

WELFARE STATES IN THE MARKETPLACE
EXPLORING THE LINK BETWEEN
SOVEREIGN DEBT AND WELFARE RIGHTS
IN EUROPE

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Abstract

This thesis addresses the complicated relationship between sovereign debt and the realisation of economic and social rights (ESR) and applicable international human rights law (IHRL).

The central research questions to be addressed by this work include the following: How can sovereign debt threaten the realisation of ESR? What guidance does IHRL provide in relation to the sovereign debt issue? Why have human rights and IHRL been so irrelevant in the design and implementation of responses to the Eurozone sovereign debt crisis, as the Greek case has dramatically revealed?

This thesis advances two main arguments. Firstly, the ‘marketisation’ of sovereign financing can be problematic for the realisation of ESR for reasons that go beyond the negative social impacts of austerity or other fiscal consolidation measures. Secondly, this thesis will argue that IHRL has been ineffective in preventing or mitigating the negative ESR impacts of responses to the crisis, not only because of the normative shortcomings of the existing legal framework, but also, and more fundamentally, because of the hegemony of neoliberal morality and its influence upon international law. The ascendancy of neoliberal assumptions, also in legal and human rights reasoning—which, as I will argue, appears to have been confirmed and reinforced rather than reversed, by some of the legal developments that have occurred since the crisis—limits the possibility of international law to constitute an instrument for the affirmation and protection of ESR.

This thesis has two main theoretical objectives. Firstly, to provide a more holistic picture of the relationship between sovereign debt (and sovereign financing more generally) and ESR, that is not limited to the ESR impacts of austerity. Secondly, to review and critically analyse the existing international law on ESR—particularly relating to the use of State resources—and on sovereign debt and ESR, in order to assess its current status and post-crisis developments, explore the possible reasons of its irrelevance in the context of the Eurozone debt crisis, and speculate on its future directions.

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Law 4050/2012 of 23 February 2012 on Rules relating to the adjustment of securities, their issue or guarantee by the Greek State with the agreement of the bond holders

Italy

Constitutional Law No 1 of 20 April 2012, ‘Introduzione del principio del pareggio di bilancio nella Carta Costituzionale’, GU No 95 of 23 April 2012

Law 243/2012 of 24 December 2012 on Provisions for implementation of the balanced budget principle pursuant to Article 81 paragraph 6 of the Constitution, as amended by Law No 164 of 12 August 2016

Law No 99 of 22 June 2010, ‘Conversione in legge del decreto-legge 10 maggio 2010, n. 67, recante disposizioni urgenti per la salvaguardia della stabilità finanziaria dell'area euro. Ordine di esecuzione dell'accordo denominato 'Intercreditor Agreement» e dell'accordo denominato «Loan Facility Agreement» stipulati in data 8 maggio 2010’, GU No 150 of 30 June 2010

List of Abbreviations

AMR	Alert Mechanism Report
BEPGs	Broad Economic Policy Guidelines
BIS	Bank for International Settlements
CESCR	UN Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CRAs	Credit rating agencies
ECB	European Central Bank
ECOSOC	UN Economic and Social Council
ECtHR	European Court of Human Rights
EDP	Excessive deficit procedure
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EIP	Excessive Imbalance Procedure
EMU	Economic and Monetary Union (European Union)
ESM	European Stability Mechanism
ESR	Economic and Social Rights
EU	European Union
FAO	Food and Agriculture Organization
GC	General Comment (CESCR)
GDP	Gross domestic product
GNP	Gross national product
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDR	In-Depth Review
IE	Independent Expert (UN)
IFIs	International Financial Institutions
IHRL	International human rights law
IKA	Social Insurance Institute (Greece)
ILO	International Labour Organization

IMF	International Monetary Fund
MIP	Macroeconomic Imbalance Procedure
MoU	Memorandum of Understanding
MTOs	Medium-Term budgetary Objectives
OECD	Organization for Economic Co-operation and Development
OMTs	Outright monetary transactions
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SGP	Stability and Growth Pact
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
UDHR	Universal Declaration on Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization

Chapter I

Introduction

1.1. Introduction

Today, when the relationship between sovereign debt and economic and social rights (ESR)¹ is mentioned, austerity inevitably comes to mind. At least in Europe, austerity materialised as a consequence of the Eurozone debt crisis, negatively affecting the realisation of many of the rights enshrined in core international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter, and producing, in the past eight years, a fully-fledged, permanent restructuring of the welfare systems of several European countries.

The attention of human rights scholarship and monitoring bodies has therefore been predominantly re-focused on the ESR impacts of austerity,² after that, in recent decades, the legal debate about sovereign debt has been mostly dedicated to the issues of debt restructuring,³ debt relief,⁴ and odious debt.⁵

However, austerity is not a novel phenomenon nor are its social consequences. In terms of economic rationale, objectives, instruments and impacts, the measures implemented since 2009 by some European countries have echoed earlier IMF structural adjustment programmes, and it seems very unlikely that the main European and international institutions involved were

¹ For a preliminary definition of the term, see Section 1.3 below.

² See Chapters 4 and 5.

³ Inter alia, Michael Waibel, *Sovereign Defaults Before International Courts and Tribunals* (CUP 2011); Rodrigo Olivares-Caminal, *Legal aspects of sovereign debt restructuring* (Sweet and Maxwell 2009); August Reinisch, *State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring* (Böhlau 1995).

⁴ Inter alia, Celine Tan, 'Life, debt and human rights: contextualising the international regime for sovereign debt relief' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Law System: Duties to the Poor* (CUP 2013); Robert K Rasmussen, 'Sovereign Debt Restructuring, Odious Debt and the Politics of Debt Relief' in Asif H Qureshi and Xuan Gao (eds), *International Economic Law* (Routledge 2011).

⁵ Inter alia, Jeff King, *The Doctrine of Odious Debt in International Law: A Restatement* (CUP 2016); Sabine Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective* (Ashgate 2007).

genuinely unaware of their social consequences. Already in 1990, for instance, the IMF had acknowledged that policies which “include fiscal retrenchment and public sector reform”—such as those recently enforced in Greece and in other European countries—“particularly when accompanied by a freezing of public sector employment or wages [...] [are] likely to affect the poor”.⁶ The IMF has re-affirmed the negative distributional effects of fiscal consolidation measures, *inter alia*, in a Working Paper of 2013.⁷

Most importantly, since the 2007-8 financial and economic crises, austerity has been a global phenomenon not necessarily linked to excessive debt levels. The Office of the High Commissioner for Human Rights (OHCHR), for instance, has reported how developing countries—which weathered the initial consequences of the global financial and economic crisis better than their more economically developed counterparts—nonetheless adopted austerity measures “for ‘pre-emptive reasons’, i.e. [...] to avert negative reactions from financial markets”.⁸ The Council of Europe Commissioner for Human Rights has noted how “contractions in public spending as an ongoing consequence of the global economic downturn affect[ed] [...] 80% of the global population in 2013, increasing to [...] 90% of persons worldwide by 2015”.⁹

Therefore, while fiscal consolidation and other forms of austerity—and the resulting regression in the enjoyment of ESR—have certainly been linked in Europe to the sovereign debt crisis, they appear as a symptom of a more generalised, constrained fiscal climate, associated with increased supranational control over national economic and fiscal policies.¹⁰ Policy choices, more and more, tend to be oriented by the ‘fear of the market’.¹¹ Among the various causes of this ‘fear’ are, first and foremost, the increased role that debt has acquired in state financing and the way in which the nature of sovereign indebtedness has

⁶ IMF, Annual Report (1990), 41-42.

⁷ Laurence Ball, Davide Furceri, Daniel Leigh and Prakash Loungani, ‘The Distributional Effects of Fiscal Consolidation’ (June 2013) IMF Working Paper, WP/13/151.

⁸ Office of the High Commissioner for Human Rights, *Report on austerity measures and economic and social rights* (2013), 8.

⁹ Council of Europe Commissioner for Human Rights, *Safeguarding human rights in times of economic crisis* (November 2013), 15.

¹⁰ Wolfgang Streeck, ‘The Rise of the European Consolidation State’ (2015) *MPIfG Discussion Paper No. 15/1* <http://www.mpifg.de/pu/mpifg_dp/dp15-1.pdf>.

¹¹ Paul Krugman, *The Return of Depression Economics* (Allen Lane 2008).

changed, at a global level, since the 1970s, a phenomenon that may be summarised under the label of ‘sovereign financing marketisation’. With the term I do not refer as much to the existence of sovereign debt markets—which have existed since Medieval Italy, as Chapter 2 will illustrate—as to the operating mechanisms of sovereign financing, which are, nowadays, increasingly those of the market. In as much as States raise a great deal of their revenues through the market, the realisation of ESR becomes gradually subsumed under the logic of the latter.

In this context, therefore, austerity appears as the tip of the iceberg, and the resulting deterioration of ESR as the most recent and visible manifestation of a halt, to say the least, in their realisation, which appears to have been accelerated, rather than entirely caused by the latest crisis.¹² To limit the analysis of the relationship between sovereign debt and ESR to the impacts of austerity and to a strictly post-crisis approach, therefore, may restrict the possibilities for human rights scholarship to understand the nature of sovereign debt in the current global economic system and its link with ESR, to explain the reasons behind the lamented irrelevance of human rights law in responses to the crisis, and to offer fully appropriate and effective alternatives.

1.2. Object and purpose of the thesis

This thesis addresses the complicated relationship between sovereign debt and the realisation of ESR and applicable international human rights law (IHRL).

The central research questions to be addressed by this work include the following: How can sovereign debt threaten the realisation of ESR? What guidance does IHRL provide in relation to the sovereign debt issue? Why have human rights and IHRL been so irrelevant in the design and implementation of responses to the Eurozone sovereign debt crisis, as the Greek case has dramatically revealed?

This thesis advances two main arguments. Firstly, the ‘marketisation’ of sovereign financing can be problematic for the realisation of ESR for reasons that go beyond the negative social impacts of austerity or other fiscal

¹² See Chapter 6.

consolidation measures. Secondly, this thesis will argue that IHRL has been ineffective in preventing or mitigating the negative ESR impacts of responses to the crisis, not only because of the normative shortcomings of the existing legal framework,¹³ but also, and more fundamentally, because of the hegemony of neoliberal morality and its influence upon international law.¹⁴ The ascendancy of neoliberal assumptions, also in legal and human rights reasoning—which, as I will argue, appears to have been confirmed and reinforced rather than reversed, by some of the legal developments that have occurred since the crisis—limits the possibility of international law to constitute an instrument for the affirmation and protection of ESR.

This thesis has two main theoretical objectives. Firstly, to provide a more holistic picture of the relationship between sovereign debt (and sovereign financing more generally) and ESR, that is not limited to the ESR impacts of austerity. Secondly, to review and critically analyse the existing international law on ESR—particularly relating to the use of State resources—and on sovereign debt and ESR, in order to assess its current status and post-crisis developments, explore the possible reasons of its irrelevance in the context of the Eurozone debt crisis, and speculate on its future directions.

1.3. A preliminary definition of ESR and welfare rights

Although the precise meaning and content of the notions of sovereign debt and ESR as internationally recognised legal human rights will be fully expounded, respectively, in Chapters 2 and 4, a brief terminological clarification seems necessary from the outset.

The terms ‘economic and social rights’, ‘socio-economic rights’, and the abbreviation ‘ESR’, are used throughout this thesis to cover the full range of economic and social rights as expressed in international human rights instruments, notably the International Covenant on Economic, Social and Cultural Rights and the European Social Charter.¹⁵ According to a concise description offered by the Office of the High Commissioner for Human Rights

¹³ See Chapter 4.

¹⁴ I will introduce and expand upon this idea in Chapter 6.

¹⁵ On which, see further Chapter 4.

(OHCHR), economic, social and cultural rights are human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education¹⁶. A basic list includes *workers' rights* (including freedom from forced labour, the rights to decide freely to accept or choose work, to fair wages and equal pay for equal work, to leisure and reasonable limitation of working hours, to safe and healthy working conditions, to join and form trade unions, and to strike); *the right to social security and social protection* (including the right not to be denied social security coverage arbitrarily or unreasonably, and the right to equal enjoyment of adequate protection in the event of unemployment, sickness, old age or other lack of livelihood in circumstances beyond one's control); *protection of and assistance to the family* (including the rights to marriage by free consent, to maternity and paternity protection, and to protection of children from economic and social exploitation); *the right to an adequate standard of living* (including the rights to food and to be free from hunger, to adequate housing, to water and to clothing; *the right to health* (including the right to access to health facilities, goods and services, to healthy occupational and environmental conditions, and protection against epidemic diseases, and rights relevant to sexual and reproductive health); *the right to education* (including the right to free and compulsory primary education and to available and accessible secondary and higher education, progressively made free of charge; and the liberty of parents to choose schools for their children); and *cultural rights* (including the right to participate in cultural life and to share in and benefit from scientific advancement, and protection of authors' moral and material interests from scientific, literary or artistic production).¹⁷

International human rights law does not make any explicit distinction between economic, social or cultural rights. The rationale embraced by international instruments was an essentially bureaucratic one, the adjectives 'economic', 'social' and 'cultural' being originally used to identify the rights that fell within the sphere of interest of, respectively, the International Labour

¹⁶ OHCHR, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Rights* (2008) <<http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>>.

¹⁷ Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials* (OUP 2013) 285-286.

Organisation (ILO), UN agencies such as the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Cultural rights, in particular, although conceptually clustered with economic and social rights, have been dealt with more in relation to civil and political rights (*inter alia*, under the International Covenant on Civil and Political Rights' non-discrimination clause, minorities provisions, or in the context of specific rights).¹⁸ Thus, this work will devote its attention principally to economic and social rights, although many of the issues discussed may well concern cultural rights too.

The term 'welfare rights', which is rather extraneous to the language of human rights law, will be used in this thesis as a general, descriptive term,¹⁹ especially in connection with political or philosophical ideas on the Welfare State.

1.4. Methodology

This work is premised on a constructivist idea of international law, and it will combine both doctrinal and 'law in context' research methods.

Constructivism starts from the assumption that institutional facts are constructed and reproduced through permanent interaction between social agents, and thus social reality does not exist independently of social agents' interpretation of it.²⁰ Legal constructivism, in particular, sees law as a 'social construct' in the sense both that law is considered as the product of human social interaction (rather than existing independently of human beings), and that its *legal* quality depends on what its addressees as a whole in any particular society *believe* to be (their) law.²¹

Importantly, constructivism in general and legal constructivism in particular, consider ideational factors, such as world-views, ideas, collective

¹⁸ Ibid.

¹⁹ On the descriptive nature of the term and difficulties to define unequivocally the concepts of 'welfare' and the 'Welfare State', see further Chapter 3.

²⁰ Sabine Saurugger, *Theoretical Approaches to European Integration* (Palgrave Macmillan 2014) 146.

²¹ Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (OUP 2012) especially 1-55.

understandings, norms, values, cognitive schemes, etc., to have not only an instrumental but also a normative dimension,²² in the sense that reality is made by ideational as well as material factors.²³ Constructivist approaches to the study of international law, thus, confer special relevance and concentrate on the role of ideational factors in shaping the nature, content and transformations of law, and on the practice of social construction “in order to better understand both why a certain reality is as it is today, as a result of past practices, and how it can be changed for tomorrow, as a result of current and future practices”.²⁴ This approach will be particularly relevant in my analysis and interpretation, in Chapter 6, of some of the legal developments that have occurred following the Eurozone debt crisis.

Furthermore, the doctrinal research method—formally described as a process in which “the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised to establish an arguably correct and complete statement of the law on the matter in hand”,²⁵ will be primarily adopted to address, in a largely descriptive pursuit, the existing and relevant international human rights law, case law and scholarship on sovereign debt and ESR.

This research’s further theoretical aspiration of “seeking explanation”²⁶ about why the law is the way it is and, most importantly, why it has been apparently irrelevant for States as well as European and international institutions when dealing with the Eurozone debt crisis, will be further guided by the ‘law in context’ method, “an approach to the study of law and legal processes [...] [which] covers the theoretical and empirical analysis of law as a social phenomenon”,²⁷ “embrac[ing] disciplines and subjects concerned with law as a

²² Saurugger (n 20) 145.

²³ Ibid.

²⁴ Focarelli, *International Law as Social Construct* (n 21) 36.

²⁵ Terry C Hutchinson, ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9; Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing 2004) 49.

²⁶ Malcom M Feeley, ‘Three Voices of Socio-Legal Studies’ (2001) 35 *Israel Law Review*, 185; Roger Cotterrell, ‘Socio-Legal Studies, Law Schools, and Legal and Social Theory’ (2012) Queen Mary University of London, School of Law, Legal Studies Research Paper No. 120/2012, 4.

²⁷ Economic and Social Research Council, *Review of Socio-Legal Studies: Final Report* (1994).

social institution, with the social effects of law, legal processes, institutions and services, and with the influence of social, political and economic factors in the law and legal institutions”.²⁸ Anchored to the idea that law “is socially contingent”²⁹ and “exists only in *specific times and places*”,³⁰ the ‘law in context’ research method will guide this work to interface with the sociological, historical, economic or other context, as it may be relevant, within which the law exists.³¹

1.5. Outline

Chapter 2 will introduce the concept of sovereign debt and its macro-economic underpinnings, presenting the historical origins of sovereign debt, and the way in which debt has changed throughout history, before introducing the trends and main features of contemporary sovereign debt in advanced economies. Most importantly, Chapter 2 will introduce the idea that debt essentially (re)structures the relationship between the parties involved into an asymmetrical power relationship, which equips one side of such relationship—the creditor(s)—with considerable political leverage upon the other—the debtor(s).

Chapter 3 will introduce the notion of the Welfare State, the historical (economic, social and political) circumstances that led to its development in Europe, as well as some of its main philosophical underpinnings (the Sen/Nussbaum capabilities approach, and Robert Goodin’s theory of the Welfare State and relational egalitarianism). This chapter will argue that the Welfare State epitomises an historically contingent relationship between State and Market (the result of an historically contingent ‘balance’ of different domestic and international factors), which, since the 1970s, has undergone a dramatic

²⁸ Socio-Legal Studies Association, *Statement of Ethical Practice* (2009), para 1.2.1 (‘Scope’)
<http://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf>.

²⁹ Feeley (n 26) 180.

³⁰ Cotterrell (n 26) 2 (emphasis in the original).

³¹ Sally Wheeler, and Phil Thomas, ‘Socio-Legal Studies’ in David Hayton (ed), *Law’s Futures* (Hart Publishing 2000), 271.

transformation towards a different, neoliberal model.

Chapter 4 will introduce and analyse the existing international legal framework on economic, social and cultural rights, i.e. particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the principles on sovereign debt and human rights that have been so far developed particularly in the UN context. This thesis argues that this framework provides, for a number of reasons, somewhat ‘weak’ protection to ESR. This chapter will also introduce the circumstance (which will be more fully discussed in Chapter 6) that from the 1990s onwards, States, particularly within the EU, have undertaken increasingly stringent obligations in relation to their economic and fiscal policy-making. These have become even tighter after the financial crisis of 2007-2008, moving States’ ESR obligations to the background.

Chapter 5 will provide an in-depth description and examination of the Greek debt crisis (2009 to the present) and its consequences for the enjoyment of ESR in the country. The analysis of the Greek case—an exemplifying case study—³²can help to shed light on some important elements and ‘trends’ of the sovereign debt–ESR relationship: the nature and structural causes of sovereign (over)indebtedness; the asymmetrical relationship between debtor and creditor(s), epitomised by the principle of conditionality; the impacts of conditionality on ESR, and on the ability of the State to fulfil its ESR obligations; and the irrelevance/ineffectiveness of international ESR law in responses to the crisis and in their assessment by human rights monitoring bodies.

Chapter 6 will finally take stock of the sovereign debt–ESR relationship after and beyond the crisis, arguing that the crisis has essentially confirmed and strengthened the neoliberal character of international and EU law. Under this trend, whose characteristics will be presented in this chapter, the legal protection of ESR appear to have been weakened, to say the least, and there are no signs at present that this trend will be altered nor, even less, reversed anytime soon.

This thesis will conclude by suggesting that the relationship between

³² Exemplifying case studies are concerned with capturing the circumstances and conditions of a (potentially) common situation, to illuminate the links between different variables, in this specific case between sovereign debt and ESR, see Alan Bryman, *Social Research Methods* (4th edn, OUP, 2012). The purpose of this research design is, thus, to generate an intensive examination and theoretical analysis of a specific case, not necessarily to generalise its findings to other cases, although some of the latter may well be relevant for other similar situations.

sovereign debt and the realisation of ESR must be reconsidered in light of the current neoliberal global economic and legal system.

Chapter II

Sovereign Debt: Historical, Macroeconomic and Social Underpinnings

2.1. Introduction

Let us imagine a government. This government does not have at its immediate disposal the funds to pay for certain expenses it cannot delay. Hence, it turns, eager to borrow, to the market. The interest rates offered on its debt, however, are not appealing to potential lenders: credit remains scarce and the government keeps struggling to raise the funds it needs. In order to circumvent the legal boundaries that limit its borrowing possibilities, the government resorts, with the help of some ‘knowledgeable consultants’, to ‘creative accounting’. It can finally satisfy creditors’ appetites and secure the resources it is looking for. State debt becomes an attractive and, all things considered, relatively safe investment. A secondary market and speculation grow strong.

Despite the illusion of prosperity, though, such a system, unfettered, ultimately generates a diversion of wealth from the taxpayers, who are paying the debt back, to the government’s creditors. Increased taxation weighs especially on the poorest in society, who are disproportionately affected by the rise in the price of basic items of consumption. The illusion eventually bursts: the debt burden is unbearable. The most deprived segments of the population flow onto the streets in protest, demanding, among other things, to halt the payment of interest and subvert the existing mechanisms of sovereign financing.

As familiar as this story may sound, it is not that of Greece or the other countries struck, since 2009, by the Eurozone sovereign debt crisis. It is the story of the Commune of Florence at the end of the 14th century. The words in quotation marks above refer, in fact, both to the financial expedients adopted in Florence at the time, as well as to the recent history of Greece, which around 2002 was allegedly helped by Goldman Sachs to ‘legally’ circumvent the EU Maastricht rules and partly cover the true extent of its deficit, through the use of special cross currency swaps with fictional exchange rates, providing the country

with an additional credit of up to \$1bn that remained concealed from its debt statistics.³³

In the case of Florence, at the outbreak of the war against Pisa in 1362, after a legal reform in 1345 had set the interest paid on public debt at ‘just’ five percent, only a few citizens were willing to lend their money to the Commune. The latter appealed, thus, to the help of ser Piero di ser Grifo, Secretary for the *Riformagioni*, “highly knowledgeable about these things”,³⁴ who suggested to register any credit of 100 *fiorini* as a credit of 300 *fiorini* in the public books. The creditors of Florence were, hence, receiving an interest of three times five, or 15 percent, on their loans. These interests were paid with revenues from indirect taxation, two thirds of which was derived from *gabelle* on items of large consumption, such as salt or wheat. Indirect taxes have a highly regressive nature, as they impact relatively more on the scarce resources of the less well-off. This unjust ‘fiscal system’ was one of the causes of the popular anger that broke out in Florence in July 1378, when the Ciompi (wool carders), among the poorest in 14th-century Florence, seized the Palazzo del Podestà and took control of the city. They immediately suspended the payment of interest on debt and demanded direct taxation to be imposed in place of indirect levies. On 31 August 1378, however, after just 41 days of revolt, their protest was brutally put to an end, and the previous system fully restored.

Notwithstanding captivating analogies, however, this brief introductory chronicle and the next sections do not claim to compare like with unlike. Although borrowing may be a time-honoured State practice, sovereign debt has had a different (historically and socially contingent) significance in 14th-century Italy than it has today.

This chapter aims to introduce the concept of sovereign debt, most importantly its nature as a social relationship. To fully understand sovereign indebtedness and its implications for the nature of the international system—and

³³ See Chapter 5; Beat Balzli, ‘Greek Debt Crisis: How Goldman Sachs Helped Greece to Mask its True Debt’, *Spiegel Online International* (8 February 2010) <<http://www.spiegel.de/international/europe/greek-debt-crisis-how-goldman-sachs-helped-greece-to-mask-its-true-debt-a-676634.html>>.

³⁴ Gino Capponi, *Storia della Repubblica di Firenze di Gino Capponi* (1875); Niccolò Rodolico (ed), *Cronaca Fiorentina di Marchionne di Coppo Stefani* (Rerum Italicarum Scriptores, Tomo XXX, 1903) 384-385.

thus for international law itself (see Chapters 6 and 7)—it seems necessary to go beyond purely formalistic definitions of the concept, looking at the way in which indebtedness, as a social relationship, builds upon and restructures interactions among the members of a specific community. What kind of relationship is debt? What kind of social relations does it presuppose? How does it (re)structures social relations?

Therefore, this chapter will firstly present the existing European and international legal definitions of sovereign debt (Section 2.2). It will then proceed beyond these formal definitions to introduce briefly the basic economic underpinning of State debt, its determinants and consequences for the State budget (Section 2.3). It will, then, retrace the origins and historical development of borrowing as a State practice, since its distant origins in 12th-century Italy, highlighting some of its timeless features, as well as interesting discrepancies between sovereign indebtedness in the past and today (Section 2.4). This section will also describe the current trends of indebtedness in high-income countries, which some authors associate, in the European context, with the affirmation and expansion of the Welfare State.

The chapter will conclude by discussing the social nature of indebtedness, through the lenses of David Graeber’s sociological work on the concept of debt and the moral grounds of economic relations (Section 2.5). Graeber’s work can serve as a starting point to reflect further upon both the determinants and possible consequences of preferring borrowing to other forms of State funding, primarily taxation, especially when it comes to the realisation of the Welfare State and the implementation of welfare rights.

2.2. Legal definitions of sovereign debt

In a colloquial, non-legal connotation, a debt is “any form of obligation, particularly a moral obligation by a person to reciprocate a benefit received from another person in the past”³⁵.

In the broadest legal sense of the term, debt is a “liability on a claim”.³⁶ At

³⁵ ‘Debt’ in *The Wolters Kluwer Bouvier Law Dictionary*, Vol. 1 (Wolters Kluwer 2012) 758.

³⁶ ‘Debt’ in *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 488.

this abstract level of description, debt represents “a fundamental element of [any] legal interrelationship”,³⁷ as the term pins down “the (legal) burden or duty to do or to omit something”³⁸ that lies on the ‘debtor’, i.e. “the obligated side of the legal relationship which, on the opposite side, has a party with the entitlement to claim something”.³⁹ Although such a legal relationship may involve different objects (hence debt possibly also consisting of “a non-monetary thing that one person owes to another”),⁴⁰ the notion of debt is more commonly associated with a financial obligation. It usually “connotes a definite, readily computable amount owed in return for goods or services, or perhaps real estate”.⁴¹ Debt is, thus, generally intended as a “monetary sum”,⁴² or a “duty [...] to pay money”.⁴³

With regard to a legal definition of ‘sovereign debt’ (also described, depending on the context, as ‘State’, ‘public’, ‘national’, or ‘government’ debt), EU law contains a broad definition of ‘government debt’, shaped around the primary preoccupation with operationalising the EU law limits on budget deficit and public debt foreseen by the Stability and Growth Pact (SGP) and the Excessive Deficit Procedure (EDP) in the Economic and Monetary Union (EMU).⁴⁴ Under the Protocol No. 12 on the EDP annexed to the Treaty on the Functioning of the European Union (TFEU), ‘government debt’ (also called ‘EDP’ or ‘Maastricht debt’) corresponds to the sum of the existing general government liabilities under the categories of currency and deposits, debt securities, and loans.⁴⁵

In international law, the only instruments that include a relevant definition

³⁷ Christoph G Paulus, ‘Debts’ in *The Max Planck Encyclopedia of Public International Law*, Vol II (OUP 2012) 1082.

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ *Black’s Law Dictionary* (n 36) 488.

⁴¹ ‘Debt; indebtedness; debit; debitum; arrear; arrearage’ in *Garner’s Dictionary of Legal Usage* (3rd edn, OUP 2011) 249.

⁴² *ibid*

⁴³ *The Wolters Kluwer Bouvier Law Dictionary* (n 35) 758.

⁴⁴ On which see further Chapter 6.

⁴⁵ Article 2, Protocol (No 12) on the Excessive Deficit Procedure in Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, as supplemented by Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community [2009] OJ L 145/1 and by Commission Regulation (EU) No 220/2014 of 7 March 2014 amending Council Regulation (EC) No 479/2009 as regards references to the European system of national and regional accounts in the European Union [2014] OJ L 69/101.

of sovereign debt are the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (not yet in force)⁴⁶ and the 2012 Guiding Principles on Foreign Debt and Human Rights (a ‘soft law’ instrument).⁴⁷

The 1983 Vienna Convention defines ‘State debts’ as “any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law”.⁴⁸ However, as it has been noted, this characterisation of sovereign debt, purposely developed in the context of the law of State succession, is inadequate for two reasons:

[f]irst, being based on the restriction to ‘another State, an international organization or any other subject of international law’, it appears to exclude all debt owed to private creditors – [currently] the most important type of debt in volume terms. [...] Second, even if private creditors were ‘other subjects of international law’ the qualification ‘in conformity with international law’ is of doubtful practical value [...] [because] [w]ith few exceptions, today’s sovereign debt instruments are governed by municipal law.⁴⁹

On the contrary, the relevance of private creditors and the more likely domestic legal dimension of contemporary sovereign debt have been incorporated in the definition of ‘foreign debt’ provided by the 2012 Guiding principles on foreign debt and human rights:

external (or foreign debt) refers to an obligation (including monetary obligation) created under a contractual agreement and owed by a State to a non-resident lender which may either be an international financial institution, a bilateral or multilateral lender, a private financial institution or a bondholder, or is subject to foreign law.

⁴⁶ Vienna Convention on Succession of States in respect of State Property, Archives and Debts (8 April 1983).

⁴⁷ Human Rights Council, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina: Guiding principles on foreign debt and human rights (10 April 2011) A/HRC/20/23 (hereinafter, UN Guiding Principles on foreign debt and human rights), on which see further Chapter 4.

⁴⁸ Vienna Convention on Succession of States (n 46) Article 33.

⁴⁹ Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (CUP 2011) 12.

It includes: (i) loans, that is, advances of funds to the debtor by the lender on the basis of an undertaking that the borrower will repay the funds at some future point (including deposits, bonds, debentures, commercial loans and buyer's credits); and (ii) suppliers' credits, that is, contracts whereby the supplier allows the customer to defer payment until sometime after the date on which the goods are delivered or the services are provided. The aggregate of a State's outstanding external debts is referred to as its external debt stock.⁵⁰

This definition evidences the distinction usually made between domestic (or internal) and foreign (or external) debt, although the boundary between the two is progressively eroding.⁵¹ Such distinction can, in fact, be based on a number of criteria—e.g. the law governing the debt contract, the currency in which the debt is issued, or the nationality of creditors—⁵²so that debt could be 'domestic' according to one of the criteria, but 'foreign' according to the others. Foreign debt is usually described as debt "expressed in some foreign currency, typically payable abroad, governed by some external law and subject to the jurisdiction of external courts."⁵³ It can consist of public debt owed to international financial institutions (e.g. the IMF or the World Bank), other State entities (including central banks), or commercial banks (also in the form of syndicated loans); tradable debt held by international bondholders (sovereign bonds); trade debt, i.e. obligations arising from the purchase of supplies and services, or owed to banks through arrangements such as documentary letters of credit; and other liabilities, e.g. arbitral awards.⁵⁴

However, the relevance of each criterion over the others actually depends on the context of analysis (for legal purposes, the law governing the contract is certainly paramount).

The definitions contained in the 1983 Vienna Convention and the 2012 Guiding Principles mirror a surpassed or otherwise partial notion of what can be currently considered as

⁵⁰ UN Guiding Principles on foreign debt and human rights, 11, para 4.

⁵¹ Waibel (n 49) 13.

⁵² Hans-Ernst Folz, 'State Debts' in Rudolf Bernhardt and Peter Macalister-Smith (eds), *Encyclopaedia of Public International Law*, vol 4 (North-Holland 2000) 608.

⁵³ Waibel (n 49) 13.

⁵⁴ International Law Association, Sovereign Insolvency Study Group, 'State Insolvency: Options For The Way Forward' (2010) 9.

(internationally-)relevant sovereign debt. They record the temporary ‘versions’ of debt that have attracted concerns at specific times in recent history, prompting the attempt to regulate the phenomenon. Legal definitions, in particular, aim at delimiting the object and circumstances of the *vinculum juris*,⁵⁵ therefore being shaped around specific normative aspirations. They do not describe a concept ‘as it is’, but as it is made legally relevant for regulation. Therefore, they are contingent upon historical, social and political circumstances, which they crystallise, featuring the whole range (and limitations) of the contextual issues that triggered the law-making process. A further element to better understand sovereign debt is, thus, provided by considering its economic nature.

2.3. Macroeconomic underpinnings of sovereign debt

Today, a State has two main ways to finance its expenses: taxes and debt.⁵⁶

In theory, States also have a third option, i.e. money creation, or so called ‘debt monetisation’: “with the central bank’s cooperation, the government can [...] issue bonds and ask the central bank to buy them. The central bank then pays government with money it creates, and the government uses that money to finance its deficit.”⁵⁷ This option must be left aside, though, for a number of reasons. In practice, “to finance a large budget deficit through seignorage⁵⁸ can lead not only to high inflation but also, as is the case during hyperinflations, to high and increasing inflation”.⁵⁹ More precisely, “governments cannot use seignorage permanently to finance primary deficits much in excess of one percent of [Gross National Product] GNP without producing inflation”.⁶⁰

Moreover, in the EU context, the purchase of central government, regional,

⁵⁵ ‘Definition’ in *Oxford English Dictionary (OED) Online* <<http://www.oed.com>> (last accessed 28 September 2017).

⁵⁶ In ancient and modern times, ‘States’ used to rely as well on other means (for instance, exploitation colonialism), which are today precluded also as a consequence of the emergence of specific international norms.

⁵⁷ Olivier Blanchard, *Macroeconomics* (5th edn, Pearson Prentice Hall 2009) 519.

⁵⁸ Seignorage is the revenue that governments earn from the printing of money. It literally amounts to the face value of the money minus the cost of minting coins or printing paper money.

⁵⁹ Blanchard (n 57) 523.

⁶⁰ Stanley Fisher and William Easterley, ‘The Economics of the Government Budget Constraint’ (July 1990) 5 *The World Bank Research Observer* 127, 136.

local or other public authority's debt instruments directly by the European Central Bank (ECB) or by national central banks is (in theory)⁶¹ prohibited by Article 123 TFEU and the 'no bail-out' clause in Article 125 TFEU.

Therefore, any country may resort to a combination of both taxation and debt, although the two modalities have very different implications, including in terms of wealth (re-)distribution between both current and future generations, and domestic and international actors.

Without claiming to be an exhaustive account of the economic implications of sovereign indebtedness, the next sub-section will provide a concise overview of the 'functioning' of debt.

2.3.1. The government budget constraint

In general terms, whenever a State spends more than it earns, it runs a budget deficit and it must borrow to make up the difference. There are limits, though, both as to how much a State can tax its citizens,⁶² as well as how much indebtedness it can sustain. Bluntly put, State resources are limited.

Macroeconomic theory defines the State 'budget deficit' (in year t) as the sum of 'primary deficit'—i.e. government spending on good and services (G), minus net tax receipts (T)—⁶³and debt service—i.e. the real interest (r) payments on the government debt in year t (B_{t-1}). This corresponds to State debt at the end of year $t-1$ (or at the beginning of year t).⁶⁴ This observation can be formalised as follows:

⁶¹ Lucy Meakin, Max Julius and Anchalee Worrachate, 'ECB Starts Buying German, Italian Government Bonds Under QE Plan' *Bloomberg* (9 March 2015) <<http://www.bloomberg.com/news/articles/2015-03-09/ecb-said-to-begin-buying-german-government-bonds-under-qe-plan-i71mqdno>>. On the Outright Monetary Transactions (OMTs) of the ECB see, among others, Susanna Cafaro, 'L'azione della BCE nella crisi dell'area dell'euro alla luce del diritto dell'Unione Europea' in Giovanna Adinolfi and Michele Vellano (eds), *La crisi del debito sovrano degli Stati dell'area euro: profili giuridici* (G. Giappichelli Editore 2013), 58.

⁶² In economic theory, these limits are represented by the so called 'Laffer curve', see e.g. *Investopedia* <<http://www.investopedia.com/terms/l/laffercurve.asp>> (last accessed 20 September 2017).

⁶³ Net tax receipts T correspond to taxes minus State transfers (Tr), e.g. pensions, unemployment and other social security benefits, and subsidies, see Blanchard (n 57) 579.

⁶⁴ *ibid*, 579; Michael Burda and Charles Wyplosz, *Macroeconomics: A European Text* (Oxford University Press 2009), 428.

$$Deficit_t = G - T + rB_{t-1} \quad [1]$$

Primary deficit Debt service

According to the government budget constraint, “the change in government debt during year t is equal to the deficit during year t ”,⁶⁵ meaning that, in order to finance its deficit in year t , the State will need to borrow accordingly:

$$B_t - B_{t-1} = Deficit_t \quad [2]$$

or

$$B_t - B_{t-1} = G - T + rB_{t-1} \quad [3]$$

Change in the debt Primary deficit Debt service
(Debt accumulation)

B_t and B_{t-1} actually represent absolute levels of debt, but “a country’s ability to service debt (repay it with interest) is fundamentally related to its economic magnitude.”⁶⁶ Likewise, comparisons among different countries’ debt levels are meaningless in absolute terms. That is why we need to express debt in terms of debt ratios to Gross Domestic Product (GDP) or Y , to have a useful and comparable measure of indebtedness in practice. Thus, equation [3] should be rewritten as follows:

$$\frac{B_t}{Y_t} - \frac{B_{t-1}}{Y_{t-1}} = (r - g) \frac{B_{t-1}}{Y_{t-1}} + \frac{G_t - T_t}{Y_t} \quad [4]$$

Change in the debt Debt service Ratio primary
(Debt accumulation) deficit to GDP

or

$$\Delta B/Y = (r - g) \frac{B_{t-1}}{Y_{t-1}} + \frac{G_t - T_t}{Y_t} \quad [5]$$

Y_t represents current GDP (or GDP at year t), while Y_{t-1} represents last year’s GDP (or GDP at year $t-1$); r still represents the real interest rate, while g corresponds to the rate of growth of the GDP (or, in broader terms, of the ‘economy’). While in equation [3] the debt service was equal to r times debt at

⁶⁵ Blanchard (n 57) 579.

⁶⁶ Burda and Wyplosz (n 64) 429.

year $t-1$ (B_{t-1}), in the equation [5] it is equal to $(r - g)$ times the initial debt-to-GDP ratio (at time $t-1$): the presence of $r-g$ is explained by the fact that if debt and GDP grow respectively at rates r and g , then their ratio (debt-to-GDP) will grow at rate $r-g$.⁶⁷

Equation [5] can, therefore, help to understand how the different variables and their variations influence the level of State indebtedness. In particular it evidences that, *ceteris paribus*, firstly, when an increase in public spending ($G_t \uparrow$) is not counterbalanced by greater taxation (T_t) or tax-cuts are not associated with a cut in public spending, the primary deficit ($G_t - T_t$) will grow, necessarily determining (or sustained by) a rise in sovereign borrowing ($\Delta B/Y \uparrow$).

Secondly, a rise in real interest rates ($r \uparrow$) (assuming g as stable) will make debt repayments heavier, therefore increasing the debt-to-GDP ratio ($\Delta B/Y \uparrow$). This can happen, for instance, when for a number of reasons a State is ‘perceived’ as less credible by the markets, which is also reflected in the downgrading of its debt by Credit Rating Agencies (CRAs). In fact, interest rates increase as the markets demand higher returns in order to commit resources towards investments that are deemed ‘riskier’. For example, when in October 2009 the Greek government officially announced that its earlier fiscal data had been misreported, correcting the estimates, for the same year, of the Greek deficit from 3.7 percent to 15.4 percent of GDP, and of debt from 99.6 percent to 126.8 percent of GDP,⁶⁸ “markets reacted by increasing spreads (that is, interest rate differentials from German government bonds), and by lowering credit ratings”⁶⁹ to ‘junk’ level, over concerns that the country could default.⁷⁰ In April 2010, interest rates on Greek 2-year government bonds reached almost 15 percent.⁷¹ Thirdly, a lower rate of GDP growth ($g \downarrow$)—as in the case of the economic recession that struck the Eurozone countries since 2008—determines an increase of the debt-to-GDP ratio ($\Delta B/Y \uparrow$). In absolute terms, “as long as the real interest

⁶⁷ Blanchard (n 57) 584.

⁶⁸ Bank of Greece, *Governor's Report for the Year 2010* (Bank of Greece, 2011), quoted in Manos Matsaganis, ‘The welfare State and the crisis: the case of Greece’ (2011) *Journal of European Social Policy* 501, 501. On the Greek case, see Chapter V.

⁶⁹ *ibid*

⁷⁰ ‘Greek bonds rated ‘junk’ by Standard & Poor’s’ *BBC News* (27 April 2010) <<http://news.bbc.co.uk/1/hi/business/8647441.stm>>.

⁷¹ *ibid*

rate exceeds the growth rate [$r > g$], the debt process is explosive”⁷² (although “it tends to grow at rate $r - g$, lower than r ”⁷³ as implied by equation [3]). Conversely, “if the rate of interest r is below the GDP growth rate g , the debt-to-GDP ratio can be stabilised while running a budget deficit [thus meaning that] [i]n theory, fast-growing countries can outgrow their deficits.”⁷⁴

2.4. History

2.4.1. Early systems of sovereign debt: Italian city-States in the 12th century and the 16th-century debts of Philip II

‘Government’ debt (i.e. debt contracted by ‘States’ themselves) is a relatively recent phenomenon. As it has been observed, apparently, “neither Rome’s nor China’s rulers contracted government debt on a significant scale; the Ottoman Empire for most of its history did not issue debt either[;] [m]edieval kings did borrow and occasionally default on their obligations; [...] [but] [all t]hose debts [...] were private in nature”.⁷⁵

The earliest systems of public debt developed in Italy at the beginning of the twelfth century.⁷⁶ The first evidence of urban debt dates back to 1149 for Genoa, 1164 for Venice,⁷⁷ and 1222-26 for Florence.⁷⁸ At the time, the Mediterranean was, as Braudel describes it, “a *Weltwirtschaft*, a world-economy, a self-contained universe”⁷⁹ at whose centre stood the urban quadrilateral of Venice, Milan, Genoa and Florence. The maritime city-States of Venice and Genoa, in particular, were “at the frontier of economic development and capitalism”,⁸⁰

⁷² Burda and Wyplosz (n 64) 430.

⁷³ *ibid*

⁷⁴ *ibid*

⁷⁵ Mauricio Drelichman and Hans-Joachim Voth, *Lending to the borrower from hell: debt, taxes, and default in the age of Philip II* (Princeton University Press 2014) 23; Max Winkler, *Foreign bonds: an autopsy. A study of defaults and repudiations of government obligations* (Swain 1933) 21 ff.

⁷⁶ *ibid*, 24.

⁷⁷ Michele Fratianni and Franco Spinelli, ‘Italian city-states and financial evolution’ (2006) *European Review of Economic History* 257, 262.

⁷⁸ Capponi (n 34) 329.

⁷⁹ Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, vol 1 (Collins 1972), 387.

⁸⁰ Fratianni and Spinelli (n 77) 261.

followed at short distance by Hamburg, Basel and Cologne. They both used to trade with the North of Europe, fighting for dominance of overseas routes until their third and last war in 1378-81, when the Venetians took control over the routes to the East, leaving trade with the West in the hands of the Genoese.⁸¹ Within this economic universe, Venice in particular was the centre of gravity until the 16th century.⁸²

Although State borrowing was made possible by the advent of taxation—i.e., initially, more or less predictable streams of revenue that could be earmarked or used as guarantees to repay State creditors—,⁸³ it initially operated as a “semi-coercive structure”,⁸⁴ replacing direct taxation on wealth or income, which did not exist until the 15th century.⁸⁵ In fact, as has been noted:

[t]he fiscal systems of early modern Europe were clearly very different from their modern counterparts. Unlike the States of today, the early modern State was a competitor for resources with other powers, such as the church, and social groups, such as the nobility. There was greater reliance on indirect, as opposed to direct, taxes in many European countries. A third difference was in the way that taxes were collected [...]: the State was unable to collect impositions directly and had to rely on private entrepreneurs or contractors.⁸⁶

City-States used to finance their peacetime expenses through an infinite number of indirect taxes and custom duties,⁸⁷ which were levied especially on

⁸¹ *ibid.*, 262.

⁸² Braudel (n 79) 387

⁸³ Niall Ferguson, *The Cash Nexus: Money and Power in the Modern World, 1700-2000* (Basic Books 2001), 107. In the 12th century, for instance, Venice used to allocate to debt service its revenues from the monopoly on salt, and in 1164 it “granted eleven years of income from the Rialto market to a dozen wealthy citizens who had lent 1,150 silver marks (about 270 kilos of silver)”, Luciano Pezzolo, ‘Bonds and Government Debt in Italian City-States, 1250-1650’ in William N Goetzmann and K Geert Rouwenhorst (eds), *The Origins of Value: The Financial Innovations that Created Modern Capital Markets* (OUP 2005) 147. In 1152 Genoa applied to foreign lenders “who, in exchange for 50 lire, were given the proceeds of the customs at Rivarolo [an area of the city] for two years”, *ibid.*

⁸⁴ Drelichman and Voth (n 75) 135.

⁸⁵ Jean-Claude Hocquet, ‘City-State and Market Economy’ in Richard Bonney (ed), *Economic Systems and State Finance* (OUP 1995) 81-100, 86.

⁸⁶ Giovanni Muto, ‘The Spanish System: Centre and Periphery’ in Bonney (n 85) 231.

⁸⁷ Hocquet (n 85) 84. Revenues from indirect taxation used to generate strong budget surpluses: e.g. in 1339 Florence, revenues amounted to 343,300 *fiorini* while expenditures to only 40,000 *fiorini*, see Ernesto Screpanti, ‘La “Tobin Tax” fiorentina e la rivoluzione dei Ciompi’, *Attac.it* (18 April 2012) <www.attac.it> (last accessed 28 October 2015) 1.

items of everyday consumption and essential foodstuffs, such as grain, bread, meat, salt, or oil, thereby affecting the population at large. Indirect taxation was less detrimental to the interests of the rich ruling merchant class, and was an instrument in their service against external competition.⁸⁸ Nevertheless, almost incessant wars continually put public revenues to the test. Until after the Second World War, the need to borrow was dictated by and intimately related to the necessities and costs of war⁸⁹ and, especially after 1500, warfare was “not only frequent [...] [but] a near-permanent feature of the [European] political landscape”.⁹⁰ Thus, while calling for short-term voluntary loans from its wealthiest prominent citizens (mostly “at high interest rates, which were very seldom made public in order to escape the censure against usury”),⁹¹ Italian city-States increasingly resorted to forced loans, or so called *prestanze*:

[a]s far as we know, the first Italian government to do so was that of Venice, which in 1171, in order to prepare a fleet against the Byzantine emperor, decreed a loan from every citizen in relation to his patrimony, at an interest rate of 5 percent until the money was paid back [...]. During the last quarter of the thirteenth century the demand for loans on Venetian citizens grew: they had to deposit a part of their assessed wealth into State coffers, the sums were registered on public books, and tax revenues were devoted to paying interests. By 1274 Genoa adopted a similar measure [...].⁹²

Of course, potential taxpayers preferred to lend their money against the payment of interest and the return of their capital, rather than to hand it over to their rulers for no return at all.⁹³ However, lending to the Commune “was regarded as a duty, part of belonging to the urban community[;] loans were connected, to a certain extent, with the concept of charity and gifts to the *res publica*”.⁹⁴ Consequently, foreigners were at first forbidden to hold State bonds, or, in some cases, granted with citizenship.⁹⁵ As it has been emphasised,

⁸⁸ *ibid*, 85.

⁸⁹ Drelichman and Voth (n 75) 26.

⁹⁰ *ibid*, 27.

⁹¹ Pezzolo (n 83) 147.

⁹² *ibid*

⁹³ Hocquet (n 85) 87.

⁹⁴ Pezzolo (n 83) 156.

⁹⁵ *ibid*

annuities or perpetual bonds—such as, for instance, the Genoese *compere*, French *rentes* and Dutch *renten*—were at the beginning “used by monarchs to reward distinguished service by their subjects”.⁹⁶ In other words, originally debt used to reinforce ‘social linkages’, but this characteristic derived from—and confirms—the different nature of urban debt at the time: it represented a form of (‘direct’) taxation.

Forced loans were irredeemable, had moderate interest rates, and were an inheritable, negotiable, and usable form of payment. A primary market for sovereign debt—i.e. where new issues are sold or placed—did not exist until the early 16th century, but a lively secondary market for debt that was already issued was in place, although it was limited to the city walls.⁹⁷

Venice and Genoa were also the first city-States to transform their floating (i.e. short-term) debt into consolidated debt (i.e. longer-term debt undertaken to refinance the payment of previous debts), followed by Florence in the 1340s.⁹⁸

Forced loans, however, proved soon inadequate to cover the budget needs of the republics, especially in times of war. Consequently, in the 15th century, the city-states progressively replaced the compulsory loan system with a more ‘market-friendly approach to debt management’.⁹⁹ Essentially, they realised that it was easier to attract credit against the promise of higher profits, also because the city-States were still lacking the institutional capacity to assess wealth thoroughly and enforce the collection of forced loans, as was the case with taxes more generally. In order to gain the confidence of creditors against potential abuses of power, political authorities had to become ‘credible’ and ‘transpersonal’.¹⁰⁰ In this respect, Venice, Genoa and Florence shared republican political institutions, which they had “preserved [...] from their earlier history, in particular government through a council or councils”.¹⁰¹ These were “maintained and even enhanced when cities became territorial principalities,

⁹⁶ Drelichman and Voth (n 75) 89.

⁹⁷ Pezzolo (n 83) 146 and 155-156.

⁹⁸ Ibid, 149. In Venice, this occurred through the establishment of the *Monti*, i.e. series of public debt: *Monte Vecchio* in 1156, later superseded by *Monte Nuovo* in 1482, *Monte Nuovissimo* in 1509, and *Monte Sussidio* in 1526, see Fratianni and Spinelli (n 77) 263.

⁹⁹ *ibid*

¹⁰⁰ Drelichman and Voth (n 75) 25.

¹⁰¹ Hocquet (n 85) 83.

[...] whose sovereignty was personified either in a non-hereditary elective monarchy (the doges of Venice and Genoa) or in a dynastic principality (Florence under the Medici)".¹⁰² It has been argued that the republican institutions were precisely what "gave [Venice and Genoa] legitimacy and credibility to issue large amounts of long-term and marketable debt".¹⁰³ A first example of a credible, transpersonal, commitment of Venice was the so-called *Ligatio pecuniae*, a decree issued on 12 March 1262 by the Great Council, which committed the government to spend up to 3,000 *lire* a month for its ordinary needs and the remaining tax revenues for the payment (twice a year) of five percent interest to State creditors.¹⁰⁴

In the case of monarchical rulers elsewhere in Europe, given the personal nature of their debts and the divine nature of their power, which constituted a potential argument to escape uncongenial repayments—some authors have argued that the doctrine of absolutism conveyed "a legal conceptualisation of the ['transpersonal'] State that allowed it to make near-permanent commitments".¹⁰⁵ The later establishment of representative assemblies, able "to influence policy 'just enough' to constrain abuses of power",¹⁰⁶ provided further guarantees in this sense.

