with itself within an illegitimate type of neoliberal governance prone to mere efficiency and wealth maximization. A clash that points to the very own structural deficiencies of the European project and brings forward questions on the multi-level legitimacy deficit of Europe at a conceptual, normative and systemic level.

In 1997 a number of scholars drafted the "Manifesto for Social Europe"[149] where they were stressing that the European Union was lacking social legitimacy and they envisioned a 'Social Constitution' that would be founded on solidarity and social cohesion. In 2014, almost 20 years after the above-mentioned statement, the economist Thomas Piketty alongside 14 other scholars, described in their own "Manifesto for Europe"[150] the present crisis of the Union, as being an existential one. A crisis that stagnates in a formalistic and computational understanding of the role of law and is yet ignited by an economic analysis of the law as the legal equivalent to the ordo liberal politics that are adopted. This existential crisis calls for

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[145] E. Christodoulidis, *The European Court of Justice and "Total Market" Thinking*, cit. at 58, 2015, 2016-2020; see also K. Mathis, D. Shannon (transl.), *Efficiency Instead of Justice: Searching for the Philosophical Foundations of the Economic Analysis of Law*, cit. at 110, 35, 145.

[146] St. Mitas, *Solidarity as a Fundamental Legal Principle*, cit. at 145, 140-150.

[147] E. Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement,* cit. at 142, 126, 148-149.

[148] Ibid, 129.

[149] B. Bercusson, et al., *A Manifesto for Social Europe*, 3 Eur Law J. (1997), 189–205.

[150] See Th. Piketty and 14 others, *Our Manifesto for Europe*, The Guardian (2014) available at http://www.theguardian.com/commentisfree/2014/may/02/manifesto-europe-radical-financial-democratic, accessed May 7, 2018.

an 'existential revolution'[151]. That is, for a moral and political reconstitution of the society and a radical re-conceptualization of the social rights discourse and of the relationship between politics and the law. While we re-construct and re-define the foundations of our justice system, it is time that we put forward and defend the imperative for a social Europe premised on solidarity, equality and substantive unity.

[151] J. Komárek, *Waiting for the Existential Revolution in Europe*, 12 International Journal of Constitutional Law (2014), 208.