During the 15th century, however, the relative importance of Venice declined, and Genoa and Florence gradually gained prominence.¹⁰⁷ In fact, not only commercial activities on the sea were more and more concentrated in the West (and Genoa secured the Spanish and American trade), but the two cities also became financial centres on an unprecedented scale.¹⁰⁸ Drawing a parallel with the geographers' notion of the 'catchment area of a river', it has been emphasised how "there was a catchment of many trades by the quick-flowing rivers of money to the profit of financiers in Genoa and Florence",¹⁰⁹ as the two cities "gained control of all the economically backwards regions, whether in

¹⁰² *ibid*

¹⁰³ Fratianni and Spinelli (n 77) 262.

¹⁰⁴ Pezzolo (n 83) 145.

¹⁰⁵ Drelichman and Voth (n 75) 26.

¹⁰⁶ *ibid*, 27.

¹⁰⁷ Fratianni and Spinelli (n 77) 262.

¹⁰⁸ Braudel (n 79) 393.

¹⁰⁹ *ibid*

Eastern Europe or southern Italy, in the Balkans, France, or the Iberian peninsula”.¹¹⁰ In fact, in the early 16th century, monarchical States in Europe had begun to emulate the debt system of the Italian republics. They “realized, if it had ever seriously been doubted, that territorial control and the assertion of their rule were impossible to achieve without adequate financial resources”.¹¹¹ In that context, Genoese bankers in particular, who had more than 150 years of experience in managing the debts of their city,¹¹² became “the masters of international payments, of the fortune both of Europe and of the world, the not unchallenged but well-entrenched masters of the political silver of Spain”.¹¹³

In that context, Philip II of Spain (who inherited from his father, the emperor Charles V, possessions on every continent then known to Europeans, building an empire *donde nunca se ponía el sol*)¹¹⁴ is considered to be the first serial defaulter in history. During his reign, he defaulted on his debts four times in 1557, 1560, 1575 and 1596, while Spain (and Castile, its predecessor State) defaulted 13 times between 1500 and the present.¹¹⁵

While fiscal management under Philip II had long been regarded as chaotic and dangerous, and every default portrayed as a catastrophe ruining entire generations of lenders,¹¹⁶ a unique analysis of Philip II’s debts and defaults published in 2014 has argued that the reality was actually very different, and similarities with modern-day sovereign financing “striking”¹¹⁷ to the point that Philip’s case-study can provide important lessons for the present.

The Spanish Crown used two kind of debt instruments, *juros* and *asientos*. *Juros* were annuities or perpetual bonds regularly issued, since the 14th century, in exchange for future revenues, and whose term was gradually lengthened to

¹¹⁰ *ibid*

¹¹¹ Muto (n 86) 231.

¹¹² Drelichman and Voth (n 75) 98.

¹¹³ Braudel (n 79) 393.

¹¹⁴ Philip II was King of Spain from 1556, of Naples and Sicily, as well as Duke of Milan, from 1554, King of Portugal and the Algarve (under the name of Philip I) from 1580, King of England and Ireland, *jure uxoris*, during his marriage to Queen Mary I (1554–58), and from 1555, sovereign of the Seventeen Provinces of the Netherlands.

¹¹⁵ Carmen M Reinhart and Kenneth Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009); Drelichman and Voth (n 75) 18.

¹¹⁶ *ibid*, 3-4 and 7.

¹¹⁷ *ibid*, 96.

two lives and ultimately in perpetuity.¹¹⁸ They could be earmarked exclusively for ordinary tax streams,¹¹⁹ which were typically stable revenues, thus making juros some of the safest investments in Europe at the time.¹²⁰ They were issued to a specific person, but the Crown regularly allowed their transfer in exchange for a fee.¹²¹ Juros' most important feature, however, was that

they only bound the monarch to service them as long as the tax stream backing them produced sufficient funds. In that sense they represented a contingent claim on fiscal resources, with the lender bearing the downside risk. [...] Because the possibility of non-payment was already part of the original loan contract, when specific tax revenues dried up, it did not constitute bankruptcy to fail to service juros.¹²²

Throughout the 16th century, juros accounted for well over 80 percent of outstanding Castilian debt. They were mostly held by Castilian elites (thus, defaulting on juros would have had huge political costs for the king).¹²³ They could, however, only be issued against a little more than half of all revenues, and this left “a sizeable free cash flow, which could be leveraged using short-term debt.”¹²⁴ That is why the king used to resort to *asientos*. This term covered a wide variety of financial agreements between the king and private bankers, i.e. mostly German, Genoese, Spanish, and Portuguese banking families. Sovereign debt had become, in effect, properly ‘international’. The intrinsic debtor-creditor relationship did not involve just the ‘State’ and its citizens anymore: an international financial elite had emerged.

Asientos were “short-term, largely unsecured loans, with maturities stretching from a few months to a few years”.¹²⁵ Their “contractual forms were typically straightforward – a delivery of funds, followed by one or several repayments with interest”.¹²⁶ Obviously, *asientos* were riskier than juros, also

¹¹⁸ *ibid*, 90.

¹¹⁹ *ibid*, 76.

¹²⁰ *ibid*, 91.

¹²¹ *ibid*, 90.

¹²² *ibid*

¹²³ *ibid*, 91.

¹²⁴ *ibid*, 93.

¹²⁵ *ibid*, 19.

¹²⁶ *ibid*, 93.

because no specific funds were earmarked to their service (although contracts sometimes made explicit the intended sources of repayment).

The Genoese, who took control of most of the debt market after 1566,¹²⁷ introduced several financial innovations: loans were generally ‘securitised’ and ‘collateralised’ and, most importantly, asientos included various contingency clauses. Securitisation used to occur through the sell off by the Genoese—much as Wall Street firms do today—of most of their Spanish loans (with an intermediation fee of 1 percent on average) to smaller investors in Genoa or at the European payment fairs. The latter, in turn, offered portions of their own shares to further ‘retail customers’ across several Italian cities.¹²⁸ In this way the Genoese transferred as much risk as they wished, ending up with only a limited and controlled exposure to the Crown. The risk-spreading was thus ‘multitiered’, and “[t]he short-term financing of the Spanish Crown [...] became a multinational affair, trickling down to all level of society”.¹²⁹ This mechanism insured the Spanish system against the risks of leverage.¹³⁰ Differently from today, however,

[s]avers invested in a share of a loan made by bankers, not in deposits held by the banker – an early form of syndicated lending. Investors shared in both the upside and downside of loans to the king. Bankers thus could repay the investors in *la misma moneda* – literally, ‘the same currency’, meaning that their creditors shared losses in proportion to their investment. Had their repayment obligations remained unchanged, every payment stop could have spelled bankruptcy for the great financiers. [...] Bankers did not end up holding the most ‘toxic’ portion of assets, as modern-day banks did in the 2000s. Instead, losses from adverse shocks were widely shared – and so were gains in good times, ensuring a steady supply of willing savers lending to the banking dynasties that financed the Spanish monarchy.¹³¹

In addition to that, as mentioned, most asientos contained contingency clauses where alternative repayment scenarios were stipulated in advance.¹³²

¹²⁷ *ibid*, 95.

¹²⁸ *ibid*

¹²⁹ *ibid*

¹³⁰ *ibid*, 3.

¹³¹ *ibid*

¹³² *ibid*, 97.

[f]or example, a banker might be promised a hundred thousand ducats from the silver brought by the first fleet arriving from the Indies. The contract might further stipulate that if the fleet did not arrive by a specific date, the bankers might be entitled to a penalty rate, collect payment from other sources, or liquidate the collateral. The combination of contingency and collateral clauses allowed the king and bankers to contract over a wide variety of states of the world at a time when long-distance trade and large-scale military enterprises created large volatility in the Crown's cash flow.¹³³

These two characteristics of Philip's debt—i.e. the way in which risks were assumed and shared by financial institutions, and the pre-arranged risk-sharing between bankers and the borrower—determined, according to the study's authors, “a remarkably stable and effective system for financing sovereign borrowing”.¹³⁴ Thus, all four payment stops of Philip II, were “[b]y modern standards [...] on the whole remarkably mild”,¹³⁵ as “only a relatively limited share of total debt was rescheduled; settlements were negotiated in less than two years (compared to an average of eight years today); terms were relatively generous; and lending resumed quickly”.¹³⁶ The authors, therefore, conclude that:

[t]he debt and defaults of Philip II suggest that there is another way: prearranged reductions in what a government owes and has to pay to creditors in bad times. [...] So-called state-contingent debt allows for interest and capital repayments to be reduced in times of crisis, helping break [the] negative feedback loop [between economic recession and austerity]. The cuts that make a crisis worse can therefore be avoided. Economic downturns as a result will be less severe and the risk of default declines. And yet in spite of all the intellectual appeal and conceptual elegance of the idea, there are few examples of state-contingent debt being traded in twenty-first century debt markets.¹³⁷

¹³³ *ibid*

¹³⁴ *ibid* 1.

¹³⁵ *ibid*

¹³⁶ *ibid*

¹³⁷ *ibid*, 1-2.

The history of modern public debt is marked, instead, by the birth of the ‘Consol’—short form for ‘consolidated annuities’, i.e. the forerunners of the modern ‘gilt’—¹³⁸ and the global spread of the British system of public debt in the 19th century.¹³⁹ The Bank of England issued its first Consols in 1751, which, differently from the pre-1720 annuities (illiquid, irredeemable and with a ninety-nine-year term), were liquid, perpetual bonds, redeemable at par at the option of government.¹⁴⁰ The British government, and to varying degrees also France, Belgium, Austria and Italy, initially used to borrow from an elite group of bankers. Among them, the Rothschilds used to play a leading role (their multinational partnership monopolised almost all new bond issues),¹⁴¹ while the Barings were dominating Russian public borrowing and the Morgan group that of the United States.¹⁴²

Only gradually the new joint-stock banks assumed the role of private partnerships like the Rothschilds,¹⁴³ and States began resorting to direct sale via subscription to the public, a transformation in the techniques of sovereign borrowing that was essentially required by the enormous expenditures occasioned by the First World War.¹⁴⁴

[t]he system of selling bonds directly to the public by subscription was widely adopted during the First World War, when buying war bonds was portrayed in official propaganda as a matter of patriotic duty. [...] However, as the war wore on it became steadily harder (especially for the Central Powers) to persuade their subjects to put their cash into war bonds. For that reason, the First World War also saw a revival and development of short-term debt instruments, principally Treasury-bills. By the end of the war, 32 percent of the German national debt was in this form – of which more than two-fifths were held by the Reichsbank – and 37

¹³⁸ *ibid.* A gilt is “a UK Government liability in sterling, issued by HM Treasury and listed on the London Stock Exchange”, the term referring to “the primary characteristic of gilts as an investment: their security”, United Kingdom Debt Management Office, ‘Gilt Market’ <http://www.dmo.gov.uk/index.aspx?page=gilts/about_gilts>.

¹³⁹ Ferguson (n 83) 111-112.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*, 116-117.

¹⁴² *ibid.*

¹⁴³ *ibid.*, 117.

¹⁴⁴ *ibid.*, 118.

percent of the French. [...] The British also reduced their long-term debt. The funded national debt (mainly consols) had accounted for 90 percent of the total debt in March 1914; five years later consols accounted for less than 5 percent of the total debt.¹⁴⁵

Since 1914, sovereign debt worldwide acquired a more complicated ‘term structure’.¹⁴⁶ In particular, “the growth of short-term debt created complex and not always well-understood links between fiscal and monetary policy [...] leading to considerable inflationary pressure during and after the First World War,”¹⁴⁷ and to “the need regularly to renew or ‘roll over’ short-term debts[, which] could expose modern States to funding crises”,¹⁴⁸ i.e. a refusal by lenders to roll over short term debts, and could thereby lead to serious monetary instability. Trends and current implications of short-term borrowing are explored further in Section 2.4.3.

After the Second World War, and especially since the 1970s, there has been a significant change in the character of sovereign borrowing from “traditional types of private finance to public entities such as bonds, suppliers’ credits, and direct investment, [...] to syndicated loans [i.e. loans provided by usually large, transnational, commercial banks which create a ‘syndicate’]¹⁴⁹ without a link to any particular project or transaction, i.e. to what in many instances became loans for balance of payment purposes.”¹⁵⁰ While, historically, sovereign indebtedness had been almost exclusively motivated by war expenditures, 20th-century debt has been contracted when not for entirely illegitimate purposes, either for economic development and trade-related reasons. In other words, to cope with imbalances that seem intrinsic to the functioning of the international economic system itself, or, as the next section will explore, to allegedly finance the growth of the Welfare State. Such a shift in the destination of borrowed funds reflects the transformation of State functions and objectives.

Another interesting aspect is that, particularly after the Second World War,

¹⁴⁵ *ibid*,

¹⁴⁶ *ibid*, 119.

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ Yvonne Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (Edward Elgar, 2012) 27.

¹⁵⁰ Andreas F Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 670.

the relationship between creditors and debtor countries, especially when the latter were experiencing economic difficulties or were at risk of default, has been essentially left to the negotiations and political equilibriums of the moment. Ironically, in the contemporary era, despite the creation of the Bretton Woods' financial institutions in 1945, sovereign financing and debt restructuring seem less coherently regulated than they were at the time of Philip II, and tend to operate at the mercy of market forces, on a case-by-case basis. As admitted by Lowenfeld, in the course of the debt crises that broke out from the 1980 onwards in Latin America, South-East Asia and Russia, a "certain pattern of international joint endeavour developed [...] [but] it would be an exaggeration to say that rules were either followed or made".¹⁵¹ As will be explored further in Chapter 4, public international law on sovereign debt has not developed as rapidly as other branches of international law generally did in the twentieth century,¹⁵² despite the fact that this type of debt necessarily implicates important questions of public international law¹⁵³ and sovereign defaults, today, "cannot be settled satisfactorily purely on the basis of contract law".¹⁵⁴ After failed attempts, at the beginning of the 2000s, to establish an international Sovereign Debt Restructuring Mechanisms (SDRM) within the IMF,¹⁵⁵ in 2014 the General Assembly of the United Nations created an Ad Hoc Committee for the establishment of a multilateral legal framework on sovereign debt restructuring processes, whose activities are, however, still in progress.¹⁵⁶ The case of Argentina, with the many ongoing investor-State disputes relating to its debt restructurings, and the ruling in 2012 by the US Federal District Court in Manhattan¹⁵⁷ in favour of the 'holdout' investors who refused to take part in the

¹⁵¹ *ibid*, 669.

¹⁵² Waibel (n 49) 19.

¹⁵³ *ibid*, 21.

¹⁵⁴ *ibid*

¹⁵⁵ Anne O Krueger, *A New Approach to Sovereign Debt Restructuring* (IMF 2002) <<http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf>>.

¹⁵⁶ United Nations, General Assembly, Res 69/247 of 29 December 2014, 'Modalities for the implementation of resolution 68/304, entitled "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes"', A/RES/69/247 (13 January 2015).

¹⁵⁷ The ruling was upheld by the United States Court of Appeals for the Second Circuit in *NML Capital, Ltd. v Republic of Argentina*, Judgement of 26 October 2012, 699 F.3d 246, 250 (2d Cir. 2012) <<http://www.shearman.com/~media/Files/Old%20Site%20Files/secondcircuitdecision110512>>.

2005 and 2010 restructurings (also negatively termed ‘vulture’ creditors, as “they purchase sovereign bonds in arrears and or in default for, say, 30 or 40 percent of face value, and wait”),¹⁵⁸ epitomises this development to the extreme.

Furthermore, since the Brady Plan of 1989, the accountability and involvement of creditors in solutions to the debt crises has seen a shift away from the so called ‘cooperative strategy’, promoted by Jacques de Larosière (Managing Director of the IMF between 1978 and 1987). The latter was essentially aimed at involving the governments of both debtor and creditor countries, the Bank for International Settlements, the World Bank, the IMF and, most importantly, private creditors, “extending the principle of conditionality to creditors”.¹⁵⁹ Instead, there was a move towards the increased responsibility of the IMF, coupled with a diminished role for private creditors.

2.4.3. Sovereign debt today: structure and trends in advanced economies

A 2014 IMF Working Paper examined the evolution of sovereign debt, over the period 1900-2011, in thirteen advanced economies (Australia, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Netherlands, Spain, Sweden, the United Kingdom and the United States).¹⁶⁰ The paper analyses debt composition

pdf>, and the US Supreme Court refused to hear the case. See, among others, Diane Desierto, ‘Republic of Argentina v. NML Capital Ltd.: The Global Reach of Creditor Execution on Sovereign Assets and The Case for an International Treaty on Sovereign Restructuring’, *EJIL: Talk!* (22 June 2014) <<http://www.ejiltalk.org/republic-of-argentina-v-nml-capital-ltd-the-global-reach-of-creditor-execution-on-sovereign-assets-and-the-case-for-an-international-treaty-on-sovereign-restructuring/>>.

¹⁵⁸ Lowenfeld (n 150) 737.

¹⁵⁹ *ibid*, 675.

¹⁶⁰ SM Ali Abbas, Laura Blattner, Mark De Broeck, Asmaa El-Ganainy and Malin Hu, ‘Sovereign Debt Composition in Advanced Economies: A Historical Perspective’ (September 2014) IMF Working Paper WP/14/162. For other studies on the same topic, see *inter alia* SM Ali Abbas, Nazim Belhocine, Asmaa El-Ganainy and Anke Weber, ‘Current Crisis in Historical Perspective’ in Carlo Cottarelli, Philip Gerson and Abdelhak Senhadji (eds), *Post-Crisis Fiscal Policy* (MIT Press 2014); Carmen M Reinhart, Vincent R Reinhart and Kenneth Rogoff, ‘Public debt overhangs: Advanced-economy episodes since 1800’ (2012) 26 *Journal of Economic Perspectives* 69; Carmen M Reinhart and Kenneth Rogoff, ‘From financial crash to debt crisis American Economic Review’ 101 *American Economic Review* 5, 1676-1706; International Monetary Fund, *World Economic Outlook: Coping with High Debt and Sluggish Growth (October 2012)*, Chapter 3: ‘The Good, the Bad, and the Ugly: 100 Years of Dealing with Public Debt Overhangs’; and SM Ali Abbas, Nazim Belhocine, Asmaa El-Ganainy and Mark Horton, ‘Historical patterns and dynamics of public debt: Evidence from a new database’ (2011) 59 *IMF*

series of *central* government (without consideration of the laws under which debt is issued) along four parameters: debt currency at issuance (foreign or local currency);¹⁶¹ debt maturity (short-term or medium-/long-term debt for local currency debt only);¹⁶² debt holders (central bank, domestic commercial banks, domestic non-bank sector, or non-residents); and debt marketability (non-marketable or marketable debt).¹⁶³ It essentially argues that “debt structure matters for debt servicing costs [and cost minimization], especially at high debt levels”¹⁶⁴ as “short-duration debt can quickly re-price in the event of a rise in yields, raising the interest bill.”¹⁶⁵ The authors also acknowledge that “[a] prudent debt composition choice¹⁶⁶ can also help reduce broader fiscal vulnerabilities [to macroeconomic shocks] and the risk of sovereign debt crisis.”¹⁶⁷ Oversimplifying the concept, short-term debt can be fiscally more ‘dangerous’ than medium-/long-term debt, while debt issued in domestic

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¹⁶¹ For the Euro Area member countries, today, the debt issued in national or ‘local’ currency is the debt denominated in Euro, see Eurostat, ‘Structure of government debt’ <http://ec.europa.eu/eurostat/statistics-explained/index.php/Structure_of_government_debt> (last accessed 27 September 2017).

¹⁶² Short-term local currency debt is debt “with less than one year maturity or the shortest maturity of more than one year for which data are available at the time of issuance,” and medium-/long-term debt as “the residual [local currency] debt,” Abbas and others, *Sovereign Debt Composition in Advanced Economies* (n 160) 8.

¹⁶³ Non-marketable debt consists of debt instruments that are not tradable on the market, i.e. loans, currency and deposits, and other accounts payable/receivable. Other financial liabilities that can be traded between holders independently from the debtor represent marketable debt. The specific debt instruments included in this notion may vary, depending on the overall definition of government debt considered. Among others, debt securities (e.g. sovereign bonds) are marketable debt. This classification clearly presents some limitations (reflecting, according to the authors, data availability issues): in particular, there is no itemization of foreign currency debt in medium/long-term debt, nor a further breakdown of the ‘non-residents’ category in, for example, international financial institutions, commercial banks, or individual bondholders, which would have been particularly interesting to observe.

¹⁶⁴ Abbas and others, *Sovereign Debt Composition in Advanced Economies* (n 160) 3.

¹⁶⁵ *ibid*

¹⁶⁶ Debt composition is considered ‘prudent’ when debt preferably consists of marketable instruments, denominated in domestic currency, with a relatively long average maturity and is owned by a diversified investor base, *ibid*, 4. The authors report how this notion corresponds to practices that have been promoted as standards of good practice by the IMF, the World Bank and the OECD, see IMF and World Bank, *Revised Guidelines for Public Debt Management* (2014) <<http://www.imf.org/external/np/pp/eng/2014/040114.pdf>>; OECD, *OECD Public Debt Markets: Trends and Structural Changes* (2002); OECD, *Public Debt Management and Government Securities Markets in the 21st Century* (2002).

¹⁶⁷ Abbas and others, *Sovereign Debt Composition in Advanced Economies* (n 160) 4.

currency can be ‘safer’ than foreign currency debt.¹⁶⁸

The IMF study focuses particularly on explaining debt structure ‘shifts’ during episodes of large and rapid debt accumulation and following debt consolidation, specifically associated with the two World Wars and three deep and global economic downturns, i.e. the Great Depression (1930s), the so called ‘Great Accumulation’ (early 1970s to mid-2000s) and the Great Recession (2007 onwards).¹⁶⁹ Besides the more specific analysis of these historical shifts, some trends and conclusions reached by the authors deserve closer attention.

First, in terms of debt *levels* three “visibly large spikes in the average debt-to-GDP ratio,”¹⁷⁰ or ‘accumulation episodes’ are highlighted, respectively during World War I, the Great Depression, and World War II, each of which was followed by a period of reduction (see Figure 1). More interestingly, “after declining during the decades following World War II, the advanced economy sovereign debt ratio has risen consistently since the 1970s, an increase the Great Recession has exacerbated.”¹⁷¹ The term ‘Great Accumulation’ was coined to refer to the period from the early-1970s until the mid-2000s,¹⁷² “during which public debt [...] of advanced economies rose by about 40 percentage points, despite the absence of a global crisis.”¹⁷³ This increase was due, in the authors’ opinion, to “a reduction in the rate of growth from the first three post-World War II decades; the collapse of the Bretton Woods system; the two oil price shocks; and, most notably, the rise of the welfare States, and the accompanying permanent increase in government expenditure, in advanced economies.”¹⁷⁴

¹⁶⁸ As the authors recall, indeed, the inability to issue long-term sovereign debt in domestic currency, or the so called ‘original sin’, has been identified as a major source of fiscal vulnerabilities in emerging market economies, *ibid* 4-5. See also Barry Eichengreen, Ricardo Hausmann and Ugo Panizza, *The Pain of Original Sin* (2003) <<http://eml.berkeley.edu/~eichengr/research/ospainaug21-03.pdf>> (last accessed 27 November 2014); Barry Eichengreen and Ricardo Hausmann (eds), *Debt Denomination and Financial Instability in Emerging Market Economies* (University of Chicago Press 2002); and Eduardo Borensztein, Marcos Chamon, Olivier Jeanne, Paolo Mauro and Jeromin Zettelmayer, ‘Sovereign Debt Structure for Crisis Prevention’ (2004) IMF Occasional Paper No 237.

¹⁶⁹ Abbas and others, *Sovereign Debt Composition in Advanced Economies* (n 160) 7.

¹⁷⁰ *ibid*, 3.

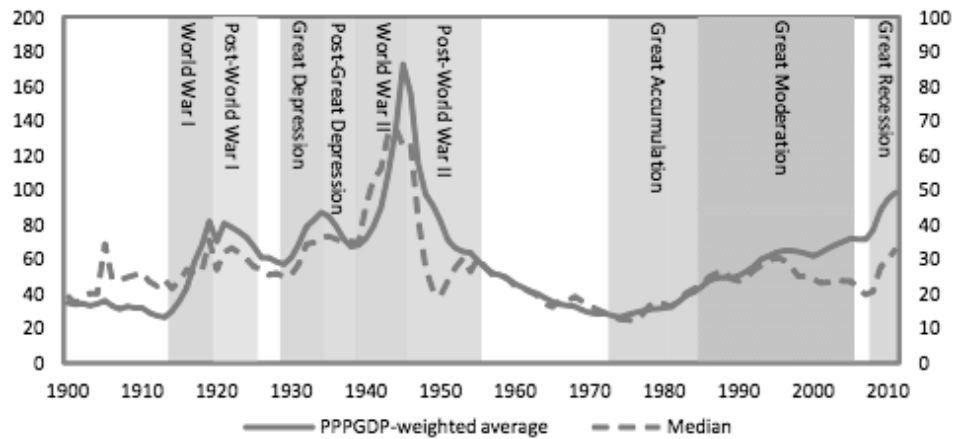
¹⁷¹ *ibid*

¹⁷² *ibid*

¹⁷³ *ibid*, 14, footnote 30.

¹⁷⁴ *ibid*

Figure 1: Debt-to-GDP ratio in advanced economies, 1900-2011



Second, in terms of debt *structure*, the data illustrate that the “bulk of advanced economies’ debt was and is denominated in local currency barring a few periods and countries,”¹⁷⁵ the share of foreign currency debt declining “from around 8 percent in the late 1950s to a negligible level today.”¹⁷⁶ Most (if not all) debt of EU countries is today issued in euro (with some country differences, though).

The share of domestic medium-/long-term debt rises “in good times and fall[s] in bad,”¹⁷⁷ and it dropped dramatically in coincidence with the two World Wars, “as governments rushed to meet military spending needs from short-term and foreign funding sources.”¹⁷⁸ The average share, however, “never [fell] below 50 percent”¹⁷⁹ during the whole 111-year sample period, recovering to pre-World War II peaks (between 70 and 80 percent of central government debt) by the mid-1990s, “facilitated by demand-side developments,”¹⁸⁰ especially an increased interest in “long-dated government securities by investor groups with

¹⁷⁵ *ibid*, 9. Peaks in foreign currency aggregate debt levels coincide in particular with the loans granted by the US to its European allies for post-World War I reconstruction and the 1953 London Agreement on German External Debts concluded between the Federal Republic of Germany and its main creditor nations after the II World War.

¹⁷⁶ *ibid*, 10.

¹⁷⁷ *ibid*, 11.

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ *ibid*, footnote 23.

long-term liabilities—such as insurance companies and pension funds.”¹⁸¹ The shares of short-term debt in relation to GDP evolved conversely, “reflecting financing pressures that had to be met through short-term funding sources.”¹⁸² The authors reported, however, “a sustained increase in the ratio of short-term debt-to-GDP [taking] place from the mid-1970s through the mid-1990s”¹⁸³ (from 9 percent of GDP to 15 percent of GDP respectively).

The share of marketable debt, furthermore, “illustrates governments’ reliance on unconventional means in periods of high indebtedness”,¹⁸⁴ with marketable debt shares declining during the post-World War I period and ‘falling precipitously’ during and after World War II. Today, it stands at about 80 percent of total central government debt.

Finally, as the authors clarify, “the data suggest an interesting pattern of holder substitutions, with commercial banks [and central banks] usually picking up the tab from the domestic nonbank sector during crisis periods.”¹⁸⁵ Nevertheless, during and after the so called ‘Great Moderation’ (mid-1980s until 2007), both the share of debt held by domestic commercial banks and by the domestic nonbank sector fell,¹⁸⁶ while since the ‘Great Accumulation’, “non-resident holdings as share of GDP have exhibited a rising trend,”¹⁸⁷ increasing “steadily from 2 percent of GDP in the mid-1970s to 29 percent of GDP in 2011” (or 36 percent of total government debt today, compared with 3 percent at end-World War II).¹⁸⁸ This trend has been caused by a number of factors. These include: “financial innovation and globalisation during the 1970s and 1980s; reduced capital controls; improved debt management in issuing countries; independent central banks committed to low inflation; the introduction of the euro, which led to the *de facto* elimination of currency risk within the Euro zone

¹⁸¹ *ibid.*

¹⁸² *ibid.*, 11.

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*, 13.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*, 14. The authors allege that “changes in the regulatory framework, including those since the 1988 Basel Capital Accord, could have been an influencing factor in domestic banks’ holdings of sovereign debt,” *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*, 14 and 25.

and mispricing of sovereign risk for the euro zone peripheral economies.”¹⁸⁹

Data suggest that, overall, the ‘Great Accumulation’ “saw lengthening debt maturities, greater marketability and stronger non-resident participation,”¹⁹⁰ and the Great Recession “has not significantly dented the maturity or currency structure of debt in the countries [considered].”¹⁹¹ However, there has been a “clear [but supposedly temporary] rise in the share of the banking system’s holding”¹⁹² (i.e. in the holdings of “commercial banks, central banks, and, to a less extent, non-residents [...], matched by a decline in the share of the nonbank domestic sector”).¹⁹³

In summary, particularly since the beginning of the ‘Great Accumulation’ (early 1970s), sovereign borrowing in advanced economies has become a routine, prevalently market-based, State financing practice, with a strong international dimension.

2.5. Beyond legal and economic definitions: some reflections on the social nature of indebtedness

As mentioned at the beginning of this chapter, this latter section will look at the concept of debt as a social relation, using David Graeber’s analysis of indebtedness and the moral grounds of economic relations as the analytical starting point.¹⁹⁴ Although his considerations originally relate to human interaction, some of the concepts he unravels can shed light on the nature of State debt alike, and the type of social relationships it sustains, both at the domestic and the international level.

Graeber proposes that, in any human society, economic relations can be founded on three main moral principles, coexisting everywhere and which essentially determine who has access to what sort of things under which

¹⁸⁹ *ibid*

¹⁹⁰ *ibid*, 19 (emphasis added).

¹⁹¹ *ibid* 20.

¹⁹² *ibid*

¹⁹³ *ibid*

¹⁹⁴ See David Graeber, ‘On the moral grounds of economic relations: A Maussian approach’ (2014) 14 *Journal of Classical Sociology* 1, 65-77; *Debt: The First 5.000 Years* (Melville House Publishing 2011).

conditions: 1) *communism*, when human relationships operate according to the principle ‘from each according to their abilities, to each according to their needs’;¹⁹⁵ 2) *hierarchy*, which implies a relationship between two or more parties, in which one is “considered superior to the other”,¹⁹⁶ and which tends to operate by a ‘logic of precedent’;¹⁹⁷ and 3) *exchange*, which “is all about equivalence[;] it’s a back-and-forth process involving two sides in which each side gives as good as it gets”.¹⁹⁸ Commercial exchange in particular is, according to Graeber, “‘impersonal’: who it is that is selling something to us, or buying something from us, should in principle be entirely irrelevant”.¹⁹⁹ Accordingly, exchange as a moral principle implies that “[o]nce the object [of exchange] changes hands, there is no expectation that the two [parties to the transaction] will ever have anything to do with each other again”.²⁰⁰

According to this premise, debt is, in Graeber’s opinion, “just an exchange that has not been brought to completion”;²⁰¹ it is “what happens in between; when the two parties cannot yet walk away from each other”.²⁰² It is “strictly a creature of reciprocity [that] has little to do with other sorts of morality”,²⁰³ i.e. communism and hierarchy.

Debt is a creature of reciprocity in the sense that, for one even to ‘feel indebted’, i.e. under a moral obligation to reciprocate something that they have received from someone else in the past, it is necessary that the underlying relationships are, first of all, understood in terms of exchange. In a relationship proceeding according to a different morality, e.g. communism or hierarchy, one could receive something and not feel ‘indebted’, but one would actually expect to receive what one has, based either on the knowledge that, if needed, one too would give what one can (communism), or that, according to precedent, things

¹⁹⁵ Graeber, *Debt* (n 194) 94. Communism as principle of morality is not just about property ownership. ‘Baseline’ or ‘everyday communism’, in particular, is the raw material of all human sociability, “a recognition of our ultimate interdependence that is the ultimate substance of social peace”, *ibid*, 98-99.

¹⁹⁶ *ibid*, 109.

¹⁹⁷ *ibid*

¹⁹⁸ *ibid*, 103.

¹⁹⁹ *ibid*

²⁰⁰ *ibid*, 104.

²⁰¹ *ibid*, 121.

²⁰² *ibid*, 122.

²⁰³ *ibid*, 121.

have always been and will always be this way (hierarchy).

While, on one side, as Graeber suggests, debt promotes social linkages, creating a ‘bond’ between actors who could otherwise be potentially unrelated (let us think, for instance, of foreign debt contracted by a State with a non-resident individual or commercial bank), on the other hand, this also entails that, because of the exchange nature of this interaction, debt aside, the two parts do not really need to share any further common purpose, aim, or interest. Their fates can be entirely indifferent to each other; their relationship can be limited to and last for the period of indebtedness. Once the latter is written off, “when the money changes hands, [...] both parties can walk away and have nothing further to do with each other”.²⁰⁴ If this can be perfectly acceptable in the case of purely commercial transactions, it might be less so when the ultimate purpose of one party is the realisation of its sovereign functions. Not all social interactions are, nor ought to be forms of exchange.²⁰⁵ In market societies, though, we have grown used to the idea that all relationships must be based on reciprocity, and that reciprocity is always necessarily ‘just’. We are essentially used to imagining ‘justice as reciprocity’ and tend to feel non-reciprocal relationships as somehow ‘unjust’.

The original and final ‘separation’ between the parties in an exchange relationship is also an inherent difference between debt and other modes of State financing, in particular taxation, where there is a coincidence (at least in principle) between the interests and objectives of the taxpayers and the State, who both share a common destiny. It is true that in some cases, for instance with domestic debt, such separation is formally absent. Nonetheless, if we consider, in very abstract terms, lending as an alternative to taxpaying (as was the case, for instance, in 12th-century Italian city-States), domestic indebtedness may imply a different, less participatory, way of conceiving one’s contribution to the resources needed to realise collective aims. Clearly, since debt has to be repaid, “debt financing is in the interest of those who have the means to lend to the government”,²⁰⁶ but “[f]rom the standpoint of the general interest, it is normally

²⁰⁴ *ibid*, 122.

²⁰⁵ *ibid*,

²⁰⁶ Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014) 540.

preferable [in terms of justice and efficiency] to tax the wealthy rather than borrow from them”.²⁰⁷ The ultimate purpose of credit is personal profit. Taxpaying represents, instead, individual support to the achievement of the common good. Debt, even domestic debt, contributes to realising a less cohesive community, a community whose members may still be ‘bonded’, but ultimately in a relationship where some owe something to others, rather than everyone to everybody else *per* the State. This idea is partially supported by the fact that, historically, debt as a form of State financing emerged long before direct taxation, precisely because the cohesive political, social and institutional structures that were needed to implement direct taxation, had not yet been developed.

I do not intend to demonise sovereign borrowing here. In many cases, it can be a mere necessity and, under certain conditions, responsible borrowing represents an opportunity and a resource for development. It seems worthwhile nonetheless to reflect on its multifaceted implications, especially on the way in which indebtedness and taxation relate and evolve side by side (and historical perspectives can offer many interesting ideas on this).

A further characteristic of debt highlighted by Graeber’s analysis is that

[d]uring the time that the debt remains unpaid, the logic of hierarchy takes hold. There is no reciprocity. [...] [D]ebtor and creditor confront each other like a peasant before a feudal lord. The law of precedent takes hold. If you bring your creditor tomatoes from the garden, it never occurs to you that he would give something back.²⁰⁸

Across the world and history, as this chapter has discussed, indebtedness involves (as any ‘relationship’ actually does) a certain grade of dependency, be it that of the maritime republic, the medieval monarch, or the nation-State, from rich merchant and banking families, other States, supranational institutions or international financial elites of any kind. Borrowing means depending on someone else’s resources,²⁰⁹ and with dependence comes external influence, if not actual control. Nevertheless, in order to finance its functions and no matter

²⁰⁷ *ibid*

²⁰⁸ Graeber (n 194) 121.

²⁰⁹ Carlo Focarelli, *Trattato di Diritto Internazionale* (UTET 2015) 1545.

how it chooses to do so, any political organisation must ‘depend’ on someone. Is not taxation a form of financial ‘dependence’ on the taxpayers after all? As Margaret Levi has suggested:

rulers always depend on others for some of the resources necessary to acquire and sustain rule. They depend on the generals and even the soldiers of their armies, on the owners or managers of economic wealth, on the church officials who justify their status, or on the scientists or inventors of new technologies of force.²¹⁰

The question at stake, then, is rather the following: ‘who’ is in a position to influence or control, through the reins of money, what a State should or is able to achieve? Does such control undermine democracy, and if so, how?

A final interesting fact, and one that is often understated, is that such dependency between debtor and creditor can be reciprocal as well. No political authority, not even the great monarchy of Philip II, has ever been so powerful as not to fear the consequences of an arbitrary default; and no financial power so independent from the losses that such a default would imply. Any political, social or economic system, be it local or global, is still a ‘system’, and as such interconnected and interdependent, despite threatening assertions to the contrary. This is something to be firmly kept in mind when discussing responsibilities for and possible ways out of a sovereign debt crisis.

2.6. Conclusions

This chapter was aimed to introduce the idea of sovereign debt. Firstly, it presented its legal definitions under EU and international law, emphasising how these essentially reflect the historically contingent conceptions of debt that caught the eye of EU and international law-makers. Legal definitions do not describe a concept as it is, but as it made legally relevant for regulation, so that they can become ‘outdated’ (as in the case of the definition encompassed by the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts) and, more generally, provide only a partial picture of a

²¹⁰ Margaret Levi, *Of Rule and Revenue* (University of California Press 1989) 43.

specific concept.

The chapter has gone beyond purely formalistic definitions of sovereign debt, presenting the concept of debt from an economic perspective: its role in State financing, its link with the public deficit, and its interaction with the other relevant economic variables, notably a country's rate of economic growth and interest rates.

The chapter has extensively described the origins and historical development of borrowing as a State practice, since its roots in 12th-century Italian city-States, up to contemporary debt trends in advanced economies. The function, moral grounds, and instruments of debt have changed in an extraordinary way throughout history. Today, sovereign debt represents a routine, market-based State financing practice, with a strong international dimension, to which States increasingly resort for balance of payment purposes.

Finally, the chapter has reflected upon the nature of debt as a social relationship, taking its cue from David Graber's work on the concept. Debt is premised on relationships based on the moral principles of exchange and reciprocity and it is governed by the logic of hierarchy.

Chapter III

The Welfare State

3.1. Introduction

The Welfare State has been, since its early development, a question of great interest from a wide range of disciplinary perspectives, and an immense body of literature exists addressing its manifold nature. Yet, the notion is still surrounded by disagreement over a definite meaning and confusion over the origins of the term.²¹¹ More than twenty-five years after Gøsta Esping-Andersen noted in the 1990s the scant conceptual attention received by the notion itself,²¹² the Welfare State remains a challenging concept to be portrayed univocally. Some even reached the (doubtful) conclusion that the term has been “emptied of any explanatory meaning”,²¹³ since no criteria supposedly exist to differentiate Welfare from non-Welfare States once and for all.

It seems, perhaps, more reasonable to concede that the Welfare State cannot be portrayed as a “single, unified, unambiguous entity”.²¹⁴ It is a dynamic political artefact, shaped by a range of national and supranational, economic, social, ideological and political circumstances. These wide-ranging factors, gave birth and moulded several different conceptions of the same basic concept, i.e. the one typically reproduced by textbooks and dictionary definitions: the Welfare State is a State that assumes responsibility for the well-being of its people.²¹⁵ As Esping-Andersen eloquently put it:

²¹¹ John Hudson, ‘Welfare’ in Peter Dwyer and Sandra Shaw, *An Introduction to Social Policy* (SAGE 2013) 5. Archbishop William Temple is often credited with the invention of the phrase in his *Citizen and Churchman* of 1941, but it has been convincingly argued that the German term ‘Wohlfahrtsstaat’ had been in use since the 1920s, and Alfred Zimmern had already used the term in 1934, defining the Welfare State as a liberal rule of law State as opposed to the power States of Central Europe, see Daniel Wincott, ‘Images of Welfare in Law and Society: The British Welfare State in Comparative Perspective’ (2011) 38 *Journal of Law and Society* 3, 348.

²¹² Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990) 18.

²¹³ Bob Deacon, *Global Social Policy and Governance* (SAGE 2007) 4.

²¹⁴ *ibid.*, 3.

²¹⁵ An important distinction must be made between the notion of ‘Welfare State’ and that of the so called ‘Social State’. The former, which is the object of the present work, is a descriptive

[t]he Welfare State is something other than whatever menu of social benefits a State happens to offer. [...] [It is] more than social policy; it is a unique historical construction, an explicit redefinition of what the State is all about.²¹⁶

In fact, ‘Want, Disease, Ignorance, Squalor and Idleness’, or the ‘Five Giants’ on the road of post-war reconstruction and social progress identified in his famous 1942 report by William Beveridge—the economist and social reformer conventionally associated with the development of the British Welfare State—²¹⁷ have existed worldwide, in some form or other, since time immemorial. Nonetheless, until the second half of the 19th century, from which the early origins of European Welfare States date back, those ‘evils’ were treated more as the object of moral (rather than political or, least of all, legal) concern, left to the erratic care, at the local level, of communal or familial bonds and of charitable and religious organisations.²¹⁸ The emergence of early Welfare States in Europe—and of socio-economic rights clearly distinct from charity—is conventionally associated with the full emergence of the modern nation-State and the adoption, between the 1880s and the end of World War I, of the first national, insurance-like policies and social legislation, for whose planning and implementation the State was directly responsible.²¹⁹ However, it is generally

notion, denoting the universal type of State that emerged in all developed countries in the 20th century. The ‘Social State’, on the contrary, is a normative, prescriptive idea, defining a specific polity, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres, see George Katrougalos, ‘A Short Genealogy of Social Rights’ in Nikita Aliprantis and Ioannis Papageorgiou (eds), *Social Rights at European, Regional and International Level: Challenges for the 21st Century* (Bruylant 2010) 24, footnote 62.

²¹⁶ Gøsta Esping-Andersen, *Social Foundations of Postindustrial Economies* (OUP 1999) 34 (emphasis added). Ramesh Mishra shared Esping-Andersen’s standpoint that it can be misleading to identify the Welfare State solely with social policy: the latter “is a generic concept, whereas the ‘Welfare State’ has a fairly specific historical (post-war) and policy (‘institutional’) connotation which cannot be ignored”, Ramesh Mishra, *The Welfare State in Capitalist Society: Policies of Retrenchment and Maintenance in Europe, North America and Australia* (Harvester Wheatsheaf 1990) 123.

²¹⁷ Sir William Beveridge, ‘Social Insurance and Allied Services’ (American edn reproduced photographically from the English edition and published by arrangement with His Majesty’s Stationery Office, The Macmillan Company 1942) 6.

²¹⁸ Katrougalos (n 215) 13, quoting Harry Girvetz, ‘Welfare State’ in *International Encyclopaedia of the Social Sciences*, Vol. 16 (McMillan and Free Press 1968) 512.

²¹⁹ Stein Kuhnle and Anne Sander, ‘The Emergence of the Western Welfare State’ in Francis G Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger, and Christopher Pierson (eds), *The Oxford Handbook of the Welfare State* (OUP 2010) 61; Chris Pierson and Matthieu Leimgruber,

emphasised that modern, fully-developed Welfare States only came into being, in Western Europe, after the Second World War.

The present chapter will address this ‘redefinition of the State’, to use Esping-Andersen’s expression, with the aim to layout the historical, political and philosophical foundations of the Welfare State and of welfare rights. It will not examine the specific legal content of welfare rights as international ESR, as this will be rather the focus of Chapter 4.

Hence, the first part of Chapter 3 will delve deeper into the central debates about the nature of human welfare. It will introduce the ‘Capability Approach’ formalised by economist and Nobel laureate Amartya Sen, and refined and extended by philosopher Martha Nussbaum. In particular, Nussbaum maintains that, being grounded on a specific concept of human dignity, her version of the Capability Approach is “closely allied with the international human rights movement”²²⁰ and can supplement standard human rights approaches.²²¹

The chapter will then introduce Robert E. Goodin’s theory of the Welfare State. Goodin’s theory—and relational egalitarianism more generally—add a different relational dimension to justifications of the Welfare State, not only as an institution that is necessary to ensure respect for human dignity, but also to preserve a social order in which individuals stand in relations of equality, an essential prerequisite for democratic societies to survive. What is meant by ‘equality’ in this case, will be explored further in the last section of this chapter.

The second part of the chapter, instead, will provide an historical account of the origins and development of Welfare States in Western Europe, as well as an overview of the ‘welfare regimes’ identified in particular by Esping-Andersen in his influential classification.

‘Intellectual Roots’, *ibid*, 34; Peter Flora and Jens Alber, ‘Modernization, democratization, and the development of Welfare States in Western Europe’ in Peter Flora and Arnold J Heidenheimer (eds), *The Development of Welfare States in Europe and America* (Transaction Books 1981).

²²⁰ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000) 62-63.

²²¹ Rutger Claassen, ‘Human dignity in the capability approach’ in Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 240.

3.2. What is human welfare?

The term ‘welfare’ broadly refers to “the State or condition of doing or being well, well-being, prosperity, success, the health, happiness, and fortunes of a person or group”.²²² More concretely, however, the term also refers to “particular ingredients and sources of happiness or good”,²²³ the individuation of which, predictably, has always been the object of debate.

Economic theory and philosophy have developed at least four different conceptions of welfare, respectively characterising it in terms of ‘pleasure’, ‘preferences’, ‘resources’, or ‘capability/ies’. I will only succinctly recall, here, the first three conceptions of welfare, and mention the main critiques moved against each one. On the contrary, in Section 3.2.1, I will expand more upon the ‘Capability Approach’.

The conception of ‘welfare as pleasure’ derives from the so called ‘classical hedonism’ elaborated by the utilitarians of the 18th and 19th century, in particular by Jeremy Bentham, James and John Stuart Mill, and Henry Sidgwick. Despite peculiar differences, it can be said that these economic theorists shared the following line of thought: “(1) Individual welfare is the only thing desirable as an end. (2) Welfare consists in happiness. (3) Happiness consists in pleasure and the absence of pain, both construed as mental states. (4) Therefore, pleasure is the only thing desirable as an end”.²²⁴ In the post-Second World War period, hedonistic conceptions of welfare have been largely abandoned and dismissed as “crude and naïve”.²²⁵ The strongest criticism moved against hedonism as a theory of welfare was that pleasure is not able to account for all the different motivational forces in human nature.

²²² ‘Welfare’ in the *Oxford English Dictionary (OED) Online* (last accessed 16 January 2016). The term derives from ‘well’ and ‘fare’, the latter word understood as a journey or arrival and, later, also as a supply of food, see Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Fontana 1976) 281, quoted in Bent Greve, ‘What is welfare and public welfare?’ in *The Routledge Handbook of the Welfare State* (Routledge 2012) 3. Also the *Oxford English Dictionary* defines ‘fare’ both as a “going, journeying; course, passage, way; voyage” and, with a more archaic meaning, as “food, regarded with reference to its quality; supply or provision of food, regarded as abundant or scanty”.

²²³ Jonathan Riley, ‘Welfare: Philosophical Aspects’ in *International Encyclopedia of the Social and Behavioural Sciences*, vol. 25 (2nd edn, Elsevier 2015) 504.

²²⁴ Leonard Wayne Sumner, ‘Welfare, Happiness, and Pleasure’ (1992) 4 *Utilitas* 2, 199.

²²⁵ Riley (n 223) 506.

Preference-oriented approaches to welfare, instead, “conceive personal welfare in terms of personal preferences, and social welfare in terms of social or moral preferences that are constructed in some way from the set of personal preferences”.²²⁶ Preferences can be defined in terms of observable ‘choice behaviour’ (i.e. a person’s preference for x over y is revealed when that person chooses x when also y is available), or in terms of ‘desires’ (a preference for x over y implies greater desire-satisfaction, but not necessarily greater pleasure, from x than from y). Although this approach incorporates those situations in which choices are not necessarily taken because of an expected pleasure, but rather, in some cases, even despite an expected suffering, its subjectivism has been criticised for failing to take into account the conditions under which personal preferences are formed, and the capacities required to make the relevant choices or form the relevant desires.²²⁷ This criticism introduces the fundamental idea that human beings are not totally independent, unconnected atoms in society, nor their choices happen in a vacuum. Pleasure, happiness, choices or desires, among other States of the human body and mind, are strongly influenced by space, time and context. Among others, Amartya Sen has emphasised how, in some circumstances, preferences or desires may just be a response to entrenched deprivation:

[a] person who has had a life of misfortune, with very little opportunities, and rather little hope, may be more easily reconciled to deprivations than others reared in more fortunate and affluent circumstances. The metric of happiness may, therefore, distort the extent of deprivation, in a specific and biased way. The hopeless beggar, the precarious landless labourer, the dominated housewife, the hardened unemployed or the over-exhausted coolie may all take pleasures in small mercies, and manage to suppress intense suffering for the necessity of continuing survival, but it would be ethically deeply mistaken to attach a correspondingly small value to the loss of their well-being because of this survival strategy.²²⁸

Finally, resource-oriented approaches to welfare (such as those adopted,

²²⁶ *ibid*

²²⁷ *ibid*, 507.

²²⁸ Amartya Sen, *On Ethics and Economics* (Blackwell 1987) 45.

among others, by John Rawls and Ronald Dworkin) define personal welfare in terms of an ‘objective’ list of resources, and social welfare in terms of the effective production and fair distribution of these resources.²²⁹ This conception of welfare has raised several objections, the most important being, perhaps, the fact that it does not seem to take into account interpersonal variation in human capacities to convert resources into the achievement of what Sen labelled as human ‘functionings’.²³⁰

3.2.1. The Capability Approach

In contrast to resource-based or preference-based approaches, the Capability Approach developed by Sen assumes *functionings* and *capabilities* as the value-objects and measures of well-being.

According to Sen, a person’s living – human life – consists of

a set of interrelated ‘functionings’, consisting of beings and doings [...] [which] can vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity and premature mortality, etc., to more complex achievements such as being happy, having self-respect, taking part in the life of the community, and so on.²³¹

Sen later described functionings also as “the various things a person *may value* doing or being”,²³² or “the things he or she has reason to value”,²³³ in order to build into the concept itself the normative criterion for deciding which functionings are valuable or not and will ultimately lead to well-being: i.e. individuals themselves are the judges of such decision.²³⁴

Functionings, Sen claims, are “constitutive of a person’s being, and an evaluation of well-being [i.e. the quality of a person’s living] has to take the form

²²⁹ Riley (n 223223) 507.

²³⁰ *ibid.*, 508.

²³¹ Amartya Sen, *Inequality Re-examined* (OUP 1995) 40.

²³² Amartya Sen, *Development as Freedom* (OUP 1999) 75.

²³³ Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009) 231, quoted in Claassen (n 221) 240.

²³⁴ Claassen (n 221) 240.

of an assessment of these constituent elements”.²³⁵ To this aim, the ‘capability’ to function represents “the various combinations of functionings (beings and doings) that the person *can* achieve”,²³⁶ and it reflects “the person’s freedom to lead one type of life or another[] [...] to choose from possible livings”.²³⁷ The quality of a person’s living/life – her well-being or welfare – depends therefore on her *achieved functionings*, but also on her *capability* to achieve functionings, i.e. on the real choices she has to live the life she values.²³⁸ In this perspective, resources, primary goods or real income (i.e. the variables on which other conceptions of welfare are based) are just ‘instruments’ to achieve wellbeing, while functionings are its ‘constitutive elements’, and capability reflects freedom to pursue these elements.²³⁹

The freedom that people has to achieve well-being ultimately shapes, in Sen’s opinion, the ‘goodness of the social State’:

this freedom [i.e. the capability], reflecting a person’s opportunities of well-being, must be valued at least for *instrumental* reasons, e.g. in judging how good a ‘deal’ a person has in society. But in addition [...] freedom may be seen as being intrinsically important for a good social structure. A good society, in this view, is a society of freedom.²⁴⁰

Martha Nussbaum, instead, uses the notion of capability in the plural, ‘capabilities’, “in order to emphasise that the most important elements of people’s quality of life are plural and qualitatively distinct [...] [not] reduc[ible] to a single metric without distortion”.²⁴¹ According to her interpretation, a capability is an ability or opportunity to choose a specific functioning, so that for every functioning there is a capability to function in that way. Capabilities are, thus, “what Sen calls ‘substantive freedoms’, a set of (usually interrelated)

²³⁵ *ibid*

²³⁶ Sen, *Inequality Re-examined* (n 231) 40 (emphasis added).

²³⁷ *ibid*

²³⁸ Sen notes the difference between ‘achieved functionings’ and ‘capabilities’, and the different way in which these influence the well-being of a person. In fact, being well-nourished (i.e. an achieved functioning) is intrinsically important for the wellness of a person. The capability to be well-nourished, instead, on one side reflects the freedom of that person to achieve well-being and, on the other, is also a functioning itself (i.e. being able to choose).

²³⁹ Sen, *Inequality Re-examined* (n 231) 43.

²⁴⁰ *ibid*, 40-41 (emphasis in the original).

²⁴¹ *ibid*, 18.

opportunities to choose and to act”.²⁴² They are freedoms to achieve functionings, while the latter are the active realisation of one or more capabilities.

Sen does not believe that “all types of capabilities [that is, in his version of the term, all the different combinations of functionings that a person can achieve] are equally valuable”²⁴³ (health and education, for instance, have a particular centrality), but he has refused to give directions himself as to which capabilities society should promote, leaving their selection to public and democratic deliberation.²⁴⁴ In Nussbaum’s version of the capability approach, on the contrary, “some capabilities are important and other less important, some good, some (even) bad”,²⁴⁵ and selection is entrusted to an ethical process in which the concept of *human dignity* assumes pre-eminence, and becomes the ground for political and legal entitlement to a certain set of ‘basic capabilities’.²⁴⁶ She, indeed, argues that “some living conditions deliver to people a life that is worthy of the human dignity that they possess, and others do not”.²⁴⁷

Nussbaum puts her dignity-based Capabilities Approach “to work in constructing a theory of basic social justice”²⁴⁸, a capability-based theory of justice, or a “theory of fundamental political entitlements”.²⁴⁹ Her theorisation provides an essential normative basis to reflect upon the Welfare State, which I am introducing in the following Section.

3.2.1.1. Human dignity and ‘Central Capabilities’ as the normative basis for the Welfare State

Unfortunately, it is not possible to retrace Nussbaum’s full argumentation here, but I will briefly introduce her idea of dignity, from which both a list of

²⁴² *ibid*, 20.

²⁴³ Sen, *Inequality Re-examined* (n 231) 40.

²⁴⁴ Claassen (n 221) 241; Martha Nussbaum, ‘Human Dignity and Political Entitlements’ in President’s Council on Bioethics, *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* (2008).

²⁴⁵ Nussbaum, *Women and Human Development* (n 220) 28.

²⁴⁶ Claassen (n 221) 241.

²⁴⁷ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Harvard University Press 2011) 30.

²⁴⁸ *ibid*, 19.

²⁴⁹ *ibid*

basic, Central Capabilities and a specific account of social justice stem (before moving to address the role that Nussbaum consequently envisages for politics and the law in a pluralistic democratic society).

Nussbaum accepts, on one side, the (Stoic-Kantian) idea of dignity as the idea of the person being an *end*, rather than a *means* to be used for the ends of others. This idea is conceptually related (to the point that the two notions are not totally independent, according to Nussbaum) to the idea of *respect* as “the proper attitude towards dignity”, i.e. what dignity requires.²⁵⁰

On the other side, however, she rejects the (Kantian) ascription of dignity to humans based on their rational powers—or what she calls the ‘capability of practical reason’, i.e. the capacity for moral choice—, as well as ascription possibly based on any single capability. In fact, this “would exclude from human dignity many human beings with severe mental disabilities”,²⁵¹ or lacking some other specific capability (e.g. for care or social interaction). Dignity is, thus, rather attached to human beings’ capacity for various forms of activity and striving, to agency more in general (not to normative agency specifically).

Human dignity is also “equal in all who are agents in the first place”,²⁵² so that “all [...] deserve equal respect”.²⁵³

Nussbaum also, very importantly, rejects the (Stoic) quietistic (and inconsistent, in her view) attitude to the outer world. According to the Stoics, in order for it to be of truly equal and infinite worth, human dignity has to be radically independent from the accidents of fortune. The Stoics considered dignity as inalienable and inviolable: “[m]oney, honour, status – but also health, friendship, the lives of one’s children and spouse – all these things, according to the Stoics, have no true worth”.²⁵⁴ If we accept this idea, as Nussbaum argues, there can be nothing that respect for dignity practically requires nor, importantly, “anything that politics can give”.²⁵⁵

More in affinity with the Aristotelian-Marxist tradition, instead, Nussbaum argues that human dignity is neither independent, nor inviolable by the outer

²⁵⁰ Nussbaum, ‘Human Dignity and Political Entitlements’ (n 244).

²⁵¹ *ibid*

²⁵² Nussbaum, *Creating Capabilities* (n 247) 31.

²⁵³ *ibid*

²⁵⁴ Nussbaum, ‘Human Dignity and Political Entitlements’ (n 244) 355.

²⁵⁵ *ibid*, 356.

world. Human capacities for various forms of activity and striving are innate and inalienable, yet unfulfilled, incomplete. They *depend* on the outer world:

human beings have a worth that is indeed inalienable, because of their capacities for various forms of activity and striving. These capacities are, however, dependent on the world for their full development and for their conversion into actual functionings.²⁵⁶

Such dependence implies that dignity *can* be violated, whenever a person is deprived of the ability or opportunity to exercise and develop her capacities. Respect for dignity therefore requires the protection and promotion of certain capabilities:

the Stoics are wrong if they think that respect requires only a reverential attitude. It requires more: it requires creating the conditions in which capacities can develop and unfold themselves. [...] Respect for human dignity [...] means creating conditions favourable for development and choice.²⁵⁷

Not all capacities that inhere in human nature, however, are in Nussbaum's opinion the source of moral and political claims. On the contrary, her Capabilities Approach aims at the primary protection of those areas of freedom that are so crucial, that their removal would make a life not worthy of human dignity. In this sense, she proposes – leaving this open to discussion – that, at a bare minimum, an ample threshold level of ten Central Capabilities should be guaranteed to every person: *Life; Bodily health; Bodily integrity; Senses, imagination, and thought; Emotions; Practical Reason; Affiliation; Other species; Play*; and political and material *Control over one's environment*.

It would be beyond the scope of this Chapter to go into details here on each of these capabilities, so I will leave it to another place. Nonetheless, it is essential to highlight here that Nussbaum's account of social justice fundamentally claims that “respect for human dignity requires that citizens be placed above an ample (specified) threshold of capability, in all ten of those areas”.²⁵⁸

²⁵⁶ *ibid*, 357.

²⁵⁷ *ibid*, 359.

²⁵⁸ Nussbaum, *Creating Capabilities* (n 247) 36.

Before moving to investigate why the State, in Nussbaum's opinion, should bear responsibility for creating such conditions, I would like to supplement her approach with a different perspective on dependency, remarkably provided by Robert E. Goodin in the context of his theory of the Welfare State.²⁵⁹ I am convinced, in fact, that his elicitation of the socio-economic dimension of dependency may add a significant analytical layer to the idea of social justice, and provide a different perspective also on why no one else but the State—insofar as it remains the most important political unit of the modern world—can be responsible for its achievement.

3.2.2. Relational theories of the Welfare State

Dependence is intrinsic to the human condition, as well as an intrinsically relational concept. As embodied agents, “incomplete and wounded animals”,²⁶⁰ human beings are constantly threatened with insecurity. Dependence—from the material conditions of existence, but also from other humans, especially in certain phases of our life—is a consequence of our existential incompleteness and vulnerability. The latter are the fundamental basis of society itself,²⁶¹ as we need each other and the social institutions that we erect, e.g. the family, kinship groups, tribes, wider communities, and even the State, to defend ourselves and confront the contingencies of the everyday world.²⁶² These same institutions, however, can significantly influence the nature and consequences of dependence.

Goodin has emphasised the social dimension of dependence: we all depend upon the outer world but what matters most, remarkably in terms of social justice, is upon ‘whom’ we ultimately depend.

In fact, nothing makes human dependence necessarily ‘wrong’, or autonomy

²⁵⁹ Robert E. Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton University Press 1988).

²⁶⁰ Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Doubleday 1967) quoted in Bryan S. Turner, ‘Sociology of Human Rights’ in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 88.

²⁶¹ Turner (n 260) 88.

²⁶² *ibid*

necessarily 'right'. As Goodin noted:

[i]n any reasonably complex society, most people are dependent upon a great many other people for a great many things. Interdependence is the essence of all mutually profitable trades, of all political alliances, and of all friendships and loving relations. No one thinks that there is anything wrong with such relationships merely by virtue of the fact that people within them depend upon one another.²⁶³

The problem with dependence, Goodin argued, lies in the possibility of interpersonal exploitation of dependencies.

Interpersonal exploitation consists of taking unfair advantage of some peculiar features of a person and her situation. The unfairness associated with interpersonal exploitation lies in "*playing for advantage* in situations where it is *inappropriate* to do so",²⁶⁴ so that exploitation essentially entails an abuse of power. This can be either because a) the other person has renounced playing for advantage herself, as, for example, friends or lovers usually do; or because b) the other person is unfit or otherwise unable to play in games of advantage at all, being therefore in no position to bargain, e.g. in the case of a drowning millionaire—to use Goodin's own example—who agrees to pay a large fortune to someone who is in the position to throw her a life preserver; or when c) there is a vastly disproportionate bargaining power, so that it is inappropriate/unfair for the strong part to press its advantage against a hopeless, outmatched opponent; or, finally, when d) someone's relative advantage derives from others' grave misfortunes.²⁶⁵

Goodin argued that only a certain type of dependencies may be at risk of interpersonal exploitation. Exploitable dependencies, in fact, derive from relationships that are 1) asymmetrical (i.e. not characterised by mutual dependence), and where 2) the subordinate party needs the resource that 3) only a particular superordinate can supply, with 4) discretionary control over it (i.e. where no rules exist that can force the supplier to provide the subordinate with the much needed resource). In these cases, the subordinate party is particularly

²⁶³ Goodin (n 259) 175.

²⁶⁴ *ibid*, 144 (emphasis in the original).

²⁶⁵ *ibid*, 145-146.

vulnerable to the actions and choices of the superordinate.

Such dependencies stem from unequal, inescapable relationships that give the superordinate a great deal of power over the subordinate, which the superordinate can potentially abuse. Dependencies of this kind are a source of vulnerability. It is difficult to imagine how they can exist without threatening human dignity, the idea of equal human worth and, ultimately, freedom.

Exploitable dependencies may arise, according to Goodin, first and foremost from market relationships, but also from family relationships, or relationships with a State bureaucracy that retains a high level of discretion in the provision of welfare.

Interpersonal exploitation is inherently morally wrong, according to Goodin, and it consists of wrongful behaviour of a particular sort: the violation of the moral duty to protect the vulnerable in some particular way.²⁶⁶

Goodin admitted that the extent of people's vulnerability varies and can be difficult to ascertain: some persons may be vulnerable to many people, all the time and with respect to a broad range of aspects of their well-being, while others may be vulnerable only to particular people, for a brief moment, and only with respect to a very narrow range of threats.²⁶⁷ However, anyone who is vulnerable to someone else has, "to the extent of that vulnerability and by reason of that vulnerability",²⁶⁸ a claim to protection by that someone (although, Goodin clarified, the more vulnerable a person is to someone else, and that someone alone, the stronger the latter's duty is to protect that person).²⁶⁹

The corresponding duty to protect the vulnerable is, therefore, a two-fold duty: not only to 1) take positive measures to assist those who are particularly vulnerable to us (a 'weaker' form of the duty, whose violation constitutes a mere 'failure to discharge'); but also, more importantly, a duty to 2) suspend ordinary rules of behaviour in dealing with those who are particularly vulnerable to us and, specifically, to refrain from pressing our (unfair) advantage against them in the way that would have been perfectly permissible in ordinary, everyday relationships (a 'stronger' form of the duty, whose violation represents a

²⁶⁶ *ibid*, 147.

²⁶⁷ *ibid*, 148, footnote 35.

²⁶⁸ *ibid*

²⁶⁹ *ibid*. Goodin emphasised that the source of one's vulnerability is morally irrelevant.

‘flagrant delict’).²⁷⁰

The duty to protect the vulnerable rests, first and foremost, upon each and every one of us: we ought not to do ourselves anything that would constitute a flagrant delict against those who are vulnerable to our own actions and choices.²⁷¹ However, we also have, laid upon all of us, a duty to *prevent* the vulnerable from being exploited by anyone, more generally, who is peculiarly well placed to do so²⁷² (i.e. a duty to prevent exploitable dependencies).

The Welfare State, thus, in Goodin’s theory, is “one particularly apt way of discharging [this sort] of duty toward vulnerable others, preventing their exploitation not just by us but by anyone”.²⁷³

3.2.3. Why we (should) have a Welfare State

Nussbaum and Goodin’s theories provide two different but potentially mutually reinforcing justifications for the State to assume responsibility to care for the vulnerable.

Nussbaum argued—a common ground with human rights approaches—that “all people have some core entitlements just by virtue of their humanity”.²⁷⁴ These entitlements correspond, in Nussbaum’s theory, to the enjoyment of a specific threshold of the ten Central Capabilities that she has identified and which, she pointed out, substantially overlap with the human rights recognised in the Universal Declaration of Human Rights, as well as other human rights instruments.

The correlated duties belong first and foremost, to the basic political structure of society, i.e. the State.²⁷⁵ According to Nussbaum, in fact, we cannot assign duties directly to individuals, “we need an institutional solution”.²⁷⁶ In fact, she strongly argues that

²⁷⁰ *ibid*, 149.

²⁷¹ *ibid*, 151.

²⁷² *ibid*

²⁷³ *ibid*, 152.

²⁷⁴ Nussbaum, *Creating Capabilities* (n 247) 62.

²⁷⁵ Nussbaum, ‘Human Dignity and Political Entitlements’ (n 244) 359-360.

²⁷⁶ Nussbaum, *Creating Capabilities* (n 247) 120.

[t]he nation [State] is not just a convenient starting place: it has moral importance. Nations – reasonably democratic ones, at any rate – are systems of principles and laws that have their ultimate source in the people. They are thus important expressions of people’s autonomy, that is, their entitlement to live under laws of their own choosing. Thus key aspect of the Capabilities Approach, especially its respect for practical reason and for political empowerment, lead it to accord the nation a central standing and to pursue a world in which national sovereignty is protected for reasonably democratic nations.²⁷⁷

Indeed, she explored the possibility of assigning the duties towards Central Capabilities to a ‘World State’, the United Nations, the European Union, or perhaps even international non-governmental organisations, but all these institutions seem to lack, at present, the accountability that only democratic nations possess.

However, according to Nussbaum, the duties deriving from her Capabilities Approach belong, in the second place, to the governments of richer nations, which have obligations to assist the poorer nations.²⁷⁸ The “bare existence of inequality (pushing many people beneath the capability threshold) is reason enough to do something about it”.²⁷⁹

This idea resonates in the duty of international assistance and cooperation affirmed in international law, *inter alia*, in article 2(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (on which, see Chapter 4).

According to Goodin, instead, the justification for the Welfare State is the elimination of (exploitable) dependencies:

[t]here are many people who, absent Welfare State assistance, would be dependent upon and peculiarly vulnerable to particular other individuals [i.e. family, friends, neighbours or the market] for satisfaction of their basic needs. Through Welfare State programs, such people become less dependent upon those particular other individuals. Being less vulnerable to

²⁷⁷ *ibid*, 113-114.

²⁷⁸ *ibid*, 64 and 117.

²⁷⁹ *ibid*, 115.

the actions and choices of those particular other individuals, they are less exploitable by them.²⁸⁰

Thus, a (minimal) Welfare State, in Goodin's definition, is a State which, at least,²⁸¹ attempts to relieve palpable distress of those in desperate circumstances, through programs of general social assistance, *as a matter of right*, i.e. "in a way that [its] agents [...] are bound by a legal duty to provide those in distress with certain resources that they need [...] [and] must have no discretionary power over those resources that the State allocates for the relief of people in distress".²⁸² This idea directly links to the notion of 'social rights', as Goodin himself acknowledged: "[t]he crucial shift from the old poor law State to the modern Welfare State lays in the emergence of welfare rights to supplant notions of public benefice".²⁸³

Goodin shares, although with a different motivation, the conviction that other social actors, such as the market, the family, or religious and charitable organisations are not adequate substitutes for the State. Especially in reason of their discretionary power, he is very critical of their role with regard to welfare provision, as well as of conservative critiques that, instead, argue in favour of a return to private and public 'charity'. According to Goodin, charging the family, for instance, of welfare provision, simply amounts to shifting there the *locus* of dependency, while both market and family can produce, in different ways, exploitable relationships.²⁸⁴

Goodin's arguments concur with the political aims of so called 'relational

²⁸⁰ *ibid*, 152.

²⁸¹ Goodin's defence of a 'minimal' Welfare State is, as he stressed, "an argument that the State *should* provide for people's basic needs [...] [and] should do that much *at the very least*", Goodin (n 259) 18. He is setting a minimum task for the State, not a maximum one. He also identifies other characteristic elements of the Welfare State, namely that it intervenes a) in a market society (it does not aim at subverting the existing economic structure), b) to meet certain of people's basic needs, c) through relatively direct means (therefore representing an alternative to the market, not an 'opportunity for' the market). Furthermore, the Welfare State is a system of compulsory, collective (non-private) and largely non-discretionary mode of welfare provision (differently from charitable or voluntary provision of welfare).

²⁸² *ibid*, 6-7.

²⁸³ *ibid*, 19.

²⁸⁴ Without an explicit reference to the concept of exploitation, the same perspective is shared also by Esping-Andersen, who measured welfare outcomes precisely in terms of levels of de commodification and defamilialisation, as it will be said in Section 3.3.2.1.

egalitarianism’.

Relational equality represents a collective conception of social equality, in that it is concerned with and, differently from individualized conceptions, attributes the property of equality to the overall structure of a society, requiring that this is not characterised by settled hierarchies, or relations of domination, oppression or exploitation.²⁸⁵ Individualized conceptions of equality (‘distributional equality’) focus, instead, on “the relationship between particular properties (P1, P2, etc.) of individuals and the amount of socially distributed goods (G1, G2, etc.) that these individuals control”,²⁸⁶ their concern being, therefore, to identify the properties “which must *not* trigger *unequal* amounts of social goods”.²⁸⁷

According to relational egalitarians, equality should be seen as a property of a given social structure or of social relations, rather than (just) a property of the distribution of social goods. In the case of relational egalitarianism, in other words, social relations are the value-object of equality, while distributional equality focuses on the distribution of social goods. Thus, relational egalitarians assert that the proper negative and positive aims of egalitarian justice should be, respectively, to end oppression (“by definition socially imposed”),²⁸⁸ or domination,²⁸⁹ or hierarchy,²⁹⁰ and “to create a community in which people stand in relations of equality to others”.²⁹¹

Social relations are, thus, considered ‘relations of equality’ when they are characterised by the absence of hierarchies, oppression, domination, or exploitation.

A particular individualized notion of equality that has been vehemently criticised by relational egalitarians is that of so called ‘luck egalitarianism’, or ‘equality of fortune’ (promoted by theorists such as Ronald Dworkin and Gerald Cohen), according to which

²⁸⁵ Wojciech Sadurski, *Equality and Legitimacy* (OUP 2008) 148-149.

²⁸⁶ *ibid*, 148.

²⁸⁷ *ibid* (emphasis in the original).

²⁸⁸ Elizabeth S Anderson, ‘What is the Point of Equality?’ (1999) 109 *Ethics* 2, 289.

²⁸⁹ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press 1997).

²⁹⁰ Samuel Scheffler, ‘Choice, Circumstance, and the Value of Equality’ (2005) *Politics, Philosophy and Economics* 4, 5-28.

²⁹¹ Anderson (n 288) 289.

equality can be conceived as an ideal whose aim is to eliminate the impact of luck (or bad fortune) on our social positions [...] [that is to say] that some types of properties of individuals (P) must not trigger unequal distribution of certain goods (G). In this case, properties P which are disqualified from triggering unequal amounts of good G are those which can be properly described as fortuitous, morally arbitrary, or as being beyond any effective control for an individual concerned.²⁹²

Luck egalitarianism, in Elizabeth Anderson's particular view, aims to correct what it takes to be injustices generated by the natural order, and regards two people as equal so long as they enjoy equal amounts of some distributable good – income, resources, opportunities for welfare, etc. – while regarding social relationships as instrumental to generating patterns of distribution.²⁹³ She particularly objected luck egalitarians' focus on correcting a supposedly "cosmic injustice" while neglecting the "distinctively *political aims* of egalitarianism".²⁹⁴

In order to defend what, in her view, the original purposes of egalitarianism were, she observed that

[i]negalitarianism asserted the justice or necessity of basing social order on a hierarchy of human beings, ranked according to intrinsic worth. Inequality referred not so much to distribution of goods as to relations between superior and inferior persons. [...] Such unequal social relations generate, and were thought to justify, inequalities in the distribution of freedoms, resources, and welfare. Egalitarian political movements oppose such hierarchies. They assert the equal moral worth of persons. [...] Negatively, the claim repudiates distinctions of moral worth based on birth or social identity – on family membership, inherited social status, race, ethnicity, gender, or genes. [...] Positively, the claim asserts that all competent adults are equally moral agents [denying a hierarchy of types of moral agency]. [...] Egalitarians base claims to social and political equality on the fact of universal moral equality. [...] Negatively, egalitarians seek to abolish oppression – that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon

²⁹² Sadurski (n 285) 154-155.

²⁹³ Anderson (n 288) 313.

²⁹⁴ *ibid*, 288 (emphasis added).

others. [...] Positively, egalitarians seek a social order in which persons stand in relations of equality. They seek to live together in a democratic community, as opposed to a hierarchical one.²⁹⁵

According to relational egalitarianism, therefore, the Welfare State's job is to help secure the conditions for status equality and the absence of social 'domination'.²⁹⁶

3.3. Welfare States in Europe: origins and development in historical perspective

The second part of this Chapter will present the historical developments that led to the birth, consolidation, growth and ostensible decline of Welfare States in Europe. It is divided into three sections, each addressing a rough phase of transformation (although, as it will be mentioned in Section 3.3.2, a single homogeneous periodization of Welfare States' development is difficult to retrace).

Section 3.3.1 will evoke the early origins of Western-European Welfare States, up to the outbreak of the Second World War. Section 3.3.2 will retrace the post-war development of European Welfare States into 'mature' institutions, until the end of the 1970s. Their classification in the context of welfare-regime ideal types will be introduced in Section 3.3.2.1. Finally, Section 3.3.3 will introduce the 'retrenchment' phase of the Welfare State, which has begun in the late 1970s, highlighting in particular the supranational variables that may have been responsible for the reversal in the trajectory of Welfare State development.

3.3.1. 'Early' Welfare States: from the end of the 19th century to the Second World War

Ideas about a governmental, as opposed to a merely societal, *moral*

²⁹⁵ Anderson (n 288) 312-313.

²⁹⁶ This emphasis on using welfare policies to prevent 'domination' marks a point of commonality also with Esping-Andersen's ideas about the 'decommodification' effects of the Welfare State (on which below, Section 3.3.2.1).

responsibility to care for the more vulnerable members of a community have circulated since Aristotle, and were already associated with broader concerns about the purposes of government, its legitimacy, and the justice of a system of rule.

In his 1516 *Utopia*, Thomas More wrote:

If you do not find a remedy to these evils it is a vain thing to boast of your severity in punishing theft, which, though it may have the appearance of justice, yet in itself is neither just or convenient; for if you suffer your people to be ill-educated, and their manners to be corrupted from their infancy, and then punish them for those crimes to which their first education disposed them, what else is to be concluded from this but that you first make thieves and then punish them?²⁹⁷

Along the same lines, Thomas Paine suggested in 1791:

When, in countries that are called civilized, we see age going to the workhouse and youth to the gallows, something must be wrong in the system of government. [...] There lies hidden from the eye of common observation, a mass of wretchedness that has scarcely any other chance than to expire in poverty or infamy. Its entrance into life is marked with the presage of its fate; and until this is remedied, it is in vain to punish. Civil government does not consist in executions; but in making that provision for the instruction of youth, and the support of age, as to exclude, as much as possible, profligacy from the one, and despair from the other.²⁹⁸

Yet, only in the 19th century several economic, political, social and ideological factors combined—with different explanatory weight across countries and time—to change progressively the role and responsibilities of States towards the living conditions of their people.²⁹⁹ Among these factors were new ideas and more scientifically-grounded perceptions of social contingencies and poverty; the increasing inadequacy of traditional non-State welfare provision (philanthropy and poor laws); the novel conception of the rights of the

²⁹⁷ Thomas More, *Utopia* (1516) 13-14.

²⁹⁸ Thomas Paine, *The Rights of Man* (1791).

²⁹⁹ The general term ‘people’ will refer, especially in the post-Second World War context, not only to citizens, but to any person potentially under the authority of the State.

individual that stemmed from the American and French revolutions;³⁰⁰ the progressive affirmation of democratic nation-States, based on a different ‘social contract’ between the institution and its members; the industrial, urban and economic (capitalist) developments of the 19th century, and the changes they involved in terms of social structures, movements of people, and sources of social insecurity; the relevance that all these forces progressively acquired in political competition.³⁰¹

Authoritarian, imperial Germany is conventionally considered the first European country to have established, under Bismarck’s chancellorship, the legislation on sickness (1883), accident (1884) and invalidity and old age (1889).³⁰² In his famous Imperial Decree [*Kaiserliche Botschaft*] of 17 November 1881, Bismarck had announced that “curing social defects will have to be pursued not only through the repression of Social Democratic excesses but also through the consistent and positive promotion of workers’ welfare”.³⁰³ He had urged the Reichstag to give “the needy greater security and the abundance of assistance to which they are entitled”.³⁰⁴ Despite mentioning only two bills (on workers’ insurance against industrial accidents, and on a commercial health insurance system), the Imperial Decree concluded exhorting the Reichstag not to forget “that all those persons who have become unfit for gainful employment through age or disability also have a legitimate claim to a greater degree of State welfare than they have received thus far”.³⁰⁵

The new insurance laws are deemed radical not only because they introduced compulsory insurance as a ‘revolutionary’ new principle and instrument of social policy, but also because individuals (although, at this stage, essentially male, industrial workers) became entitled to social benefits as a matter of right,

³⁰⁰ Gaston V Rimlinger, *Welfare Policy and Industrialization in Europe, America and Russia* (Wiley & Sons 1971) 2-3.

³⁰¹ Kuhnle and Sander (n 219) 67-70.

³⁰² Pierson and Leimgruber (n 219) 35.

³⁰³ ‘Kaiser Wilhelm I’s Royal Proclamation on Social Policy’ in *Stenographische Berichte über die Verhandlungen des Reichstags* [Stenographic Reports on the Proceedings of the Reichstag] 5th Legislative Period, First Session 1881/82: Opening Session, 17 November 1881, Berlin (Printing Office of the Norddeutsche Allgemeine Zeitung, 1882) 1-3 <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1808>.

³⁰⁴ *ibid*

³⁰⁵ *ibid*

established and ensured by the State, rather than upon discretion and means-testing as it had been the case under poor law regimes.³⁰⁶

Despite the rhetorical language of the Decree and its legal formulation, however, Bismarck's social insurance legislation was "not intended to establish genuine subjective rights".³⁰⁷ It was a 'top-down decision', rather intended to build workers' loyalty towards the imperial regime,³⁰⁸ or "to buy off some of the nineteenth-century revolutionary Social Democrats",³⁰⁹ as Claus Offe more openly put it. Just a few years before, the Chancellor had in fact implemented an 'Anti-Socialist Law', banning all Social Democratic associations, meetings, and newspapers (between the enactment of the law in 1878 and its termination in 1890, about 1,500 people were sentenced to more than 800 years' imprisonment).³¹⁰

Indeed, contrary to common beliefs about the original propulsive role of social democracy in welfare development, two set of factors seem to have determined the establishment of the first social legislation in Europe: the need to preserve and reproduce an educated working class, to sustain the demands of the industrial revolution; and the institutional (conservative) reaction to the mobilisation of the growing labour and socialist movements. The first social laws in Europe were *de facto* 'market-supporting', rather than 'market-usurping'.³¹¹

Peter Flora and Jens Alber noted that constitutional dualistic monarchies (e.g. Germany, Austria, Denmark and Sweden) were indeed the first in Europe to introduce social insurance policies at the end of the 19th century.³¹² On the contrary, parliamentary regimes, such as more industrial and democratic (but

³⁰⁶ Kuhnle and Sander (n 219) 64.

³⁰⁷ Katrougalos (n 215) 30.

³⁰⁸ *ibid.*, 31; Rimlinger (n 300) 1971 ?; Hans-Ulrich Wehler, *The German Empire, 1871-1918* (Berg 1985); Kuhnle and Sander (n 219) 65.

³⁰⁹ Claus Offe, 'Advanced Capitalism and the Welfare State' (1972) 4 *Politics and Society* 479, 481.

³¹⁰ 'Anti-Socialist Law (October 21, 1878)', in German History in Documents and Images (GHDI), *Documents - Politics II: Parties and Political Mobilization*, 'Law Against the Publicly Dangerous Endeavours of Social Democracy', 21 October 1878 [German text in SB, IV, i (1878), vol. 1, No. 47, pp. 132-35] <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1843>.

³¹¹ Katrougalos (n 215) 22.

³¹² Flora and Alber (n 219).

liberal) England, embraced social security somewhat later, although with higher levels of coverage and protection, and often as a result of the extension of suffrage and, consequently, of political rights.³¹³ This ‘social lead’ of non-parliamentary regimes is deemed to have been the combined result of stronger State bureaucracies (required “to handle the new, highly complex social protection programmes”);³¹⁴ of a greater need for conservative regimes to appease tensions with rising labour movements; and of the presence and power of landed interests “that could shift the costs of social expenditures to the urban upper and middle classes”,³¹⁵ and which feared the rising labour movements more than a few social policy concessions.

As Chris Pierson and Matthieu Leimgruber noted, “those who [initially] fashioned the institutions and policies most widely associated with [the Welfare State] [...] were often arguing for something rather (and sometimes quite) different”³¹⁶ from what the term represents to us today. The earliest welfare programmes were not generally presented as the founding legislation of a new species of citizenship, nor was any comprehensive and universal system of social provision in the minds of those who were essentially arguing, at the very beginning, just for workplace insurance in favour of (essentially male) workers:

[t]he Welfare State only really became the project of social democracy after John Maynard Keynes and after 1945 [...]. Before that, it was really the intellectual property of others.³¹⁷

Indeed, as both Esping-Andersen and Pierson and Leimgruber remarked, the earliest socialists regarded “social policy as an alternative to socialism”,³¹⁸ and

³¹³ Ernest P. Hennock, *The Origin of the Welfare State in England and Germany, 1850-1914* (Clarendon Press 2007). See also Theda Skocpol and Edwin Amenta, ‘States and Social Policies’ (1986) 12 *Annual Review of Sociology* 131, 137-8. Esping-Andersen interestingly noted how, at the end of the 19th century, both liberals and socialists, although for different reasons, were suspicious about parliamentarism: the first feared that “democracy might produce socialism”, while the latter that “parliamentarism would be little more than an empty shell or, as Lenin suggested, a mere ‘talking shop’”, Esping-Andersen, *The Three Worlds* (n 212) 11.

³¹⁴ Pierson and Leimgruber (n 219) 33.

³¹⁵ Kuhnle and Sander (n 219) 66.

³¹⁶ Pierson and Leimgruber (n 219) 32.

³¹⁷ *ibid.*, 34.

³¹⁸ *ibid.*

social reforms “little more than a dike in a steadily leaking capitalist order”.³¹⁹ In their view, early welfare measures were not challenging the prevailing economic and political order, nor could they thus lead the working classes towards emancipation.³²⁰

These views are echoed, in more recent times, by several contemporary Marxists. For instance, Offe attacked in 1972 the ability of the Welfare State to secure societies against poverty and inequality:

The common denominator of the most advanced and of the most backward Welfare State is the coexistence of poverty and affluence, or in more precise terms, the coexistence of the logic of industrial production for profit and the logic of human need. This contradiction, which is a basic characteristic of every capitalist society, has in no way been resolved by the arrival of the Welfare State. The contradiction has been simply tempered or modified in a few aspects. The Welfare State in no way represents a *structural change* of capitalistic society. [...] [T]he Welfare State tries to compensate for *new problems* which are the by-products of industrial growth in a private economy.³²¹

In particular, according to Offe, the Welfare State has in no way altered the structure of capitalist societies, i.e. their political and economic power relationships; it has benefitted proportionally more corporate business enterprises rather than the lower classes, thanks to measures such as indirect State subsidies, government protected minimum floors of expenditures in certain areas, or maximum ceilings of taxation; and it has not actually dealt, as originally conceived, with primary human needs, but rather with the new problems created by industrial growth and capitalism itself.³²²

Returning to history, Denmark, Norway, Sweden and the United Kingdom were amongst the first countries to follow Germany's initiative by the end of the 19th and the beginning of the 20th century. Denmark adopted accident, sickness, old age/disability insurance and workmen's compensation between 1891 and

³¹⁹ Esping-Andersen, *The Three Worlds* (n 212) 11.

³²⁰ *ibid*; Pierson and Leimgruber (n 219) 34.

³²¹ Offe (n 309) 480-1.

³²² *ibid*, 481-2.

1898 and unemployment insurance in 1907. Sweden implemented a sickness and maternity benefit scheme in 1891, and the first universal contributory old age pension scheme, combined with old age assistance (thus covering all citizens above pension age) in 1913. Norway was not only inspired, like the other countries, to follow the German example, but reproduced its social insurance legislation in the Norwegian industrial accident insurance law of 1894. Norway also adopted a subsidize, voluntary unemployment benefit scheme in 1906 and compulsory sickness insurance in 1909.³²³

In the United Kingdom, the Poor Law Amendment Act of 1834 replaced the so called ‘Elizabethan Poor Law’ regime, established by the Acts of 1598 and 1601. The ‘Old Poor Law’ had assigned to parishes responsibility for their own paupers and classified the poor along a three-fold categorisation (laying the foundations of a lasting distinction between the ‘deserving’ and ‘undeserving’ poor, which has kept recurring ever since in ideas and debates about the provision of welfare both in the UK, as well as in other European countries). The ‘impotent poor’, i.e. the old, sick or lunatic, was to be accommodated in poor- or alms-houses; the ‘able-bodied poor’ was to be set to work in the parish, and their children apprenticed to a trade; and the ‘able-bodied poor who absconded’ was to be punished in the ‘house of correction’.

The Amendment Act of 1834 aimed at overcoming the discretionality and inconsistency of the parish relief system, and responding to concerns that the old system was, on one side, undermining principles of thrift and hard work while, on the other, no longer meeting the demands of 19th-century Britain. Therefore in 1834 it assigned the central government with responsibility to care for the poor, divesting individual parishes of the Poor Law’s management, and creating a locally elected Board of Guardians. This was to administer relief in ‘unions’ (groups of parishes), supervised at a central level by the Poor Law Board (replaced by the Local Government Board in 1871).³²⁴

³²³ Kuhnle and Sander (n 219) 69.

³²⁴ Among the various measures introduced by the New Poor Law (which is not possible to fully retrace here) the ‘less eligibility’ criterion is particularly relevant, as it bears an influence on later social policy reforms in Britain and resonates, for instance, in current notions of ‘workfare’, conditionality, and ideas about ‘personal responsibility’ for one’s living conditions. The Report of the Royal Commission to investigate the operation of the existing poor laws of 1832 indeed stated that “[the poor’s] situation on the whole shall not be made really or apparently

At the end of the 19th century, however, a series of reforms transformed the whole system. Britain adopted workers' compensation in 1897. In 1908, it introduced a means-tested old age pension scheme, payable from general taxation, which provided basic income for 'deserving' old people (later amended as a Widows, Orphans and Old Age Contributory Pensions Act in 1925). In 1911 the National Insurance Act introduced compulsory sickness and unemployment insurance, mainly for those active in the workforce. Its aim was to improve national efficiency and economic strength.³²⁵ By 1911, hence, Britain had surpassed Germany "as a Welfare State leader with more risks and larger parts of the population covered".³²⁶

Among the Mediterranean countries, the history of the Greek Welfare State is particularly relevant in the context of the present work. In Greece, the first elements of social insurance can be traced back almost to the creation of the Kingdom of Greece in 1830, although until the 1920s the few beneficiaries of social protection were mainly army officers and civil servants, and a small number of high-risk workers, e.g. seamen and miners. In 1836, the Seamen's Retirement Fund (NAT), the very first social insurance fund, was established.³²⁷ It has been noted, that

the idea of a national social insurance system covering the entire population was officially expressed quite early, however, it did not flourish. [...] [A]lmost in their entirety, the numerous social insurance funds that were established were the product of politics [...] [and] based on criteria directly related to clientelism.³²⁸

so eligible as the situation of the independent labourer of the lowest class", quoted in Cliff Alcock, Guy Daly and Edwin Griggs, *Introducing Social Policy* (2nd edn, Pearson, 2008) 12. An interesting contribution, which takes into account the different influence that the Catholic, Lutheran and Reformed Protestant religious heritage had on welfare developments is that of Sigrun Kahl, 'Religious Doctrines and Poor Relief: A Different Causal Pathway' in Kees van Kersbergen and Philip Manow (eds) *Religion, Class Coalitions, and Welfare State Regimes* (CUP 2009) 267-295; Sigrun Kahl, 'The Religious Roots of Modern Poverty Policy: Catholic, Lutheran, and Reformed Protestant Traditions Compared' (2005) 46 *European Journal of Sociology* 1, 91-126.

³²⁵ Kuhnle and Sander (n 219) 64-69.

³²⁶ *ibid*, 67-68; Flora and Alber (n 219) 55.

³²⁷ Maria Korda, *The role of international social security standards: an in-depth study through the case of Greece* (Intersentia 2013) 151. The fund still exists today.

³²⁸ *ibid*, 150 (emphasis in the original).

In 1922, the Liberals introduced Law No. 2868/1922, the first insurance law referring to the compulsory insurance of workers and private employees, but it only covered 10,000 workers. The 25 insurance funds that were active during the 1920s secured only 20,000 employed persons in total.³²⁹ Further social insurance legislation was introduced in 1922-23 and again in 1928 (upon return of the Liberals to government). In 1934, with Article 2, para 1 of Law No. 6298/1934, all private sector wage earners were compulsorily covered under a newly-established 'Social Insurance Institute' (the IKA, a legal entity of public law that, however, started to function properly only in the 1950s).³³⁰ A further Law No. 6234/1934 established insurance also for artisans and the craftsmen.³³¹ However, in the 1930s, 67 percent of the population, mainly peasants, still remained uninsured.³³²

Interestingly, some have noted that social reforms in Greece before the Second World War were largely influenced by the intervention of some of the newly established international organisations, especially the League of Nations and the International Labour Office (ILO). Greece appealed the League of Nations' Health Organization for policy advice during the malaria outbreak that struck the northern part of the country in the 1920s, also as a consequence of the arrival of 1,300,000 refugees from Asia Minor, after the disastrous end of the Greek military campaign against Turkey to extend the frontiers of the Greek State across the Aegean Sea. To help Greece cope with the refugees, an independent Committee for the Resettlement of Refugees was also established

³²⁹ *ibid*; Manos Matsaganis, 'Greece – Fighting with hands tied behind the back: Anti-poverty policy without a minimum income' in Maurizio Ferrera (ed), *Welfare State Reform in Southern Europe: Fighting poverty and social exclusion in Italy, Spain, Portugal and Greece* (Routledge 2005) 34.

³³⁰ Similar legislation had already been passed in 1932 but, soon after, the government responsible for its enactment was overthrown and that law was never implemented, Maria Petmesidou, 'Tracking Social Protection: Origins, Path Peculiarity, Impasses and Prospects' in Maria Petmesidou and Elias Mossialos, *Social Policy Developments in Greece* (Ashgate 2006) 27.

³³¹ Korda (n 327) 150. The IKA still exists today, and it represents the largest social security organisation in Greece, comprising the general fund for the insurance coverage of all employees and workers in the private sector. It has been renamed as 'Social Insurance Institute for the Private Sector' (IKA-ETAM), *ibid* In the 1940s-50s, several other insurance funds were also established in the form of legal entities of public law.

³³² Petmesidou (n 330) 28.

in 1923 under an agreement with the League of Nations.³³³ Furthermore, the establishment of the IKA was reportedly inspired by the document produced by a group of specialists, specifically set up for the occasion in Prague, under the auspices of the ILO.³³⁴

Comparing the history of 12 European countries, Flora and Alber revealed that social insurance for industrial accidents was generally introduced first, followed by sickness and old age insurance, while unemployment insurance tended to be the last policy development. By the end of World War I, 32 countries worldwide had introduced some kind of legislation on industrial accidents or occupational hazards, 18 countries had some form of sickness insurance or benefit scheme, 13 countries had some kind of old age disability, survivors' insurance or assistance scheme, and only 7 countries had introduced unemployment benefit schemes.³³⁵

World War I is reported to have had a “radicalizing effect on post-war politics”,³³⁶ consolidating the role of the State in relation to social issues. Debates about social security gradually became a vital element of party politics (especially for the growing labour movements, which were promoting it as a solution to class antagonism) and it is rather at this point that the Welfare State became increasingly associated with social democracy. It seems reasonable to wonder thus, as many have done, what the possible other ‘causal forces’ that led to the development of Welfare States in Europe had been up to that time.

Esping-Andersen (significantly relying on the work of Theda Skocpol and Edwin Amenta)³³⁷ retraced in his seminal work the three main approaches that have tried to respond to that question, respectively the systems/structuralist approach, the institutional approach, and the class-mobilization and (later) class-

³³³ *ibid*, 26-28.

³³⁴ Vasiliki Rapti, ‘The Postwar Greek Welfare Model within the context of Southern European Welfare’ in Gro Hagemann (ed), *Reciprocity and Redistribution: Work and Welfare Reconsidered* (Edizioni Plus 2007) 48.

³³⁵ Kuhnle and Sander (n 219) 69-70. The foundations for a European divide between two welfare models – a social insurance model premised on the application of relatively pure insurance principles (such as in continental Europe), and a social citizenship model premised on universal tax-based provision (such as in Scandinavia and the United Kingdom) – were laid in this early period, *ibid*, 62.

³³⁶ *ibid*, 70.

³³⁷ Theda Skocpol and Edwin Amenta, ‘States and Social Policies’ (1986) 12 *Annual Review of Sociology*, 131-157.

coalition approach.³³⁸

Systems or structuralist theories seek “to capture the logic of development holistically[; i]t is the system that ‘wills’, and what happens is therefore easily interpreted as a functional requisite for the reproduction of society and economy”.³³⁹ The two main variants of this explanatory thread are the so-called ‘logic of industrialism’ and ‘logic of capitalism’ perspectives. According to the first perspective, the process of industrialization that occurred in the 19th century had made social policy “both necessary and possible”.³⁴⁰ In fact, on the one hand, the forces of modernization (i.e. social mobility, urbanization, individualism, and market dependence) had destroyed the pre-industrial modes of social re-production, i.e. the family, the church, *noblesse oblige*, and guild solidarity; on the other hand, though, they had promoted the development of modern bureaucracy as a rational, universalist and efficient mean for managing collective goods. Since the market had proved no adequate substitute to the previous social reproduction modes – being a system that “caters only to those [...] able to perform in it” –³⁴¹ the nation-State had to appropriate the ‘welfare function’. Hence, according to this thesis, the Welfare State emerged because “the modern industrial economy destroy[ed] traditional social institutions”.³⁴² Esping-Andersen noted, however, that this account partially contrasts with the fact that “government social policy only emerged 50 and sometimes even 100 years after traditional community was effectively destroyed”. This inconsistency is generally explained with recourse to the so-called Wagner’s Law of 1883, which postulates that “a certain level of economic development and thus surplus is needed in order to permit the diversion of scarce [State] resources from productive use (investment) to welfare”.³⁴³

According to the ‘logic of capitalism’ perspective (and new structuralist Marxism), instead, “the Welfare State is an inevitable product of the capitalist mode of production”.³⁴⁴ Social reform is, in fact, compelled by the

³³⁸ Esping-Andersen, *The Three Worlds* (n 212) 13-18.

³³⁹ *ibid*, 13.

³⁴⁰ *ibid*

³⁴¹ *ibid*

³⁴² *ibid*

³⁴³ *ibid*, 13-14.

³⁴⁴ *ibid*, 14.

contradictions created by capital accumulation and the State as such, according to this theory, “is positioned in such a way that the collective needs of capital are served”,³⁴⁵ regardless of the directives that may come from class and political actors. Esping-Andersen noted, however, that this approach (mistakenly) assumes that “power is structural and [...] that the State is ‘relatively’ autonomous from class directives”).³⁴⁶

The institutional approach (prompted by the work of Karl Polanyi) argues that the isolation of the economy from social and political institutions (*disembeddedness*) will destroy human society, and that social policy is thus “one necessary precondition for the reintegration of the social economy”.³⁴⁷

The class-mobilization approach, instead, focused on social classes as the main agents of change, arguing that it is the balance of class power that rather determines distributional outcomes through parliamentary institutions which, on their part, can translate mobilized power into desired policies and reform. According to this approach, though, the Welfare State not only “alleviate[s] the current ills of the system: a ‘social democratic’ Welfare State will, in its own right, establish critical power resources for wage-earners, and thus strengthen labour movements”. This approach has encountered several objections, which is not possible of course to recall here in full, but which led to the further development of the so called ‘class-coalition thesis’ by Barrington Moore. According to this thesis, the development of Welfare States in Europe was not determined by the strength of the working class itself, as much as by the “capacity of (variably) strong working-class movements to forge a political alliance with farmer organizations [...] [and] new-working-class-white-collar coalition[s]”.³⁴⁸

³⁴⁵ *ibid*

³⁴⁶ *ibid*

³⁴⁷ *ibid*, 15.

³⁴⁸ *ibid*. The so called ‘social democratic hypothesis’ associates the affirmation and progressive (unequal) expansion of social reforms with the presence of strong leftist parties in a country. However, ‘class-coalition analyses’ of Welfare State development have highlighted also the significance of existing farmer-labour coalitions (as in Sweden and Finland) or Christian Democratic rule. In Britain and Scandinavia, for example, welfare reforms were possible because “solidaristic risk-sharing measures also strongly reflected the interests of the middle classes and, in Scandinavia in particular, the interest of the politically emerging agrarian middle classes”, Olli Kangas, ‘The Politics of Social Rights: Studies on the Dimensions of Sickness Insurance in OECD Countries’ (Stockholms Universitet, Swedish Institute for Social Research, 1991);

Before and increasingly after World War I, the role of the State as a provider and protector of social security became evident in the legislation of many Western European countries,³⁴⁹ and the interwar period saw the extension of social protection in terms of the scope of risks, population coverage, and increase in compulsory provision. Additional typologies of workers and employees were increasingly insured against occupational injuries, and in some cases insurances were extended to cover family dependants.³⁵⁰ More importantly, Belgium and France were the first, among European countries, to introduce a fifth type of core social security scheme, i.e. family allowances (following the example of New Zealand, the first country worldwide to implement family allowances in the mid 1920s).³⁵¹ After the Great Depression and until the aftermath of the Second World War, reforms and policy developments in Western European democratic countries increasingly pointed towards universalistic forms of welfare provision,³⁵² as concerns about welfare progressively extended beyond just a minimum of economic security, to issues of broader equality and of equal treatment of citizens. Many scholars have interpreted the progressive shift in focus from ‘social welfare’ to ‘social justice’ as a logical consequence of democratization and the institutionalization of political rights.³⁵³

3.3.2. After the Second World War: ‘Mature’ Welfare States and the emergence of the international human rights regime

The wartime experience has been often considered responsible for shaping the post-war trajectory of social development, by creating at the national level a sense and a spirit of national solidarity, manifested in increased social policy

Kuhnle and Sander (n 219) 76.

³⁴⁹ *ibid.*, 75.

³⁵⁰ *ibid.*; Flora and Alber (n 219).

³⁵¹ In 1919, the International Labour Organisation (ILO) was created as part of the Treaty of Versailles. It contributed to the diffusion, internationally and beyond the ‘West’, both of ideas of minimum social standards and of relevant legislation. Kuhnle and Sander (n 219) 78; Sandrine Kott and Joëlle Droux, *Globalizing social rights: the international labour organization and beyond* (ILO 2012); Guy Perrin, ‘Reflections on fifty years of social security’ (1969) 99 *International Labour Review* 3, 249-292.

³⁵² Kuhnle and Sander (n 219) 75-77; Alber, 1979.

³⁵³ Kuhnle and Sander (n 219) 77-78; Flora and Alber (n 219).

efforts and subsequent generosity of spending³⁵⁴ (according to some, however, such generosity was rather the result of an ‘increased threshold of tolerable taxation’ to which people had become accustomed thanks to the wartime expansion of government expenditure).³⁵⁵ The perspective of a ‘unifying’ wartime social experience, though, is partly contested. Ben Jackson, for instance, cautions about the dangers of oversimplifying the nature and consequences of World War II: the war is often considered as an ‘homogeneous social experience’ and an experience of social unity, but in fact there were quite diverse (and dividing) experiences of the war.³⁵⁶

In terms of differences between countries, it has been sensibly argued that

the impact of wartime experience is likely to have varied not only according to pre-war social policy history, but also on the basis of whether countries were active participants in the war, subject to foreign occupation, materially and physically devastated, and/or carried huge human losses.³⁵⁷

For instance, it is generally conceded that the five-year German occupation of Norway was the trigger, in this country, of an all-party political commitment, after the war, to build a universal national people’s social security system (inspired by the UK and Swedish examples). On the contrary, some have attributed the limited diffusion and implementation of welfare provisions in the United States, to the fact that the country was the only big industrial economy of the world that had not been debilitated by the war, but had remained relatively strong.³⁵⁸ Others have noted, perhaps more accurately, that the different historical development of the Welfare State in the United States may have its

³⁵⁴ Tomas H Marshall, *Class, Citizenship and Social Development* (Doubleday 1964); Richard M Titmuss, *Problems of Social Policy (History of the Second World War: United Kingdom Civil Series)* (HMSO/Longmans 1950) and ‘War and Social Policy’ in Richard M Titmuss (ed), *Essays on the ‘Welfare State’* (Allen and Unwin 1976); Robert E Goodin and John S Dryzek, ‘Justice deferred: Wartime rationing and post-war welfare policy’ (1995) 23 *Politics and Society* 1, 49-73.

³⁵⁵ Alan T Peacock and John Wiseman, *The Growth of Public Expenditure in the United Kingdom* (Princeton University Press 1961); Kuhnle and Sander (n 219) 79.

³⁵⁶ Ben Jackson, ‘Why was the Beveridge Report so Popular?’, Talk given as part of the annual luncheon of the William of Durham Club, University College, Oxford, 23 May 2015 <<https://vimeo.com/129116741>>.

³⁵⁷ Kuhnle and Sander (n 219) 80.

³⁵⁸ *ibid*

roots already in the difference between the American and French Revolutions (the first aiming at political independence as an end in itself, while the latter at realising an entirely different social and legal order) and in the relative ‘weakness’ of 19th-century social tensions in the New Continent, due to the vastness of its resources and its ‘new, open frontiers’ policy, which provided land and opportunities to farmers and settlers (Roosevelt once said, quoting Jefferson, that “America had no paupers, as most of the labor class possessed property”).³⁵⁹

Regardless of whether the war represented a unifying social experience or had homogeneous consequences in terms of social policy developments across Europe, however, it undoubtedly had the effect of reinforcing, in many countries, trust in democratic means as the proper way to solve political and social conflicts. State intervention and parliamentary democracy came down a different light, after the authoritarian and totalitarian drifts of the 1920s and 1930s; and the postwar growth of the Welfare State was surprisingly characterised by widespread consensus over the structural social and economic reforms to be implemented,³⁶⁰ to the point that some have highlighted its “post-ideological character”.³⁶¹

The periodization of Welfare State developments in Europe after the Second World War is debated.³⁶² A first sequence of development, largely accepted today, divides the post-war era into two periods: 1) a phase of Welfare State *expansion* (a ‘Golden Age’), going from 1945 to the oil crisis of 1973, which was characterised by the growth of social security systems and the affirmation of the Welfare State as a core institution of Western societies; followed, after

³⁵⁹ Katrougalos (n 215) 17, quoting Franklin Delano Roosevelt, ‘New conditions impose new requirements upon Government and those who conduct government, Campaign address, 1932’ in *The Public Papers of Franklin Roosevelt* (1938).

³⁶⁰ Ido de Haan, ‘The Western European Welfare State Beyond Christian and Social Democratic Ideology’ in Dan Stone (ed), *The Oxford Handbook of Postwar European History* (OUP 2012) 299.

³⁶¹ *ibid.*, 302.

³⁶² Nullmeier and Kaufmann noted how “[p]eriodizations are *interpretations* of history that entail a number of crucial assumptions” and are “often used for political purposes, to promote a particular perception of growth, change, adjustment, or retrenchment”: the “proclamation of an epoch is never an ‘innocent’ act or a merely practical decision”, Frank Nullmeier and Franz-Xaver Kaufmann, ‘Post-War Welfare State Development’ in Castles et al (n 219) 82-83 (emphasis in the original).

1973, by 2) a phase of Welfare State retrenchment (a ‘Silver Age’, or a phase of structural adjustment or permanent austerity) characterised, on the contrary, by expenditure cuts and deteriorating welfare provision (see Section 3.3.3 below).³⁶³

With regard to the first (expansionary) phase, however, where *social expenditures* are taken as the sole indicator of Welfare State development, the whole period between 1918/1920 and 1973/1975 may be understood as a period of more or less uninterrupted growth and expansion.³⁶⁴ Actually, the major expansion of the Welfare State in terms of expenditures occurred between 1960 and 1973.³⁶⁵

On the contrary, where the *institutional dimension* of the Welfare State and the adoption of social legislation is considered, the post-war era appears to be the end of a phase of institutional emergence, culminating in around 1950 (when the core set of social policies had been established in most continental European and Anglo-Saxon countries), rather than the beginning of a Golden Age. In the United Kingdom, for instance, the major social policy reforms inspired by Lord Beveridge’s 1942 universalistic model had been all implemented by that time.³⁶⁶

The post-war era represents, nonetheless, a “phase in its own right”,³⁶⁷ and the end of World War II is generally understood as an “obvious historical juncture”³⁶⁸ in the context of the Welfare State (and rights) development. The ideological, political and legal developments occurred during and immediately after the Second World War transformed the previous understanding of the Welfare State, creating an essential link with the notion of social rights.

This development was initially portrayed in Thomas Humphrey Marshall’s notion of ‘social citizenship’. Writing in 1950, Marshall affirmed to believe that the drive towards social equality was “the latest phase of an evolution of citizenship [as opposed to class status] which has been in continuous progress for some 250 years”,³⁶⁹ and which is characterised by Marshall in terms of

³⁶³ *ibid*, 81.

³⁶⁴ *ibid*, 84.

³⁶⁵ *ibid*, 87.

³⁶⁶ *ibid*

³⁶⁷ *ibid*

³⁶⁸ Nullmeier and Kaufmann (n 362) 83.

³⁶⁹ Thomas Humphrey Marshall, *Citizenship and Social Class and other essays* (CUP 1950)

progressive affirmation of rights. In feudal times, he argued,

there was no uniform collection of rights and duties with which all men – noble and common, free and serf – were endowed by virtue of their membership of the society. There was, in this sense, no principle of the equality of citizens to set against the principle of the inequality of classes.³⁷⁰

He proposed to divide citizenship into three parts, or elements: a civil, a political, and a social one. These elements of citizenship respectively formed during the 18th, 19th and 20th century, through a double process of geographical fusion and functional separation of State activities, institutions and rights/duties.

Social citizenship, or the latter element necessary to fully realise, in Marshall's opinion, the egalitarian principle expressed in citizenship, is constituted by

the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services.³⁷¹

Furthermore, 'welfare rights' were gradually acknowledged and included, between 1941 and 1948, as key elements of the human rights regime designed for the post-World War II international order.

In the 'Atlantic Charter' of 1941, former President of the United States Franklin D. Roosevelt, together with British Prime Minister Winston Churchill, announced the two nations' desire:

10.

³⁷⁰ *ibid*, 12.

³⁷¹ *ibid*, 11. The civil element of citizenship is, according to Marshall, "composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice", while the institutions most directly associated with it are the courts of justice. The political element of citizenship is, instead, represented by "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body", and the corresponding institutions are parliaments and councils of local government. *ibid*, 10-11.

to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security [Fifth point]; [...] after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want [Sixth point].³⁷²

Resolution towards the realisation of ‘freedom from want’ (which “translated into world terms, mean[t] economic understandings [to] secure to every nation a healthy peacetime life for its inhabitants, everywhere in the world”)³⁷³ was also included by Roosevelt in his famous 1941 ‘Four Freedoms’ speech, among the ‘essential human freedoms’ upon which to found a vision of the future world. The idea of ‘freedom from want’ (and of social insurance as “an attack upon Want”) was also in Beveridge’s 1942 report.³⁷⁴

In his 1944 State of the Union Speech, Roosevelt also envisaged a ‘Second Bill of Rights’, “under which a new basis of security and prosperity can be established for all regardless of station, race, or creed”.³⁷⁵ Indeed, he famously declared that

true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are hungry and out of a job are the stuff of which dictatorships are made.³⁷⁶

These ideas directly influenced the UN delegates of the Working Group created in 1947 by the newly established Commission on Human Rights to draft the Universal Declaration of Human Rights.³⁷⁷ Eleanor Roosevelt, chairing the Working Group, insisted and succeeded in making economic and social rights –

³⁷² *Atlantic Charter*, 14 August 1941, points 5 and 6 <<http://avalon.law.yale.edu/wwii/atlantic.asp>>.

³⁷³ Franklin D Roosevelt, ‘Annual Message to Congress on the State of the Union’ (1 June 1941).

³⁷⁴ Beveridge (n 217) 6.

³⁷⁵ Franklin D Roosevelt, ‘Annual Message to Congress on the State of the Union’ (11 January 1944).

³⁷⁶ *ibid*

³⁷⁷ Olivier De Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2013) xiii.

such as the right to medical care, to education, the ‘right and duty to perform socially useful work’, the right to good working conditions, to ‘such public help as may be necessary to make it possible for him to support his family’, the right to social security’, to good food and housing and to live in surroundings that are pleasant and healthy’, or the right to rest and leisure – part of the catalogue of rights that the United Nations General Assembly would adopt.³⁷⁸

The Universal Declaration was adopted on 10 December 1948 by 48 votes in favour, eight abstentions (the Soviet Union and its satellites, South Africa and Saudi Arabia), and no vote against, and it includes in Articles 22 to 27 a range of economic, social and cultural rights. Most importantly, Article 22 on the right to social security, includes language that applies generally to all the economic, social and cultural rights recognised.³⁷⁹

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Associated with this post-World War II ideological and legal breakthrough, however, was also a paradigm shift in terms of social policy provisions and implementation. Contrary to its selective nature before the war, post-war social policy aimed at universality, i.e. at providing coverage for the entire population – ‘from cradle to grave’, as in the British expression. This paradigm shift merged with claims for equality, irrespective of race, religion or gender, and extended its scope towards a broad concept of individual welfare. This was also reflected in the increased use of ‘social security’ and ‘Welfare State’, in place for the expressions ‘social insurance’ and ‘social policy’.³⁸⁰

Since the late 1950s, several attempts have been made to categorise ‘mature’ Welfare States into ideal-type models – or ‘regimes’ – according to different

³⁷⁸ These rights were included in a list of 48 items identified for the occurrence by the United Nations’ Secretariat Human Rights Division as appearing most frequently in the human rights catalogues across the world, *ibid.*

³⁷⁹ *ibid.*, xiv.

³⁸⁰ Nullmeier and Kaufmann (n 362) 85.

criteria. The term ‘regime’, differently from the notion of welfare ‘State’, refers “to the ways in which welfare production is allocated between State, market and households”.³⁸¹ A welfare regime is, thus, “an *institutional matrix* of market, State and family forms, which generates welfare outcomes”.³⁸²

The categorisation of welfare regimes formalised by Gøsta Esping-Andersen in the 1990s has gained unparalleled prominence in Welfare State debates. Hence, both his categorisation and the notion of ‘social risks’ will be briefly discussed in the following section, before introducing, in the last part of the historical narrative, the hypothesis of the Welfare State ‘retrenchment’.

3.3.2.1. *Welfare regimes and social risks*

As Emanuele Ferragina and Martin Seeleib-Kaiser have noted, despite criticism especially on the part of historical nominalism and anthropological interpretations of culture and society, the use of ‘ideal types’ pertains to a long sociological tradition. Their relevance was already acknowledged by Max Weber, who in 1949 claimed that the only means to ‘master the complexity of social life’ was by constructing systems of abstract and purely formal propositions.³⁸³

Before Esping-Andersen, in particular Richard Titmuss had identified, in the 1970s, three ‘contrasting models’ of social policy – residual, industrial achievement-performance, and institutional-redistributive – that he held existed simultaneously (differently from the thesis advanced in the 1950s, in an earlier categorisation by Wilensky and Lebeaux, of a progressive transition, through a process of modernisation, from a ‘residual’ or less developed, to an ‘institutional’ or well-developed Welfare State).³⁸⁴ The ‘residual’ welfare

³⁸¹ Esping-Andersen, *Social Foundations* (n 216) 74.

³⁸² Ian Gough, ‘Social policy regimes in the developing world’ in Patricia Kennett (ed), *A Handbook of comparative social policy* (Edward Elgar 2013) 206 (emphasis added).

³⁸³ Emanuele Ferragina and Martin Seeleib-Kaiser, ‘Welfare regime debate: past, present, futures?’ (2011) 39 *Policy & Politics* 4, 583, quoting Max Weber, *On the methodology of the social sciences* (The Free Press 1949) 87. Historical nominalism, in particular, considers ‘ideal types’ only “a vain sport, a meaningless academic game”, that should be avoided, Ferragina and Seeleib-Kaiser, 584.

³⁸⁴ Richard M Titmuss, *Social Policy: An Introduction* (Pantheon Press 1974); Harold L Wilensky and Charles N Lebeaux, *Industrial Society and Social Welfare* (Russell Sage Foundation 1958); see also Patricia Kennett (ed), *A Handbook of comparative social policy*

model, according to Titmuss, is characterised by the provision of remedial and temporary aid, prompted by the failure of the market and the family in the provision of welfare. In the case of the ‘industrial achievement-performance’ model, a minimum standard of social security is publicly provided, largely to complement the market. The ‘institutional-redistributive’ model, finally, is focused on redistribution and on ‘command-over-resources through time’, and is aimed at achieving greater equality.

Esping-Andersen, instead, examined and classified welfare regimes according to three variables: 1) the welfare-mix, i.e. the different patterns of State, market, and family provision of welfare; 2) welfare outcomes, identified with the level of decommodification and defamilialisation of individuals (on which more will be said shortly); and 3) stratification outcomes, i.e. the resulting levels of social stratification (or ‘social solidarities’).³⁸⁵

Before introducing Esping-Andersen’s classification of welfare regimes, it is essential to clarify his main concepts of decommodification, defamilialisation, and social stratification.

Commodification corresponds to “the action of turning something into, or treating something as, a (mere) commodity; [or to the] commercialization of an activity, etc., that is not by nature commercial”.³⁸⁶ According to Esping-Andersen, the “mainsprings of modern social policy lie in the process by which both human needs and labor power became commodities and, hence, our well-being came to depend on our relation to the cash nexus”.³⁸⁷ From independent producers, workers have been transformed into propertyless wage-earners, as

(Edward Elgar 2013) 143. A further significant classification of ‘informal security’ and ‘insecurity’ welfare regimes has also been construed by Ian Gough. However, his two ideal-types were specifically elaborated with reference to the world’s South (among others, South and East Asia, Latin America, and parts of sub-Saharan Africa), therefore, they are not relevant in the context of the present work.

³⁸⁵ Esping-Andersen, *Social Foundations* (n 216) 75.

³⁸⁶ ‘Commodification’ in the *Oxford English Dictionary (OED) Online* (last accessed 30 December 2015).

³⁸⁷ Esping-Andersen, *The Three Worlds* (n 212) 35. Human needs became commodities, as Esping-Andersen admits, “when the satisfaction of human wants came to imply the purchase of commodities”, *ibid.* The term ‘cash nexus’ was coined by Karl Marx and Friedrich Engels to describe the depersonalised relationship that exists, in capitalist societies, between those who possess the means of production and the labour force, i.e. the fundamental reduction of relations of production to monetary exchange.

theorised by Marxism and recalled by Esping-Andersen:

with no recourse to property, and no [Welfare] State to which human needs can be directed, the market becomes to the worker a prison within which it is imperative to behave as a commodity in order to survive. [...] As commodities, people are captive to powers beyond their control [...].³⁸⁸

In market societies, commodification of labour means that individuals come to entirely depend on market-income for their welfare.³⁸⁹ Their eventual loss of employment “tends to amount to the loss of the means of existence”.³⁹⁰

Decommodification, on the contrary, “refers to the degree of to which individuals, or families, can uphold a socially accepted standard of living independently of market participation”,³⁹¹ and is produced “when a service is rendered as a matter of right”.³⁹² The affirmation of (legally) guaranteed social rights, therefore, “implies a loosening of the pure commodity status”,³⁹³ and of the market-dependency relationship.

With the concept of defamilialisation, Esping-Andersen intends to “capture policies that lessen individuals’ reliance on the family [and] maximize individuals’ command of economic resources independently of familial or conjugal reciprocities”.³⁹⁴ In other words, policies that aim at preventing family-dependency relationships. A ‘familialistic’ welfare regime is, on the contrary, “one that assigns a maximum of welfare obligations to the household”.³⁹⁵

³⁸⁸ *ibid*, 36.

³⁸⁹ See the OECD, *In It Together: Why Less Inequality Benefits All* (2015) for a discussion of sources of household (disposable) income and of increasing market-income (and wealth) inequality in OECD (especially European) countries.

³⁹⁰ Klaus Steigleder, ‘Human dignity and social welfare’ in Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 475.

³⁹¹ Esping-Andersen, *The Three Worlds* (n 212) 37. Esping-Andersen measures decommodification based on the following criteria: the eligibility rules and the restrictions of entitlements, levels of income replacement and the range of cash benefits provided to deal with traditional social risks, i.e. unemployment, sickness and old age, *ibid*, 47 and Ferragina and Seeleib-Kaiser (n 383) 601.

³⁹² Esping-Andersen, *The Three Worlds* (n 212) 22. He noted, however, that “[i]t is not the mere presence of a social right, but the corresponding rules and preconditions, which dictate the extent to which welfare programs offer genuine alternatives to market dependence”, *ibid*.

³⁹³ *ibid*, 21.

³⁹⁴ Esping-Andersen, *Social Foundations* (n 216) 45.

³⁹⁵ *ibid*

With regard to social stratification, i.e. the “formation and establishment of social or cultural levels resulting from differences in occupation and political, ethnic, or economic influence”³⁹⁶, in Esping-Andersen’s view “the Welfare State is not just a mechanisms that intervenes in, and possibly corrects, the structure of inequality; it is, in its own right, a system of stratification[, ...] an active force in the ordering of social relations”.³⁹⁷ Stratification outcomes also “shape class coalitions, which tend to reproduce or intensify the original institutional matrix and welfare outcomes”.³⁹⁸

Before introducing the three ‘welfare regime-types’ identified by Esping-Andersen, I will briefly discuss the notion of ‘social risks’, promoted by the author as the force behind Welfare State development.

Esping-Andersen argued that to insure the population against social risks has always been the main objective behind social policy, egalitarianism being rather a ‘derivative consequence’. Acknowledging that most risks were not considered ‘social’, i.e. “a matter of State”,³⁹⁹ until the 20th century (because of the predominantly rural nature of 19th-century Europe and because public administration, statistical bookkeeping and tax systems had not developed yet to the point of supporting the collectivisation of social risks on a mass scale), Esping-Andersen basically maintained that “how, to what degree, and which kind of risks are pooled collectively will certainly have immediate – but none the less derivative – consequences for poverty, income distribution, economic opportunities and, more generally, for social solidarities and stratification outcomes”.⁴⁰⁰

Individual risks – some of which are perennial (e.g. poverty, homelessness, handicaps, violence and sudden death), others historically contingent (e.g. unemployment or nuclear radiation), some ‘democratic’ (e.g. old age infirmity) or life-course specific (e.g. income loss in old age), others socially stratified (e.g. unemployment and poverty) – become ‘social’, according to Esping-Andersen, for three reasons: first, when the aggregate destiny of many individuals has

³⁹⁶ ‘Stratification’ in the *Oxford English Dictionary (OED) Online* (last accessed 30 December 2015).

³⁹⁷ Esping-Andersen, *The Three Worlds* (n 212) 23.

³⁹⁸ *ibid*

³⁹⁹ *ibid*

⁴⁰⁰ Esping-Andersen, *Social Foundations* (n 216) 32.

collective consequences, threatening the welfare of the entire society; second, when society simply recognises certain risks as warranting public consideration; and third, because the growing complexity of society itself entails that more and more risks originate from sources beyond the control of single individuals.

In particular, Esping-Andersen includes in the latter type of risks the *dependency on market income*: “markets cannot guarantee an income, or a job”, therefore “survival itself is at the mercy of conditions over which individuals have little say”.⁴⁰¹

The author observes that social risks are, also, unequally distributed in society, and most of the risks which occur with sociological regularity can be classified along three axes: a) *class-risks*, or risks that impact on specific social strata (occupational injuries are most likely to occur to workers in the industrial or mining sector; unemployment is most likely to impact on the unskilled, etc.); b) *life-course risks* (e.g. poverty tends to afflict childhood and old age, although in post-industrial societies, Esping-Andersen claims, life-course risks impact more strongly on youth and prime age, adult life);⁴⁰² c) *intergenerational risks*, or risks that would normally identify as ‘class risks’ but are also inherited (e.g. poverty), therefore producing an intergenerational risk transmission.

However, the idea of social ‘risks’ (and the consequent notion of social ‘insurance’) is borrowed by economic theory, and its appropriateness in the context of the Welfare State analysis has been subject to a lively debate.⁴⁰³ Hazel Kemshall, for instance, observed how, in European thought, the meaning and usage of the word ‘risk’ and the ensuing explanatory systems of personal misfortunes and disaster have changed throughout history. From risk as the product of ‘fate’ and God’s will in pre-renaissance thought, and therefore personal misfortunes as the result of chance and destiny; to risk as the product of ‘determinism’ in post-renaissance thought, and an explanatory system based upon universal laws and causality; to risk eventually, in modernity,⁴⁰⁴ as

⁴⁰¹ *ibid*, 37.

⁴⁰² *ibid*, 43.

⁴⁰³ Tony Fitzpatrick, *Welfare Theory: An Introduction to the Theoretical Debates in Social Policy* (2nd edn, Palgrave Macmillan 2011).

⁴⁰⁴ ‘Modernity’ has been defined as the process and institutions of industrialization, Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press 1991) 14-15.

‘statistically calculable hazard’, something measurable and predictable, produced not by fate, but rather by the actions and activities of humans.⁴⁰⁵

In particular, while the idea of ‘risk’ is easily associated with the notion of ‘insurance’, and that of ‘social risk’ with ‘social insurance’, the Welfare State (especially its post-World War II declinations) becomes characterised as an institution whose purposes go beyond the mere ‘insurance against risks’, towards ideas of ‘social justice’ and ‘equality’.

Furthermore, late modernity, or postmodernity according to some,⁴⁰⁶ has not only challenged the idea, the ‘myth’ of risks’ calculability.⁴⁰⁷ Being characterized by global risks, indeterminate and contingent knowledge about the probability of such risks, and uncertainty over future outcomes and impacts, postmodernity has produced what Beck labelled the ‘risk society’, a society where “hazards and insecurities [are] induced and introduced by modernisation itself”.⁴⁰⁸ A society characterised no longer by the preoccupation to distribute wealth, but “with the distribution of risks, who manufactures them and upon whom they fall”.⁴⁰⁹ The risk society has severe implications for social policy and traditional welfare systems.⁴¹⁰

However, the Welfare State represents, according to Esping-Andersen, one of three different sources of social risks management, together with the family and the market (and civil society, as others have argued and Esping-Andersen dismissed, claiming that this may make little empirical difference since, when civil society’s role is of any impact, generally this occurs, in his opinion, because it has been subsidized by the State).⁴¹¹

Thus, based on the three concepts outlined above, and on the different national arrangements in terms of State, market and familial provision of welfare, Esping-Andersen identified three welfare regime-types – three ‘worlds’ of welfare capitalism – which he respectively labelled ‘liberal’, ‘conservative’

⁴⁰⁵ Hazel Kemshall, *Risk, Social Policy And Welfare: Introducing Social Policy* (Open University Press 2002) 4.

⁴⁰⁶ Giddens (n 404); Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE 1992).

⁴⁰⁷ As, for instance, in Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity 1998), quoted in Kemshall (n 405) 5.

⁴⁰⁸ *ibid*

⁴⁰⁹ *ibid*, 6.

⁴¹⁰ *ibid*, 20 ff.

⁴¹¹ *ibid*

(or Christian-democratic) and ‘social-democratic’ (although the author also acknowledged that no single pure case exists).⁴¹²

Liberal welfare regimes – whose archetypical examples are the Anglo-Saxon nations, particularly the United States, Canada, and Australia – have their roots in “19th-century English political economy, to its notions of ‘less eligibility’ and ‘self-help’ [...] [reflecting] a political commitment to minimize the State, to individualize risks, and to promote market solutions”.⁴¹³ Liberal regimes are ‘residual’, in the sense that they limit intervention to so called ‘bad risks’, adopt extremely narrow definitions both of who should be eligible and what risks should be considered as ‘social’,⁴¹⁴ and are characterised by means-tested (social) assistance, strict entitlement rules (often associated with stigma), modest universal transfers or social-insurance plans which “cater to a clientele of low-income, usually working-class, State dependents”.⁴¹⁵ The State encourages the market either passively or actively, in the first case by guaranteeing only a minimum, while subsidizing private welfare schemes in the latter. Consequently, in this type of regime, *decommodification effects are minimized, social rights limited*, and stratification results in “a blend of relative equality of poverty among State-welfare recipients, market-differentiated welfare among the majorities, and class-political dualism between the two”.⁴¹⁶

Instead, in *conservative (or corporatist/Christian-democratic) welfare regimes* – such as Austria, France, Germany and Italy – social rights are attached to class and status, as attention to market efficiency or commodification is very limited compared to concerns with the preservation of status differential. Such preservation is pursued, according to Esping-Andersen’s theorisation, through a State edifice which perfectly absorbs this corporatism and actively “displace[s] the market as a provider of welfare[: ...] private insurance and occupational fringe benefits play a truly marginal role”.⁴¹⁷ Redistributive impacts of this regime type are therefore negligible. Corporatist regimes are also typically shaped by the Church. They are, therefore, inspired towards the preservation of

⁴¹² *ibid*

⁴¹³ Esping-Andersen, *Social Foundations* (n 216) 74-75.

⁴¹⁴ *ibid*, 76-77.

⁴¹⁵ Esping-Andersen, *The Three Worlds* (n 212) 26.

⁴¹⁶ *ibid*, 27.

⁴¹⁷ *ibid*, 27.

traditional family-hood, this meaning, for instance, that non-working married women are generally excluded from social insurance, family benefits tend to encourage motherhood, and day-care and other similar services are less developed.

On the contrary, *social democratic welfare regimes* (label that should be reserved, according to Esping-Andersen, to ‘mature’ welfare States after the mid-1960s)⁴¹⁸ – exemplified by the Scandinavian countries, especially Denmark, Norway, Sweden and Finland – are inspired by the objective to “pre-emptively socialise the costs of family-hood[, with] [t]he ideal [...] not to maximise dependence on the family, but capacities for individual independence”.⁴¹⁹ The aim, indeed, is to promote equality of the highest standards, not of minimal needs. Therefore, principles of universalism and de-commodification of social rights are extended also to the new middle classes, “all [social] strata are incorporated under one universal insurance system, yet benefits are graduated according to accustomed earnings”,⁴²⁰ and the “result is a Welfare State that grants transfers directly to children, and takes direct responsibility of caring for children, the aged, and the helpless. It is, accordingly, committed to a heavy social-service burden [...] at once genuinely committed to a full-employment guarantee, and entirely dependent on this attainment.”⁴²¹

Within this tripartite classification, Britain holds a special status. It is, according to Esping-Andersen, an example of regime shifting or ‘stalled social democratization’:

[h]ad we made our comparisons in the immediate post-war decades, we would almost certainly have put Britain and Scandinavia in the same cluster: both were built on universal, flat-rate benefit programmes, national health care, and a vocal political commitment to full employment. Moving ahead into the 1970s and beyond, the two clearly part ways: Britain failed

⁴¹⁸ Indeed, as it has been noticed, “Britain was the only country which in the first years after the war had a Labour government [...]. In most European countries outside Scandinavia [where social democratic governments reigned more or less continuously] the Welfare State came about under the wings of government coalitions dominated by Christian Democrats”, see de Haan (n 360) 301.

⁴¹⁹ Esping-Andersen, *The Three Worlds* (n 212) 26.

⁴²⁰ *ibid.*, 28.

⁴²¹ *ibid.*

to uphold its full-employment commitment and to supplement modest flat-rate benefits with a guarantee of adequate income replacement. Failure to keep up promoted a gradual privatization that was, no doubt, accelerated by concerted de-regulation, more targeting, and privatization during the 1980s: sickness and maternity benefits were transferred to employers, council housing was sold off, the earnings-related pension (SERPS) was ‘privatized’ through opting-out, and both private pensions and health insurance have been nurtured via tax subsidies. In a contemporary comparison, then, Britain appears increasingly liberal.⁴²²

Esping-Andersen argued that each welfare regime represents also a specific “politics of solidarity, of social stratification”,⁴²³ and identified for each one of them a corresponding model of solidarity.

First, a *residual approach*, characteristic of the liberal welfare regime, limits assistance to ‘targeted (‘bad’) risk strata’, is typically needs-tested and generally meagre, and tends to create a society divided into ‘them and us’, a “self-reliant majority of citizens [...] [and] a minoritarian and dependent Welfare State clientele”.⁴²⁴ A second, *corporatist approach*, typical of conservative welfare regimes, tends to pool risks by status membership (especially occupational status). Finally, a third, *universalistic approach* embraces the idea of pooling all individual risks, bad or good, either because they *are* universal (e.g. health risks that led countries across Europe to establish of National Healthcare Systems), or because they *should* be shared universally (as in the cases, exemplified by Esping-Andersen, of the Nordic ‘peoples’ pensions’ or universal family allowances). This latter social stratification mode is especially characteristic of social-democratic welfare regimes.

Esping-Andersen categorisation has been enormously influential in the Welfare State literature, but it has also been criticised on several grounds. Some have questioned the models identified, arguing that some countries had been misclassified and that additional typologies should have been added to the list, to include in particular the Southern European countries (that, with the exception of Italy, had been systematically overlooked by Esping-Andersen’s analysis).

⁴²² Esping-Andersen, *Social Foundations* (n 216) 88.

⁴²³ *ibid*, 41.

⁴²⁴ *ibid*

Others attacked the criteria for classification for being too narrowly based on income-maintenance programmes, too focused on the State-market nexus, and too one-dimensionally built around the standard male production worker.⁴²⁵ Others have put into discussion even the idea of coherent ‘models’ in itself, claiming that “the internal homogeneity of developments in different branches of national social security systems is much lower than Esping-Andersen assumed”.⁴²⁶ Nevertheless, as Ferragina and Seeleib-Kaiser have noted, “the comparative Welfare State research community has largely accepted the benefits of using ideal types and typologies as heuristic devices, as evidenced by the high number of references to Esping-Andersen’s seminal work”.⁴²⁷

The case for a fourth, ‘Latin Rim’ or ‘Mediterranean’/‘Southern European’ welfare model has been proposed, in particular, by Stephan Leibfried and Maurizio Ferrera.

According to Leibfried, whose analysis is limited, though, to social assistance, Portugal, Spain, Italy, Greece and France constitute a distinct model because of some common peculiarities:

the decisive influence of the Church; employment structures in which agriculture has long been important; the relative underdevelopment of the Welfare State and the rudimentary character of its actual achievements as opposed to the promised, even legislated ones; [and] traditional family structures with a major role played by primary solidarities and mutual obligations.⁴²⁸

Ferrera, instead, argued that seven distinctive traits characterise the Southern welfare model: the prevalence of cash benefits over social services or transfers in kind; the unbalanced distribution of protection in favour of pensions *vis-à-vis* other types of social risks; their universalistic approach to healthcare provision; the low degree of State penetration in the welfare sphere and the collusive mix

⁴²⁵ *ibid.*, 73.

⁴²⁶ Nullmeier and Kaufmann (n 362) 89; Lyle A Scruggs and James P Allan, ‘Welfare-State decommodification in 18 OECD countries: A replication and revision’ (2006) 16 *Journal of European Social Policy* 1, 55-72.

⁴²⁷ Ferragina and Seeleib-Kaiser (n 383) 585.

⁴²⁸ Rapti (n 334) 45; S. Leibfried, ‘Towards a European Welfare State?’, in Catherine Jones (ed), *New Perspectives on Welfare State* (Routledge 1993).

between public and non-public actors and institutions; the particular vulnerability to clientelism of public institutions; the low efficiency of the public services; and the high incidence of tax evasion.⁴²⁹

Ferrera's model is, thus, mainly construed around the (distorted) distributive practices of Southern European welfare regimes. Esping-Andersen replied, however, that although they may define the character of a polity, the elements outlined by Ferrera cannot be considered as the defining characteristics of a separate welfare regime, "unless the entire system was from the very beginning specifically designed for the purpose of clientelism rather than social protection".⁴³⁰

With regard to Leibfried's assumptions, Esping-Andersen argued that, given Leibfried's limited focus on social assistance, the 'acid test' of his separate Mediterranean model would ultimately depend on the issue of familialism. However, the case for a fourth, rather familialistic, 'world' of welfare capitalism is not very convincing, according to Esping-Andersen, as the evidence from the test he conducted does not suggest great differences between Mediterranean countries and the rest of Continental Europe.

A further comparative review of 23 different studies analysing welfare regimes, conducted by Ferragina and Seeleib-Kaiser appears to confirm the existence of Esping-Andersen's 'three worlds' of welfare capitalism.⁴³¹

3.3.3. The last quarter of the 20th century and the 'retrenchment' of the Welfare State

Despite initial resilience, for instance under the attacks of the cuts implemented in 1981-9 and 1979-90 respectively in the US and the UK during the governments of Ronald Reagan and Margaret Thatcher, since the last quarter of the 20th century the Welfare State has undergone a phase of inexorable 'retrenchment'.⁴³²

⁴²⁹ Maurizio Ferrera, 'The "Southern Model" of Welfare in Social Europe' (1996) 6 *Journal of European Social Policy* 1, 17-37; Rapti (n 334) 45-46.

⁴³⁰ Esping-Andersen, *Social Foundations* (n 216) 91.

⁴³¹ Ferragina and Seeleib-Kaiser (n 383) 594.

⁴³² Some authors contest the idea of a State 'retreat' (not exclusively, but also on matters of

As Evelyne Huber and John Stephens have argued, this retrenchment phase can be segmented into three sub-periods: 1) a phase of ‘fumbling’, in the 1970s, when the challenges prompted by the two oil crises and the demise of the Bretton Woods international monetary system were faced by piecemeal attempts to keep running social policies that were still perceived as generally successful; 2) the 1980s, when the legitimacy of the Welfare State commenced to be massively questioned by the neoconservative right, especially in Great Britain and the United States, and developments saw the rise of mixed economies of welfare and the increasing use of the market for social provision;⁴³³ and 3) the 1990s, characterised by the fall of the Berlin Wall and the demise of State socialism, and by the progressive creation of the EU internal market and monetary union, a phase in which “the role of economic internationalization came to the fore”.⁴³⁴

As with different theoretical approaches to the identification of the original ‘causes’ of Welfare States development in Europe, also attempts to explain retrenchment have followed different paths. Where economic factors are considered preeminent in this sense, three hypotheses exist as to the causes of retrenchment.⁴³⁵

A first hypothesis attributes retrenchment already to the oil crisis of 1973/4 and the demise of the Bretton Woods system, and to the shifts in international trade relations that these two historical events implied, putting pressures on and severely restricting opportunities for social policy making at the national level.

A second hypothesis rather considers globalisation (generally understood as the dramatic increase, since the 1970s, in the flow of goods, services, economic stocks and information between people, firms, and States all over the globe)⁴³⁶

welfare) and rather argue that the more recent phase of State development is one of ‘transformation’, see e.g. Georg Sørensen, *The Transformation of the State: Beyond the Myth of Retreat* (Palgrave Macmillan 2003).

⁴³³ Kemshall (n 405) 15; Gerry Mooney, ‘Quasi markets and the mixed economy of welfare’ in Michael Lavalette and Alan Pratt (eds), *Social Policy: A Conceptual and Theoretical Introduction* (1st edn, Sage 1997) 228-244.

⁴³⁴ Nullmeier and Kaufmann (n 362) 88.

⁴³⁵ *ibid.*, 93.

⁴³⁶ Kevin Farnsworth and Zoë Irving, ‘Fiscal crisis, financial crisis and the great recession’ in Bent Greve (ed), *The Routledge Handbook of the Welfare State* (Routledge 2013) 309; see also Ian Gough, ‘European Welfare States: Explanations and Lessons for Developing Countries’ in Anis A Dani and Arjan de Haan, *Inclusive States: Social Policy and Structural Inequalities* (World Bank, April 2008) 55.

as the main factor influencing Welfare State developments. According to this approach, the internationalization of markets and investment opportunities have determined, particularly since the 1980s, increased exit options of financial capital and the possibility to search worldwide for the most competitive investment locations. In this sense, continued Welfare State expansion is no longer possible as it threatens national competitiveness.

Finally, a third hypothesis focuses on technological changes, the rise of the service economy and the knowledge society, and the restructuring of labour markets, supporting the idea of a transition, since the 1980s, from the ‘industrial Welfare State’ to the ‘post-industrial Welfare State’. The latter would be rather aimed at dealing with the ‘new social risks’ produced, among other factors, by lower economic rates, reduced job security (increased flexibility), greater qualification requirements, the disappearance of the working class, and increased female participation in the labour force.

3.4. Conclusions

Questions about the nature, justification and consequences of the Welfare State have fostered, since its early development, an immense debate, and broad disagreement still exists today as to basically any aspect of it beyond the core idea, that is that of the State assuming responsibility for the well-being of its people.

The Welfare State is a dynamic political ‘artefact’, corresponding to a unique, historical ‘redefinition of the State’, its functions and its legitimacy. Its advent in Europe is marked by a double development: the translation into a legal duty—at first within single domestic legal systems and, after the Second World War, also in international law—of what had been, at least since Aristotle, a moral duty to care for the vulnerable, and the undertaking of this duty by the State, it being the fundamental political unit of the modern world.

The emergence of early Welfare States in Europe is, in fact, conventionally associated with the full emergence of the modern nation-state, and with the social and political changes prompted, since the beginning of the 19th century, by industrialisation and the advent of capitalism. Between the 1880s and the end of World War I, several European States, following the example of Bismarckian

Germany, adopted their first national, insurance-like legislation, and by the end of World War I, 32 countries worldwide had introduced some kind of legislation on industrial accidents or occupational hazards; 18 countries had some form of sickness insurance or benefit scheme; 13 countries had some kind of old age disability, survivors' insurance or assistance scheme; and 7 countries had introduced unemployment benefit schemes.

Although it was initially a 'top-down' political initiative rather aimed at nation-building under authoritarian regimes, the new laws represented a revolutionary step compared to the pre-existing Poor Laws around Europe, especially because they started recognising social insurance, and assistance more generally, as a matter of 'rights'.

However, Welfare States in Europe only became modern, fully-developed institutions after the Second World War.

The totalitarian experience in several countries reinforced trust in democratic means as the proper way to solve political and social conflicts. State intervention and parliamentary democracy came down a different light, and the post-war growth of the Welfare State was surprisingly characterised by widespread consensus over the structural social and economic reforms to be implemented. Post-war social policy aimed at universality, and merged with claims for equality, extending its scope towards a broadened concept of individual welfare. Beside this 'paradigm shift' at the domestic level, welfare' rights (economic, social and cultural rights) were gradually acknowledged and included, between 1941 and 1948, as key elements of the human rights regime of the post-World War II international order, beginning with the adoption of the Universal Declaration on 10 December 1948.

Welfare States across Europe went through a phase of institutional consolidation and uninterrupted expansion (also in terms of social expenditure) until the second half of the 1970s, when a number of events at the international level changed the economic scenario and prompted a phase of inexorable Welfare State 'retrenchment' and reignited opposing ideologies: the two oil crises and the demise of the Bretton Woods international monetary system in the 1970s; the internationalization of markets and investment opportunities that have determined, particularly since the 1980s, increased exit options of financial

capital (Welfare State expansion is no longer possible as it threatens national competitiveness) and the shift from an 'industrial Welfare State' to a 'post-industrial Welfare State' model; the progressive creation of the EU internal market and monetary union since the 1990s, a phase in which the role of economic internationalization came to the fore.

Chapter IV

Economic and Social Rights in International Law

4.1. Introduction

Today, ESR are an established component of the international human rights framework, on a par, at least in principle, with civil and political rights. Over the years, the distinctions between ‘generations’ and ‘dichotomies’ of rights that were brought into the international human rights discourse by the ideological frictions of the Cold War—i.e. between positive/negative, progressive/immediate, expensive/cost-free, vague/precise rights—have gradually faded in favour of a comprehensive human rights approach that acknowledges the indivisibility, interdependence and interrelatedness of all human rights.⁴³⁷ It is now generally accepted, especially since the publication of Henry Shue’s seminal work,⁴³⁸ that if any distinctions exist, they are between duties rather than rights.

Despite developments in theory, law and practice, however, the forced regression in the enjoyment of ESR that has been registered in several European countries in the aftermath of the financial, economic and sovereign debt crises, casts a shadow on the adequacy of the existing international legal framework to shield the most vulnerable from the unfavourable circumstances that substantiate the very existence of ESR. The fact that human rights did not have a significant role in the remedies to the crisis devised by States and international institutions, rehabilitates timeworn allegations that ESR are mere ‘interests’, ‘preferences’,

⁴³⁷ Among several international declarations reaffirming such ‘leading axiom’ of human rights, see the Proclamation of Teheran, Final Act of the International Conference on Human Rights (Teheran, 22 April to 13 May 1968) A/CONF. 32/41 at 3 (1968), par. 13; Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, par. 5; UNGA, Res 60/1 of 16 September 2005, ‘2005 World Summit Outcome’, A/RES/60/1 (24 October 2005) par. 13; UNGA, Res 60/251 of 15 March 2006, ‘Human Rights Council’, A/RES/60/251 (3 April 2006) Preamble.

⁴³⁸ Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2nd edn, Princeton University Press 1996).

‘aspirations’ or, worse, subjective and unjustified ‘demands’, rather than human rights enjoying legal protection under international law.

This chapter will critically review the existing international standards on ESR and sovereign debt. It is divided into two main sections. Section 4.2 will introduce the nature and scope of States parties’ general obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴³⁹ particularly its article 2(1). Considering their relevance for the debt-related conduct of States, special attention will be paid, in this section, to the concepts of maximum available resources, international cooperation and assistance, and the prohibition of retrogressive measures. Under the same section, the Respect, Protect and Fulfil framework of tripartite State duties will be also briefly illustrated. An assessment of the overall protection offered to ESR under international law will, finally, complete this part of the chapter (Section 4.3)

Afterwards, Section 4.4 will discuss States’ ESR obligations in specific relation to the issue of sovereign debt, as illustrated, in particular, by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights,⁴⁴⁰ and in specific international instruments, particularly the 2012 UN Guiding Principles on foreign debt and human rights.

The aim of this chapter is to provide the overall international legal setting, especially for an analysis of the relationship between sovereign debt and socio-economic rights in the case of the Greek sovereign debt crisis, which will follow in the next chapter.

4.2. State obligations under the International Covenant on Economic, Social and Cultural Rights

Before embarking on the analysis of the normative content of the ICESCR, it is essential to briefly introduce the different categories of States’ obligations contained in the Covenant, as well as the role of the Committee on Economic,

⁴³⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁴⁴⁰ On the mandate of the Independent Expert, see further Section 4.4.

Social and Cultural Rights (hereinafter, the CESCR), particularly in relation to the clarification of the Covenant's normative content.

The Covenant includes 31 provisions divided in five parts. Part I is constituted of only one provision, article 1, recognising the right to self-determination. Part II, articles 2 to 5, cover States parties' general (or basic) obligations. These discipline State conduct with regard to the Covenant as a whole, and apply to all the substantive rights recognised in Part III, articles 6 to 15, which contain States' specific (or rights-based) obligations.

In particular, article 2(1) ICESCR describes the general legal obligations of States Parties under the Covenant, while the remaining articles of Part II contain, respectively, a prohibition of discrimination (art. 2(2)), the duty to treat men and women equally in the enjoyment of the Covenant's rights (art. 3), a limitation clause (art. 4) and the Covenant's interpretation rules (art. 5)

In addition to the right to self-determination (art. 1), the other substantive rights recognised in the Covenant are the rights to equality for men and women (art. 3); to work and to just and favourable conditions of work (arts. 6 and 7); to form and join trade unions, and to strike (art. 8); to social security, including social insurance (art. 9); to protection and assistance for the family, and the prohibition of child labour (art. 10); to an adequate standard of living for oneself and one's family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (art. 11); to the highest attainable level of physical and mental health (art. 12); to education (art. 13); to free and compulsory primary education (art. 14); to take part in cultural life, to benefit from scientific progress, and to benefit from the protection of scientific, literary or artistic production of which one is the author (art. 15).

Part IV of the Covenant, articles 16 to 25, establish the supervisory system, and, lastly, Part V, articles 26 to 31, contain miscellaneous provisions relating to matters such as ratification and entry into force.

4.2.1. The Committee on Economic, Social and Cultural Rights and the interpretation of the ICESCR

As is well known, the International Covenant on Civil and Political Rights

(ICCPR)⁴⁴¹ and the ICESCR were initially equipped with very different supervisory systems. Differently from the ICCPR—which provided for three monitoring procedures, i.e. State reporting, inter-state complaints and individual communications,⁴⁴² and established the Human Rights Committee (art. 28 ICCPR)—the ICESCR devised only vague State reporting obligations and did not establish a special supervisory body, but assigned the task of supervision of States’ compliance with the Covenant’s provisions to the Economic and Social Council (ECOSOC).⁴⁴³ In 1976, however, the ECOSOC laid down more specific implementation procedures and set up a subsidiary organ—the Sessional Working Group on the Implementation of the ICESCR—to *assist* the Council in the consideration of State reports.⁴⁴⁴ In 1982, the Working Group was partially reorganised and renamed as the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant,⁴⁴⁵ before being eventually renamed, in 1985, as the CESCR.⁴⁴⁶ The latter started its work with independent experts in 1987.

It must be noted that, formally speaking, the CESCR is a subsidiary organ of the ECOSOC. It is, therefore, a *sui generis* treaty-body, which differs quite significantly from other human rights committees. Its mandate and authority do not derive from the Covenant itself, but from an ECOSOC resolution. Hence, differently from other human rights monitoring bodies, which are directly

⁴⁴¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3.

⁴⁴² The latter mechanism is provided under the Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁴⁴³ ICESCR, Part IV, Articles 16 to 21.

⁴⁴⁴ ECOSOC Res 1988 (LX) (11 May 1976), ‘Procedures for the implementation of the International Covenant on Economic, Social and Cultural Rights’, E/C.12/1989/4 (27 October 1988), and ECOSOC Decision 1978/10 (3 May 1978), ‘Composition of the Sessional Working Group on the Implementation of the International Covenant on Economic, social and Cultural Rights’, E/C.12/1989/4 (27 October 1988).

⁴⁴⁵ ECOSOC Res 1982/33 (6 May 1982), ‘Review of the composition, organization and administrative arrangements of the Sessional Working Group (of Governmental Experts) on the Implementation of the International Covenant on Economic, Social and Cultural Rights’, E/C.12/1989/4 (27 October 1988).

⁴⁴⁶ ECOSOC Res 1985/17 (28 May 1985), ‘Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights’, E/C.12/1989/4 (27 October 1988).

responsible for their supervisory activities before the States parties to their founding instruments, the CESCR is primarily responsible before the ECOSOC, and maintains a significant degree of autonomy from States parties. This special legal status has admittedly placed it, to some extent, in a vulnerable situation, being the CESCR strongly dependent on the ECOSOC—and ‘sea changes’ within it—for its existence.⁴⁴⁷ Until now, however, this peculiar legal standing does not seem to have affected the work of the Committee nor, more importantly, the legitimacy with which it is perceived by States and other human rights monitoring bodies.⁴⁴⁸

Furthermore, in 2008, the Human Rights Council adopted an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR),⁴⁴⁹ which entered into force on 5 May 2013 and, as of 2017, has been ratified by 22 of the 165 States parties to the ICESCR.⁴⁵⁰

The OP-ICESCR establishes three new monitoring procedures, this time formally entrusted to the CESCR. Firstly, an individual complaints procedure, largely mirroring the one foreseen by the ICCPR, although with some differences, among which the possibility to submit communications by or on behalf of groups of individuals is certainly remarkable.⁴⁵¹ Secondly, an inter-

⁴⁴⁷ Matthew CR Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its development* (Clarendon Press 1998) 51; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 90. Craven has noted that the ‘indirect’ mandate of the CESCR could potentially raise a conflict of competence with the ECOSOC similar to that experienced by the Committee of Independent Experts to the European Social Charter vis-à-vis the Governmental Committee, although in practice the ECOSOC has manifested very little interest in the work of the Committee. However, to bring the Committee formally in line with the other human rights treaty bodies would require an amendment to the ICESCR, an arduous endeavour whose outcome would eventually bind only the States Parties that will accept it, Craven, 51.

⁴⁴⁸ Eide Riedel, Gilles Giacca and Christopher Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 7; Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press 1992) 488-489; Craven (n 447), 51. For an extensive analysis of the legitimacy of the Committee and its work, particularly its interpretation of the Covenant, see Sepúlveda (n 447) 87 ff.

⁴⁴⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117.

⁴⁵⁰ Argentina, *Belgium*, Bolivia, Bosnia and Herzegovina, Cabo Verde, Central African Republic, Costa Rica, Ecuador, El Salvador, *Finland*, *France*, Gabon, *Italy*, *Luxemburg*, Mongolia, Montenegro, Niger, *Portugal*, San Marino, *Slovakia*, *Spain* and Uruguay (countries in italics are members of the European Union). Greece has not ratified the Protocol yet, hence it has only State reporting obligations.

⁴⁵¹ Art. 2 OP-ICESCR.

state complaints procedure, allowing a State party claiming that another State party is not fulfilling its obligations under the Covenant, to refer the matter to the CESCR (only, though, where both States have expressly declared that they recognise the competence of the CESCR to receive and consider such communications).⁴⁵² Thirdly, an inquiry procedure, which can be initiated by the CESCR, on its own initiative, upon receipt of reliable information on serious, grave or systematic violations by a State party to the Covenant (in this case as well, inquiries may only involve States parties who have explicitly recognized the specific competence of the Committee, and States can at any time withdraw their declaration, by notification to the Secretary-General).⁴⁵³

The OP-ICESCR potentially represents an historic step forward for the effective protection of ESR, offering additional means to the CESCR to strengthen its interpretation of the Covenant. However, given its recent entry into force and the limited number of ratifications, the jurisprudence of the Committee is still very limited. Since 2013, the CESCR has received 13 individual complaints, of which seven were declared inadmissible, and four are still pending. The Committee has, so far, adopted Views only on two cases.⁴⁵⁴

Immediately after its creation, however, and well before the proposal of an Optional Protocol had even come into existence, the Committee had substantially moved beyond the ‘advisory’ role assigned to it by the ECOSOC, gradually emerging as “the principal forum in which the implications of the concept of ESR are being explored”.⁴⁵⁵ Especially through the practice of its General Comments,⁴⁵⁶ as well as the adoption of Concluding Observations, Statements and Letters addressed to the States parties, the Committee has had a

⁴⁵² Art. 10 OP-ICESCR.

⁴⁵³ Art. 11 OP-ICESCR. As of 2017, only Belgium, El Salvador, Finland, San Marino and Portugal have made declarations under arts. 10 and 11 OP-ICESCR.

⁴⁵⁴ Views adopted by the Committee on 20 April 2016 on the case *López Rodríguez* (Spain), communication No 001/2013 (E/C.12/57/D/1/2013) on the matter of access to non-contributory disability benefits for prisoners; and Views adopted by the Committee on 13 October 2015 on the case *I.D.G.* (Spain), communication No 002/2014 (E/C.12/55/D/2/2014) on the matter of lack of effective access to the courts to protect the right to adequate housing. No inter-State complaints and no inquiry procedures have been so far opened.

⁴⁵⁵ Philip Alston and Bruno Simma, ‘Second Session of the UN Committee on Economic, Social and Cultural Rights’ (1988) 82 *American Journal of International Law* 3, 604; Sepúlveda (n 447) 32.

⁴⁵⁶ To date, the CESCR has adopted 23 General Comments.

critical role in generating interpretative clarity on the normative content of the Covenant.⁴⁵⁷ It must be emphasised, however, that the Committee's observations, comments and views and, consequently, the interpretations of the Covenant therein expressed, are not *per se* binding upon States parties. They have, nonetheless, considerable legal weight⁴⁵⁸ and seem to be widely accepted, as reflected in the States parties' practice before the Committee, as well as by a plethora of resolutions and decisions adopted by States in international fora.⁴⁵⁹ With regard to the Committee's Concluding Observations, it has been noted, for instance, that

while the Committee's concluding observations, in particular suggestions and recommendations, may not carry legally binding status, they are indicative of the opinion of the only expert body entrusted with and capable of making such pronouncements. Consequently, for States parties to ignore or not act on such views would be to show bad faith in implementing their Covenant-based obligations. In a number of instances, changes in policy, practice and law have been registered at least partly in response to the Committee's concluding observations.⁴⁶⁰

Over the years, key academics and civil society actors have also contributed to the elucidation of the normative content of the ICESCR, through the adoption of international expert opinions. Prominent among these are, in ascending chronological order, the 1986 *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (hereinafter, the Limburg Principles);⁴⁶¹ the 'basic postulates' on the nature of State obligations with respect to economic, social and cultural rights, proposed in 1992 by Danilo Türk, then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;⁴⁶² the 1997 *Maastricht*

⁴⁵⁷ Craven (n 447) 57.

⁴⁵⁸ Focarelli, *Trattato* (n 209) 1017 ff.

⁴⁵⁹ Sepúlveda (n 447) 88 and 110; Craven (n 447) 91-92.

⁴⁶⁰ OHCHR, *Fact Sheet No.16 (Rev.1)*, *The Committee on Economic, Social and Cultural Rights* <<http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>> (last accessed March 2017).

⁴⁶¹ 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 122.

⁴⁶² Commission on Human Rights, Sub-Commission on Prevention of Discrimination and

Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter, the ‘Maastricht Guidelines’);⁴⁶³ and the 2011 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (hereinafter, the ‘Maastricht Principles’).⁴⁶⁴ Reference to these documents which, according to their authors, predominantly reflect the State of international law at the time of their adoption,⁴⁶⁵ will be made throughout the following sections. However, it must be emphasised that, being interpretative guidelines and principles adopted by groups of experts, these instruments do not, as such, represent legally binding norms, although they are frequently referred to by various human rights monitoring bodies.

4.2.2. States parties’ general obligations under article 2(1) ICESCR

Art. 2(1) ICESCR describes the nature of the general legal obligations undertaken by States parties and, according to the CESCR, it “must be seen as having a dynamic relationship with all of the other [Covenant’s] provisions”.⁴⁶⁶ It provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Protection of Minorities, ‘The realization of economic, social and cultural rights’, Second progress report prepared by Mr Danilo Türk, Special Rapporteur (18 July 1991) E/CN.4/Sub.2/1991/17.

⁴⁶³ ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 691.

⁴⁶⁴ Other important expert contributions are the 1995 ‘Bangalore Declaration and Plan of Action’ on the realisation of economic, social and cultural rights (specifically examining the role of lawyers with regard to ESR) in ‘Special Issue’ (1995) *ICJ Review* 55, 219-227; and, at the Latin American level, the 1998 ‘Quito Declaration on the Enforcement and Realisation of Economic, Social and Cultural Rights in Latin America and the Caribbean’ (1999) 2 *Yale Human Rights and Development Law Journal* 6.

⁴⁶⁵ Sepúlveda (n 447) 64.

⁴⁶⁶ CESCR, General Comment No 3, ‘The nature of States parties’ obligations (art. 2, para. 1)’ (1 January 1991) E/1991/23 (hereinafter, ‘GC3’).

The main elements of art. 2(1) will be presented here in brief general terms while, in the following sub-sections, I will more extensively discuss the three elements that have a special bearing in relation to the issue of sovereign debt, i.e. retrogressive measures, maximum available resources, and the duty of international assistance and cooperation.

Firstly, Art. 2(1) requires States to take steps *with a view to achieving progressively the full realization of the Covenant's rights*.

The concept of 'progressive realisation' is considered to be in many ways the linchpin of the whole Covenant.⁴⁶⁷ It was deployed by the drafters as a "necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights",⁴⁶⁸ in line with their conviction that such full realisation cannot be achieved in a short period of time, that progress towards that goal cannot be universal but only relative to States' available resources, and hence that economic circumstances must be taken into account in determining the scope of States parties' obligations.⁴⁶⁹

Although the concept of progressive realisation has been often mistakenly taken to imply that ESR can be realised only when a country reaches a certain level of economic development, it must be stressed that this is neither the intent nor the legal interpretation of this provision.⁴⁷⁰ As the language of art. 2(1) makes clear, States parties have voluntarily committed to the *full realisation* of economic, social and cultural rights, which is the ultimate goal of the ICESCR (although the exact meaning of this goal—when is an economic, social or cultural rights 'fully realised'?—remains elusive). Thus, progressive realisation is essentially a means to this end.⁴⁷¹ States cannot use the notion as a pretext for failing to comply with or for indefinitely deferring their efforts to ensure the

⁴⁶⁷ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly*, 173.

⁴⁶⁸ CESCR, GC3, para 9.

⁴⁶⁹ Alston and Quinn (n 467) 172 ff; Aoife Nolan and Mira Dutschke, 'Article 2(1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) *European Human Rights Law Review* 3, 282.

⁴⁷⁰ OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations, 2005) 10.

⁴⁷¹ Nolan and Dutschke (n 469) 282.

enjoyment of the Covenant's rights; nor can they justify limitations of or derogation from ESR on that basis.⁴⁷² As the OHCHR has usefully explained, the standard of progressive realisation "must be viewed, used and acted upon by States in a positive way to prevent or reverse any regressive policies, laws or practices negatively affecting the full enjoyment of economic, social and cultural rights".⁴⁷³

Bearing this qualification in mind, States parties' obligations under art. 2(1) ICESCR, according to the subsequent interpretations of the Committee, can be outlined as follows:

- (a) States must take steps, immediately and continuously, towards the progressive achievement of the full realisation of ESR,
 - (a)(1) to the maximum of their available resources, and
 - (a)(2) individually and through international cooperation and assistance;
- (b) States must immediately ensure the satisfaction, at the very least, of minimum essential levels of each substantive right ('minimum core' obligation);
- (c) States must protect, at any time and regardless of available resources, the most vulnerable and disadvantaged members or groups of society; and
- (d) States must not take any deliberately retrogressive measures.

I will now briefly outline the obligations under the points (a), (b) and (c), while reserving the following sections to analyse those under the points (d), (a)(1) and (a)(2).

States parties have (a) an obligation to take, "within a reasonably short time after the Covenant's entry into force" (and continuously thereafter), steps that must be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".⁴⁷⁴ This is, therefore, an *immediate* obligation. 'Steps' should engage "all appropriate means", including (but not limited to) the adoption of legislative measures, the provision of judicial

⁴⁷² Limburg Principles, principle 21; Maastricht Guidelines, guideline 8; OHCHR (n 470) 11.

⁴⁷³ *ibid*, 12.

⁴⁷⁴ CESCR, GC3, para 2.

remedies, as well as “administrative, financial, educational and social measures”.⁴⁷⁵ Furthermore, as suggested by the ordinary meaning of the adjective ‘progressive’ (i.e. ‘to make continuous forward movement’),⁴⁷⁶ progressive realisation requires States parties to *continuously* take ‘forward’ steps, both in ‘qualitative and ‘quantitative’ terms (i.e. improving the implementation of the rights as well as gradually expanding both the number and the range of people who can access the rights), towards the full realisation of ESR.⁴⁷⁷

Rooted in the immediate obligation to take steps are also other immediate obligations, first of all (b) an obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the Covenant’s rights, or the so called ‘minimum core’ obligation.⁴⁷⁸ In General Comment No. 3, in fact, the Committee underlined that “if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*”.⁴⁷⁹

What is to be meant by ‘minimum essential levels’ in relation to each of the substantive rights recognised in the ICESCR has been further clarified by the Committee in its General Comments on the specific rights,⁴⁸⁰ and in some of the

⁴⁷⁵ *ibid*, paras 4-5 and 7; Limburg Principles, principles 16-20.

⁴⁷⁶ Sepúlveda (n 447) 319.

⁴⁷⁷ OHCHR (n 470) 12; Nolan and Dutschke (n 469) 284; Sepúlveda (n 447) 319-323.

⁴⁷⁸ CESCR, GC3, para 10; Maastricht Guidelines, guideline 9.

⁴⁷⁹ CESCR, GC3, para 10.

⁴⁸⁰ For instance, with regard to the right to the highest attainable standard of physical and mental health (article 12), the CESCR has explained that “[...] these core obligations include at least the following obligations: (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (e) To ensure equitable distribution of all health facilities, goods and services; (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups, see CESCR, General Comment No 14, ‘The right to the highest attainable standard of health (art. 12)’, E/C.12/2000/4 (11 August 2000) para 43 (hereinafter, ‘GC14’).

Concluding Observations.

The minimum core obligation consequently entails, according to the Committee, that a “State party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant”.⁴⁸¹

Also rooted in the duty to take immediate and continuous steps to progressively achieve the full realisation of ESR is (c) an obligation to protect at any time, even and especially in times of severe resources constraints, the most vulnerable and disadvantaged members and groups of society, through the adoption of relatively low-cost targeted programmes.⁴⁸²

4.2.2.1. *Retrogressive measures*

Rooted, on the contrary, in the idea of progressive realisation, is the obligation for States parties *not to take any deliberately retrogressive measures*. These have been usefully defined by Magdalena Sepúlveda as

any measure that implies a step back in the level of protection accorded to the rights contained in the Covenant which is the consequence of an intentional decision by the State.⁴⁸³

Examples of retrogressive measures could be the introduction of a legislation or policy with a direct collateral negative effect on the enjoyment of ESR, or containing discriminatory provisions, or abrogating ESR-favourable legislation (unless outdated) without replacing it with equally or more consistent law or

⁴⁸¹ CESCR, GC3, para 10.

⁴⁸² *ibid*, para 12; General Comment No 5, ‘Persons with disabilities’ (1 January 1995) para 10; General Comment No 6, ‘The economic, social and cultural rights of older persons’ (7 October 1996) para 17; General Comment No 12, ‘The right to adequate food (art. 11)’ (12 May 1999) E/C.12/1999/5, para 28; GC 14, para 18; General Comment No 17, ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)’ (12 January 2006) E/C.12/GC/17, para 20; General Comment No 18, ‘The right to work (art. 6)’ (6 February 2006) E/C.12/GC/18, para 12 (hereinafter, respectively, ‘GC5’, ‘GC6’, ‘GC12’, ‘GC17’ and ‘GC18’).

⁴⁸³ Sepúlveda (n 447) 323, on the basis of CESCR’s General Comment No 4, ‘The right to adequate housing (art. 11, para 1)’ (13 December 1991) E/1992/23, para 1 (hereinafter, ‘GC4’).

with compensatory measures; or an unjustified reduction in public expenditures devoted to implementing ESR, in the absence of adequate compensatory measures aimed to protect the injured individuals.⁴⁸⁴

Retrogressive measures are *prima facie* prohibited and amount to a violation of the ICESCR,⁴⁸⁵ so that States have the burden of proving their compatibility with the Covenant.

To that aim, the CESCR outlined, initially in its General Comments No. 3 and No. 19, some eight requirements that must be fulfilled for a retrogressive measure to be considered permissible under the Covenant. These included the need for a State to prove that any such measure received “the most careful consideration” and was “fully justified”, “by reference to the totality of the rights provided for in the Covenant”, and “in the context of the full use of the maximum available resources”.⁴⁸⁶ Furthermore, the CESCR noted that it

will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups [...]; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures [...].⁴⁸⁷

Several commentators have noted that, so far, the CESCR has not seriously monitored the adoption of deliberately retrogressive measures by States Parties and that, in the few cases where the Committee has actually engaged with measures of this kind, it has been far too permissive.⁴⁸⁸ Hence, when, on the

⁴⁸⁴ Sepúlveda (n 447) 324.

⁴⁸⁵ Statements concerning the presumption of the impermissibility of retrogressive measures can be found, *inter alia*, in General Comment No 13, ‘The right to education (art. 13)’ (8 December 1999) E/C.12/1999/10, para 45 (hereinafter, ‘GC13’) and GC14, para 32; Maastricht Guidelines, guideline 14(e).

⁴⁸⁶ CESCR, GC3, para 9.

⁴⁸⁷ CESCR, General Comment No 19, ‘The right to social security (art. 9)’ (4 February 2008) E/C.12/GC/19, para 42 (hereinafter, ‘GC19’).

⁴⁸⁸ Sepúlveda (n 447) 324-5, attributing the Committee’s flexible approach to the fact that an assessment of whether States have actually adopted such measures, would require to undertake complex analyses and consider a wide range of information that are usually out of the

occasion of the recent economic and debt crises, the prohibition against retrogressive measures could have assumed exceptional relevance in containing the negative impact on ESR of the fiscal consolidation measures adopted by several countries, the Committee was in a rather weak position to effectively urge States to comply with this prohibition.

Furthermore, in 2012, the CESCR addressed to States Parties an important Letter on austerity measures,⁴⁸⁹ spelling out some rather different criteria to assess the compatibility of retrogressive measures with the Covenant. While acknowledging that “States parties have, of course, a margin of appreciation within which to set national economic, social and cultural policies that respect, protect, and fulfil the Covenant”⁴⁹⁰ and that “some adjustments in the implementation of some Covenant rights are at times inevitable”,⁴⁹¹ the Committee emphasised that, to be compatible with the ICESCR, any proposed adjustment has to meet the following requirements:

1. it must be a *temporary* measure covering only the period of crisis;
2. the measure must be *necessary and proportionate*, in the sense that the adoption of any other policy, or failure to act, would be more detrimental to ESR;
3. the measure must *not be discriminatory* and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected; and
4. it must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and *ensure the protection of this core content at all times*.⁴⁹²

However, as it has been correctly observed, with its 2012 Letter the CESCR has established a new ‘emergency regime’ for the implementation of ESR

Committee’s reach.

⁴⁸⁹ Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (hereinafter, ‘2012 Letter on austerity measures’).

⁴⁹⁰ *ibid*, 1.

⁴⁹¹ *ibid*

⁴⁹² *ibid* (emphasis added).

obligations, which amounts to a “near-suspension of some key obligations”⁴⁹³ and poses some serious dangers for the realisation of ESR.

In fact, the pre-2012 approach to non-retrogression granted significant everyday discretion and flexibility to States in the fulfilment of their obligations under the Covenant through the combination of Article 2(1), Article 4, the less prescriptive formulation of individual rights and the doctrine of non-retrogression as formulated in the General Comments No. 3 and 19, while denying, to the contrary—in accordance with the more general formulation of the ICESCR—the need for derogations, special powers or the suspension of legal frameworks. This quality was particularly apt to ensure consistency of outcomes, the value of consistent protection of ESR, and, since obligations remained intact also in emergency situations, the preservation of avenues for contesting retrogressive measures.⁴⁹⁴

The 2012 Letter, on the contrary, has produced a substantial alteration of the doctrine of non-retrogression, towards a more ‘adaptive approach’ grounded on ‘emergency accommodation’.⁴⁹⁵ It now provides only four criteria (compared with the previous eight), two of which, i.e. non-discrimination and the protection of the minimum core, “cannot even properly be described as conditions specific to the taking of retrogressive measures [...] [but] are general, longstanding and immediate obligations that exist beyond the circumstances of retrogression”.⁴⁹⁶ Hence, the non-retrogression test is *de facto* reduced to two criteria, largely mirroring the derogations regimes provided for by the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights (ECHR), and the American Convention of Human Rights (ACHR): to be justified under the Covenant, retrogressive measures essentially must be *temporary*, and *necessary and proportionate*.⁴⁹⁷

The Committee has further reiterated the same criteria in a 2016 Statement on Public Debt, Austerity Measures and the International Covenant on

⁴⁹³ Ben TC Warwick, ‘Socio-Economic Rights During Economic Crises: A Changed Approach to Retrogression’ (2016) 65 *International and Comparative Law Quarterly* 1, 250.

⁴⁹⁴ *ibid*, 254.

⁴⁹⁵ *ibid*, 257.

⁴⁹⁶ *ibid*

⁴⁹⁷ *ibid*, 257-258.

4.2.2.2. *Maximum available resources*

As mentioned above, the obligation of States parties to take steps under art. 2(1) ICESCR is *to the maximum of their available resources*.⁴⁹⁹ As it is well known, a similar specification was not deployed in the ICCPR, owing to the idea, prevalent at the time of the Covenants' drafting, that ESR imposed positive and expensive obligations, while civil and political rights were essentially negative and 'cost-free'. It is plausible that, anchored in this perception, the limitation to the maximum of available resources was primarily intended, by some States' representatives, to exclude that the ICESCR could be interpreted as requiring States to devote all their resources, without exception, to the realisation of ESR.⁵⁰⁰

Today, however, it is well established that the realisation of all human rights, not just ESR, necessitates of resources. At the very least, in fact, resources are needed to establish an institutional structure to secure compliance also with civil and political rights.⁵⁰¹ Nonetheless, the distinct legal weight assigned to the concept of resources in relation to ESR obligations remains. In fact, the availability of resources is an "important qualifier"⁵⁰² to the obligation to take steps. Although it does not alter the immediacy of the obligation, as the CESCR has clarified,⁵⁰³ it inevitably restricts its scope.

⁴⁹⁸ CESCR, Statement on Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (22 July 2016) E/C.12/2016/1 (hereinafter, 'CESCR 2016 Statement on Public Debt') para 4.

⁴⁹⁹ Similar provisions are included, with specific regard to ESR, in the Convention on the Rights of the Child (20 November 1989), art. 4, and the Convention on the Rights of Persons with Disabilities (13 December 2006), art. 4(2).

⁵⁰⁰ This view is supported, for instance, by a Statement by Mrs. Roosevelt emphasising that "in a legal instrument it should be clear that a State was not required to use all its resources without exception but only the maximum which could be expended for a particular purpose without sacrificing essential services", 8 U.N. ESCOR C.4 (271st mtg.) at 12, U.N. Doc. E/CN.4/SR.271 (1952) (Mrs. Roosevelt, USA) 3, quoted in Alston and Quinn (n 467) 178.

⁵⁰¹ Sepúlveda (n 447) 127. Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 *Human Rights Law Review* 3, 395-6.

⁵⁰² CESCR 2016 Statement on Public Debt (n 498) para 4.

⁵⁰³ *ibid*

Neither the Covenant, nor the CESCR have expressly defined what is meant by the expression ‘available resources’. It seems plausible, however, as some commentators have noted, that the Covenant’s drafters intended to refer not only to financial, but to other resources as well, broadly interpreted; and to the ‘real’ resources of a country, of which budgetary allocations are not necessarily an authoritative description.⁵⁰⁴ The Committee, on his part, has repeatedly observed that ‘available resources’ refer to both the resources existing within a State and those available from the international community through international cooperation and assistance (on which see below, Section 4.2.2.2).⁵⁰⁵

Interestingly, in the matter of sovereign debt, it has been contended that funds that are necessary to service debt would be excluded from a State’s available resources, as the State would be under a contractual obligation to use these funds to repay its debts, so that they would be in fact ‘creditor property’.⁵⁰⁶ However, it has been more convincingly observed, on the contrary, that if funds owed as debt were excluded from the notion of available resources, many developing countries would simply not have any resources available to meet their ESR obligations. Moreover, States could then “easily contract out of their [ESR] obligations by simply entering into financial transactions by which the country’s resources would be bound”,⁵⁰⁷ without having to eventually provide any justification for giving precedence to debt repayment over social programmes. Hence, it has been correctly argued that

being under a contractual obligation does not mean that the funds that need to be dedicated to its fulfilment are therefore not at the free disposition of the debtor. Instead, while it might give rise to claims for breach of contract if a debtor State does not fulfil its contractual obligations, the State is

⁵⁰⁴ Skogly (n 501) 398; Alston and Quinn (n 467) 178.

⁵⁰⁵ CESCR GC3, para 13; CESCR 2016 Statement on Public Debt (n 498) para 5; Limburg Principles, principle 26.

⁵⁰⁶ Sabine Michalowski, ‘Sovereign Debt and Social Rights: Legal Reflections on a Difficult Relationship’ (2008) 8 *Human Rights Law Review* 1, 48.

⁵⁰⁷ *ibid*

nevertheless, in principle, free to decide how to use these funds.⁵⁰⁸

Resource allocation

States parties maintain considerable discretion in determining both what their available resources are and how to allocate and use them.⁵⁰⁹

At the time of the Covenant's drafting, various States' representatives expressed their concern that attempts to dictate how States should allocate their resources for the realisation of ESR would have been 'unrealistic', considering that in drawing up their budgets, governments have to make very difficult choices of economic policy, a domain "closely related to national sovereignty".⁵¹⁰ Therefore, the Covenant remained silent on the matter.

More recently, the Committee has reiterated that it "always respects the margin of appreciation of a State party to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others",⁵¹¹ bearing in mind "its own role as an international treaty body and the role of the State in formulating or adopting, funding and implementing laws and policies concerning economic, social and cultural rights".⁵¹² Nevertheless, States' discretion on the allocation and use of their available resources is not unlimited, nor is their conduct in this respect completely immune from scrutiny by the CESCR.⁵¹³ Over the years, the Committee has outlined, particularly in its General Comments and Concluding Observations, and in a 2007 Statement on the Evaluation of the obligation to take steps to the maximum available resources under the OP-ICESCR,⁵¹⁴ some indications on the conduct that is *required* or, more generally, *recommended* (the difference among the two notions is important, as will be discussed further below) to States Parties under the

⁵⁰⁸ *ibid*

⁵⁰⁹ Alston and Quinn (n 467) 180.

⁵¹⁰ *ibid*, quoting the Inter-American Commission on Human Rights on the issue of governmental discretion, *Annual Report of the Inter-American Commission on Human Rights 1979-1980*, OEA/Ser. G/CP/doc. 110/80 (1980) 151.

⁵¹¹ CESCR 2016 Statement on Public Debt (n 498) para 12.

⁵¹² *ibid*, para 11.

⁵¹³ Alston and Quinn (n 467) 180; Sepúlveda (n 447) 315.

⁵¹⁴ CESCR, An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant (21 September 2007), E/C.12/2007/1 (hereinafter, 'CESCR 2007 Statement on Maximum Available Resources').

Covenant in relation to the use of their maximum available resources.

With regard to explicit *obligations*, the General Comments contain very limited and general indications, establishing only minimal standards, aimed, in effect, at excluding that States could deem themselves completely free in their resource allocation, or use resource constraints as a way out of their obligations under the Covenant. States parties are, in fact, required:

- a) to *use their maximum available resources* in order to realise ESR, both the resources existing within the country and those available through international cooperation and assistance. States' unwillingness to do so amounts to a violation of the Covenant.⁵¹⁵ In this regard, States are also under a procedural obligation, inferred from the obligation to work out and adopt a detailed plan of action for the progressive implementation of each of the rights contained in the Covenant (principled policy-making),⁵¹⁶ to give adequate consideration to the possible resources available to satisfy each of the Covenant's requirements;
- b) to *ensure the widest possible enjoyment* of the relevant rights under the prevailing circumstances, even where the available resources are demonstrably inadequate;⁵¹⁷
- c) to *protect the more vulnerable members of society* by the adoption of relatively low-cost targeted programmes, at any time, even and especially in times of severe resources constraints, whether caused by a process of adjustment, or economic recession, or by other factors (prioritisation of the most vulnerable).⁵¹⁸ This requires, inter alia, the allocation by the State of adequate financial resources (e.g. for the effective implementation of poverty reduction programmes, or for social housing and rental subsidies),⁵¹⁹ and that resources should not be

⁵¹⁵ CESCR GC12; General Comment No 15, 'The right to water (arts. 11 and 12)' (20 January 2003) E/C.12/2002/11 (hereinafter, 'GC15'); GC17; and GC18.

⁵¹⁶ CESCR General Comment No 1, 'Reporting by States Parties' (27 July 1981) E/1989/22, para 4 (hereinafter, 'GC1'); Alston and Quinn (n 467) 181; Nolan and Dutschke (n 469) 288.

⁵¹⁷ CESCR, GC3, para 11; 2007 Statement on Maximum Available Resources, para 4 (the language here is the following: "[...] the obligation remains for a State party to ensure the widest possible enjoyment [...]", while in GC3 it was "to strive to ensure").

⁵¹⁸ CESCR, GC3, para 12; 2007 Statement on Maximum Available Resources, para 4.

⁵¹⁹ CESCR, Concluding observations on the second periodic report of Greece (27 October

allocated to benefit already advantaged social groups at the expense of other, more vulnerable segments of society;

- d) where States are claiming to be unable to carry out even their minimum core obligations for reasons behind their control, to *demonstrate that every effort has been made* to use all the resources that are at their disposition in an effort to satisfy, as a matter of priority, such obligations (prioritisation of minimum core, and burden of proof).⁵²⁰

The relationship between the notion of maximum available resources and the minimum core obligation deserves to be addressed briefly in greater detail. In fact, whether minimum core obligations are (or not) completely ‘resource-independent’ is not entirely clear from the Committee’s work, which also seems to contradict the Maastricht Guidelines on the point. In addition to the provision mentioned above at point d), in its General Comment No. 3 the Committee acknowledged that “any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned”.⁵²¹ The Maastricht Guidelines, on the contrary, provide that “minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties”,⁵²² and “resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of ESR”.⁵²³ Actually, in later interpretations of the Covenant, for example in General Comment No. 14, the Committee has affirmed that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations [...], which are non-derogable”.⁵²⁴ Furthermore, several commentators seem to agree on the view that minimum core obligations apply irrespective of available resources, based on the rebuttable presumption that all States have the resources necessary

2015) E/C.12/GRC/CO/2, paras 30 and 34.

⁵²⁰ CESCR GC3, para 10; GC12, para 17; GC17; GC18; GC19, para 60.

⁵²¹ CESCR GC3, para 10.

⁵²² Maastricht Guidelines, guideline 9. See also guideline 10: “As established by the Limburg Principles 25-28 and confirmed by the developing jurisprudence of the CESCR, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights”.

⁵²³ Maastricht Guidelines, guideline 10.

⁵²⁴ CESCR GC14, para 47.

to give effect to minimum core obligations if they define resources broadly enough and are sufficiently aggressive in resource acquisition.⁵²⁵

Nevertheless, in further General Comments, the Committee seems to leave the door open to the idea that resource constraints still matter in the assessment of States parties' compliance with their minimum core obligations. In fact, several more recent General Comments reiterate the provision mentioned at point d).⁵²⁶ This seems to imply that, where States are able to demonstrate that such effort has been made and, yet, they are unable to ensure minimum essential levels of ESR, they will not be considered in breach of their minimum core obligation. This would exclude, in particular, that this obligation is to be automatically considered as 'resource-independent', with evident implications for the assessment of States parties' compliance (it creates, in fact, a legal loophole through which the non-realisation of minimum levels of ESR could still be justified).

Secondly, the Committee's *recommendations* on the use of the maximum available resources, notably expressed in its Concluding Observations, touch upon a wide range of *de facto* economic and fiscal policy issues. These can be summarised as follows:

On fiscal policy

- a) The allocation of significantly more funds to non-Covenant-related expenditures (e.g. military defence or business subsidies), rather than Covenant-related items, is considered by the Committee as an indicator of non-compliance by the State with its obligation to use the maximum available resources. In such cases, the CESCR has recommended the State to increase the proportion of the national budget devoted to Covenant-related expenditures;⁵²⁷

⁵²⁵ Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) 156 *Human Rights Quarterly*, 702; Nolan and Dutschke (n 469) 288.

⁵²⁶ CESCR GC3, para 10; GC12, para 17; GC17; GC18; GC19, para 60.

⁵²⁷ Sepúlveda (n 447) 316-7; *inter alia*, CESCR, Concluding observations on the initial report of the Philippines, in CESCR, 'Report on the Twelfth and Thirteenth Sessions (1-19 May 1995, 20 November-8 December 1995)' (1996), E/1996/22, paras 121-3; Concluding observations on the initial report of Azerbaijan, in CESCR, 'Report on the Sixteenth and Seventeenth Sessions (28 April-16 May 1997, 17 November-5 December 1997)' (1998)

- b) If the percentage of the national budget allocated by a State for the realisation of a specific right is significantly lower than the percentage devoted to the realisation of the same right by another State with a similar level of development, the Committee has considered this an indication of non-compliance with the obligation to use the maximum of available resources;⁵²⁸
- c) Likewise, depending on the level of development of a State (advanced economies generally go under higher scrutiny), the Committee has considered the allocation of scarce resources for the realisation of specific rights (e.g. only 1 per cent of budget allocated to health, or only primary education provided free of charge, where the economic circumstances of a country would allow higher spending) as an indication of non-compliance with the obligation to use the maximum of available resources.⁵²⁹ The Committee has, thus, often recommended States to progressively increase their expenditure on a certain right as a proportion of their gross domestic product (GDP).⁵³⁰ The CESCR has also considered the existence of serious problems with the implementation of a right (e.g. high numbers of homeless people) in a developed country (e.g. Canada) sufficient to indicate that it has not devoted the maximum of its available resources to the realisation of ESR;⁵³¹
- d) The non-utilisation or the diversion (e.g. due to inefficient administration or corruption) of budget items already allocated to social expenditure is considered by the Committee another indicator of non-compliance with the Covenant.⁵³² The CESCR has, thus, recommended

E/1998/22, para 345.

⁵²⁸ Sepúlveda (n 447) 317; *inter alia*, CESCR, Concluding observations on the second periodic report of the Dominican Republic, in CESCR, 'Report on the Twelfth and Thirteenth Sessions (1-19 May 1995, 20 November-8 December 1995)' (1996), E/1996/22, para 228.

⁵²⁹ Sepúlveda (n 447) 317-8; *inter alia*, CESCR, Concluding observations on the initial report of the Republic of Korea, in CESCR, 'Report on the Twelfth and Thirteenth Sessions (1-19 May 1995, 20 November-8 December 1995)' (1996) E/1996/22, paras 26 and 29.

⁵³⁰ *Inter alia*, CESCR, Concluding Observations, Greece (n 519) para 36(a).

⁵³¹ Sepúlveda (n 447) 318; CESCR, Concluding observations on the third periodic report of Canada, in CESCR, 'Report on the Eighteenth and Nineteenth Sessions (27 April-15 May 1998, 16 November-4 December 1998) (1999) E/1999/22, para 399.

⁵³² See also, Maastricht Guidelines, guideline 14.

to combat the practice of non-utilisation of budget items earmarked for social expenditure and to ensure that such appropriations are used for the purposes for which they were budgeted;⁵³³

- e) Where there is an increase in the availability of resources in a country, the Committee expects and has recommended that States proportionally increase their allocation of resources for the realisation of ESR (also in accordance with their obligation to continuously take steps towards the progressive achievement of full ESR);⁵³⁴
- f) It must be also recalled that, as mentioned above (Section 4.2.2.1), an unjustified reduction in ESR expenditure, resulting in the non-enjoyment of such rights, would constitute a deliberately retrogressive measure and a potential violation of the Covenant.⁵³⁵

On economic policy

The Committee has, at times, recommended specific economic policy measures, such as ‘diversification of the economy’ (drawing the attention away from certain industries, e.g. the oil industry, towards other industries and business models, such as local small and medium-scale enterprises);⁵³⁶ increases in real salaries of certain categories of workers (e.g. teachers and nurses),⁵³⁷ or upwards adjustments of minimum wage levels.⁵³⁸

The Committee has clarified that, in assessing the adequacy and reasonableness of the measures taken by a State party in light of the maximum

⁵³³ Sepúlveda (n 447) 315; *inter alia*, CESCR, Concluding observations on the third periodic report of Colombia, in CESCR, ‘Report on the Twelfth and Thirteenth Sessions (1-19 May 1995, 20 November-8 December 1995)’ (1996) E/1996/22, para 181.

⁵³⁴ Sepúlveda (n 447) 322.

⁵³⁵ *ibid*, 324; Maastricht Guidelines, guideline 14 (f).

⁵³⁶ CESCR, Concluding Observations, Azerbaijan (n 527) para 345.

⁵³⁷ CESCR, Concluding observations on the second periodic report of Uruguay, in CESCR, ‘Report on the Sixteenth and Seventeenth Sessions (28 April-16 May 1997, 17 November-5 December 1997)’ (1998) E/1998/22, para 378.

⁵³⁸ CESCR, Concluding observations on the second periodic report of Portugal, in CESCR, ‘Report on the Twelfth and Thirteenth Sessions (1-19 May 1995, 20 November-8 December 1995)’ (1996) E/1996/22, paras 95 and 98; Concluding observations on the third periodic report of Mexico, in CESCR, ‘Report on the Twentieth and Twenty-first Sessions (26 April-14 May 1999, 15 November-3 December 1999)’ (2000) E/2000/22, para 382.

available resources criterion, in the context of the monitoring procedures provided by the OP-ICESCR, it may take into account, *inter alia*, whether the State party's decision to allocate available resources was in accordance with international human rights standards, although the Committee provides no further indication as to what these standards are supposed to be.⁵³⁹

Finally, the Committee has explained that, where a State party uses resource constraints as an explanation for any retrogressive steps taken, it will consider such information on a country-by-country basis, in the light of objective criteria such as: (a) the country's level of development; (b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; (c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession; (d) the existence of other serious claims on the State party's limited resources, for example, resulting from a recent natural disaster or from recent internal or international armed conflict; (e) whether the State party had sought to identify low-cost options; and (f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.⁵⁴⁰

4.2.2.3. *International assistance and cooperation*

As mentioned above, according to art. 2(1) ICESCR, States parties must take steps towards the full realisation of ESR both individually and *through international assistance and cooperation, especially economic and technical*.⁵⁴¹

As the CESCR emphasised, pursuant to the Covenant, and in accordance with arts. 55 and 56 of the UN Charter and with well-established principles of international law, international cooperation and assistance is an obligation of all States, "particularly incumbent on those States which are in a position to assist

⁵³⁹ CESCR 2007 Statement on Maximum Available Resources, para 8 (c), (d) and (f).

⁵⁴⁰ *ibid*, para 10.

⁵⁴¹ Alston and Quinn (n 467) 190. The essential role of international cooperation in facilitating the full realisation of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22, and 23 ICESCR, see CESCR, GC3, para 13.

others in this regard”.⁵⁴² It shall have in view, as a matter of priority, the realization of all human rights and fundamental freedoms,⁵⁴³ must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (in accordance also with art. 28 UDHR),⁵⁴⁴ and shall be based on the sovereign equality of States.⁵⁴⁵ Notwithstanding, the detailed legal implications of the duty to cooperate remain imprecise.

There are some important considerations that can be inferred from the description so far outlined of States parties’ general obligations under art. 2(1) ICESCR but, before discussing them, I will lastly introduce the so called ‘Respect, Protect and Fulfil’ framework, which has been adopted by the CESCR to further illustrate the Covenant’s requirements.

4.2.3. The respect, protect and fulfil framework

The idea that the full realisation of a right gives rise to multiple (both negative and positive) duties was first proposed by political philosopher Henry Shue in 1980. Going beyond the traditional assumption that there is a single correlative duty for each right, Shue suggested that every right imposes three types of duties on States, “all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions”.⁵⁴⁶ These were, in Shue’s formulation, the duties *to avoid* depriving, *to protect* from deprivation and *to aid* the deprived.⁵⁴⁷ In 1987, Shue’s tripartite typology was reformulated in terms of obligations *to respect*, *to protect* and *to fulfil* by the then Special Rapporteur on the right to food to the former UN Sub Commission on Prevention of Discrimination and Protection of Minorities, Asbjørn Eide.⁵⁴⁸ Eide’s version of the tripartite

⁵⁴² CESCR, GC3, para 14; OHCHR (n 470) 14.

⁵⁴³ Limburg Principles, principle 29.

⁵⁴⁴ CESCR, GC3, para 14; Limburg Principles, principle 30.

⁵⁴⁵ Limburg Principles, principle 33.

⁵⁴⁶ Shue (n 438) 52.

⁵⁴⁷ *ibid*, 52-53.

⁵⁴⁸ Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, ‘The Right to Adequate Food as a Human Right’, Report prepared by

typology, or the ‘respect, protect and fulfil framework’, has then been adopted, since 1999, by the CESCR, as a tool to further clarify States parties’ obligations under the Covenant.

As the Committee explained,⁵⁴⁹ the obligation *to respect* requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of ESR, and to ensure that existing access to ESR is maintained. The obligation *to protect* requires States parties to take measures that prevent third parties from violating or interfering in any way with the enjoyment of ESR. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority.⁵⁵⁰ The obligation *to fulfil* incorporates both an obligation *to facilitate* and *to provide*. The obligation *to fulfil (facilitate)* requires the State to act pro-actively to assist individuals and communities to access and enjoy ESR. Finally, State parties have an obligation *to fulfil (provide)* a right directly when an individual or group is unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. Furthermore, since General Comment No. 15, the CESCR has identified a further component of the obligation to fulfil, i.e. the obligation *to fulfil (promote)*, requiring States parties to take a variety of measures, including to ensure that there is appropriate education and public awareness on a specific right.⁵⁵¹

In terms of resource-intensity, the CESCR has clarified that the obligation to respect ESR does not necessarily require the involvement of significant State resources. The obligation to protect, on the other side, and to a greater extent the obligation to fulfil, often require positive budgetary measures in order to prevent third parties from interfering with the rights recognized in the Covenant (obligation to protect) or to facilitate, provide and promote the enjoyment of

Mr. Asbjørn Eide, Special Rapporteur (7 July 1987) E/CN.4/Sub.2/1987/23, paras 112-114. Shue’s tripartite classification was also adopted and expanded into a scheme of four types of State duties (to respect, to protect, to ensure and to promote) by van Hoof in 1984, see GJH van Hoof, ‘The legal nature of economic, social and cultural rights: A rebuttal of some traditional views’ in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Martinus Nijhoff 1984) 106-108; and into a scheme of five types of State duties (to respect, to create institutional machinery, to protect, to provide and to promote) by Henry Steiner and Philip Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (OUP 2000).

⁵⁴⁹ CESCR, GC12, para 15; GC13, paras 46-47 and 50; GC14, paras 33-37; GC15, paras 20-29; GC19, paras 43-50.

⁵⁵⁰ CESCR, GC15, para 23.

⁵⁵¹ *ibid*, para 25; GC19, para 49.

these rights (obligation to fulfil).⁵⁵²

4.3. Some remarks on the ICESCR: the right to a minimal Welfare State and the economic and fiscal policies recommended by the CESCR

There are some important considerations that can be inferred from the description so far outlined of States parties' general obligations under art. 2(1) ICESCR.

First of all, as it has been repeatedly noticed, due to the ideological contentions that affected the drafting process, the provisions of the ICESCR are formulated in vague and general terms.⁵⁵³ As one commentator has duly remarked, art. 2(1) is "a fairly unsatisfactory article", whose "convoluted phraseology" makes it "virtually impossible to determine the precise nature of the obligations".⁵⁵⁴

By reason of the same contentions, the Covenant was also initially equipped with an extremely weak (and uncertain) supervisory mechanism, and this fact delayed of several years any useful clarification of the Covenant's normative content. Later, the Committee began essentially to work, formally, *ultra vires*, although its authority as an interpretive body, as mentioned before, has not been so far challenged by the States parties, and has been certainly strengthened by the adoption of the OP-ICESCR. It might be argued, though, that the hesitant commitment of States towards ESR, reflected in the protracted and elusive formulation of both the Covenant and its supervisory mechanism, has created a constant tension, backwards and forwards, in respect of the legal assertion of ESR, that strongly influenced the work of the Committee. This has, in fact, often found itself rather in the position of having almost to reassure States parties' about the limitations of its role, not seldom adopting a cautious attitude in outlining the Covenant's requirements and the criteria for compliance assessment (for instance, when requested by States parties to clarify how it would apply the obligation under art. 2(1) to take steps 'to the maximum of the available resources' in the context of an individual communications procedure,

⁵⁵² CESCR 2007 Statement on Maximum Available Resources, para 7.

⁵⁵³ Sepúlveda (n 447) 132.

⁵⁵⁴ Craven (n 447) 151.

when such communications procedure was still in the drafting).⁵⁵⁵ Without detracting from the other several factors that impacted on the Committee's work—such as the initial absence of a complaints procedure, the scarcity of information provided by States' reports, or the limited technical expertise of the CESCR on matters, for instance, of economic policy—⁵⁵⁶ the wavering commitment of States towards ESR, perhaps more than limited scholarly attention itself,⁵⁵⁷ may be the main reason why the normative content of the Covenant, despite the important efforts of the Committee, remains quite elusive, and the legal protection of ESR under international law, *de facto*, relatively weak, as responses to the Eurozone sovereign debt crises have revealed.

If we consider, first of all, what general State conduct is actually required—as a matter of duty—under the Covenant, this could be summarised as follows: States parties are under an immediate obligation to take steps to progressively achieve the full realisation of ESR, which entails i) a minimum core obligation, ii) an obligation to protect at any time the most vulnerable and disadvantaged members of society, and iii) a *prima facie* prohibition to adopt deliberately retrogressive measures. As mentioned above, these general obligations apply to all the substantive rights recognised in articles 6-15 of the Covenant. Nonetheless, they are—with the exception of the protection of the most vulnerable—qualified, to a greater or lesser extent, by the availability of resources. As a result, it could be argued that the Covenant recognises and protects as a legal human right, at least, the 'right' to a minimal Welfare State, or to minimum subsistence levels of ESR for all.⁵⁵⁸ The prohibition of retrogressive measures could be read, in this sense, as a 'safety clause' to preserve the basic welfare function of the State, although its force has been put into question by the recent crisis. Whether and to what extent the legal protection

⁵⁵⁵ CESCR 2007 Statement on Maximum Available Resources, paras 1-2.

⁵⁵⁶ Sepulveda (n 447).

⁵⁵⁷ Aoife Nolan, 'Not Fit for Purpose? Human rights in times of financial and economic crisis' (2015) *European Human Rights Law Review*, 368-9.

⁵⁵⁸ It might be worth recalling, here, Goodin's definition of a 'minimal welfare State', discussed above in Chapter 3: a State which, at least, attempts to relieve palpable distress of those in desperate circumstances, through programs of general social assistance, as a matter of right, i.e. "in a way that [its] agents [...] are bound by a legal duty to provide those in distress with certain resources that they need [...] [and] must have no discretionary power over those resources that the State allocates for the relief of people in distress", Goodin (n 259) 6-7.

of ESR under the ICESCR goes beyond that, essentially depends on the still uncertain interpretation of the notion of available resources.

As discussed above, the interpretation of the phrase ‘maximum available resources’ has been developed, over the years, through the work of the Committee, in the form, mostly, of ‘recommendations’. These can reveal, as I attempted to describe above, some of the different fiscal and economic policies that the Committee seems to pursue, in effect, when guiding States parties in the use of their maximum available resources. To identify and make these policies explicit, can be, in my opinion, extremely revealing about (a) the relationship between ESR and (different) economic systems or, better, about the relationship between the economic system underpinning ESR and other economic systems; and (b) the relationship between, on one side, the economic and fiscal policy measures promoted by the CESC for the protection of ESR and, on the other side, the economic and fiscal policy measures ‘required’ to States by the market, especially in the context of sovereign debt arrangements (as will be discussed in the next chapter).

(a) Is the Committee actually promoting *neutral* policies in terms of the economic system to be used as the vehicle for the realisation of ESR? Are these policies incompatible with other systems of political economy?

Since the *travaux préparatoires* for the Covenant, there existed a debate over whether the obligations assumed under the Covenant were inherently incompatible with one or more systems of political economy and would thus necessitate the adoption of a radically different system by at least some States.⁵⁵⁹ In fact, as it has been reported, the proponents of ESR were not “unaware of the Pandora’s Box that was being opened”,⁵⁶⁰ i.e. “of the reforms or, indeed, upheavals that were sometimes necessary to implement certain ESR which had not yet been recognised for the reason that a number of diverse measures had to be adopted involving changes in the country’s economic and social equilibrium”.⁵⁶¹ Nonetheless, most probably for reasons of ‘diplomatic’ necessity – existing at the time of the Covenant’s drafting and until the end of

⁵⁵⁹ Alston and Quinn (n 467) 181.

⁵⁶⁰ *ibid*, 168.

⁵⁶¹ *ibid*, 168, quoting René Cassin, the representative of France during the drafting of the ICESCR, 7 U.N. ESCOR C.4 (232d mtg.) at 11, E/CN.4/SR.232 (1951).

the Cold War, given the fragile compromise that had been reached over ESR in the Covenant – several authors and the Committee itself have made every effort to affirm the idea that such inherent incompatibility does not exist. In its General Comment No. 3 (drafted in 1990), the CESCR has clarified that the Covenant

neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question.⁵⁶²

Indeed, the Covenant itself does not explicitly dictate any particular economic system. States parties' obligations under the ICESCR are formulated in such a way as to leave governments, in principle, a considerable degree of discretion to determine for themselves how best to promote the realisation of the relevant rights.⁵⁶³ However, the concerns of the drafters (and, initially, of the Committee) were, quite understandably, directed towards excluding that the realisation of ESR could be understood by some States (essentially, the Western bloc) as requiring them to adopt a different (non-market) economic system. Those historical circumstances, though, have disappeared, and we must now re-contextualise the Covenant, and re-open the debate on its possible relationship with different economic systems, in light of the current settings.

In fact, although the Covenant may have been kept *formally* 'neutral' in respect of the economic system that States might be required to adopt, if we

⁵⁶² CESCR, GC3, para 8.

⁵⁶³ Alston and Quinn (n 467) 182-183.

consider, on one hand, the specific economic and fiscal policy measures that have been recommended by the Committee over the years in its Concluding Observations (described above), it might be argued that these seem to promote, *de facto*, a mixed economy system, defined, in basic terms, as a system “that uses both market signals and government directives to allocate goods and resources”.⁵⁶⁴ In this sense, they are inevitably destined to clash (as some have already noted)⁵⁶⁵ with, for instance, neoliberal economic prescriptions.

On the other hand, the Committee has been generally reluctant to engage *deliberately* and critically with issues of economic and fiscal policy,⁵⁶⁶ and with the possible structural causes of its concerns. This has caused, I believe, the Committee to adopt, at times, an ambiguous attitude towards economic paradigms which have been proved to have a negative impact on the realisation of ESR, *in primis* fiscal austerity,⁵⁶⁷ with the result that its instructions have remained inevitably weak (this happened, for instance, when, in its 2016 Statement on Public Debt, the Committee Stated that “[t]he adoption of fiscal consolidation programmes may be *necessary* for the implementation of economic and social rights”).⁵⁶⁸ Rather than counterweighting such economic paradigms, the Committee has, at times, *de facto* reiterated the subordination of ESR to the requirements of the market.

Thus, the potential conflict is not, anymore, between ‘blocs’ of countries with different economic ideologies, but between economic ideologies themselves, ‘embodied’, this time, into different State functions. It is time, I believe, to openly and methodically engage with such ideologies. My hesitations are, thus, directed to persisting attempts at preserving the asserted economic ‘neutrality’ of international human rights law, while demanding, at the same

⁵⁶⁴ Bradley Schiller, *The Micro Economy Today* (McGraw-Hill, 2010) 15.

⁵⁶⁵ Nolan, ‘Not Fit for Purpose’ (n 557) 370; Wyn Grant and Graham K. Wilson, ‘Introduction’ in Wyn Grant and Graham K. Wilson (eds), *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation* (OUP 2012) 6; Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity 2011); Margot E. Salomon, ‘Of Austerity, Human Rights and International Institutions’ (2015) 21 *European Law Journal* 4, 543.

⁵⁶⁶ Nolan, ‘Not Fit for Purpose’ (n 557) 368.

⁵⁶⁷ Jonathan D. Ostry, Prakash Loungani and Davide Furceri, ‘Neoliberalism: Oversold?’ (2016) 53 *Finance and Development* 2
<<http://www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm>>.

⁵⁶⁸ CESCR, 2016 Statement of Public Debt, para 2 (emphasis added).

time, an improved, more comprehensive definition of State obligations under the ICESCR. I doubt that this could be achieved, without an honest, explicit consideration of the economic and social arrangements that are actually needed to realise the ‘values’ that underpin and should be protected through ESR.

(b) Secondly, what is the relationship between the economic and fiscal policy measures that States are ‘recommended’ or ‘required’ to adopt, respectively, by the CESCR and in the context of sovereign debt arrangements? Are these measures compatible? And if they are not, which ones are meant to prevail?

On one hand, it must be noted that, in addition to the fact that they are not *per se* legally binding (State reporting is in effect a mechanism of political supervision), the economic and fiscal policies encouraged by the Committee are also usually expressed in cautious and extremely general terms. Moreover, as it has been observed, the Committee has not always been consistent and equally strict in its recommendations.

On the other hand, the fiscal and economic policy requirements that exist for the Eurozone Member States more generally, in the context of the Economic and Monetary Union, and for debtor countries in particular, such as Greece, in the context of their debt and financial assistance arrangements, are expressed in clear and detailed terms, within instruments which have, rather, legally binding nature. These will be the object of analysis in Chapter 6.

4.4. ESR obligations and sovereign debt

This section aims to introduce the principles that have been so far developed, at the international level, in an attempt to guide the debt-related conduct of States and other actors, in accordance with their human rights obligations.

The potentially adverse impacts of sovereign debt on human rights have, in fact, preoccupied the international community and various UN bodies since the 1990s, particularly the United Nations Conference on Trade and Development (UNCTAD) and the Human Rights Commission (the latter superseded, in 2006, by the Human Rights Council). In 1997, it was also decided to address the issue of foreign debt and human rights through the establishment of a thematic mandate which, in 2008, after several transformations, developed into the mandate of the current 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 (hereinafter, the Independent Expert on Foreign Debt and Human Rights).⁵⁶⁹

It seems important to briefly mention that, despite the fact that the adverse impacts of debt and related policies on the enjoyment of human rights, particularly ESR, are now well-established and abundantly evidenced, the mandate of the Independent Expert and, more generally, the consideration of the topic by the Human Rights Council (and the Commission on Human Rights before it) has met considerable opposition from developed (mainly creditor) countries, which are members of the Human Rights Council. These have contended that to treat the issue of sovereign debt as a human rights problem would be ‘inappropriate’, and likewise would be the attention devoted to the issue by the Human Rights Council and the continuation of the mandate of the Independent Expert,⁵⁷⁰ since other international *fora*—presumably the international financial institutions and the Paris Club—would be better equipped to deal with this issue. Developing (mainly borrower) countries, on the contrary, have always overwhelmingly supported the involvement of the Human Rights Council.⁵⁷¹

⁵⁶⁹ The current Independent Expert is Juan Pablo Bohoslavsky, whose mandate was established by the Human Rights Council in 2014 with Res 25/16 of 15 April 2014, Mandate of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, A/HRC/RES/25/16. As mentioned, since the 1990s, the mandate of the Independent Expert has undergone several changes. In 1997 and 1998, the Commission on Human Rights had established the two mandates, respectively, of the Independent Expert on structural adjustment policies, and of the Special Rapporteur on the effects of foreign debt on the full enjoyment of economic, social and cultural rights. In 2000, the two mandates were discontinued, and replaced with an Independent Expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights, which, in 2005, was renamed as Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights. Finally, in 2008, the mandate of the Independent Expert was redefined and the title reformulated in its current form, see Human Rights Council, Res 7/4 of 27 March 2008, Mandate of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.

⁵⁷⁰ HRC (16th Session) ‘US Explanation of Vote on Foreign Debt as a Human Rights Problem’ (23 March 2011) quoted in Cephias Lumina, ‘Sovereign Debt and Human Rights: The UN Approach’ in Juan Pablo Bohoslavsky and Jernej Letnar Čerňič (eds), *Making Sovereign Financing and Human Rights Work* (Hart Publishing 2014).

⁵⁷¹ Report of the independent expert on the effects of foreign debt and other related

The Independent Expert has eventually reaffirmed the competence of UN human rights bodies on the matter, by emphasising, *inter alia*, that “rules other than human rights law and other international forums [...] have thus far failed to deliver an equitable and lasting solution to the sovereign debt problem in line with the various commitments made by the international community”, nor have those other fora “explicit mandates to promote and protect human rights”.⁵⁷² On the contrary, as creditors, they “cannot realistically be expected to focus on finding a solution to the debt crisis that prioritizes social and economic justice over debt repayment”.⁵⁷³

Consequently, the human rights impacts of the latest debt crisis, eventually prompted the various UN bodies involved to identify and propose ‘principles’ aimed at promoting responsible and human rights-compliant sovereign debt practices. These are the UNCTAD Principles on responsible sovereign borrowing and lending (2012),⁵⁷⁴ the UN Guiding Principles on foreign debt and human rights (2012)⁵⁷⁵ and the Basic Principles on sovereign debt restructuring processes (2015).⁵⁷⁶ It must be remarked, also in this case, that these instruments

international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (14 August 2008) A/63/289, para 8 (hereinafter, ‘IE 2008 Report’)

⁵⁷² Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina: Guiding principles on foreign debt and human rights (10 April 2011) A/HRC/20/23, para 7, endorsed by HRC, Res 20/10 of 18 July 2012, The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, A/HRC/RES/20/10 (hereinafter, ‘UN Guiding Principles on Foreign Debt and Human Rights’) para 7.

⁵⁷³ HRC, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina (7 March 2014) A/HRC/25/50, para 9.

⁵⁷⁴ UNCTAD, Principles on Promoting Responsible Sovereign Lending and Borrowing (10 January 2012). In 2009, the UNCTAD launched the Project to Promote Responsible Sovereign Lending and Borrowing, with the aim to develop a set of internationally recognised principles to promote and reinforce responsible sovereign lending and borrowing practices. These could, in the intentions of UNCTAD, eventually lead to the establishment of criteria to assess whether the contracting of sovereign debt has been performed in accordance with commonly accepted principles.

⁵⁷⁵ UN Guiding Principles on Foreign Debt and Human Rights (n 572).

⁵⁷⁶ UNGA, Res 69/319 of 10 September 2015, ‘Basic Principles on Sovereign Debt Restructuring Processes’, A/RES/69/319 (29 September 2015). Based on the principles previously identified by an UNCTAD working group (UNCTAD, *Sovereign debt workouts: going forward. Roadmap and guide*, available at

are not *per se* legally binding upon States and other international actors.

While the 2012 UNCTAD Principles on responsible sovereign borrowing and lending and the 2015 Basic Principles on sovereign debt restructuring practices concern the identification and recommendation of ‘responsible’ behaviour in relation to, respectively, borrowing/lending and debt restructuring practices, the Guiding Principles on foreign debt and human rights specifically address the scope of the *human rights obligations* of States, international financial institutions and other non-State actors in relation to sovereign debt and related policies. They attempt to articulate “a universally applicable framework on foreign debt and human rights [...] to ensure that the obligations assumed by States under debt and other international financial arrangements do not undermine their capacity to create the conditions for the realization of all human rights, particularly ESR and the right to development”.⁵⁷⁷

For this reason, the Guiding Principles will be included, together with the above-cited Statement of the CESCR on Public debt, austerity measures and the ICESCR,⁵⁷⁸ and with other relevant documents produced by the Independent Expert on foreign debt and human rights, in the next sub-section. Based on the normative contribution of these documents, the latter will thus attempt at systematising the existing international standards on sovereign debt and ESR.

4.4.1. ESR obligations in the context of sovereign debt

As already mentioned above, international human rights bodies have recognised the constraints that States may face due to their debt arrangements, especially during a crisis. Nonetheless, there are limits to the extent to which

<http://unctad.org/en/PublicationsLibrary/gdsddf2015misc1_en.pdf>), the Basic Principles propose an incremental approach to sovereign debt workouts that relies on the continuous, progressive development of sovereign debt restructuring practice. Of major importance is also the fact that the Basic Principles explicitly affirm that the principle of sustainability must include respect for human rights, see Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (5 August 2016) A/71/305, para 53 (hereinafter ‘IE 2016 Annual Report’). On the incremental approach and the economic and legal implications of the Basic Principles, see the Special Edition on Sovereign Debt of the *Yale Journal of International Law* (2016) Vol. 41.

⁵⁷⁷ UN Guiding Principles on Foreign Debt and Human Rights (n 572) para 14.

⁵⁷⁸ CESCR, 2016 Statement on Public Debt (n 498).

States may deviate from their obligations to realise ESR. The aim of the Guiding Principles, as well as of further guidance provided by the CESCR and the IE, is to “balance a debtor and creditor State’s contractual obligations arising from external debt arrangements and both debtor and creditor’s international legal obligations to respect, protect and fulfil all human rights, particularly economic, social and cultural rights”.⁵⁷⁹

4.4.1.1. The primacy of human rights and the human rights obligations of States...

The Guiding Principles reassert that all States, when acting individually or collectively, including through international and regional organisations of which they are members, have to respect, protect and fulfil human rights.⁵⁸⁰ Not only. The Independent Expert on foreign debt and human rights has explicitly affirmed that States’ human rights obligations have primacy over many other types of legal obligations under international law.⁵⁸¹

Consequently, all State actions should be consistent with international human rights law. This means, inter alia, that States should ensure that

any and all of their activities concerning their lending and borrowing decisions, those of international or national public or private institutions to which they belong or in which they have an interest, the negotiation and implementation of loan agreements or other debt instruments, the utilization of loan funds, debt repayments, the renegotiation and restructuring of external debt, and the provision of debt relief when appropriate, do not derogate from these obligations.⁵⁸²

4.4.1.2. ...also as members of international organisations

⁵⁷⁹ UN Guiding Principles on Foreign Debt and Human Rights (n 572) principle 2.

⁵⁸⁰ *ibid*, principle 6.

⁵⁸¹ HRC, IE 2008 Report (n 571) para 14. This pre-eminence would be confirmed, according to the Independent Expert, by Article 103 of the UN Charter: “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. As remarked by the IE, the obligations under the Charter include the duty to cooperate with the United Nations in its quest to promote universal respect for human rights (art. 56 UN Charter), *ibid*.

⁵⁸² UN Guiding Principles on Foreign Debt and Human Rights (n 571) principle 6.

When making decisions in their capacity as members of international financial institutions (such as the IMF, the World Bank or regional development banks) or other international organisations, States parties to the ICESCR retain their ESR obligations,⁵⁸³ nor would they be absolved of their responsibility, even where, in that capacity, they would be acting in full accordance with the rules of the organisation.⁵⁸⁴ Furthermore, when the lender is an international organisation of which the borrowing State is a member, it would not be acceptable for the borrowing State to circumvent its international obligations under the ICESCR by transferring certain competencies relating to the subject matter of the Covenant to an organization, thus causing the organization to commit an act that, if committed by the State party, would be in breach of its obligations under the Covenant.⁵⁸⁵ States parties to the ICESCR would, thus, be acting in violation of the obligations if they were to delegate powers to the IMF, for instance, or to other agencies, and allowed such powers to be exercised without ensuring that they do not infringe on human rights. Similarly, they would be acting in breach of their obligations if they were to exercise their voting rights within such agencies without taking human rights into account (according to the CESCR, the same duty applies to States that are not parties to the Covenant, under human rights law as part of general international law). States parties to the ICESCR, as well as the relevant UN agencies, should, thus, make a particular effort to ensure that the protection of the most basic ESR is, to the maximum extent possible, built into programmes and policies designed to promote adjustment.⁵⁸⁶

⁵⁸³ CESCR, 2016 Statement on Public Debt (n 498) para 9; Report of the Independent Expert on the effects and foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to institutions of the European Union (28 December 2016) A/HRC/34/57/Add.1, para 34 (hereinafter, 'IE 2016 Report on mission to the EU').

⁵⁸⁴ CESCR, 2016 Statement on Public Debt (n 498) para 9.

⁵⁸⁵ CESCR, 2016 Statement on Public Debt (n 498) para 5; Report of the International Law Commission, 'Articles on the Responsibility of International Organizations' (2011) A/66/10.

⁵⁸⁶ CESCR, 2016 Statement on Public Debt (n 498) para 9; see also GC2, para 9. These requirements have been also reiterated also in Olivier De Schutter and Margot E. Salomon, 'Economic Policy Conditionality, Socio-economic Rights and International Legal Responsibility: The case of Greece 2010-2015', *Legal Brief for the Special Committee of the Hellenic Parliament on the audit of the Greek debt* (15 June 2015) 14-15.

4.4.1.3. *The human rights obligations of international organisations*

International financial institutions and, more generally, international organisations have to act in accordance with any human rights obligations incumbent upon them on the basis of the general rules of international law, their foundational treaties, and the human rights treaties to which they are parties.⁵⁸⁷

With regard to the general international law obligations of EU institutions, the Independent Expert of foreign debt and human rights has recently reasserted the principle that “international organisations and international financial institutions have certain obligations under international human rights law based on customary law and general principles of international law”,⁵⁸⁸ recalling in particular the Statement of the CESCR on Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights.⁵⁸⁹ Here, the CESCR has made explicit reference only to “human rights, as listed in particular in the Universal Declaration of Human Rights, that are part of customary international law or of the general principles of law, both of which are sources of international law”. Although this is correct in principle, neither the Independent Expert nor the CESCR have provided further clarifications on which specific economic and social rights possibly belong to such category, an issue that has not been yet conclusively resolved. Some authors include among general international law some of the core obligations contained in the ICESCR, or the minimum core rights.⁵⁹⁰

However, the CESCR also disagrees with interpretation by the IMF and International Bank for Reconstruction and Development (IBRD) in particular, that the relevant Articles of Agreement are not requiring them to include human rights considerations in their decision-making. According to the Committee, in fact, it is in the exercise of the powers that have been delegated to them by their member States that these organisations should refrain from adopting measures

⁵⁸⁷ ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980 [1980] ICJ Rep 73, para 37; IE 2016 Report on mission to the EU (n 583) para 19.

⁵⁸⁸ *ibid*, para 28.

⁵⁸⁹ CESCR, 2016 Statement on Public Debt (n 498) paras. 7-8.

⁵⁹⁰ Bruno Simma and Philip Alston, ‘The Sources of International Human Rights Law: Custom, *Jus Cogens*, and General Principles’ (1992) 12 *Australian Yearbook of International Law*, 82; Riedel et al (n 448) 21.

that would result in human rights violations. Moreover, as specialised agencies of the United Nations,⁵⁹¹ they are obligated to act in accordance with the principles of the UN Charter (Articles 1(3) and 55(c)) which sets the realization of human rights and fundamental freedoms as one of the purposes of the organisation.⁵⁹²

The Guiding Principles reiterated that international financial organisations and private corporations too, have an obligation to respect international human rights, which implies a duty to refrain from “formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights”.⁵⁹³

4.4.1.4. Retrogressive measures and conditionality-related duties

The CESCR has clearly affirmed that any conditions attached to a loan that would imply an obligation on the (borrowing) State to adopt retrogressive measures in the area of ESR that are unjustifiable would be a violation of the ICESCR. The borrowing State should therefore ensure that such conditions do not unreasonably reduce its ability to respect, protect and fulfil the Covenant’s rights.⁵⁹⁴

If the adoption of retrogressive measures is unavoidable, the criteria outlined in the Committee’s Letter of 2012 apply⁵⁹⁵ (these have been further developed in the United Nations High Commissioner for Human Rights’ report to the ECOSOC of 2013).⁵⁹⁶ As already mentioned, retrogressive measures are justifiable, according to the Committee’s interpretation, only if they are unavoidable, necessary and proportionate, in the sense that the adoption of any other policy or failure to act would be more detrimental to ESR (States bear,

⁵⁹¹ Charter of the United Nations (26 June 1945), Articles 57 and 63; UNGA, Res 124 (II) of 15 November 1947, ‘Agreements with specialized agencies’.

⁵⁹² CESCR, 2016 Statement on Public Debt (n 498) para 8.

⁵⁹³ UN Guiding Principles on Foreign Debt and Human Rights (n 572), para 9.

⁵⁹⁴ CESCR, 2016 Statement on Public Debt (n 498) para 4.

⁵⁹⁵ CESCR, 2012 Letter on austerity measures (n 489).

⁵⁹⁶ ECOSOC, Report of the United Nations High Commissioner for Human Rights, E/2013/82 (7 May 2013) paras 15-21, also recalled in HRC, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephass Lumina, Addendum: Mission to Greece (22-27 April 2013) (7 March 2014) A/HRC/25/50/Add.1, para 10 (hereinafter, ‘IE 2014 Report on first mission to Greece’).

thus, the burden of ensuring that retrogressive measures are introduced only after the most careful consideration of all other less restrictive alternatives).⁵⁹⁷ Retrogressive measures should remain in place only insofar as they are necessary; they should not result in discrimination; they should mitigate inequalities that can grow in times of crisis and ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected; and they should not affect the minimum core content of the rights protected under the Covenant.⁵⁹⁸

According to the Independent Expert on foreign debt and human rights, these criteria should also inform the assessment by EU institutions of whether adjustment measures that may encroach on ESR are justifiable.⁵⁹⁹

Furthermore, when exiting financial assistance programmes, States parties are also required to review their policies so as to enhance the effective protection of the Covenant's rights, in line with the progress achieved in the post-crisis economic recovery.⁶⁰⁰ For instance, in its Concluding Observations on the situation in Cyprus, the Committee recommended the State party to "ensure that austerity measures are gradually phased out and that the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery", and to "restore the pre-crisis levels of public services and social benefits".⁶⁰¹

4.4.1.5. Coercion

All States, whether parties to the ICESCR or not, that coerce other States into violating their own obligations under either the Covenant or under other rules of international law, are responsible for that act under international law. Both as

⁵⁹⁷ HRC, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to Greece (21 April 2016) A/HRC/31/60/Add.2, para 17 (hereinafter, 'IE 2016 Report on second mission to Greece').

⁵⁹⁸ CESCR, 2016 Statement on Public Debt (n 498) para 4; IE 2016 Report on mission to the EU (n 583) para 32-33; IE 2016 Annual Report (n 576) paras 62-63; IE 2016 Report on second mission to Greece (n 597) para 17; IE 2014 Report on first mission to Greece (n 596) para 9.

⁵⁹⁹ IE 2016 Report on mission to the EU (n 583) para 33.

⁶⁰⁰ CESCR, 2016 Statement on Public Debt (n 498) para 6.

⁶⁰¹ CESCR, Concluding observations on the sixth periodic report of Cyprus (28 October 2016) E/C.12/CYP/CO/6, para 12(b) and (c).

lenders of bilateral loans and as members of international organisations providing financial assistance, all States should therefore ensure that they do not impose obligations on borrowing States that would lead them to breach their duties, e.g. adopting retrogressive measures in violation of their obligations under the Covenant.⁶⁰²

4.4.1.6. Procedural obligations

Human Rights impact assessments

The Committee is of the view that the above-cited obligations imposed under the ICESCR require both lending and borrowing States seeking loans with certain conditionalities, to carry out a human rights impact assessment prior to the provision of the loan, in order to ensure that the conditionalities do not disproportionately affect ESR nor lead to discrimination. The CESCR drew attention to the Guiding Principles on foreign debt and human rights⁶⁰³ and the 2012 Guiding Principles on extreme poverty and human rights,⁶⁰⁴ both of which call for human rights impact assessment of conditionalities attached to loans or of measure which create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their national territory.⁶⁰⁵

Principle 12 of the Guiding Principles on foreign debt and human rights enjoins States to analyse policies and programmes, including those relating to external debt, macroeconomic stability, structural reform and investment, with respect to their impact on poverty and inequality, social development and the enjoyment of human rights as well as their gender implications, and adjust them as appropriate to promote a more equitable and non-discriminatory distribution of the benefits of growth and services. Principle 13 specifies that such impact analyses should pay special attention to certain groups in society that may be particularly vulnerable, including children, women, persons with disabilities, older persons, persons belonging to minorities and migrant workers and

⁶⁰² CESCR, 2016 Statement on Public Debt (n 498) para 10.

⁶⁰³ UN Guiding Principles on Foreign Debt and Human Rights (n 572) para 40.

⁶⁰⁴ HRC, Res 21/11 of 18 October 2012, 'Guiding Principles on Extreme Poverty and Human Rights', A/HRC/RES/21/11, para 92.

⁶⁰⁵ CESCR, 2016 Statement on Public Debt (n 498) para 11.

members of their families.⁶⁰⁶

In addition, in accordance with principles 40 and 41, it is incumbent upon lenders to conduct a credible human rights impact assessment as a prerequisite to providing new loans.⁶⁰⁷

According to the Guiding Principles on foreign debt and human rights,

[l]enders should not finance activities or projects that violate, or would foreseeably violate, human rights in the Borrower States. To avoid this eventuality, it is incumbent upon lenders intending to finance specific activities or project in Borrower States to conduct a credible Human Rights Impact Assessment [...] as a prerequisite to providing a new loan.⁶⁰⁸

Similarly, also the Guiding Principles on extreme poverty and human rights require human rights impact assessments.⁶⁰⁹

Transparency, participation and accountability

The Guiding Principles on foreign debt and human rights underline that transparency, participation and accountability are core values that should be observed in lending and borrowing decisions by States, international financial institutions and other actors. Transparency requires the full disclosure of all relevant information regarding loan agreements; participation means ensuring effective and meaningful input from all stakeholders in loan policy and resource utilization decisions; and accountability requires that decision makers be answerable and held accountable, if warranted, for their actions regarding external debt agreements and external debt policies and strategies. Meaningful participation goes beyond ensuring that adjustment policies are subject to approval by national parliaments; it also requires that individuals and groups affected by policy decisions be consulted and able to provide meaningful input to decisions affecting them.⁶¹⁰

⁶⁰⁶ IE 2016 Report on mission to the EU (n 583) para 38; UN Guiding Principles on Foreign Debt and Human Rights (n 572) principles 12-13 and 40-41.

⁶⁰⁷ IE 2016 Report on mission to the EU (n 583) para 38.

⁶⁰⁸ UN Guiding Principles on Foreign Debt and Human Rights (n 572) para 40.

⁶⁰⁹ UN Guiding Principles on Extreme Poverty and Human Rights (n 604) paras 61 and 92; IE 2016 Report on second mission to Greece (n 597) para 26.

⁶¹⁰ IE 2016 Report on mission to the EU (n 583) para 39; UN Guiding Principles on Foreign Debt and Human Rights (n 572) principles 28-31.

4.5. Conclusions

This Chapter has examined the existing international legal standards on ESR and sovereign debt, particularly the 1966 International Covenant on Economic, Social and Cultural Rights—especially States’ general obligations relating to the use of the maximum available resources, the prohibition of non-retrogression and the duty of international cooperation and assistance—and the 2012 UN Guiding Principles on foreign debt and human rights, with the aim to present a useful background discussion on the nature, scope and potential limitations of the existing international legal framework applicable to the issue of sovereign debt and ESR.

Despite the efforts of the CESCR, the normative content of the ICESCR remains quite elusive, offering relatively weak protection to ESR under international law. Among the key reasons of this weakness is the legal weight assigned to the notion of available resources, as an important qualifier which inevitably restricts the scope to States’ obligations under art. 2(1) ICESCR to take steps to progressively achieve the full realisation of ESR. As a result, the ICESCR certainly offers legal protection, at least, to a ‘human right’ to a minimal Welfare State—i.e. to minimum subsistence levels of ESR for all—but, whether and to what extent the legal protection of ESR under the Covenant goes beyond that, depends on the uncertain interpretation of the notion of available resources.

Furthermore, the new emergency regime introduced by the CESCR since 2012 with regard to the prohibition of non-retrogression has been accused of further endangering the legal protection of ESR, by reducing the non-retrogression test to just two criteria (temporariness, and necessity and proportionality). Although the Committee has been generally reluctant to deliberately engage with issues of economic and fiscal policy, it has adopted a rather ambiguous stance towards economic paradigms whose negative effects on ESR have become apparent. At times, this attitude has actually reinforced the subordination of ESR to the requirements of the market. Chapter 6 will address again the recent statements of the CESCR, to argue that the CESCR may have actually implicitly introduced neoliberal assumptions into international human rights law.

This chapter has challenged the idea that the ICESCR can be really ‘neutral’

in respect of the economic system that is needed to realise ESR. The economic and fiscal policy measures specifically recommended, over the years, by the CESCR, especially in its Concluding Observations, have *de facto* promoted a mixed economy system, which is seemingly contradicted by the more recent global economic developments and the (neoliberal) prescriptions endorsed especially by supranational institutions, including in the context of the Eurozone debt crisis.

Chapter V

Sovereign debt and human rights in Greece (2009-present)

5.1. Introduction

The outbreak of the Greek sovereign debt crisis is conventionally dated back to the famous announcement made, at the meeting of the Eurozone finance ministers on 19 October 2009, by Georgios Papaconstantinou, former Greek Minister of Finance under the then incoming socialist government of Georgios Papandreou, that Greece had significantly underreported its deficit and debt figures.⁶¹¹ On that occasion, Papaconstantinou revealed that the country's deficit for 2009 would have more than doubled the estimates provided by the former conservative government (which had already revised its figures more than once, during the course of the year), amounting to 12.7% of GDP, more than four times the maximum allowed by EU rules.⁶¹² Similarly, the figure for public debt at the end of that year was revised from 113% to 127-130% of GDP,⁶¹³ or

⁶¹¹ For timelines of the Greek debt crisis, see *The Guardian*, 'Greece debt crisis: timeline' (2001-2010) <<https://www.theguardian.com/business/2010/may/05/greece-debt-crisis-timeline>>; 'Greek debt crisis: timeline' (2009-2012) <<https://www.theguardian.com/business/2012/mar/09/greek-debt-crisis-timeline>>; and 'Greece crisis timeline: the rocky road to another bailout' (2015) <<https://www.theguardian.com/business/2015/aug/20/greece-crisis-timeline-rocky-road-another-bailout>>. For a history of the crisis in charts, see 'The complete history of the Greek debt drama in charts', *Quartz* (30 June 2015) <<https://qz.com/440058/the-complete-history-of-the-greek-debt-drama-in-charts/>>.

⁶¹² Greece, Ministry of Finance, 'Update of the Hellenic Stability and Growth Programme including an Updated Reform Programme' (January 2010) 16 <http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/20_scps/2009-10/01_programme/el_2010-01-15_sp_en.pdf>.

⁶¹³ Tony Barber, 'Greece vows action to cut budget deficit', *Financial Times* (20 October 2009). Different sources report different figures, see e.g. HRC, IE 2014 Report on first mission to Greece (n 596) para 22; Truth Committee on Public Debt, *Preliminary Report* (17-18 June 2015) 11 and 18; Arturo C Porzecanski, 'Behind the 2012 Greek default and restructuring' in Eugenio Bruno (ed), *Sovereign Debt and Debt Restructuring: Legal, Financial and Regulatory Aspects* (Globe Business Publishing 2013) 34-35. I have generally tried to report the most accredited figures and, wherever numbers are not univocal, I have indicated ranges.

approximately €300 billions, the highest debt in modern history.⁶¹⁴ The announcement plunged Greece into a destructive spiral of growing market scepticism over the country's solvency, constant increases of yields on Greek bonds, intensifying talks with other Eurozone members (who feared that the crisis could spread to other countries and destabilise the Euro Area as a whole) and mounting social unrest in Greece. Despite the attempts of the Greek government to preserve some trust from its creditors,⁶¹⁵ in December 2009, Fitch downgraded the country's credit rating from A- to BBB+, marking the first time in 10 years that Greece had seen its rating falling below an A grade. Downgrading by Standard & Poor and Moody's followed shortly,⁶¹⁶ and in the spring of 2010, the Hellenic Republic had *de facto* lost access to financial markets.⁶¹⁷

The prosaic version of the story, however, tends to omit the fact that, as the saying goes, "to every irresponsible borrower there corresponds an irresponsible lender". On the other side of Greece's solvency troubles in 2009 there were mostly European banks, heavily exposed to the country. French and German banks in particular had lent to Greece, respectively, €60 and €35 billion.⁶¹⁸ These

⁶¹⁴ Rosa M Lastra, *International Financial and Monetary Law* (2nd edn, OUP 2015) 310. Eventually, the actual figures of Greece's deficit and debt for 2009 were, respectively, 15.1% of GDP and 126.7% of GDP, see Eurostat data, 'Government Finance Statistics' (GFS) <<http://ec.europa.eu/eurostat/web/government-finance-statistics/overview>>.

⁶¹⁵ 'Papandreou unveils radical reforms to salvage Greece's public finances', *The Guardian* (14 December 2009) <<https://www.theguardian.com/world/2009/dec/14/greece-unveils-reforms-to-public-finances>>.

⁶¹⁶ 'Financial markets tumble after Fitch downgrades Greece's credit rating followed by Moody's downgrading from A1 to A2', *The Guardian* (8 December 2009) <<https://www.theguardian.com/world/2009/dec/08/greece-credit-rating-lowest-Eurozone>>; 'Greece is downgraded by a second credit rating agency', *BBC News* (16 December 2009) <<http://news.bbc.co.uk/1/hi/business/8417270.stm>> and 'Greece debt rating downgraded by third agency', *BBC News* (22 December 2009) <<http://news.bbc.co.uk/1/hi/business/8426085.stm>>.

⁶¹⁷ 'Standard & Poor's downgrade Greek credit rating to junk status', *The Guardian* (27 April 2010) <<https://www.theguardian.com/business/2010/apr/27/greece-credit-rating-downgraded>>.

⁶¹⁸ Figures about the actual exposure of EU banks to Greek public debt vary. The numbers reported here are from the Bank for International Settlements, 'Consolidated positions on counterparties resident in Greece', Q4 2009 <<http://stats.bis.org/statx/srs/table/B4?c=GR&p=20094>> and correspond also to data from the Truth Committee on Public Debt, *Preliminary Report* (n 613) 15 and 19. See also HRC, IE 2014 Report on first mission to Greece (n 596) para 21, footnote 22. According to Yanis Varoufakis, who reports slightly higher figures, in the years preceding the crisis, French and German banks

same banks were concurrently exposed for more than €620 billion to other countries of the Eurozone's periphery, i.e. Portugal, Ireland and Spain,⁶¹⁹ at a time when several German banks (as those of other European countries) were already being bailed out by the government for their US losses, through a €500 billion Financial Market Stabilization Fund.⁶²⁰

What followed in the Greek story, as this chapter will illustrate, were three consecutive adjustment programmes, all accompanied by harsh conditionality. They were meant to restore Greece's fiscal sustainability, market access and economic competitiveness.⁶²¹ Instead, seven years later, Greece's debt stands at 178.8% of GDP or €324.7 billions, well above its 2009 level. Its already shrunken economy has fallen back into recession, and the country is frozen out of international debt markets.⁶²² Economically speaking, Greece is stuck in a debtors' prison of Dickensian memory.⁶²³ Meanwhile, conditionality has radically transformed the country's labour market and enforced a permanent restructuring/downsizing of its welfare system. The realisation of economic, social and cultural rights in Greece has suffered an appalling setback that shows no signs of reversing, while human rights law has been almost irrelevant throughout the process.⁶²⁴

This chapter will describe how, through conditionality, sovereign debt can impact on various welfare rights, using the case of Greece as an example. Section

had lent to Greece up to €102 billion each, see Yanis Varoufakis, *Adults In The Room: My Battle With Europe's Deep Establishment* (Vintage Digital, 2017).

⁶¹⁹ 'Exposure to Greece Weighs On French, German Banks', *The New York Times* (17 February 2010) <<https://www.wsj.com/articles/SB10001424052748703798904575069712153415820>>.

⁶²⁰ 'The State's Silent Takeover: Germany's Big Banking Bailout', *Spiegel Online* (2 February 2009) <<http://www.spiegel.de/international/business/the-state-s-silent-takeover-germany-s-big-banking-bailout-a-605044.html>>.

⁶²¹ See e.g. HRC, IE 2014 Report on first mission to Greece (n 596) para 24; IMF, Greece: 2013 Article IV Consultation (5 June 2013) IMF Country Report No 13/154, 5; IMF, Greece: Request for Stand-By Arrangement (10 May 2010) Country Report No 10/111, 4.

⁶²² 'Greek economy sinks back into recession', *BBC News* (16 May 2017) <<http://www.bbc.co.uk/news/business-39933638>>; 'What is the message from Greece's bond market?', *Financial Times* (21 February 2017) <<https://www.ft.com/content/c6293b50-f781-11e6-9516-2d969e0d3b65>>.

⁶²³ Varoufakis (n 608).

⁶²⁴ On this issue, see in particular Nolan, 'Not Fit for Purpose?' (n 557) 360; Mary Dowell-Jones, 'The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity' in Riedel et al (n 448) 51 ff; Margot E Salomon, 'Europe's Debt to Greece', *EJIL: Talk!* (25 August 2015) <www.ejiltalk.org/europes-debt-to-greece/>.

5.2 will provide the historical background, zooming out from the circumstances of the crisis to encompass the possible structural determinants of Greece's fiscal vulnerability before 2009, based on the assumption that the economic decisions of a country do not happen in a vacuum, especially in a globalised economic system, and even more so in a monetary union. Section 5.3 will provide a critical overview of the three financial assistance packages so far granted to Greece by the other Euro Area Member States and the IMF. Section 5.4 will introduce conditionality, as a controversial tool of economic governance, before illustrating the main conditionalities implemented by Greece since 2010 and their impacts on the rights to work/labour rights, health, education, adequate housing and social security (including pensions). The chapter will, finally, conclude with an overall assessment of the consequences of the sovereign debt crisis and responses thereto for welfare rights in Greece and, possibly, other countries experiencing financial difficulties in the future.

5.2. Before the crisis: economic and debt trends after the dictatorship

Several narratives exist on the causes of the Greek sovereign debt crisis, and to try and separate the different accounts from political agendas can be a challenging task. Undoubtedly, Greece confronted with the economic crisis that reached Europe in 2008 from a position of pre-existing economic and fiscal vulnerability, as this section will illustrate shortly. Nonetheless, against those who have argued that responsibility for the latter lies entirely on the Greeks, being a consequence of the country's long-standing fiscal mismanagement, others have acknowledged the importance of concurrent exogenous factors, particularly the architecture of the Economic and Monetary Union (EMU) and the resulting divergence in competitiveness trends among its Member States.⁶²⁵

⁶²⁵ Costas Lapavitsas, Annina Kaltenbrunner, Duncan Lindo, Jo Michell, Juan Pablo Paineira, Eugenia Pires, Jeff Powell, Alexis Stenfors and Nuno Teles, 'Euro-zone Crisis: Beggar Thyself and Thy Neighbour' (2010) 12 *Journal of Balkan and Near Eastern Studies* 4, 321-373; Costas Simitis, *The European debt crisis: The Greek case* (Manchester University Press 2014); Heiner Flassbeck and Costas Lapavitsas, *Against the Troika: Crisis and austerity in the Eurozone* (Verso 2015); Lastra, *International Financial and Monetary Law* (n 614) 311; Andrew Yianni and Nikita Aggarwal, 'Eurozone financial rescue and stabilization measures, and their legal foundations' in Rosa M Lastra and Lee Buchheit, *Sovereign Debt Management* (OUP, 2014) paras 26.06-26.19.

Indeed, Greece's fiscal behaviour in the years preceding the crisis and its predicament at the end of 2009 cannot be fully evaluated in isolation from the broader institutional and economic context. To this end, it seems necessary to review in brief the main elements of Greece's economic history after the end of the seven-year military dictatorship in 1974 and its transition to parliamentary democracy.

Most sources agree that the high level of Greek debt at the onset of the debt crisis was essentially the main heir to debts accumulated during the period 1980-1993. During those 13 years, in fact, the debt-to-GDP ratio of the country increased by 70.4 percentage points, compared to an increase of 11.9 percentage points in the 14 years between 1993-2007.

Until the mid-1970s, Greek governments had followed the 'golden rule' of allowing fiscal deficits only for public investment purposes, so that, until 1980, the country's deficit had remained below 3% of GDP. However, confronted with a stagnating economic situation and high unemployment rates after that the Greek 'economic miracle' of the 1960s had been brought to an end by the energy crises of the 1970s, the socialist governments that ruled for two consecutive terms, between 1981 and 1989, responded with the adoption of expansionary fiscal policies. These were aimed at the protection of income and employment, mostly by means of social transfers and bailouts of insolvent firms by state-owned banks.⁶²⁶ The 1980s have been described as a period of "redistribution without growth" and "macroeconomic populism", since macroeconomic policy was essentially used for the attainment of mass political outcomes.⁶²⁷ The period 1981-1993 witnessed the emergence of strong electoral-fiscal cycles, where systemic fiscal expansions occurred shortly before election periods. It was estimated that each one of the seven electoral contests held in Greece over the period 1974-1993, increased the public deficit by 1.83% of GDP on average. Pre-election populism alone translated into cumulative deficits of about 13% of

⁶²⁶ Stavros B Thomadakis, 'Growth, Debt and Sovereignty Prolegomena to the Greek Crisis' (May 2015) GreeSE Paper No 91, LSE Hellenic Observatory Papers on Greece and Southeast Europe, 5-7.

⁶²⁷ *ibid*, 5 and 8-9. The concept of 'macroeconomic populism' is attributed to Rudiger Dornbusch and Sebastian Edwards (eds), *The Macroeconomics of Populism in Latin America* (University of Chicago Press 1991).

GDP.⁶²⁸

Consequently, in 1981 the country's deficit rose to 9% of GDP and lingered at almost 10% of GDP on average until 1990.⁶²⁹ As a result, public debt exploded. Whilst before 1981 the country's debt-to-GDP ratio had been fluctuating under 20%, between 1981 and 1993, it rose to 94% of GDP, bequeathing the country with the high debt burden that has threatened its stability ever since.⁶³⁰

On the contrary, thanks to a combination of fiscal stabilization, modest tax reforms, increased foreign investments,⁶³¹ lower interest rates, and the inflow of European funds,⁶³² the period 1990-2007 was, for Greece, one of impressive economic growth, large public investments and an import boom.⁶³³ The rate of GDP growth at market prices went from negative at the beginning of the 1980s, to an average 3.7% per year between 1996 and 2006, with peaks of 5.9% and 5.5% respectively in 2003 and 2006.⁶³⁴ Consequently, the years 1993-2007 saw the quasi-stabilisation of the Greek debt, from 94% to 103% of GDP (see Figure 1).

In economic terms, before the 2007 financial crisis and the ensuing economic downturn, Greece was considered a "star performer" in Europe, compared to countries that had started in a similar economic position, such as Spain or Portugal, but had grown at lower annual average rates (over 1996-2006, Spain and Portugal grew, respectively, at 3% and 2%).⁶³⁵ However, as will be

⁶²⁸ *ibid*, 9; Stavros B Thomadakis, 'The Greek Economy: Performance, Expectations and Paradoxes' in Graham Allison and Kalipso Nicolaidis (eds), *The Greek Paradox* (MIT Press 1997) 39-60; George Alogoskoufis, 'Greece's Sovereign Debt Crisis: Retrospect and Prospect' (January 2012) GreeSE Paper No54, Hellenic Observatory Papers on Greece and Southeast Europe, 16-17.

⁶²⁹ *ibid*, 17.

⁶³⁰ *ibid*

⁶³¹ The 1990s were characterised by an important reform of the domestic financial sector and the liberalization of capital movements, which led to large-scale capital inflows especially after the stabilization of the drachma in 1998, *ibid*, 14.

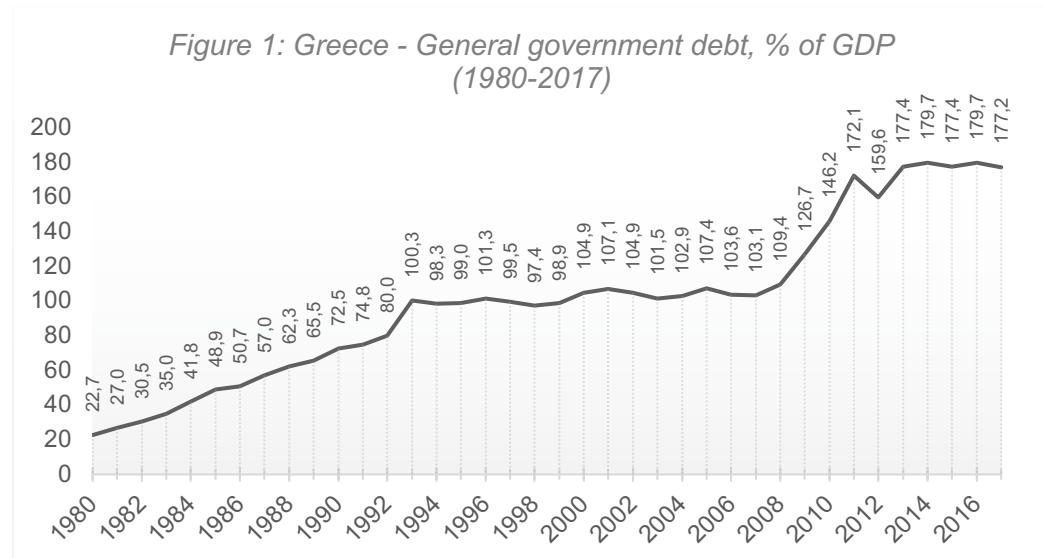
⁶³² EU transfers have amounted regularly to 4-5% of GDP per year, *ibid*, 11, footnote 10.

⁶³³ *ibid*, 10-11; Simitis (n 625) 3.

⁶³⁴ Eurostat data, 'GDP and main components, volumes: GDP at market prices, percentage change on previous period' <<http://ec.europa.eu/eurostat/data/database>>. See also OECD data, 'Aggregate National Accounts, SNA 2008 (or SNA 1993): Gross Domestic Product' <http://www.oecd-ilibrary.org/economics/data/aggregate-national-accounts/gross-domestic-product_data-00001-en>.

⁶³⁵ *ibid*

mentioned shortly, economic growth in Greece, especially since 2001, was essentially debt-driven.



Source: AMECO (2017) Database

Greece's entry in the Eurozone, effective as of 2001, was approved in 1999 with, allegedly, public debt at around 100% of GDP and deficit below 3% of GDP. In 2004, these statistical data were contested by Eurostat and revised in upward sense, and the European Commission launched an infringement procedure against Greece.⁶³⁶ The country effectively accessed the EMU without meeting the necessary fiscal requirements.

In addition, participation in the Eurozone marked for Greece, as for the other Member States of the Euro Area, a qualitative change in the sovereignty of debt.⁶³⁷ With the transfer of monetary sovereignty to the European Central Bank, monetisation of debts and currency devaluations were removed from the government's debt management toolkit, and debt sovereignty restricted to

⁶³⁶ EUROSTAT, Report on the revision of the Greek government deficit and debt figures (22 November 2004) <<http://ec.europa.eu/eurostat/documents/4187653/5765001/GREECE-EN.PDF/2da4e4f6-f9f2-4848-b1a9-cb229fcbae3?version=1.0>>. The infringement procedure was dismissed in 2007, when the Commission concluded that the measures adopted in the meanwhile by the Greek authorities had annulled the procedure's specific grounds, see European Commission, Report on Greek Government Deficit and Debt Statistics (COM(2010) 1 Final, 8 January 2010, 16.

⁶³⁷ Thomadakis, 'Growth, Debt and Sovereignty' (n 626) 16.

servicing, refinancing, or defaulting on debts.⁶³⁸

Accession to the Euro Area was also accompanied by the ability to issue debt without exchange risk, borrowing in the common currency. If this, on one hand, removed a previous barrier to market access for both the government and private agents in Greece, on the other, it intensified opportunities to (over)borrow, especially since the interest rates at the time were favourably low.⁶³⁹ Most importantly, in the early years of the Euro, financial markets did not evaluate the difference in sovereign assets across the EMU, so that Eurozone countries of actually different creditworthiness all received similar, very low interest rates for their bonds.⁶⁴⁰ This fact entailed that, although in the meanwhile the economic and fiscal performance of Greece had started deteriorating, as will be said shortly, until 2007 Greek bonds enjoyed the same market conditions of German bonds.⁶⁴¹ The absence of market discipline, attributed by some to the optimism of financial markets, reassured by Greece's persisting high growth rates, has been credited among the causes of the "fiscal fatigue" that contributed to the Eurozone crisis.⁶⁴² In fact, since 2001, Greece had relaxed its fiscal management, with a crucial turnaround in 2002 towards primary fiscal deficit (-0.5% of GDP), opposite to the surplus trend of the period 1995-2001.⁶⁴³ It also experienced a considerable worsening of its external current account deficit,⁶⁴⁴ considered in no small part a consequence of the design of the Euro Area itself. In fact, with the adoption of the single currency, the mostly southern economies of the Eurozone struggled to maintain competitiveness in the face of a stronger currency and of wage inflation exceeding gains in labour productivity. The

⁶³⁸ *ibid.* Monetisation of government debt is prohibited under Article 123(1) TFEU and Article 21 of the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute), see Lastra, *International Financial and Monetary Law* (n 614) 295. By adopting the single currency, furthermore, Eurozone Member States have lost their currency devaluation powers.

⁶³⁹ Thomadakis, 'Growth, Debt and Sovereignty' (n 626) 20.

⁶⁴⁰ Lastra, *International Financial and Monetary Law* (n 614) 312-3.

⁶⁴¹ Thomadakis, 'Growth, Debt and Sovereignty' (n 626) 20.

⁶⁴² *ibid.*, 20; Lastra, *International Financial and Monetary Law* (n 614) 312; Paul De Grauwe and Yuemei Ji, 'Mispricing of Sovereign Risk and Multiple Equilibria in the Eurozone', *Centre for European Policy Working Paper No. 61* (20 January 2012).

⁶⁴³ AMECO database <http://ec.europa.eu/economy_finance/ameco>. General government 'primary fiscal/budget balance' measures the difference between government expenditures *excluding interests payments on debt* and revenues.

⁶⁴⁴ Thomadakis, 'Growth, Debt and Sovereignty' (n 626) 20.

constraints of the single currency and a ‘one-size-fits-all’ monetary policy meant that these external imbalances could not be accommodated through real external exchange rate adjustments, and this eventually led to the accumulation of increasingly large current account deficits.⁶⁴⁵ Dwindling competitiveness, combined with lower external borrowing costs encouraged the ‘deficit countries’ of the Euro Area to borrow heavily and to rely on consumption-led economic growth.⁶⁴⁶

Furthermore, the adoption of the Euro led to a drastic increase of private debt, from 74% of GDP in 2001 to 129.1% of GDP in 2009. Important European private banks, especially French and German,⁶⁴⁷ participated actively in this sharp increase, also through direct participation in Greek banks, often underestimating the credit risks, in Greece as well as in other Eurozone countries such as Ireland, Italy and Spain.⁶⁴⁸

After 2001, thus, economic growth in Greece was dependent on the continued ability of the country to obtain external finance. With the credit crunch that followed the 2007 global financial crisis, the illusion came to an end. At this point, the conservative government of Karamanlis enacted a policy of large fiscal expansion (2007-2009), probably in an attempt to stimulate demand and prevent the growth rate of the economy from declining any further.⁶⁴⁹ This choice, however, proved completely misguided and provoked a critical deterioration of the country’s fiscal position. 2008 was marked, for the first time after almost two decades of positive rates, by negative GDP growth. Primary fiscal deficit reached 5.4% of GDP in 2008 and 10.1% in 2009. Between 2007 and 2009, the debt-to-GDP ratio shot from 103.1% to 113%, before being revised to 126.7% of GDP with Papaconstantinou’s announcement in November 2009.⁶⁵⁰

As it has been correctly remarked, however, Greece was the rule rather than the exception. In fact, every one of the member countries of the Eurozone

⁶⁴⁵ Yianni and Aggarwal (n 625) paras 26.08-26.09.

⁶⁴⁶ Thomadakis, ‘Growth, Debt and Sovereignty’ (n 626) 22; Truth Committee on Public Debt, *Preliminary Report* (n 613) 14.

⁶⁴⁷ Including BNP, Société Générale and Crédit Agricole for France (through its participation in the Greek bank Emporiki) and Commerzbank, Baden Bank, Postbank and DZ Bank for Germany, *ibid*, 16, note 17.

⁶⁴⁸ *ibid*, 14; Lastra, *International Financial and Monetary Law* (n 614) 313.

⁶⁴⁹ Thomadakis, ‘Growth, Debt and Sovereignty’ (n 626) 27.

⁶⁵⁰ AMECO Database (2017).

experienced a major fiscal deterioration between 2007 and 2009 as a consequence of Europe's economic downturn and the added fiscal costs of various bank bailouts. While Greece's fiscal deficit widened by 9.3 percentage points of GDP during the two years, the fiscal position of the Eurozone as a whole widened by 5.7 percentage points (the UK's own 2009 budget deficit was equivalent to 11.3% of GDP).⁶⁵¹ Furthermore, in the aftermath of the 2007 crisis, a substantial increase in sovereign debt took place all over the world. According to the IMF, between 2008 and 2014, general government debt increased globally from 65% to 79.8% of GDP, from 78.8% to 105.3% of GDP in advanced economies, and from 68.6% to 94% of GDP in the Euro Area.⁶⁵²

Nonetheless, the idea of a fiscal crisis has been contested, in particular, by the Greek Truth Committee on Public Debt.⁶⁵³ With regard to the abrupt increase of the Greek deficit and debt levels between 2007-2009, the Committee has argued that in 2009, the newly elected socialist government of Papandreou intentionally 'falsified' statistical data to 'dramatize' the fiscal situation in Greece and, with the collaboration of the EU institutions, helped to present elements of what in reality was a *banking crisis*, as a *sovereign debt crisis*, in order to convince the public opinion in the country and in Europe to support a Greek bailout.⁶⁵⁴ In this sense the Committee has highlighted, among several alleged cases of falsification, the irregular statistical treatment of hospital and public corporations' liabilities, and of certain Credit Default Swaps (CDS) with Goldman Sachs. The latter have been the object of heated criticism, as the US investment bank was accused of helping the Greek government to 'hide' part of its debt from the budget, by arranging additional credit to Greece through the use of CDS with fictional ('off-market') exchange rates. This was, nonetheless, done

⁶⁵¹ Porzecanski (n 613) 3.

⁶⁵² Truth Committee on Public Debt, *Preliminary Report* (n 613) 20; IMF, Now is the time: Fiscal Policies for Sustainable Growth (April 2015) *Fiscal Monitor* <<http://www.imf.org/en/Publications/FM/Issues/2016/12/31/Now-Is-the-Time>>.

⁶⁵³ Established on 4 April 2015 by the former President of the Hellenic Parliament, Zoe Konstantopoulou (Coalition of the Radical Left, SYRIZA), beyond the *Preliminary Report* (n 613), the Committee released a further report on the *Illegitimacy, Illegality, Odiousness and Unsustainability of the August 2015 MoU and Loan Agreement* (August 2015), before being suppressed on 12 November 2015 by the new Parliament brought about by the snap election of September 2015.

⁶⁵⁴ Truth Committee on Public Debt, *Preliminary Report* (n 613) 15 and 20.

in accordance with Eurostat reporting rules.⁶⁵⁵

While this kind of transactions are undoubtedly revelatory of the ‘collusive’ and opaque nature of the relationship between governments and economic actors,⁶⁵⁶ of the potentially illicit use of derivatives by the former, and of intentional loopholes left available in fiscal reporting, and should correctly be the object of concern in their own right, they cannot be considered, in the Greek case, as having had a decisive effect on the country’s fiscal situation. It has been speculated that, most likely, the cash flows were either used to help lower the debt/GDP ratio from 107% in 2001 to 104.9% in 2002, or interest payments from 7.4% in 2001 to 6.4% in 2002.⁶⁵⁷ In any case, the fiscal imbalances of the country remained severe, notwithstanding the disputable transactions with Goldman Sachs.

Furthermore, the links between governments and financial systems are so intricate, that they have become “communicating vessels: strength or weakness in one flows to the other, and back [...]”.⁶⁵⁸ As mentioned in the chapter’s introduction, there are always two sides of the ‘debt coin’. Certainly, behind the over-indebtedness of Greece, as behind that of most countries who suffered from a major debt crisis since the 1980s, there were unconscionable creditors, and the trigger of the economic crisis in Europe, it must not be forgotten, was the financial havoc caused by the 2007 sub-prime crisis in the United States. The law should certainly work to prevent and punish the misconduct and the irresponsibility of those involved. Nonetheless, to attribute the 2009 predicament of Greece to a banking crisis allegedly disguised as a sovereign debt crisis, may

⁶⁵⁵ For a clear explanation of the deal and the role of the debt managers of certain Eurozone countries in the lax drafting of the ESA95 rules, see Nicola Dunbar, ‘Revealed: Goldman Sachs’ mega deal for Greece’, *Risk.net* (July 2003) <<http://www.risk.net/derivatives/structured-products/1498135/revealed-goldman-sachs-mega-deal-greece>>. On the issue, see also ‘Goldman’s Trojan currency swap’, *Financial Times* (9 February 2010); ‘Goldman Sachs faces FED inquiry over Greek crisis’, *The Guardian* (26 February 2010); ‘Greek Debt Crisis: Goldman Sachs could be sued for helping hide debts when it joined the euro’, *The Independent* (10 July 2015); ‘Plenty deserve blame for Greece’s woes, but maybe not Goldman Sachs’, *The New York Times* (13 July 2015).

⁶⁵⁶ It is widely acknowledged that other Eurozone countries, e.g. Italy, have used similar financial instruments, Dunbar (n 655).

⁶⁵⁷ *ibid*

⁶⁵⁸ Anne Gelpern, ‘Sovereign Debt and Banking Crises: An “Arial View”’ in Lastra and Buchheit (n 614), Chapter 15.

risk overlooking the pre-existing economic difficulties of the country, and distract from the other, more fundamental questions that remain to be addressed: Why has Greece's economic 'survival' been so dependent on debt/external funding in the post-2001 economic and institutional context? Have the structural economic and institutional causes of such dependence been addressed by the institutions involved?

5.3. After the crisis: the EU-IMF Economic Adjustment Programmes

Since 2010, Greece has received financial assistance from other Euro Area Member States and the IMF under three different programmes, launched respectively in 2010, 2012 and 2015.⁶⁵⁹

It must be noted that, at the onset of the Eurozone crisis, the EU did not have a mechanism in place to assist Member States in financial difficulties. Besides a medium-term balance of payment (MTBoPA) facility available on the basis of Article 143 TFEU under Council Regulation (EC) No. 332/2002⁶⁶⁰ only to non-Eurozone Member States,⁶⁶¹ the only other provision in this sense was Article 122 TFEU, which allows the Council, on a proposal from the Commission, to grant, under certain conditions, financial assistance to a member State in difficulties or seriously threatened with severe difficulties that are caused by natural disasters or exceptional occurrences beyond the member State's control.

Instead, Articles 123-125 TFEU explicitly prohibit the monetization of

⁶⁵⁹ For full details and documentation on the three programmes, see European Commission, 'Financial assistance to Greece' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en#economicadjustmentprogrammes>. A useful 'tracker' of Greece's repayments is available on the Financial Times' website, see 'Greek debt tracker' <<https://ig.ft.com/sites/2015/greek-debt-monitor/>>. The Wall Street Journal provides also an informative 'Greece's Debt Due' webpage, with data on Greek outstanding repayments by holder, until 2059 <<https://graphics.wsj.com/greece-debt-timeline/>>.

⁶⁶⁰ Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L053.

⁶⁶¹ Financial assistance under the MTBoPA (whose funds are raised by the Commission on behalf of the EU in international financial markets) was provided, at the beginning of the crisis, to Hungary, Latvia and Romania, see Lastra, *International Financial and Monetary Law* (n 614) 296, para 8.41-42. See also European Commission, 'Balance of Payments (BoP) Assistance' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/balance-payments-bop-assistance_en>.

government debt, privileged access to financial institutions and the mutual guarantee of debts. In particular Article 125 TFEU, or the so called ‘no bail-out’ rule, provides that neither the Union, nor a Member State shall be “liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project”.⁶⁶² Therefore, different mechanisms to assist Greece and the other Euro Area Member States in financial difficulty were progressively put in place, remarkably outside the EU legal framework, by means of new intergovernmental agreements.

5.3.1. The First Economic Adjustment Programme (8 May 2010)

Under a *First Economic Adjustment Programme* (8 May 2010) – whose granting was controversially based on Article 122(2) TFEU, since the situation of Greece was considered to be an ‘exceptional occurrence beyond the country’s control’ – Greece was initially accorded assistance for €110 billion, to be disbursed between May 2010 and June 2013. Out of the total, €80 billion were to be provided by the Euro Area Member States through bilateral, non-concessional loans on the basis of an Intercreditor Agreement⁶⁶³ and a Loan Facility Agreement between the lenders (with the exception of Germany, who acted in this case through its bank KfW) and Greece.⁶⁶⁴ The bilateral loans were

⁶⁶² Lastra, *International Financial and Monetary Law* (n 614) 296; Rosa M Lastra and Jean-Victor Louis, ‘European Economic and Monetary Union: History, Trends and Prospects’ (2013) 32 *Yearbook of European Law* 1, 43-4.

⁶⁶³ Intercreditor Agreement (hereinafter, IA) between Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland, 8 May 2010, *Euro Area Loan Facility Act 2010* [Ireland], Schedule 1.

⁶⁶⁴ Loan Facility Agreement (hereinafter, LFA) between the following Member States whose currency is the Euro: Kingdom of Belgium, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland and KfW, acting in the public interest, subject to the instructions of an with the benefit of the guarantee of the Federal Republic of Germany, as Lenders and The Hellenic Republic as Borrower, the Bank of Greece as Agent to the Borrower, 8 May 2010, *Euro Area Loan Facility Act 2010* [Ireland], Schedule 2. The initial amount was

centrally pooled by the European Commission, which, according to the Intercreditor Agreement, would represent the States parties in organising and administering the loans pursuant to the terms of the Loan Facility Agreement,⁶⁶⁵ and would negotiate and sign on their behalf (subject to prior approval by all of them) the Loan Facility Agreement and the Memorandum of Understanding (MoU) with Greece (on which, see further below).⁶⁶⁶ It must be noted that these loans were initiated with an “onerous” interest rate.⁶⁶⁷ Allegedly, this policy choice was meant to act as an incentive for Greece to return to market-based financing as soon as possible. However, as a result, the Truth Committee on Public Debt has reported that, by March 2012, Greece had transferred to the Euro Area Member States €2,614 billions of interest payments⁶⁶⁸ and, since some of the creditor countries’ borrowing costs were lower than the lending rate (e.g. Italy, among other countries, has financed its loans to Greece by issuing medium- and long-term bonds)⁶⁶⁹ some lenders actually profited out of the loans.

The remaining €30 billions planned as part of the assistance, were to be provided by the IMF, under a three-year stand-by arrangement (SBA).⁶⁷⁰ It must be noted that, in order to participate in the assistance under the terms dictated by the EU, the IMF had to bend its core rule of providing financial support only to

subsequently reduced by €2.7 billion, as Slovakia decided not to participate in the Loan Facility Agreement, and Ireland and Portugal stepped down from the facility as they requested financial assistance themselves, see European Commission, ‘Financial Assistance to Greece’ (n 58).

⁶⁶⁵ IA, Art. 1(1).

⁶⁶⁶ IA, Art. 2(1).

⁶⁶⁷ This was set at the variable rate of 3-month Euribor plus 300 basis points. Consequently, in August 2011, the interest rate on the bilateral loans reached over 4.6%. In 2011, thus, the spread was retroactively cut to 150 basis points and on 27 November 2012 the spread was cut to 50 basis points, see Zsolt Darvas and Pia Hüttel, ‘How to reduce the Greek debt burden?’, *Bruegel* (9 January 2015) <<http://bruegel.org/2015/01/how-to-reduce-the-greek-debt-burden/>>.

⁶⁶⁸ Truth Committee on Public Debt, *Preliminary Report* (n 613) 23. The Truth Committee extrapolated this figure by summing up all the interest payments (in EUR billion) charged to Greece by the euro area Member States between June 2010 and March 2012, as reported in European Commission, ‘The Second Economic Adjustment Programme for Greece’, *Occasional Papers No 94* (March 2012) <http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf> 45.

⁶⁶⁹ Law No 99 of 22 June 2010, ‘Conversione in legge del decreto-legge 10 maggio 2010, n. 67, recante disposizioni urgenti per la salvaguardia della stabilità finanziaria dell’area euro. Ordine di esecuzione dell’accordo denominato «Intercreditor Agreement» e dell’accordo denominato «Loan Facility Agreement» stipulati in data 8 maggio 2010’, GU No 150 of 30 June 2010.

⁶⁷⁰ LFA, Preamble, para (3).

remedy temporary problems of liquidity and not of prolonged and unsustainable indebtedness (i.e. insolvency), by amending the requirement of “high probability of public debt being sustainable in the medium term” to include circumstances where “there is a high risk of international systemic spillovers” (and Greece, as part of the Eurozone, was deemed to meet this definition).⁶⁷¹ Secondly, the IMF had to accept the EU opposition to an *ex ante* debt restructuring, contrary to previous IMF practice, despite the vast majority of IMF officials and several commentators in 2010 considered a restructuring of the Greek debt as necessary and inevitable.⁶⁷² In a later 2013 report on the evaluation of the assistance provided to Greece in 2010, the Fund admitted that

[i]n the event, the SBA-supported program served as a holding operation. [...] An upfront debt restructuring would have been better for Greece although this was not acceptable to the Euro partners. A delayed debt restructuring also provided a window for private creditors to reduce exposures and shift debt into official hands. As seen earlier, this shift occurred on a significant scale and limited the bail-in of creditors when [Private Sector Involvement] eventually took place [in 2012, see further below], leaving taxpayers and the official sector on the hook.⁶⁷³

In fact, it has been argued, and the just-quoted IMF statement seems to confirm the point, that the high exposure of foreign banks to Greece was the key reason behind the unwillingness to apply an early haircut on bonds, and that the

⁶⁷¹ IMF, Decision No 14064-(08/18) of 22 February 2008, as amended by Decision Nos. 14184-(08/93) of 29 October 2008, 14284-(09/29) of 24 March 2009, BUFF/10/56 of 9 May 2010, and 14716-(10/83) of 30 August 2010, ‘Access Policy and Limits in the Credit Tranches and under the Extended Fund Facility and on Overall Access to the Fund’s General Resources, and Exceptional Access Policy—Review and Modification’ in IMF, *Selected Decisions and Selected Documents of the International Monetary Fund*, 35th Issue (31 December 2010) 426-427; IMF, ‘Sovereign Debt Restructuring—Recent Developments and Implications for the Fund’s Legal and Policy Framework’ (26 April 2013) 20, para 22 <<https://www.imf.org/external/np/pp/eng/2013/042613.pdf>>.

⁶⁷² Lesly Wroughton, Howard Schneider and Dina Kyriakidou, ‘How the IMF’s Greek misadventure is changing the fund’, *Ekathimerini.com* (28 August 2015) <<http://www.ekathimerini.com/200988/article/ekathimerini/comment/how-the-imfs-greek-misadventure-is-changing-the-fund>>.

⁶⁷³ IMF, Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement (June 2013) IMF Country Report No 13/156, 28, para 57 <<https://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf>>; see also Lastra and Buchheit (n 614) paras 5.02 and 5.39.

first assistance package was essentially aimed at rescuing Greece's private creditors, i.e. European banks, rather than the country itself.⁶⁷⁴ During the implementation of the programme, in fact, there was a dramatic transformation in the profile and ownership of the Greek debt. European and Greek banks massively sold off Greek bonds, so that public debt privately owned was eventually transferred into public hands, to the other Eurozone Member States and the Member States of the IMF (while, in the meanwhile, private debt was being 'socialised' with taxpayers' money, through the bailouts of banks across Europe). Euro Area banks' exposure to Greece, which had peaked at about €128 billion in 2008, progressively dropped to €12 billion in September 2013,⁶⁷⁵ while the share of 'official' loans to the country increased from 5.2% to 73.06% in 2014.⁶⁷⁶

5.3.2. The Second Economic Adjustment Programme (14 March 2012)

On 14 March 2012, Greece was granted further assistance under a *Second Economic Adjustment Programme*, covering the period 2012-2014 (assistance was later extended to 30 June 2015) for a total amount of €164.5 billion. These comprised the unreleased amounts of the first programme, plus an additional €130 billion, and mandated an initial allocation of €48 billion for the recapitalization of the Greek banks who suffered losses from the debt restructuring (on which, *infra*).⁶⁷⁷ Out of the total, €144.7 billion were provided by Euro Area Member States, this time via the European Financial Stability Facility (EFSF), a *société anonyme* (limited liability company) incorporated in Luxembourg and whose sole shareholders are the Euro Area Member States,

⁶⁷⁴ Truth Committee on Public Debt, *Preliminary Report* (n 613) 19; Ronald Janssen, 'Greece and the IMF: Who exactly is being saved?' (Centre for Economic and Policy Research, July 2010) 6; Varoufakis (n 618).

⁶⁷⁵ By March 2012, German banks' exposure to Greek public debt was down to less than €795 million; French banks had totally eliminated Greek debt from their books by December 2012; and UK banks' exposure, which was €13bn in March 2008, dropped to €4.3bn by December 2012, Varoufakis (n 618); 'The Greek debt: what creditors may stand to lose', *The Guardian* (19 June 2015) <<https://www.theguardian.com/world/datablog/2015/jun/19/the-greek-debt-what-creditors-may-stand-to-lose>>.

⁶⁷⁶ Truth Committee on Public Debt, *Preliminary Report* (n 613) 20.

⁶⁷⁷ *ibid*

established in June 2010 by an intergovernmental agreement.⁶⁷⁸ The IMF, on its part, contributed €19.8 billion under a four-year Extended Fund Facility approved in March 2012.⁶⁷⁹

5.3.2.1. The Greek debt restructuring of 2012

As mentioned above, the second ‘rescue plan’ was preceded by a restructuring of the Greek debt owned by private sector investors, known as Private Sector Involvement (PSI), which represented the largest restructuring in world history and the first major one in Europe since the defaults preceding World War II.⁶⁸⁰ Private sector holders of €205.5 billion of Greek debt were ‘invited’⁶⁸¹ to forgive 53.3% of what they were owed under 135 series of bonds, and to exchange 31.5% of their remaining principal for new, low-coupon Greek bonds with maturities of 11 to 30 years and the rest (15%) for two-years notes issued by the EFSF.⁶⁸² Loans from the European Union and the IMF (€74 billions), who were providing new funding to Greece, were reasonably excluded from the deal. More controversially, however, the ECB had also set its holdings apart from and above all other bonds, by concluding an agreement with Greece, on 15 February 2012, for the exchange of its Greek debt instruments (approximately €50 billion) and those held by national central banks for new securities whose nominal value, interest rate and interest payment and repayment dates were identical to the original securities, but which bore different serial numbers and dates.⁶⁸³ Furthermore, the European Investment Bank was also exempted from any haircut, prompting complaints from private investors and

⁶⁷⁸ *EFSF Framework Agreement* of 7 June 2010 <https://www.esm.europa.eu/sites/default/files/20111019_efs_f_framework_agreement_en.pdf>.

⁶⁷⁹ Yianni and Aggarwal (n 625) 426, footnote 27.

⁶⁸⁰ Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati, ‘The Greek Debt Restructuring: An Autopsy’ (July 2013); Alexander Metallinos, ‘The Greek Sovereign Debt Restructuring’ in Eugenio Bruno (ed), *Sovereign Debt and Debt Restructuring: Legal, Financial and Regulatory Aspects* (Globe Business Publishing 2013); Porzecanski (n 613).

⁶⁸¹ For the original text of the ‘Invitation Memorandum’, see ‘Invitation of the Hellenic Republic’ (24 February 2012) available at <http://ftalphaville.ft.com/files/2012/02/Reg_S_Invitation_Memorandum.pdf>.

⁶⁸² Porzecanski (n 613) 40-41.

⁶⁸³ *ibid*

criticism by various commentators.⁶⁸⁴

Although the PSI was labelled as a ‘voluntary transaction’ and included some incentives,⁶⁸⁵ it has been correctly observed that it was not genuinely voluntary in various respects. In particular, with a so called ‘Bondholders Act’⁶⁸⁶ the Greek Parliament retroactively introduced collective action clauses (CACs) into the €177 billions of targeted bonds governed by Greek law,⁶⁸⁷ enabling bond-holders to conclude a collective agreement with the State, deciding by an enhanced majority. Therefore, once the consent of €152 billion of bonds (representing almost 86% of holders) was received, the terms of the remaining €25 billion were amended as if they too had consented.⁶⁸⁸ As a result, bonds with outstanding principal value of €199 billion were successfully restructured (i.e. 96.6% of total €205.5 billion of eligible bonds), and the total amount of debt prior to the exchange (€356 billion as of end-2011) was reduced by €106 billion.

The PSI has been criticised on various fronts, including, prominently, because it imposed big losses on public entities and small bondholders.⁶⁸⁹ These were not compensated in any way while, at the same time, as mentioned, the second economic adjustment programme earmarked almost €50 billion for bank recapitalization, thus providing full compensation to the banks who had taken part in the PSI (Greece’s four biggest banks reported a combined loss of €27.9 billion).⁶⁹⁰

Pension schemes in particular lost €14.5 billion out of total capital reserves of €21 billion. It is estimated that more than 15,000 families lost their life savings and, among these, 17 suicides have been recorded to date.⁶⁹¹ In his 2014 report

⁶⁸⁴ *ibid*

⁶⁸⁵ Metallinos (n 680) 22-23.

⁶⁸⁶ Law 4050/2012 of 23 February 2012 on Rules relating to the adjustment of securities, their issue or guarantee by the Greek State with the agreement of the bond holders. For an unofficial translation of the bill, see Andreas Koutras, ‘A better translation of Bondholders Act 4050’ <<http://andreaskoutras.blogspot.com.au/2012/03/better-translation-of-bondholders-act.html>>.

⁶⁸⁷ In 2012, there were €29 billion of bonds held by private sector creditors that were issued under foreign law, €5.5 billions of which have remained, after the PSI, in the hands of holdout investors, see Porzecanski (n 613).

⁶⁸⁸ Metallinos (n 680) 24; Porzecanski (n 613) 41.

⁶⁸⁹ See also the IMF statement quoted above (n 673).

⁶⁹⁰ Porzecanski (n 613); Metallinos (n 680); Truth Committee on Public Debt, *Preliminary Report* (n 613) 20.

⁶⁹¹ *ibid*; ‘Greek Debt Haircut Led 15 Bondholders To Kill Themselves’, *The National*

on his first mission to Greece, the former Independent Expert on Foreign Debt and Human Rights, Cephias Lumina, expressed his concern at allegations that “when purchasing their bonds, some Greek investors were misled by bank personnel who failed to adhere to the Markets in Financial Instruments Directive (MiFID Directive 2004/39/EC)”, and that “bondholders relied on representations contained in official European Union and European Central Bank documentation, as well as statements made by public institutions, namely the Bank of Greece and the Public Debt Management Agency, on the State’s economic health”.⁶⁹² He emphasised the “serious financial hardship” experienced by bondholders who had invested most of their savings in what they understood to be relatively safe investments, to fund their retirement, own healthcare needs or care of disabled family members, while severe cuts to pensions and other social benefits were also being implemented.

The appeals filed by small investors before national and supranational Courts all essentially resolved with the Courts ‘avoiding’ engagement with the restructuring decision of the State, paying extreme deference to the authorities’ margin of appreciation, and shifting most of the consequences of the ‘risk’ on small investors.⁶⁹³

In 2014, in the case of *Mamatas and others v. Greece*,⁶⁹⁴ 6,320 Greek private bondholders petitioned the European Court of Human Rights (ECtHR) alleging that their forcible participation in the 2012 restructuring had amounted to a *de facto* expropriation of their property, and that they had suffered discrimination

Herald (4 December 2014) <<https://www.thenationalherald.com/67747/greek-debt-haircut-led-15-bondholders-suicide/>>. Suicide cases related to bank rescues have been reported also in other countries, e.g. Italy, see ‘Bank rescues: putting bondholders on the hook’, *Financial Times* (4 January 2016) <<https://www.ft.com/content/80109fcc-a8e1-11e5-9700-2b669a5aeb83>>.

⁶⁹² HRC, IE 2014 Report on first mission to Greece (n 596) paras 26-28.

⁶⁹³ Several other appeals have also been filed before national, e.g. German, and supranational courts, e.g. General Court, Judgment of 7 October 2015, *Alessandro Accorinti and others v ECB*, Case T-39/13. In this case, the Court essentially held that the loss suffered in 2012 by the private, mostly Italian, holders of Greek debt instruments in connection with the restructuring of the public debt of the Greek State is not attributable to the ECB, but to the economic risks ordinarily inherent in financial sector activities. The applicants “had to be aware of those hazards and risks of a considerable loss in the value of the bonds which they purchased. That applies a fortiori because, even before the beginning of its financial crisis in 2009, the issuing Greek State was already faced with high indebtedness and a high deficit”, *ibid*, para 121.

⁶⁹⁴ *Mamatas and others v Greece*, App nos. 63066/14, 64297/14 and 66106/14 (ECHR, 21 July 2016).

as compared with other creditors, particularly institutional creditors, holding bonds for a total value of several billion euros. Although admitting that the applicants' forcible participation amounted to an interference with their right to respect for their property for the purposes of Article 1 of Protocol No. 1 to the Convention, the Court held that such interference, prescribed by law, pursued the legitimate public-interest aim of preserving economic stability and restructuring the debt in the general interests of the community, at a time of serious economic crisis. The Court affirmed, among other things, that the applicants had not suffered any special or excessive burden and the CACs and the restructuring of the public debt were an appropriate and necessary means of reducing the public debt and saving the State from bankruptcy, emphasising that investing in bonds was never risk-free and that the applicants should have been aware of the vagaries of the financial market and the risk of a possible drop in the value of their bonds, considering the Greek deficit and the country's large debt, even before the 2009 crisis. Finally, the Court excluded that the bond exchange procedure had been discriminatory under Article 14 ECHR, particularly, in the Court's opinion, because of the risk of jeopardising the whole operation, with disastrous consequences for the economy, and the need to act rapidly in order to restructure the debt. Overall, the Court seemed primarily concerned with safeguarding the margin of appreciation of the Greek authorities in adopting emergency measures to cope with the economic crisis.

The 2012 restructuring, however, failed to reduce Greece's debt burden, as the country was concurrently taking out a new €130 billion loan under its second adjustment programme.

With regard to the use of loans, although these were portrayed as if they have been used to assist Greece in covering for its primary fiscal balance, only a small share has actually contributed to the government regular expenditure. In fact, 86% of the bilateral loans (2010), between May 2010 and September 2011, were used for debt repayment, and large part of the remainder was used for the setting up of the Hellenic Financial Stability Fund. The €144.7-billion EFSF loans (2012) – the majority of which was disbursed 'in kind' (i.e. EFSF securities) and not in euros – were used to subsidise the PSI (€34.6 billion notes), in the 'Debt buy back' (€11.3 billion notes) or were borrowed for the recapitalization of

Greek banks (€37.3 billion).⁶⁹⁵ A 2016 study published by the European School of Management and Technology in Berlin confirms that only a very small fraction of the assistance provided to Greece under the first and second adjustment programmes, i.e. 9.7 billion or less than 5%, ended up in the public budget of Greece. 64% of the loans were just used to pay back the existing debt and interests, 37.3 billion or 17% was used to recapitalize Greek banks, while 29.7 billion or 14% of the amount was used to provide incentives for investors to engage in the PSI.⁶⁹⁶

5.3.3. The Third Stability Support Programme (14 August 2015)

In January 2015, the Coalition for the Radical Left, Syriza, which had consistently opposed the implementation of austerity measures, won snap elections. This led, during the first half of 2015, to an uneasy relationship of Greece with its Eurozone partners, as these insisted that the country fully implement adjustment measures, while the new government stressed the need for debt relief. An agreement could not be reached, while the financial situation in Greece became increasingly dramatic. At the beginning of June 2015, a \$300 million debt repayment to the IMF was postponed, raising fears of a possible default. When the alternative measures proposed by Syriza in late June were declined by the lenders,⁶⁹⁷ the government announced that it would hold a referendum asking the Greek people for a yes or no vote on the latest bailout terms put forward by Greece's international creditors.⁶⁹⁸ On 5 July, more than

⁶⁹⁵ Truth Committee on Public Debt, *Preliminary Report* (n 613) 23.

⁶⁹⁶ HRC, Independent Expert Foreign Debt and Human Rights, 'End-of-Mission Statement. Visit to the European Union institutions' (8 December 2015) 3, quoting Jörg Rocholl and Axel Stahmer, 'Where did the Greek bailout money go?' (2016) ESMT White Paper No WP-16-02.

⁶⁹⁷ In its latest proposal of 22 June for a Staff Level Agreement, although making some "austrian" concessions "in a bid to placate the institutions and thus come closer to an agreement", Greece had excluded further cuts in pensions and social expenditure, while advancing the possibility of a 12% one-off levy on company profits over €0.5m, a rise in corporation tax from 26% to 29%, and a luxury tax on yachts, see Yanis Varoufakis, 'As It Happened – Yanis Varoufakis Intervention During the 27th June Eurogroup Meeting' (28 June 2015) <<http://yanisvaroufakis.eu/2015/06/28/as-it-happened-yanis-varoufakis-intervention-during-the-27th-june-2015-eurogroup-meeting/>>; 'Can Tsipras' new proposals revive a deal?', *The Guardian*, 24 June 2015 <<http://www.theguardian.com/world/ng-interactive/2015/jun/24/greek-debt-crisis-negotiations-interactive>>.

⁶⁹⁸ The question asked in the referendum was: "Do you accept the institutions' proposal as

61% of eligible Greeks voted ‘Oxi/No’ to these terms, despite an ongoing European “campaign of bullying”⁶⁹⁹ against Greece (“financial terrorism” in the heated words of Yanis Varoufakis, then Greek Minister of Finance).⁷⁰⁰ In fact, after the announcement of a referendum, the Eurogroup had decided not to grant the one-month extension of the Master Financial Assistance Facility (MFAFA) requested by Greece (according to the Greek government, in order to allow for the referendum to take place undisturbed and for later debt negotiations to fully take its outcome into account), leading the country to default on its €1.6 billion repayment to the IMF on the 30 June. On 27 June, Greece was also arbitrarily excluded from the Eurogroup meeting, where the remaining 18 members discussed the forthcoming expiration of its current EFSF financial arrangement and issued a statement, breaking, for the first time in history, the Eurogroup conventional unanimity rule.⁷⁰¹ On 28 June, the ECB “[took] note of decision on Greek referendum”⁷⁰² and decided “to maintain the ceiling to the provision of emergency liquidity assistance (ELA) to Greek banks”,⁷⁰³ in other words, not to provide further support, despite it was clear that funds were leaving the country and bank reserves running low (more than €7 billion-worth deposits left Greek banks in less than a week, as a ‘mini bank run’ took place).⁷⁰⁴ This forced, on 29 June, the Greek authorities to impose a bank closure and capital controls, capping money withdrawals at €60 per day, in order to avoid financial panic.

it was presented to us [i.e. the Greek government] on 25th June in the Eurogroup?”.

⁶⁹⁹ Paul Krugman, ‘Ending Greece’s Bleeding’, *The New York Times* (6 July 2015) <http://www.nytimes.com/2015/07/06/opinion/paul-krugman-ending-greeces-bleeding.html?_r=0>.

⁷⁰⁰ Yanis Varoufakis, ‘Minister No More!’ (6 July 2015) <<http://yanisvaroufakis.eu/2015/07/06/minister-no-more/#more-8433>>.

⁷⁰¹ Eurogroup, Ministerial Statement of 27th June 2015, No 534/15 (27 June 2015) <http://www.consilium.europa.eu/press-releases-pdf/2015/6/40802199989_en.pdf>.

Varoufakis, reported that, when he asked the Secretariat for legal advice on whether the President of the Eurogroup can convene a meeting without inviting the Finance Minister of a Eurozone Member State and issue a statement without the conventional unanimity, he received the following official response: “The Eurogroup is an informal group. Thus it is not bound by Treaties or written regulations. While unanimity is conventionally adhered to, the Eurogroup President is not bound to explicit rules”, see Varoufakis, ‘As It Happened’ (n 697).

⁷⁰² European Central Bank, ‘ELA to Greek banks maintained at its current level’, Press release (28 June 2015) <<https://www.ecb.europa.eu/press/pr/date/2015/html/pr150628.en.html>>.

⁷⁰³ *ibid*

⁷⁰⁴ ‘Greek crisis: episodes of despair and drama as moment of truth nears’, *The Guardian*, 21 June 2015; ‘Greek banks given one-day reprieve as depositors pull out €1.6bn’, *Financial Times*, 22 June 2015.

The everyday life scenes that followed these announcements were sadly familiar: queues at ATMs, car lines at petrol stations, supermarkets reporting unusual volumes of sales, as people were making stocks of basic goods in fear of the worst. As the current Independent Expert on Foreign Debt and Human Rights, Juan Pablo Bohoslavsky, has noted, some observers perceived the ECB decision to reduce emergency credit to Greek banks shortly before the referendum “as an attempt to influence the outcome of the democratic decision making process in Greece”.⁷⁰⁵

After the provision, in July 2015, of short-term bridge loans through the European Financial Stabilisation Mechanism (EFSM),⁷⁰⁶ a *Third Stability Support Programme* was finally agreed (14 August 2015). It provides Greece with up to €86 billion in financial assistance over the period 2015-18, this time through the European Stability Mechanism (ESM), i.e. the treaty-based permanent international financial institution established in 2012 by the Euro Area Member States to ensure financial stability in the Economic and Monetary Union.⁷⁰⁷

Nonetheless, the unsustainability of the Greek debt is being increasingly acknowledged. Among others, the Independent Expert on Foreign Debt and Human Rights has reaffirmed its conviction that the Greek debt is “financially and socially unsustainable”⁷⁰⁸ and that a solution to the country’s economic

⁷⁰⁵ HRC, IE End of Mission Statement (n 693) 2.

⁷⁰⁶ Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism [2010] OJ L118, later amended by Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism [2015] OJ L210. Under the EFSM, the European Commission was entitled to borrow from financial markets up to €60 billion through the issuance of bonds on behalf of the EU (under an EU budget ‘guarantee’) and to provide financial assistance (in the form of loans or credit lines) to any EU country experiencing or threatened by severe financial difficulties, conditional on the implementation of reforms. In addition to the short-term bridge loans provided to Greece in 2015, the EFSM has been used to provide assistance to Ireland and Portugal between 2011 and 2014, see European Commission, ‘European Financial Stabilisation Mechanism (EFSM)’ <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm_en>.

⁷⁰⁷ Treaty establishing the European Stability Mechanism (signed 1 February 2012, entered into force 27 September 2012) D/12/3 <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en_1.pdf> (the ESM became fully operational on 8 October 2012).

⁷⁰⁸ HRC, IE 2016 Report on mission to the EU (n 583) para 41.

deadlock necessarily requires some kind of debt relief. Three consecutive adjustment programmes have so far largely failed to reduce the level of the Greek public debt.⁷⁰⁹ As mentioned in the chapter's introduction, in 2017, Greece's debt stands at 178.8% of GDP (€324.7 billion), well above its 2009 level, when the Greek ordeal began.

5.4. Welfare rights in Greece since the crisis

As a precondition for securing financial assistance from the Euro Area Member States and the IMF, Greece has been implementing a series of fiscal and economic reform measures ('conditionalities') which have touched upon key areas of welfare provision. These measures have had significant regressive impacts on the enjoyment of human rights, particularly certain ESCR,⁷¹⁰ they have increased inequality in income and wealth,⁷¹¹ and pushed the Greek economy into a deeper recession.⁷¹² After a brief preliminary introduction on the principle of conditionality, this section will review the main measures implemented in Greece and their impacts on the rights to work/labour rights, health, education, adequate housing, and social security (especially pensions). It will also review the main privatisation measures adopted.

A brief methodological premise is necessary: with the exception of more specific monitoring bodies, e.g. the Independent Expert on Foreign Debt and

⁷⁰⁹ *ibid*, para 42. Greece's debt to GDP ratio will further increase to about 250% by 2060, if no front-loaded debt relief is provided, HRC, IE End of Mission Statement (n 693) 3, quoting IMF, Greece, Preliminary debt sustainability analysis – Updated estimates and further considerations (May 2016) IMF Country Report 13/130 <<http://www.imf.org/external/pubs/ft/scr/2016/cr16130.pdf>>.

⁷¹⁰ A vast and long-standing literature exists on the adverse human rights impacts of conditionality. Among the first studies on the human rights impact of economic assistance was the 1978 Special Rapporteur on the Situation of Human Rights in Chile, 'Study of the impact of foreign economic aid and assistance on respect for human rights in Chile', Report prepared by Antonio Cassese (1978) E/CN.4/Sub.2/412 (Vol. IV). For some recent examples, see *inter alia* Aleksandra Ivanković Tamamović, 'The Impact of the Crisis on Fundamental Rights across Member States of the EU: Comparative Analysis' (2015) Study for the LIBE Committee of the European Parliament (2015); Isabel Ortiz, Matthew Cummins, Jeronim Capaldo and Kalaivani Karunanethy, *The Decade of Adjustment: A Review of Austerity Trends 2010-2020 in 187 Countries* (ILO, 2015); Council of Europe, *The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe* (2015).

⁷¹¹ HRC, IE 2016 Report on mission to the EU (n 583) para 77.

⁷¹² *ibid*, para 14.

Human Rights, which have continued to monitor the impacts of conditionality and more generally of economic/fiscal policy-making on ESCR, after 2015 the attention of international civil society organisations and human rights monitoring bodies has partially shifted to other issues, most importantly the extraordinary increase in the inflow of refugees towards the EU, of which Greece itself is a foremost witness. This fact entails that, for instance, post-2015 austerity-related legislative developments in Greece have been relatively less monitored, especially by international actors. As a consequence, less data has been gathered on the impacts of conditionality on welfare rights, and the available reports usually reference data up to 2014/2015.

5.4.1. Conditionality

As is well-known, conditionality is a well-established practice of international financial institutions, notably the IMF⁷¹³ and, since 2010, it has become a key principle of EU economic governance.⁷¹⁴ In *Pringle*, the Court of Justice of the European Union established that “strict conditionality” is a necessary requirement for financial assistance to be compatible with Article 125 TFEU⁷¹⁵ and, in 2011, the conditionality principle was enshrined in EU primary law, with the amendment to Article 136 TFEU. The added paragraph 3 – besides allowing Euro Area Member States to establish the European Stability Mechanism (ESM) – mandates to make the granting of any required financial assistance under the mechanism subject to “strict conditionality”.⁷¹⁶

Essentially, conditionality entails the acceptance by a State in financial distress of specific obligations, upon whose fulfilment depends the provision of

⁷¹³ Axel Dreher, ‘IMF Conditionality: Theory and Evidence’ (2009) *Public Choice* 141, 233-267; Cesare Pinelli, ‘Conditionality’ in *Max Planck Encyclopedia of Public International Law* (November 2013).

⁷¹⁴ Annamaria Viterbo and Francesco Costamagna, ‘L’impatto sociale della politica di condizionalità nel contesto della crisi nell’area euro: profili giuridici’ in Nicola Napolitano and Andrea Saccucci (eds), *Gestione internazionale delle emergenze globali. Regole e valori* (Editoriale Scientifica 2013) 167-194.

⁷¹⁵ Court of Justice, Judgement of 27 November 2012, *Thomas Pringle v Government of Ireland*, Case C-370/12, paras. 135-143.

⁷¹⁶ Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91.

financial assistance by the financing institution(s). These obligations are fully detailed in a Memorandum of Understanding (MoU), signed by the requesting State and the European Commission on behalf of, in the Greek case, either Euro Area Member States (first and second adjustment programmes) or the ESM (third stability support programme). Memoranda (in the case of the first Greek adjustment programme, in effect, three distinct MoUs, i.e. a Memorandum of Economic and Financial Policies (MEFP), a Memorandum of Understanding on Specific Economic Policy Conditionality and a Technical Memorandum of Understanding) are then generally annexed to the assistance facility agreement between the State and the financing institution(s). Where also the IMF is providing assistance, the same conditionalities, again in the form of a MoU, are attached to a Letter of Intent directed by the recipient State to the IMF Managing Director.

The legal nature – both under EU and international law – and binding force of MoUs are notoriously controversial, as demonstrated also by the opposite stances adopted by the Greek Council of State (i.e. MoUs are policy documents)⁷¹⁷ and the Portuguese Constitutional Court (i.e. MoUs are legally binding instruments)⁷¹⁸ in respect of the Memoranda agreed by Greece and Portugal respectively, in the context of their adjustment programmes.⁷¹⁹

Furthermore, the negotiation of the obligations contained in the MoUs, whose procedure is now regulated under Regulation (EU) No. 472/2013,⁷²⁰ has been the object of strong criticism, inasmuch as it is characterised by a certain opacity in terms of the role, relative bargaining power and legitimacy of the

⁷¹⁷ Greek Council of State, Judgement No 668/2012 of 20 February 2012, para. 28.

⁷¹⁸ See *inter alia* Portuguese Constitutional Court, Decision No 187/2013 of 5 April 2013, para. 29 <<http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html>>.

⁷¹⁹ For some insights and further references on the many constitutional issues raised by MoUs, see *inter alia* European University Institute, *Constitutional Change through Euro Crisis Law: A Multi-level Legal Analysis of Economic and Monetary Union* 2015, available at eurocrisislaw.eui.eu; Xenofon Contiades (ed), *Constitutions in the global financial crisis: a comparative analysis* (Routledge 2016); Kaarlo Tuori and Klaus Tuori, *The Eurozone crisis: a constitutional analysis* (CUP 2014).

⁷²⁰ Regulation (EU) 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] OJ L140.

actors involved.⁷²¹ In fact, the wording of Regulation 472/2013/EU follows the IMF approach of presenting the member State that requests assistance as primarily responsible for conditionality, and the role of the counterparts involved (i.e. the European Commission, the ECB and the IMF) merely in terms of “consultation”, “negotiation”, or sometimes “agreement”.

Also the ESM Treaty, as well as the EFSF Framework Agreement and the Greek Loan Facility before it, adopt the same contractual approach. ‘Domestic ownership’ of conditionality is at all points encouraged. The MoUs “are so drafted as to imply that their content expresses a commitment of the recipient government that is simply accepted as sufficient by the lenders, rather than a set of measures some of which are imposed by the latter”.⁷²² Nonetheless, several studies have highlighted that the lenders may actually have a significant bargaining power.⁷²³

Evidence at this was also contained in some of the responses provided to the questionnaire sent by the European Parliament to the Member States under financial assistance, in the context of the Parliament’s 2013 enquiry on the role and operations of the Troika.⁷²⁴ The Greek Truth Committee on Public Debt has also been very vocal on the matter of possible ‘coercion’.⁷²⁵

Furthermore, intrusiveness is a variable but widely-recognised characteristic of conditionality. In some cases, e.g. with the second adjustment programme in Greece, conditionalities were extremely detailed and specific, thus leaving no discretion to the country in relation to its fiscal and economic decision-making.⁷²⁶

⁷²¹ See e.g. Francesco Costamagna, ‘Saving Europe “Under Strict Conditionality”: A Threat for EU Social Dimension?’ (2012) LPF Working Paper No 7.

⁷²² Michael Ioannidis, ‘EU Financial Assistance Conditionality after “Two Pack”’ (20 February 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398914> (last accessed 16 September 2017).

⁷²³ *ibid*, 34-35.

⁷²⁴ European Parliament, Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the Euro Area programme countries (2013/2277(INI)) (28 February 2014).

⁷²⁵ Truth Committee on Public Debt, *Preliminary Report* and report on the *Illegitimacy, Illegality, Odiousness and Unsustainability of the August 2015 MoU and Loan Agreement* (n 613 and 653).

⁷²⁶ On the point of intrusiveness, see *inter alia* André Sapir, Guntram B Wolff, Carlos de Sousa and Alessio Terzi, ‘The Troika and Financial Assistance in the Euro Area: Successes and Failures’ (2014) Study on the Request of the Economic and Monetary Affairs Committee of the

In conclusion, the procedural and substantive ambiguity of conditionality makes it difficult to identify who actually defines the content of these obligations, based on what legitimacy, and to what ends. It also entails that any attribution of responsibility in relation to such duties can prove an extremely complex exercise.

5.4.2. The impacts of conditionality on welfare rights in Greece

The conditionalities implemented by Greece include wide-ranging fiscal and economic measures that largely replicate the measures attached to IMF structural adjustment programmes in the 1980s and 1990s,⁷²⁷ and are mainly of three kinds: 1) budgetary measures, generally directed to reduce public, mainly *social* expenditure, and to increase revenues by means of tax hikes; 2) structural reforms of the labour market, public administration, pension and social security systems, healthcare and education (i.e. key areas of welfare intervention); and 3) privatisation of public assets.⁷²⁸

In terms of overall expenditure trends, as noted by the Independent Expert on Foreign Debt and Human Rights on the occasion of his mission to the institutions of the European Union, between 2008 and 2014 social expenditure in Greece was in “free fall”, with extreme cuts in expenditure on social exclusion and poverty (-66.5% compared with an average +20.4% change in the EU-28), healthcare (-54.9% compared with +4% in the EU-28), unemployment (-44% compared with +5.4% in the EU-28), benefits for sick persons and persons with disabilities (-31.6% compared with +6.2% in the EU-28) and education (-22.3% compared with -4.8% in the EU-28)⁷²⁹ (see Table 1).

European Parliament, p. 16.

⁷²⁷ On the ‘typology of austerity’ characterising EU/IMF conditionality, see also CoE Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* (2013); Costamagna (n 721) 9.

⁷²⁸ CoE Commissioner for Human Rights, *Safeguarding Human Rights* (n 727) 16.

⁷²⁹ HRC, IE 2016 Report on mission to the EU (n 583) para 45 and table at 13.

Table 1: Percentage change in general government social expenditure, 2008-2014

	<i>Greece</i>	<i>EU-28</i>
<i>Social exclusion and poverty</i>	-66.5	+20.4
<i>Healthcare</i>	-54.9	+4
<i>Unemployment</i>	-44	+5.4
<i>Benefits for sick and disabled persons</i>	-31.6	+6.2
<i>Education</i>	-22.3	-4.8

Source: HRC, IE 2016 Report on his mission to the EU

In absolute terms, in 2015 Greece was spending less than EU-28 countries on housing (0.2% versus 0.6% of GDP), healthcare (4.5% versus 7.2% of GDP), recreation, culture and religion (0.7% versus 1% of GDP) and education (4.3% versus 4.9% of GDP). Expenditure for social protection in 2015 was slightly above the average of the Euro Area with 19 Member States (EA-19) (20.5% of GDP in Greece versus 20.1% of GDP in EA-19), although Greece is spending less than EA-19 countries for sickness and disability, family and children, unemployment, housing, and social exclusion, and above EA-19 average only for old age (15.7% versus 10.8% of GDP in 2015). It must be noted, however, that Greece is still spending above EU19 average on defence (2.7% of GDP in 2015 versus 1.2% of GDP for EA-19) and for general public services (9.9% versus 6.6% of GDP), which include debt transactions.⁷³⁰

The following sub-sections will briefly present the specific conditionalities implemented by Greece in the course of the past seven years, and their impacts on the rights to work/labour rights, health, education, adequate housing, and social security.

5.4.2.1. Measures impacting on the right to work/labour rights

The right to work and labour rights⁷³¹ more generally have been the most

⁷³⁰ Eurostat database, 'General government expenditure by function (COFOG)' (last accessed 13 June 2017); HRC, IE 2016 Report on second mission to Greece (n 597) para 36.

⁷³¹ ICESCR, Article 6; Charter of Fundamental Rights of the EU, Articles 15 and 27-31; European Social Charter (revised), Articles 1-10; several ILO conventions; Greek Constitution, Article 22(1). Greece has ratified the following fundamental ILO Conventions: Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour

affected by conditionality.⁷³² The measures implemented in Greece since 2010 involved both the public and the private sector.

Reforms in the public sector have been aimed at reducing both the number and the cost of public sector employees, i.a. by reducing the Easter, summer and Christmas bonuses and allowances paid to civil servants, by reforming the public-sector employee compensation by adjusting the payroll for special regimes, including judges, diplomats, doctors, professors, police and armed forces, and by implementing the rule of only one recruitment for each five retirements. Public sector employment decreased from 942,625 to 675,530 between 2009-2013.⁷³³ Between January 2010 and January 2013, public sector pays declined by over 25% on average.

In 2012, in the case of *Koufaki and ADEDY v. Greece*, the cuts of wages and pensions of public servants resulting from the Laws Nos. 3833/2010, 3845/2010 and 3847/2010 (the latter two implementing the first Greek Economic Adjustment Programme) were challenged before the European Court of Human Rights (ECtHR). The appellants claimed that such measures were incompatible with Article 1 of Protocol No. 1 to the European Convention on Human Rights, protecting the right to the peaceful enjoyment of possessions.⁷³⁴ The Court admitted that the measures in question constituted an ‘interference’ (not a ‘deprivation of possessions’, as claimed by the applicants) with such right. Nonetheless, this interference was justified under the Covenant, according to the Court, “by the existence of an exceptional crisis without precedent in recent Greek history”.⁷³⁵ Besides being ‘lawful’, since it was provided for by the above-mentioned laws, the Court held that the reduction in the salaries, allowances, bonuses and retirement pensions of persons working in the public service imposed by the Greek government, pursued a ‘legitimate aim in the public interest’. According to the Court, it

Convention, 1999 (No. 182). On the contrary, the country is not party yet, among others, to the ILO Domestic Workers Convention, 2011 (No. 189).

⁷³² Styliani Kaltsouni and Athina Kosma, ‘The impact of the crisis on fundamental rights across Member States of the EU: Country Report on Greece’, *Study for the LIBE Committee of the European Parliament*, 2015 (hereinafter ‘LIBE report’) 60; Truth Committee on Public Debt, *Preliminary Report*, 38.

⁷³³ LIBE report, 63-64 and 75-81.

⁷³⁴ *Koufaki and ADEDY v Greece*, App Nos 57665/12 and 57657/12 (ECHR, 7 May 2013).

⁷³⁵ *ibid*, para 37.

formed part of a wider programme of public finance adjustment and structural reform of the Greek economy which, taken as a whole, was designed to meet the country's pressing financing needs and to improve its future economic and financial prospects. Those aims were in the general interest and also coincided with those of the Euro Area Member States, in view of the requirement under European Union legislation to ensure budgetary discipline and preserve the stability of the Euro Area. By their very nature, the measures in question therefore contributed to an immediate reduction in public spending.⁷³⁶

The Court paid particular deference to the margin of appreciation of the national authorities in regulating their social policy, affirming that “[a]s the decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, [...] the national authorities are in principle better placed than the international judge to choose the most appropriate means of achieving this and will respect their judgment unless it is manifestly without reasonable foundation”.⁷³⁷ According to the Court, “[t]his margin is even wider when the issues involve an assessment of the priorities as to the allocation of limited State resources”.⁷³⁸ Crucially, the Court gave “special weight” also to the national authorities’ judgement as to what is to be considered ‘in the public interest’, “unless that judgement is manifestly without reasonable foundation”, concluding that it has “no reason to doubt that, in deciding to cut public servants’ wages and pensions, the legislature was acting in the public interest”.⁷³⁹ Finally, the Court held that the measures adopted were “reasonably proportionate” to the aim they sought to realise, and that a “fair balance” had been struck between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the applicants. In fact, the Court judged that “the extent of the reduction in the first applicant’s salary [Ms Koufaki, from €2,435.83 to €1,885.79] was not such as to place her at risk of having insufficient means to live on and thus to constitute a breach of Article 1 of Protocol No. 1”, so that, in view also “of the

⁷³⁶ *ibid*, para 38.

⁷³⁷ *ibid*, para 31.

⁷³⁸ *ibid*

⁷³⁹ *ibid*, paras 39-41.

particular context of crisis in which the interference in question occurred, the latter could not be said to have imposed an excessive burden on the applicant”.⁷⁴⁰ As to the proportionality of the cuts implemented in respect of public servants more generally, represented before the ECtHR by the Confederation of Public-Sector Trade Unions (ADEDY), the Court simply recalled the fact that they were also accompanied by a compensation mechanism in the form of a flat-rate bonus, introduced with the aim of protecting those in the lowest income segments.⁷⁴¹ Consequently, the Court declared the case inadmissible as manifestly ill-founded.

Private sector reforms, involving far-reaching amendments to both collective and individual labour laws, were essentially directed towards the promotion of non-standard employment (i.e. fixed-term employment and agency work, or employment under contracts with less pay and job security, or with extended probation periods), the reduction of job security (i.a. by shortening notice periods and eliminating or weakening the right to be reinstated after unfair dismissal or mass layoffs), the decentralization and weakening of collective bargaining (i.a. by eliminating or suspending national collective agreements), and the weakening of trade unions (e.g. through facilitating the conditions for non-union employee representatives to conclude collective agreements).⁷⁴²

In 2012, the European Committee of Social Rights held that the provision contained in the Greek Act 3899/2010, allowing the dismissal of a person without notice or severance pay during the probation period (i.e. the first 12 months of employment) in a permanent contract, constituted a violation of the right to a reasonable period of notice for termination of employment protected under Article 4(4) of the 1961 European Social Charter as part of the right to a

⁷⁴⁰ *ibid*, para 46.

⁷⁴¹ *ibid*, para 47.

⁷⁴² HRC, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (27 December 2016) A/HRC/34/57, 7 (hereinafter, ‘Labour rights report’); LIBE report, 65-74; Greek National Commission for Human Rights, ‘Recommendation: On the imperative need to reverse the sharp decline in civil liberties and social rights’, 8 December 2011; Christoph Hermann, ‘Structural Adjustment and Neoliberal Convergence in Labour Markets and Welfare: The Impact of the Crisis and Austerity Measures on European Economic and Social Models’ (2014) 18 *Competition and Change* 2, 119 and 121.

fair remuneration.⁷⁴³ On that occasion, the Committee reiterated its position that

the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. [...] [W]hile it may be reasonable for the crisis to prompt changes in current legislation and practices [...] to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter. The Committee considers that a greater employment flexibility in order to combat unemployment and encourage employers to take on staff, should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labour law, protecting them from arbitrary decisions by their employers or from economic fluctuations. [...]⁷⁴⁴

Conditionalities also included wages cuts and cuts to minimum wage levels, especially for the young, in some cases below the poverty threshold. In 2012, the European Committee of Social Rights held, *inter alia*, that the 32% reduction of the monthly minimum wage for employees under the age of 25, provided by Law 3863/2010 and resulting in a minimum wage of approximately €496 per month, was below the poverty level (i.e. €580 per month) and, thus, constituted a violation of the right to a fair remuneration protected by article 4(1) of the 1961 European Social Charter.⁷⁴⁵

Furthermore, as required by the second adjustment programme, Law 4093/2012 abolished the annual practice of setting minimum wages through collective bargaining, attributing, for the first time, minimum-wage setting to the government.⁷⁴⁶

⁷⁴³ *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011 (ECSR, 23 May 2012) paras 25-28.

⁷⁴⁴ *ibid*, paras 16-18.

⁷⁴⁵ *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011 (ECSR, 23 May 2012) paras 57-65; ILO, *Conclusions of the Report on the High Level Mission to Greece (Athens, 19-23 September 2011)*, 22 November 2011, para 309. See also European Committee of Social Rights, *Conclusions XX-3 - Greece - Article 4-1*, XX-3/def/GRC/4/1/EN, 15 December 2014.

⁷⁴⁶ LIBE report, 74 and 82; Truth Committee on Public Debt, *Preliminary Report* (n 613) 38.

The Independent Expert on Foreign Debt and Human Rights has acknowledged that the overall trend has been “to scale down labour rights”, in accordance with the “dominant tendency in the approach of international financial institutions to labour reform, notably the IMF”, whose “prevalent stance [...] has been a deregulatory one”.⁷⁴⁷ Conditionality-related reforms have brought about, according to the Independent Expert, “significant changes – sometimes even a transformation – in domestic labour law”.⁷⁴⁸ As a result, the level of protection of labour law and trade unions has been “substantially reduced”.⁷⁴⁹

Unemployment in Greece has risen substantially since the crisis, from 7.3% in June 2008 to 23.6% in 2016, or 1,131,000 unemployed persons out of an active population of 4,732,000, compared with a 8.5% average rate in the EU-28 in the same year. Youth unemployment peaked at 64.9% in May 2013, and in 2016 was still at 47.3%. Women and migrants have also been disproportionately affected by the loss of jobs. The female unemployment rate in 2016 was at 28.1% of active population, compared with 19.9% for men. Employment in the informal sector has increased as well, from 25% in 2010 to 36.2% in 2012.

More worryingly, in 2016, 72% of all the unemployed in Greece have been without a job for more than 12 months, and 51.9% for more than 24 months. Since spending on unemployment-related social security went also down, this means that the majority of those without a job have either never received unemployment benefits or have lost their entitlement to receive them owing to long-term unemployment.

Between 2008 and 2013 the average annual income of the Greek household fell by 31.8% (from €44,581 to €30,400).⁷⁵⁰

Anchored poverty, i.e. poverty relative to its pre-crisis income level, almost tripled between 2007 and 2013, and one third of the population was in poverty in 2013.⁷⁵¹ In 2015, 34.9% of the total population (28.4% in 2007) and one out

⁷⁴⁷ Labour rights report, para 14; see also Hermann (n 742)111 ff.

⁷⁴⁸ Labour rights report, para 19.

⁷⁴⁹ *ibid*

⁷⁵⁰ LIBE report, 13.

⁷⁵¹ OECD, *Economic Surveys: Greece*, March 2016, 14 <http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-greece-2016_eco_surveys-grc-2016-en#.WUFHkTN2q8U#page1>.

of every two people aged 18-24, i.e. 51.5%, compared with 33.9% in 2007, was at risk of poverty or social exclusion. The rate of children exposed to such risk has also dramatically increased, by 9.1 percentage points between 2008 and 2015 (compared with an increase of 0.5% in the EU over the same period).⁷⁵²

For those still in the job market, job insecurity and (involuntary) part-time employment, especially for women,⁷⁵³ have increased significantly. Full-time contracts have been progressively converted to part-time or rotating employment contracts. While in 2001, only 4% of the total workforce were part-time workers, in 2016, this rose to 9.7% (the EA-19 average in 2016 was 21.2%).⁷⁵⁴ It is significant that, in 2015, 22.4% of the employed in Greece was nonetheless at risk of poverty or social exclusion (18.5% in 2007).⁷⁵⁵

A 2014 study has provided systematic evidence of a causal link between fiscal austerity, higher unemployment rates, negative economic growth, reduced fertility and suicide rates in Greece, particularly for males between 45 and 89 years of age.⁷⁵⁶

5.4.2.2. Measures impacting on the right to health⁷⁵⁷

Reforms implemented in the healthcare sector include both cost-containment measures and structural reforms, e.g. the creation in 2011 of a single healthcare

⁷⁵² HRC, IE 2016 Report on mission to the EU (n 583) para 59.

⁷⁵³ Human Rights Council, Working Group on the Universal Periodic Review, ‘Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Greece’, A/HRC/WG.6/25/GRC/3, 22 February 2016, para 26.

⁷⁵⁴ LIBE report, 82-86; Truth Committee on Public Debt, *Preliminary Report* (n 613) 38; HRC, IE 2016 Report on mission to the EU (n 583) paras 45, 51-53 and 59. All data reported in these documents have been updated with the most recent data available from the Eurostat database.

⁷⁵⁵ Eurostat data, ‘People at risk of poverty or social exclusion by most frequent activity status (population aged 18 and over)’.

⁷⁵⁶ Nikolaos Antonakakis and Alan Collins, ‘The impact of fiscal austerity on suicide: On the empirics of a modern Greek tragedy’ (2014) 112 *Social Science & Medicine*, 39-50; ‘The impact of fiscal austerity on suicide mortality: Evidence across the “Eurozone periphery”’ (2015) 145 *Social Science & Medicine*, 63-78.

⁷⁵⁷ UDHR, Article 25; ICESCR, Article 12; CEDAW, Article 12; CERD, Article 5; CRPD, Article 25; CRC, Article 24; European Social Charter (revised), Article 11; Charter of Fundamental Rights of the EU, Article 35; Greek Constitution, Articles 21(2) and (3).

insurance fund and provider, the EOPYY, which in 2014 was transformed into a unique buyer of medicines and healthcare services for all those insured.⁷⁵⁸

The First Economic Adjustment Programme required that public health expenditure be limited at or below 6% of GDP (a target that Greece reached in 2012) while, in theory, maintaining universal access and improving the quality care of delivery. The Second Economic Adjustment Programme demanded reducing further hospital operating costs by 8% in 2012, and bringing average public spending on outpatient pharmaceuticals to about 1% of GDP (EU average).⁷⁵⁹ These requirements caused, among other effects, a reduction of health-care staff and available public hospital beds – contributing further to pre-existing shortages – and the increase in co-payments/user-fees for outpatient treatment or medication. 137 public hospitals were merged into 83, and 330 out of 1,950 clinics in public hospitals were merged and distributed among hospitals. Functional beds were reduced from approximately 36,000 to 32,000. Clinics for chronic illnesses, rehabilitation centres and specialised clinics for children and people with disabilities were also reformed, and mental health institutions were shut down or subject to staff cuts.⁷⁶⁰

Greece's health expenditure decreased, from 6% of GDP in 2007 (i.e. almost €14 billion) to 4.5% of GDP in 2015 (approximately €8 billion, i.e. -75%). The EU-28 average expenditure over the same period, conversely, increased from 6.5% to 7.2% of GDP.⁷⁶¹ The decrease in pharmaceutical spending in Greece was much higher than the OECD average, leading at times to internal shortages, also within hospitals.⁷⁶²

As it has been noted, reforms were “adopted within a very short time-frame and under extreme pressure to secure the disbursement of the next tranche” and “focused primarily on the structural, financial and managerial aspects of the NHS, and not so much on patients' needs”.⁷⁶³ One of the most serious consequences of conditionality, is that a large number of individuals are reported to have dropped out of the public health insurance scheme. An increasing

⁷⁵⁸ LIBE report, 46.

⁷⁵⁹ LIBE report, 44-45; Truth Committee on Public Debt, *Preliminary Report* (n 613) 38.

⁷⁶⁰ LIBE report, 48.

⁷⁶¹ Eurostat data.

⁷⁶² LIBE report, 52-53 and 56.

⁷⁶³ LIBE report, 54.

number of long term unemployed and self-employed professionals, for instance, who are unable to pay their social security contributions, are not covered by public health insurance. According to the OECD, in 2013, around 10% of the population was not eligible for health insurance⁷⁶⁴; in 2015, 25% of the population was without health insurance.⁷⁶⁵ The Independent Expert on Foreign Debt and Human Rights reported that in 2014, 17.3% of all persons belonging to the lowest income quintile have not been able to undergo necessary medical treatment, either because of waiting lists, costs, or because of the physical distance of the services. Many have been forced to resort to ‘alternative care’ options. So called ‘open polyclinics’ and ‘social pharmacies’, operated by local and international NGOs and staffed by volunteer medical personnel, have been set up to service patients who are not able to get adequate treatment in public health-care facilities.⁷⁶⁶

Appalling evidence of increased incidence of infant mortality, mental health disorders, alcohol abuse and outbreaks of infectious diseases (particularly HIV, and the re-emergence of malaria and tuberculosis) has been also reported by various sources.⁷⁶⁷ In a 2016 report, the Bank of Greece noted an increase in infant mortality by nearly 50% (mainly due to an increase in the number of deaths of infants of less than one year of age, and the decline of births by 22.1%), and an increase in the number of individuals with mental health problems, especially depression, from 3.3% in 2008 to 12.3% in 2013. The same study reported also an increase in the number of people affected by chronic diseases

⁷⁶⁴ OECD Economic Surveys, ‘Greece’, November 2013, 31 <http://www.oecd.org/economy/surveys/GRC_Overview_Eng_2013.pdf>.

⁷⁶⁵ Truth Committee on Public Debt, *Preliminary Report* (n 613) 38; World Health Organization, ‘Barriers and facilitating factors in access to health care services in Greece’, 2015 <<http://www.euro.who.int/en/countries/greece/publications/barriers-and-facilitating-factors-in-access-to-health-services-in-greece-2015>>.

⁷⁶⁶ HRC, IE 2016 Report on mission to the EU (n 583) paras 54-55.

⁷⁶⁷ Truth Committee on Public Debt, *Preliminary Report* (n 613) 39; LIBE report, 59; Antonakakis and Collins (n 756) 64 (also for further references on the issue); David Stuckler and Sanjay Basu, *The Body Economic: Why Austerity Kills* (Basic Books, 2013); Charlie Cooper, ‘Tough austerity measures in Greece leave nearly a million people with no access to healthcare, leading to soaring infant mortality, HIV infection and suicide’, *The Independent* (21 February 2014) <<http://www.independent.co.uk/news/world/europe/tough-austerity-measures-in-greece-leave-nearly-a-million-people-with-no-access-to-healthcare-9142274.html>>; Human Rights Council, Working Group on the Universal Periodic Review (n 753) para 15.

by approximately 4%.⁷⁶⁸

A major law concerning healthcare was adopted on 20 February 2016 (Law No. 4368/2016), which opened access to the public health system to uninsured and more vulnerable people, including pregnant women, children, and chronically or seriously ill individuals. The new law also introduced exceptions to the legislation prohibiting care beyond emergency treatment for adult undocumented migrants (Law No. 4251/2014), allowing the most vulnerable categories of people to access healthcare, including children up to 18 years old, pregnant women, chronically ill people, beneficiaries of a form of international protection, holders of a residence permit for humanitarian reasons, asylum seekers and their families, persons accommodated in mental healthcare units, victims of certain crimes, people with severe disabilities, seriously ill people and prison inmates.⁷⁶⁹

5.4.2.3. Measures impacting on the right to education⁷⁷⁰

The Second Economic Adjustment Programme required changes in the Greek compulsory education system, aimed at its ‘rationalization’.⁷⁷¹ Conditionalities included reduced budgetary allocation from the State budget for the Ministry of Education (in 2011, -17% for pre-primary, primary and secondary education), and the merging or shutting down of schools (between

⁷⁶⁸ Bank of Greece, *Monetary Policy Report 2015-2016*, 2016 (in Greek). For a summary of the report’s chapter on ‘Reforms in health, economic crisis and impact on the health of population’ see Alex Christoforou, ‘EU Austerity Killing Greece. Report Shows Suicide, Infant Death, And Mental Illness On The Rise’, *Global Research* (18 June 2016) <<http://www.globalresearch.ca/eu-austerity-killing-greece-report-shows-suicide-infant-death-and-mental-illness-on-the-rise/5531637>>.

⁷⁶⁹ Médecins du Monde, International Network, *2016 Observatory Report*, ‘Access to healthcare for people facing multiple vulnerabilities in health in 31 cities in 12 countries’, November 2016, 10 <http://mdmgreece.gr/app/uploads/2016/11/PDF-BD-Observatory-report2016_EN.pdf>.

⁷⁷⁰ UDHR, Article 26; ICESCR, Articles 13-14; CEDAW, Articles 10 and 14; CFC, Articles 28-29 and 40; CERD, Article 5; CRPD, Article 24; Charter of Fundamental Rights of the EU, Article 14; ECHR, Article 2; European Social Charter (revised), Articles 15, 17 and 30; Greek Constitution, Article 16(2).

⁷⁷¹ LIBE report, 32 and 38; European Commission, ‘The Second Economic Adjustment Programme for Greece – March 2012’, *European Economy – Occasional Papers No. 94*, March 2012, 80 <http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf>.

2008 and 2012, 1053 schools were closed and 1933 school units merged into 877 units). Similarly, there has been a reduction in teachers' recruitment and remuneration (compared to 2009 levels, teachers' statutory salaries in 2014 had been reduced by 40% circa, and were worth 77% of what teachers of comparable training and experience earned in 2005),⁷⁷² and the placement of teachers in the labour reserve scheme, or their reallocation to other (e.g. administrative) positions, through mobility schemes.⁷⁷³

Among the adverse effects of the reforms, difficulties to fully meet the basic needs of students have been caused by the reduction of the budget available for schools' operational costs, e.g. heating, stationery or facilities maintenance. In some cases, private initiatives made up for the lack of funds, e.g. in 2013 the Open Society Foundation of George Soros contributed to heating expenses of schools and other institutes in the municipalities of Thessaloniki and Athens.⁷⁷⁴ The measures adopted resulted, furthermore, in a shortage of teachers, impairing, among other things, the provision of all-day programs in some kindergartens and primary schools.⁷⁷⁵ One of the ways the Ministry reportedly considered to address this issue was to use *volunteer* teachers, i.e. give them points they could use in future recruitment procedures instead of a salary.⁷⁷⁶

Particularly affected was the right to education of children with disabilities, as the allocation of resources did not take into account the obligations arising from the legal framework on special education.⁷⁷⁷

5.4.2.4. Measures impacting on the right to housing

Several conditionalities impacted on the enjoyment of the right to adequate

⁷⁷² A married teacher with two children earned, on average, €26,400 (gross) per year in 2009, and €21,280 (gross) per year in 2011 after the adoption of Law 4024/2011 introducing the new single payroll, see LIBE report, 38.

⁷⁷³ LIBE report, 36-38.

⁷⁷⁴ 'George Soros Donates Funds to Help Heat Schools in Greece', Greek Reporter (15 December 2013) <<http://greece.greekreporter.com/2013/12/15/george-soros-donates-funds-to-help-heat-schools-in-greece/>>.

⁷⁷⁵ LIBE report, 39; Human Rights Council, Working Group on the Universal Periodic Review (n 753) para 6.

⁷⁷⁶ LIBE report, 39.

⁷⁷⁷ *ibid*, 40.

housing,⁷⁷⁸ particularly by vulnerable groups such as homeless, migrants and the unemployed.

Under the Second Adjustment Programme (2012), Greece was requested, as a ‘prior action’ (i.e. as a measure to be implemented upfront, before programme approval), to enact legislation “to close small earmarked funds engaged in non-priority social expenditures”.⁷⁷⁹ These included funds destined to the Workers’ Housing Organisation (OEK), the only major institution providing housing benefits in Greece, which was thus abolished with Law No. 4046/2012.⁷⁸⁰ Consequently, rental subsidies to 120,000 households and housing benefits for the elder were eliminated.

Other reforms impacted on the right to adequate housing, for instance by increasing the risks of foreclosures and evictions of poorer tenants. In a Communication of 2013 to the Greek government in 2013, the United Nations’ Special Rapporteur on adequate housing noted that the crisis had led to a rising number of evictions. These had been allegedly facilitated and accelerated by an amendment to Article 15 of Law No. 4055/2012, allowing for the eviction of rental tenants who failed to pay the rent within 15 days after the first notice, without prior judicial proceedings.⁷⁸¹ The Special Rapporteur noted, furthermore, that, since 2010, “thousands of households have been living without electricity due to their inability to pay for the rising electricity prices”,⁷⁸² and due to the ‘Urgent Special Charge on Electrified Built Surfaces’, introduced by Law No. 4021/2011, which is collected by the Public Power Corporation. The latter was authorized to cut, and according to unofficial estimates quoted by the

⁷⁷⁸ UDHR, Article 25(1); ICESCR, Article 11(1); CERD; CEDAW, Article 14; CRC, Article 27; CRPD, Article 28; European Social Charter (revised), Article, 16, 23, 30-31; Greek Constitution, Articles 4 and 21(4).

⁷⁷⁹ European Commission, Directorate-General for Economic and Financial Affairs, The Second Economic Adjustment Programme for Greece – March 2012 (March 2012), European Economy Occasional Papers No 94, 148.

⁷⁸⁰ Truth Committee on Public Debt, *Preliminary Report* (n 613) 39; HRC, IE 2016 Report on mission to the EU (n 583) paras 50-60; IE 2016 Report on second mission to Greece (n 597) paras 31-42; IE 2014 Report on first mission to Greece (n 596), paras 40-89.

⁷⁸¹ HRC, Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, ‘Communication to Greece’, (19 February 2013) GRC 1/2013 in Communications report of Special Procedures, ‘Communications sent, 1 December 2012 to 28 February 2013; Replies received, 1 February to 30 April 2013’ (22 May 2013) A/HRC/23/51.

⁷⁸² *ibid*

Special Rapporteur, has cut the electricity supply to thousands of households due to outstanding debts.

It has been reported that, since 2009/2010, there has been an increase in homelessness, and that, in 2014, over 500,000 people in Greece lived in conditions of homelessness, insecure or inadequate housing.⁷⁸³ Since the crisis, furthermore, a new generation of homeless ('neo-homeless') has emerged, consisting of individuals who, until recent years, had enjoyed satisfactory living standards and have, generally, a higher educational level compared to 'traditional' homeless, but who found themselves homeless due to financial difficulties and unemployment. Also migrants who are among the neo-homeless are individuals who previously enjoyed a good level of societal integration.⁷⁸⁴ The access of homeless people to health services, housing and benefits has also deteriorated.

Some have noticed the rise and, more worryingly, consolidation, since the crisis, of an 'emergency model of social crisis governance', characterised by a preference for short-term solutions, the shift of social policy tasks to non-governmental organisations, reliance on charitable funding, and preference for assistance in kind.⁷⁸⁵ With regard to housing in particular, the authors of the study have observed that:

a model of 'emergency' shelters and assistance in kind has been introduced by the policies of the Ministry of Labour, and is gradually consolidating. Night shelters, Day Centres, food banks, social pharmacies and social groceries have been established in this context. [...] It is premature to assess their impact, but the American experience suggests the ineffectiveness of emergency provisions. Our

⁷⁸³ Truth Committee on Public Debt, *Preliminary Report* (n 613) 39; Vassilis Arapoglou and Kostas Gounis, 'Caring for the Homeless and the Poor in Greece: Implications for the Future of Social Protection and Social Inclusion' (October 2014) <http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Research/NBG_2013_Research_Call/LSE-REPORT-EXECUTIVE-SUMMARY-CARING-FOR-THE-HOMELESS-AND-THE-POOR-IN-GREECE.pdf>.

⁷⁸⁴ Olga Theodorikakou, Alexandra Alamanou and Kyriakos Katsadoros, "'Neo-homelessness' and the Greek crisis' (2013) 7 *European Journal of Homelessness* 2, 207.

⁷⁸⁵ Vassilis Arapoglou and Kostas Gounis, 'Poverty and Homelessness in Athens: Governance and the Rise of an Emergency Model of Social Crisis Management', *GreeSE Paper No.90, Hellenic Observatory Papers on Greece and Southeast Europe* (March 2015) <http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Publications/GreeSE/GreeSE_No90.pdf>.

site visits and interviews informed us about a significant aspect in the operation of Day Centres. Namely, Day Centres not only attract street homeless individuals but an array of invisible poor in their search for healthcare services. Especially those Day Centres that are linked to day clinics open a door for health care and assistance. It has been a matter of great concern that a poor population with no health insurance or incapable of paying contributions for medication revolves around Day Centres and clinics.⁷⁸⁶

Several key local organisations have also confirmed that “‘emergency’ provisions are increasingly becoming a stable feature of social policies”⁷⁸⁷ in the field of housing.

*5.4.2.5. Measures impacting on the right to social security, including pensions*⁷⁸⁸

Finally, the adjustment programmes implemented in Greece since 2010 mandated a number of reforms of the pension and social welfare systems, whose effects amplified the negative impacts of the economic crisis, especially on the most vulnerable, at a time in which social security should have rather provided a safety net.

On one side, welfare reforms included cuts and tightened eligibility conditions for unemployment benefits and benefits for families, children and persons with disabilities. Total expenditure on social protection benefits decreased from approximately €58.5 million in 2009 to €45.4 million in 2014 (although, as a percentage of GDP, it remained quite stable from 24.6% to 25.5%, due to the concurrent GDP contraction). Expenditure on disability benefits was also cut from €3.6 million in 2009 to €2.9 million in 2014.⁷⁸⁹

It has been noted that, against a background of mounting unemployment, benefit coverage remained very low. In the case of contributory unemployment insurance, i.e. the ordinary unemployment benefit, which in 2012 was reduced

⁷⁸⁶ *ibid*, 24.

⁷⁸⁷ *ibid*, 26.

⁷⁸⁸ UDHR, Articles 22 and 25; ICESCR, Articles 9 and 10; CEDAW, Articles 11 and 13-14; CRC, Articles 18, 23 and 26-27; CERD, Articles 2 and 5; CRPD, Article 28; European Social Charter (revised), Articles 8(1), 12, 14, 16, 17 and 27(1); ECHR, Article 1 of Protocol No. 1; Charter of Fundamental Rights of the EU, Articles 17 and 34; Greek Constitution, Article 22(5).

⁷⁸⁹ Latest data available, Eurostat database, ‘Tables by functions, aggregated benefits and grouped schemes’.

from €454 to €360 per month, the coverage rate fell from 86% in 2010 to 51% in 2013. In the case of non-contributory unemployment assistance, i.e. for long-term unemployment, the coverage rate increased only from 0.7% in 2010-2011 to 2.8% in 2012, while the benefit rate was kept identical, in nominal terms, to the 2003 rate, i.e. €200 per month, and the maximum duration remained 12 months. In this respect, it has been correctly observed that “[w]hile not all those concerned are poor, it is difficult to see how anyone can argue that paying €200 per month for no longer than 12 months to such a low proportion of the long-term unemployed amounts to adequate income support”.⁷⁹⁰

Several other sources have likewise remarked that the post-reform guaranteed coverage and level of social security and benefits are “inadequate to ensure a decent living” for the recipients, and not in line with the right to social security, as recognised inter alia under Article 9 ICESCR.⁷⁹¹ Expenditure for unemployment benefits decreased from €3.4 million in 2009 to €1.9 million in 2014 despite, over the same period, the unemployment rate increased, as noted also above, from 9.6% to 26.5%. The Independent Expert on Foreign Debt and Human Rights has observed that, as of April 2016, “only about 10 per cent of all registered unemployed persons [were] actually receiving unemployment benefits”.⁷⁹²

Pension reforms, on their part, included structural and organisational changes (e.g. the consolidation of pension funds and the introduction of a distinction between basic and contributive pensions), measures affecting the entitlement to benefits (e.g. more stringent retirement conditions and increases of the official retirement age), and measures affecting the amount of granted and future pensions and pension-related benefits (including cuts or freezing of existing and future pensions, and cuts or abolition of bonuses).⁷⁹³ As noticed by the Greek Ombudsman, over the period 2010-2014, 17 alterations of the social

⁷⁹⁰ Manos Matsaganis, ‘The Greek Crisis: Social Impact and Policy Responses’ (Friedrich Ebert Stiftung, November 2013) 21.

⁷⁹¹ HRC, IE 2016 Report on second mission to Greece (n 597) para 60; CESCR, Concluding observations on the second periodic report of Greece (27 October 2015) E/C.12/GRC/CO/2, para 23.

⁷⁹² HRC, IE 2016 Report on second mission to Greece (n 597) para 60.

⁷⁹³ LIBE Report, 91.

security legislation were made and around 40 Circulars were issued.⁷⁹⁴

A number of provisions contained in over 10 different legislative acts, adopted by the Greek government between 2010 and 2012, have been challenged before the European Committee of Social Rights.⁷⁹⁵ They concerned reductions in primary and auxiliary pensions, bonuses, the pensioners' 'social solidarity contribution' (which is levied from pensions of €1,400 or more), the suspension or reduction of pensions for pensioners with an occupation, and the reduction of private sector pensioners' social solidarity benefit. The Committee has affirmed that, whilst certain of these reductions do not in themselves amount to a violation of the Charter (e.g. the restrictions introduced in respect of holiday bonuses or of pension rights, in cases where the level of pension benefits is sufficiently high, or in cases where people are of such a low age that it is legitimate for the state to conclude that it is in the public interest for such persons to be encouraged to remain part of the work-force), their *cumulative effect* "is bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned".⁷⁹⁶ Consequently, the Committee has concluded that such measures constitute a violation of Article 12(3) of the 1961 European Social Charter, protecting the right to social security.⁷⁹⁷

As a consequence of these reforms, the ILO has reported, among others, that "the rates of relative poverty and the material deprivation for people over 65 have worsened more than for the population on average".⁷⁹⁸

⁷⁹⁴ LIBE Report, 103.

⁷⁹⁵ *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*, Complaint No. 76/2012 (ECSR, 7 December 2012); *Panhellenic Federation of Public Service Pensioners (POPS) v Greece*, Complaint No. 77/2012 (ECSR, 7 December 2012); *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece*, Complaint No. 78/2012 (ECSR, 7 December 2012); *Panhellenic Federation of pensioners of the Public Electricity Corporation (POSDEI) v Greece*, Complaint No. 79/2012 (ECSR, 7 December 2012); *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece*, Complaint No. 80/2012 (ECSR, 7 December 2012).

⁷⁹⁶ See e.g. *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*, Complaint No. 76/2012 (ECSR, 7 December 2012) paras 77-78.

⁷⁹⁷ See also HRC, IE 2014 Report on first mission to Greece (n 596) para 55.

⁷⁹⁸ ILO, Observation (CEACR) - adopted 2013, published 103rd ILC session (2014), 'Social Security (Minimum Standards) Convention, 1952 (No. 102) – Greece' <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3150771,102658,Greece,2013>.

Another key component of the adjustment programmes was the privatisation, restructuring or liquidation of state-owned enterprises (SOEs) and assets in order to contribute to the reduction of the public debt. The target was initially set to €50 billion by the end of 2015, later reduced to €24.2 billion by 2020 as privatisation progressed slowly and produced revenues significantly below expectations. The Hellenic Republic Asset Development Fund (HRADF), which was established by Law 3986/2011, is now responsible for the privatisation programme. Only three privatisations of major SOEs were completed (ports, airports and the national lottery).⁷⁹⁹ In 2014, the Independent Expert on Foreign Debt and Human Rights expressed its concern that “several of the enterprises targeted for privatization provide essential public services, such as water and sanitation, transportation and energy, and that there is a likelihood of a significant increase in user fees for the services offered by these entities after privatization”.⁸⁰⁰ He also questioned the decision to privatise the Greek national lottery, if the intention was to raise funds to pay down the debt, considering that it was one of the most profitable of the world.⁸⁰¹

In the last part of this chapter, I would like to discuss the empirical evidence so far reported, first, in light of the existing standards on ESCR, as outlined in Chapter 5. Secondly, I would like to comment on the ‘bigger picture’ that emerges from the Greek case and more generally from present and past

⁷⁹⁹ OECD, ‘Greece Policy brief – Corporate governance: Reforming the State-owned enterprises sector’ (March 2016) <<https://www.oecd.org/policy-briefs/greece-reforming-the-state-owned-enterprises-sector.pdf>>. In April 2016, HRADF sold the 51 per cent of the Piraeus Port Authority to the Chinese state-owned company COSCO Shipping Corporation, which already operates the container terminal in Piraeus under a 35-year concession it acquired in 2009. In August 2016, Athens also approved a deal to hand over the operation of 14 regional airports under a 40-year contract worth €1.23 billion to a Fraport AG, the German company running Frankfurt’s airport, see ‘China’s Cosco acquires 51 pct stake in Greece’s Piraeus Port’, Reuters (10 August 2016) <<http://www.reuters.com/article/greece-privatisation-port-idUSL8N1AR252>>; ‘Greece’s largest port taken over by Chinese firm’, RT News (11 August 2011) <<https://www.rt.com/business/355523-cosco-stake-greek-port/>>.

⁸⁰⁰ HRC, IE 2014 Report on first mission to Greece (n 596) para 31.

⁸⁰¹ *ibid*, para 32. In 2013, Greece sold the government’s 33 per cent controlling shareholding to Emma Delta, a Cyprus-based vehicle led by Jiri Smejck, a Czech investor in emerging markets, and Dimitris Melissanidis, a Greek ship-owner and oil trader, ‘Greece sells lottery stake in biggest privatisation’, *Financial Times* (1 May 2013) <<https://www.ft.com/content/27a1e63a-b289-11e2-a388-00144feabdc0>>.

responses to debt crises, which is illustrative of a wider, global tendency towards the affirmation (or, perhaps, consolidation) of a state–market relationship increasingly biased not only in favour of the latter, but also of a neoliberal understanding of the market. An analysis of the impacts of conditionality solely through the lens of human rights law does not allow to capture entirely this trend, although it bears significant implications for ESCR. It concerns, in fact, the broader (re)structuring of the economic and social relationships upon which the definition and role of ESCR likewise depend.

5.4.3. Conditionality under human rights law

First of all, it is notable that most reports, including the latest reports of the Independent Expert on Foreign Debt and Human Rights,⁸⁰² generally use the terms ‘violation’ or ‘breach’ to refer to the impact of conditionalities on ESCR, only in cases where a judicial (e.g. a Constitutional Court) or quasi-judicial body (e.g. the European Committee of Social Rights) has already officially ascertained that a specific measure was in contrast with one or more provision(s) of the relative instrument. In most cases, on the contrary, the impact of conditionality on human rights is described in generic terms, e.g. of ‘tension’, ‘declining respect’, ‘weakened protection’, or ‘adverse effects’. This fact suggests that difficulties persist in effectively qualifying particular conditionality-related actions or omissions as ESCR ‘violations’. Such difficulties are due, on one side, to genuine methodological challenges. For instance, to assess the empirical dimension of retrogression, i.e. the “empirical backsliding in the effective enjoyment of the rights”,⁸⁰³ requires a comprehensive evaluation of state conduct, including its generation and use of available resources, and the monitoring of the degree of retrogression over time, also through quantitative indicators, whose data are not always readily available.⁸⁰⁴ On the other side,

⁸⁰² HRC, IE 2016 Report on mission to the EU (n 583); Labour rights report.

⁸⁰³ Aoife Nolan, Nicholas J. Lusiani and Christian Courtis, ‘Two steps forwards, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014).

⁸⁰⁴ *ibid*

difficulties to qualify conditionality in terms of ESCR violations are due also to the normative uncertainty that still characterises certain aspects of the ESCR framework, for instance the notions of ‘maximum available resources’ or ‘non-retrogression’, as discussed in Chapter 5. This normative uncertainty certainly has not been remedied by the reluctance especially of the UN Committee on Economic, Social and Cultural Rights (CESCR), but also of other supranational judicial and non-judicial bodies, to engage thoroughly with responses to the crisis.

Nonetheless, the description of conditionalities and their impacts on ESCR outlined in the previous section suggests that most of the measures implemented in Greece since 2010 had a deliberately retrogressive nature in terms of ESCR realisation, and ignored the requirement, particularly under the ICESCR, to prioritise, in the allocation of the State’s maximum available resources, the most vulnerable and the realisation of the minimum core content of each right.

In fact, Greece was required to reduce and in some cases cap (e.g. healthcare) the resources allocated to the realisation of ESCR, in almost all cases below the average percentage devoted to the realisation of the same rights by EU-28 countries, i.e. countries with a similar level of development. As mentioned in Chapter 5, in some of its Concluding Observations, the CESCR has interpreted this as an indication of non-compliance with the obligation to use the maximum available resources. In other cases, for instance with regard to the right to social security, various monitoring bodies have explicitly remarked, as mentioned above, that the post-reform allocation of resources is inadequate to ensure that the right-holders enjoy a decent standard of living. Furthermore, reforms to ‘rationalise’ the physical and human resources available to the public, healthcare, and educational sectors provoked shortages of personnel and unmet basic needs, e.g. with regard to medicines in public hospitals, or heating in public schools.

Greece was also required, in some cases, to abrogate ESCR-favourable legislation without replacing it with equally or more consistent law or compensatory measures, such as in the case of the requested abolition of its only major housing benefits institutions, the Workers’ Housing Organisation (OEK). In many other cases, conditionalities required ‘deregulatory’ reforms of

legislation, which substantially reduced the level of protection guaranteed to right-holders, both in qualitative and quantitative terms, i.e. in terms of the number and range of people who can access their rights. This has occurred prominently in the case of labour rights, but also in respect of all the other rights discussed in the previous section, as evidenced for instance by the appalling rates of people who lost their health insurance cover, could not access necessary medical treatment, or became homeless because of facilitated eviction procedures. Other key social indicators, revealing alarming rates of long-term unemployment, poverty, infant mortality, mental health disorders, suicides, the reappearance of infectious diseases that had been eradicated in the developed world, homelessness and deprivation, especially among children, the elderly, women and migrants, portray a general situation in which the protection of the rights, especially of the most vulnerable, has substantially deteriorated and often fallen below the minimum core.

However, with regard to retrogressive measures in particular, it must be remarked that their prohibition under international human rights law is not absolute, as discussed already in Chapter 5. In times of economic hardship, including due to a financial crisis, States may face constraints in the realisation of ESCR and international human rights law does not rule out that they may have to take retrogressive measures contrary to their general obligations.⁸⁰⁵ Nonetheless, there are limits on the extent to which States may deviate from their ESCR obligations in order to comply with the requirements of conditionality. The adoption of retrogressive measures is, in fact, only justifiable under the criteria reaffirmed by the CESCR, *inter alia*, in its 2016 Statement on Public Debt.⁸⁰⁶ Accordingly, retrogressive measures must be (i) temporary, covering only the period of the crisis, (ii) necessary and proportionate (this meaning that the adoption of any other policy, or failure to act, would be more detrimental to ESCR), (iii) non-discriminatory and comprising all possible measures, including tax measures, to support social transfers and mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected, and (iv)

⁸⁰⁵ Labour rights report, para. 22.

⁸⁰⁶ CESCR, 2016 Statement on Public Debt (n 498).

must identify and ensure protection of the minimum core content of ESCR at all times.

As mentioned in Chapter 5, the CESCR firstly proposed these standards in a 2012 Letter addressed to States Parties to the ICESCR,⁸⁰⁷ and they have been ever since frequently referenced to by various human rights treaty bodies and scholarly work. Nonetheless, their application in practice raises important questions that require careful analysis. When can a retrogressive measure be unequivocally said to be ‘necessary’, and based on what rationale? The idea of necessity seems to imply that there is a ‘natural’, perhaps just ‘technical’ righteousness/wrongness of certain economic decisions, but these are, on the contrary, always highly political in nature. Is an *ex-ante* counterfactual assessment of the harm potentially caused by a retrogressive measure compared to other policy options realistically possible? For instance, with regard to conditionality, the Independent Expert on Foreign Debt and Human Rights has admitted that to prove whether, without financial assistance in this guise, the social impact of the crisis may or may not have been worse, is “an extremely complex counterfactual exercise”.⁸⁰⁸ Under what circumstances can retrogressive measures actually ‘mitigate inequalities’, considering that a positive link between retrogressive measures and inequality has been frequently observed?⁸⁰⁹ While the CESCR has recalled these criteria in some of its recent Concluding Observations,⁸¹⁰ it has not further clarified yet how State conduct should be assessed against them in practice.

Furthermore, the ‘emergency approach’ to economic and social policy-making triggered by the crisis, together with the scarcity of resources caused by the exclusion of Greece from international debt markets, proved to be a useful

⁸⁰⁷ CESCR, 2012 Letter on austerity measures (n 489).

⁸⁰⁸ HRC, IE 2016 Report on mission to the EU (n 583) para. 14.

⁸⁰⁹ See e.g. HRC, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to Greece (21 April 2016) A/HRC/31/60/Add.2.

⁸¹⁰ *Inter alia*, CESCR, Concluding observations on the sixth periodic report of Cyprus (28 October 2016) E/C.12/CYP/CO/6, para. 12; Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (14 July 2016) E/C.12/GBR/CO/6, para. 19; Concluding observations on the fifth periodic report of Italy (28 October 2015) E/C.12/ITA/CO/5, 28 October 2016.

argumentative tool to justify the adoption of (allegedly) temporary measures, regressive or otherwise incompatible with ESCR.⁸¹¹ As mentioned in the previous section, most monitoring bodies have endorsed such approach, either justifying the necessity of austerity measures based on the emergency of the crisis and the public interest pursued by the State, as done by the ECtHR, or expressing ‘concern’ with regard to their ESCR impacts, without engaging more thoroughly with the conduct and the justifications put forward by the State. The European Committee of Social Rights has been, so far, the only monitoring body to uphold unambiguously that some of the austerity measures implemented by Greece since 2010 violate welfare rights. It has been, so far, also the only body to attempt at going beyond a ‘micro’ analysis of the link between conditionality and ESCR, to assess, rather, the cumulative effects of the different reforms implemented, on the enjoyment of welfare rights by all those affected. Such attempt must be very positively welcomed.

5.5. Conclusions

This chapter has attempted at providing a full portrait of the Greek sovereign debt crisis, revealing the intricate interplay of political and economic, national and supranational, country-specific and systemic factors in the build-up of unsustainable debt levels and the formulation of responses to the crisis.

Greece entered the Eurozone in 2001 with a high level of public debt, which was mainly the heir to the country’s fiscal (mis)behaviour of the 1980s-early 1990s. The architecture of the EMU both facilitated and induced Greek public and private actors to (over)borrow and to rely on debt-based economic growth. The global credit crunch that followed the 2007 financial crisis exposed the weakness of this coping mechanism, and the Greek debt crisis, together with the instability of other peripheral countries of the Eurozone, threatened the whole Eurozone project. In order to provide financial assistance to Greece and the other

⁸¹¹ Catherine Moury and Adam Stranding, ‘Going Beyond the Troika: Power discourse in Portuguese austerity politics’ (2017) *European Journal of Political Research*. The authors noted, *inter alia*, that “the crisis exploitation constitutes a tactic of depoliticisation, in which both the material constraints and the discourse used to frame them are employed to construct imperatives around a narrow selection of policy alternatives”.

Euro Area Member States in difficulty, temporary mechanisms and, finally, the ESM were progressively put in place, often circumventing or ‘reshaping’ as necessary any possible legal obstacle to the interests and the aims of the ‘powerful’ (i.e. the creditors or the Greek State itself, in some cases). Responses to the crisis followed a path riddled with injustices against all those who found themselves in a weaker or more vulnerable position, including among the creditors. The whole legal system not only has not prevented, but has actually worked towards, the prioritisation of economic objectives/interests over any other objectives/interests.

The new financial assistance mechanisms have imported conditionality in the European legal framework, despite it being an ‘opaque’ practice, characterised by power asymmetry, potentially ‘coercive’, guided by purely economic objectives, and overtly and extensively criticised for its well-known adverse social impacts. Conditionality has inappropriately become a tool of economic and, indirectly, social governance also in the European context. In Greece, it has enforced a regressive, permanent trend in the realisation of ESCR.

Chapter VI

Sovereign Debt and Socio-Economic Rights beyond the Crisis: Neoliberalism, International Law and the Consolidation of the Neoliberal State

6.1. Introduction

The word ‘crisis’ comes from the Greek ‘krisis’/‘krinein’, meaning ‘decision’/‘to decide’. In the medical use of the term, the moment of crisis represents a decisive turning point, one in which the patient finally heads towards either full recovery or death. Despite being labelled as such, however, and contrary to hopes for a cathartic solution to the economic and social suffering they caused, the latest financial, economic and fiscal/debt crises ended by returning the ‘patient’ (in this case, the global financial and economic system) to a state of permanent malaise: ‘healthy’ enough so not to die, but still marked by affliction. One in which further crises are, thus, to be expected, and may happen very soon indeed.⁸¹²

From the point of view of socio-economic rights, however, the Eurozone debt crisis represented a critical juncture, not, as one might have expected, in the sense that it led to a rethinking of the nature and aims of our economic system, but, to the contrary, in the sense that it accelerated and fostered global regressive tendencies in terms of ESR realisation that were already underway, at least since the late 1970s. The crisis has, in fact, hit hard, perhaps fatally, on ESR, producing a full-fledged permanent restructuring of the welfare systems of most European

⁸¹² Bank for International Settlements, ‘BIS Annual Report 2017 - media briefing by Claudio Borio and Hyun Song Shin’, 25 June 2017, <http://www.bis.org/publ/arpdf/ar2017e_tcintro.htm>; see also, for example, the recent warning issued by the Bank of England over the possibility of a rerun of the 2008 financial crisis linked to household debt in the UK spiralling out of control, ‘Bank of England warns of complacency over big rise in personal debt’, *The Guardian* (24 July 2017) <<https://www.theguardian.com/business/2017/jul/24/bank-of-england-household-debt-bank-credit-card-car-loans>>.

countries. Ten years later, it is somehow surprising how this seemingly inevitable course of action has been implemented amongst, all things considered, relatively weak and isolated cries of protest. The crisis silently eroded social and legal achievements that had costed years of tireless and unconditional struggle to many in Europe and around the world and, as the Greek case in particular has evidenced, the existing legal framework proved rather ineffective in protecting ESR and preventing a structural decline in their assertion. What are the reasons, hence, of this ineffectiveness?

In this last chapter, I argue that a possible explanation to this circumstance lies in the affirmation and progressive global diffusion of neoliberalism, not only as the dominant theory of international economic relations but, more generally, as a value system that is reflected in law⁸¹³ and whose core assumptions greatly diverge from the fundamental beliefs that inspired the development of the Welfare State and the affirmation of welfare/ESR rights during the 20th century. Since the late 1970s and especially after the 1989-90 collapse of the Soviet Union and the alternative communist ideology, neoliberalism has, in fact, progressively deconstructed and reconstructed ideas of poverty, inequality, autonomy, freedom, individual and collective responsibility, law, the State and even rights, among others. Neoliberal ideas have become so ingrained in our experience and understanding of the world, at all levels, “as to constitute the common sense of the age”.⁸¹⁴ As it happens with all the things to which we become accustomed, those ideas are no longer seen as points of contention, but have become almost ‘invisible’. Nonetheless, they have decisively shaped responses to the crisis, post-crisis legal developments, and the assessment of both from a human rights perspective, including by human rights monitoring bodies. The Eurozone debt crisis has essentially evidenced and further reinforced the neoliberal character—dating back to the late 1970s—of international and EU law, to the detriment of socio-economic rights.

This chapter will review under the analytical light of neoliberalism some of the legal developments reported in the previous chapters. Hence, it will firstly

⁸¹³ See Section 6.2. below.

⁸¹⁴ Corinne Blalock, ‘Neoliberalism and the Crisis of Legal Theory’ (2014) 77 *Law and Contemporary Problems* 4, 83.

introduce, in the following section, neoliberalism and the concept of the ‘neoliberalisation’ of law. Afterwards, it will illustrate some of the elements that support the idea that the crisis has reinforced the neoliberal character of international and EU law. In this context, the incorporation under EU law of the conditionality principle, the unchallenging assimilation of neoliberal ideas in the pronouncements of the CESCER and the ECtHR, and the post-crisis reform of the legal framework for economic and fiscal policy-making in the European Economic and Monetary Union (EMU) seem particularly relevant.

6.2. Neoliberalism and the law

Neoliberalism is a contested and multifarious concept, eluding any conclusive and fully coherent definition. For the purposes of a discussion of the neoliberalisation of law, it can be best described as a set of specific moral assumptions about, *inter alia*, human nature, freedom, and welfare,⁸¹⁵ called upon to justify and promote the superiority of the market as a method for the ordering of social relations.⁸¹⁶

The ‘market as method’ not only commands the constant prioritization of market needs over any other societal concerns, but also the reconceptualization and reorganization of all social relations according to ‘market rationality’. The latter operates under the logic of *exchange* and, most importantly, of *competition*. The condition of striving to gain something—whose availability

⁸¹⁵ For some insights on the neoliberal understanding of these concepts, see, *inter alia*, Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009); Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press 1944); *Individualism and Economic Order* (Regnery 1972); *Law, Legislation and Liberty*, Vol. I (University of Chicago Press 1973).

⁸¹⁶ For other attempts at defining the concept, see also Simon Springer, Kean Birch and Julie MacLeavy, ‘An Introduction to Neoliberalism’ in Simon Springer, Kean Birch and Julie MacLeavy (eds), *The Handbook of Neoliberalism* (Routledge 2016) 1-14; David Singh Grewal and Jedediah Purdy, ‘Introduction: Law and Neoliberalism’ (2014) 77 *Law and Contemporary Problems* 4, 1-23; Blalock (n 814) 84; Pierre Dardot and Christian Laval, *The New Way of the World: On Neoliberal Society* (Verso 2013) 3; Philip Mirowski, ‘Postface: Defining Neoliberalism’ in Mirowski and Plehwe (n 815) 417-455; Stephanie Lee Mudge, ‘What Is Neo-Liberalism?’ (2008) 4 *Socio-Economic Review* 6, 703-731; David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 2; Paul Treanor, ‘Neoliberalism: Origins, Theory, Definition’ <<http://web.inter.nl.net/users/Paul.Treanor/neoliberalism.html>> (last updated on December 2005); P. Bordieu, ‘The Essence of Neoliberalism’ (1998) *Le Monde Diplomatique* 3.

is, by definition, limited—by defeating or establishing superiority over ‘less competitive’ others is in fact an essential characteristic, a central ‘virtue’, of contemporary *free* markets. The market, thus, presumes and transforms all social actors, including the individual and the State, into competitors, and social order into the dominion of the most competitive. Consequently, the neoliberal faith in personal responsibility and in competition as the ‘natural force’ capable of best advancing human well-being and generating optimum social outcomes, recasts *inequality as virtuous*, a “necessary functional characteristic” of an ideal market order, “not only the natural state of market economies, but [...] actually one of [their] strongest motor forces for progress”.⁸¹⁷ The outcomes achieved through the methods of the market, and their allocation, are consequently presented as inherently just: over time, their benefits are expected to ‘trickle down’ to all segments of society, including to the weakest, who, in the short term, might have lost the competition (the image frequently used is that of ‘a rising tide that lifts all boats’). The resulting social order is eventually presented as a natural and inexorable one.⁸¹⁸

Hence, as here understood, neoliberalism does not identify exclusively with specific economic policies but, more broadly, with a normative stance—supported through different moral arguments and realised by means of the law and the political authority of the State—that promotes the alignment of social order to the order of the market, including by insulating the latter from non-market, social ‘pressures’ and conditioning.

The State and the law are essential to the realisation of market social order, and therefore their role requires to be briefly elucidated.

Contrary to the neoliberal rhetoric on State retrenchment, neoliberalism requires a strong State “as both producer and guarantor of a stable market society”.⁸¹⁹ As has been observed, the conventional opposition between State

⁸¹⁷ Mirowski (n 816) 438; Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017), noting that neoliberalism is at best concerned with managing difference and inequality, not with addressing them.

⁸¹⁸ Actually, the founding figures of neoliberalism’s ‘thought collective’ were well aware that the conditions for the existence of this social order were to be constructed, and would not have come about naturally in the absence of concerted political effort and organisation, see Mirowski (n 816) 434.

⁸¹⁹ *ibid*, 435.

and market is misguided:

[t]he questions that neoliberalism addresses at the deepest level [...] are not How much market?, or How much governance?, but Which interests will enjoy protection, whether as property rights, constitutional immunities, or objects of special regulatory solicitude, and which others will be left vulnerable or neglected?⁸²⁰

What neoliberalism actually advances is not a claim for “more market, less State” but rather a call for a particular kind of State.⁸²¹ This leads to a redefinition of the State, not to its restraint nor, even less, annihilation.

The relationship between neoliberalism and law, on the contrary, is complex and possibly contradictory. Law is not, in fact, just an instrument employed by neoliberalism to implement ‘market fundamentalism’ in a seemingly unchanged institutional context. More properly, law is constitutive of neoliberalism, and this fact reverberates on the nature of law itself.⁸²²

In a recently published volume, Honor Brabazon introduced the concept of ‘neoliberal legality’ to denote “the specific form, mode, and role that law assumes in the neoliberal period”.⁸²³ This concept builds on the idea of ‘liberal legality’, i.e. the particular historical form taken by the concept of law in liberal capitalist societies: “a system of generalised rules that are interpreted through reason and applied equally to all following rational procedural formalities in a manner void of political concerns and outcomes”.⁸²⁴ Elements of the *legal form* itself, and particularly of the liberal legal form—i.e. its alleged neutrality, equality and rationality, together with its legitimacy and hegemony when the economic and political conditions of neoliberalism occurred—have, therefore, played an essential role in the construction of neoliberal order:

Laws appear to be universal and fixed, independent of historical

⁸²⁰ Grewal and Purdy (n 816) 8.

⁸²¹ *ibid*

⁸²² Brabazon (n 817); David Trubek and Alvaro Santos, ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’ in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006).

⁸²³ Brabazon (n 817) 2.

⁸²⁴ *ibid*

conjuncture and political will, and legal decisions appear to be technical matters of the interpretation of universal and fixed legal texts in a very formalist sense. In this view, law is a principal means of mediating social relations and shaping subjectivity under capitalism, and, through this process, law configures social relations in its image: the abstraction of laws from the specific social contexts in which they arise obscures their indeterminacy, their historical contingency, and the power relations underpinning them.⁸²⁵

In other words, the asserted neutrality, formal equality and rationality of liberal legality are particularly well-suited to support the realisation of neoliberalism's envisioned *nomocracy*, i.e. a rule-governed order not devoted to the attainment of any particular collective end.⁸²⁶

In a nomocracy, the State is recognised as having sovereign authority to make and promulgate the law, but “not as it pleases”.⁸²⁷ If society is a ‘factory’, to use Friedrich Hayek’s metaphor, the State is not the factory’s managers, who produce goods or services, but rather its maintenance workers, merely entrusted with overseeing and, where necessary, improving the mechanism regulating the factory’s production (i.e. the market).⁸²⁸ Neoliberalism relies on the political authority of the State, but the ‘Neoliberal State’ is essentially a technocratic administrative entity,⁸²⁹ which neoliberalism “seeks to restructure [...] with numerous audit devices (under the sign of ‘accountability’)”.⁸³⁰

Neoliberalism tends to favour new formats of techno-managerial governance,⁸³¹ whence its preference for supranational institutions and bodies like the IMF, the World Bank, or the Eurogroup, or for so called ‘technical governments’, such as those which, for instance, supplanted the ‘political governments’ in charge in some European countries in the aftermath of the 2008 economic crisis (e.g. the 2011-2013 Monti government in Italy). More generally,

⁸²⁵ *ibid*

⁸²⁶ Raymond Plant, *The Neo-liberal State* (OUP 2010) 6. To the contrary, a *telocracy* is an order devoted to the pursuit of some collective goal or purpose, as it is, for instance, the Welfare State.

⁸²⁷ Blalock (n 814) 86.

⁸²⁸ *ibid*, 86-87; Hayek, *Law, Legislation, and Liberty* (n 815) 47-48.

⁸²⁹ Harvey (n 816) 64-86; Plant (n 826).

⁸³⁰ Mirowski (n 816) 436.

⁸³¹ *ibid*

neoliberalism seeks to put regulatory institutions beyond the reach of politics, “developing a politics of anti-politics”.⁸³² This latter manifestation is a consequence of neoliberalism’s fundamental distrust in the possibility of enacting a collective substantive vision of the ‘good society’, and thus in democratic governance,⁸³³ a characteristic with inevitable authoritarian implications.

Therefore, nomocracy entails a transformation of law from a means to achieve a substantive purpose, to a means to enforce a method, notably, in this case, the market. The rule of law is, also, frequently conflated with or subordinated to conformity with ‘market-making’.⁸³⁴

This (illusory) detachment of law from purpose allows for an opportunistic use of law’s indeterminacy to realise possibly inconsistent and even contradictory aims. This is why, under neoliberalism, ‘more law’, including for instance more procedural obligations, do not necessarily mean that certain objectives rather than others, even potentially opposite, will be attained. Human rights law too cannot escape this tendency, so that it can be used, ironically, to reinforce rather than counter market social order.⁸³⁵

Neoliberal legality is, thus, characterised, among other things, by its purported neutrality in respect of social aims, the prominence devoted to formal equality over substantive inequalities, and a more generally active role of law, or the increasing juridification of social relations, together with a preferential channelling of social and political conflicts towards judicial solutions.⁸³⁶

Hence, the ‘neoliberalisation’ of law is manifested not only

⁸³² Kanisha Jayasuriya, ‘Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?’ (2001) *Constellations* 8, 442-?, quoted in Blalock (n 814) 87.

⁸³³ Mirowski (n 816); Harvey, 66 and 69-70; Blalock (n 814). Mirowski emphasises how the political solution proposed by some of the founding figures of the neoliberal thought collective, *in primis* Friedrich Hayek, *de facto* resembled Carl Schmitt’s ‘total state’ and his arguments in support of the necessity to repress democracy, Mirowski (n 816) 440-446.

⁸³⁴ *ibid*, 437; Grewal and Purdy (n 816) 17-18; Claire Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ (2015) 35 *Oxford Journal of Legal Studies* 2, 325-353.

⁸³⁵ Carlo Focarelli, ‘Il pianeta dei balocchi. A proposito della definizione dei diritti umani’ (2016) *Diritti umani e diritto internazionale* 3, 659-676; Samuel Moyn, ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’ (2014) 77 *Law and Contemporary Problems* 4, 147-169.

⁸³⁶ Brabazon (n 817); Harvey (n 816) 66.

in the neoliberal content of specific legal rules or decisions, e.g. prescribing neoliberal economic policies, or prioritising market imperatives such as financial stability or solvency, over other social claims. It is also manifested in the market-oriented (re)interpretation of some concepts such as personal liberty, dignity, equality, public interest, or the rule of law, and in the importation and prominence given in legal reasoning to criteria or arguments borrowed from economic theory, such as efficiency, or cost-benefit analyses. Also, it is manifested in the more general use of law as a device to implement the market as a ‘method’ to organise society, and shield it from other non-market, essentially political modes of governance.

With regard to the market-modelled (re)interpretation of legally-relevant concepts, which is linked, more generally, to the question of law’s indeterminacy, David Singh Grewal and Jedediah Purdy, for instance, have noted how neoliberalism has reshaped the idea of ‘personal liberty’ under US constitutional law, as a notion centred “on individual choice in spending, consumption, and self-expression”, so that “the pursuit of individual preferences through spending decisions (including the economic ‘preferences’ of corporate ‘persons’) is *sufficient* as an account of personal liberty *and of the structural relation of that liberty to a scheme of good-enough government*”.⁸³⁷ They have further noted the habit cultivated in legal reasoning by decisions based on neoliberal pledges, of “*ignoring structure* [...] in favour of exclusive concern with the liberty of the choosing individual or corporation”.⁸³⁸

Another example of the evolution of legal concepts associated with neoliberalism is provided by Margot Salomon in relation to the concept of ‘expropriation’ under international economic law, where she noted how the same legal concept may be used for completely different purposes (some of which might become completely detached from the original aim of a rule):

while in the 1970s and 1980s disputes on direct expropriation mainly related to the nationalisation of foreign property, today the central concern is that concepts such as indirect expropriation may be applied to *bona fide* regulatory measures taken by the host government aimed at protecting the

⁸³⁷ Grewal and Purdy (n 816) 15 and 17 (emphasis in the original).

⁸³⁸ *ibid*, 15 (emphasis added).

environment, health and other welfare interests in society, giving rise to claims for compensation.⁸³⁹

The next section will, thus, recollect and analyse the international legal developments that have occurred, especially since the Eurozone debt crisis, in relation to the specific issues of sovereign debt and socio-economic rights and that may be interpreted as evidence of the posited reinforced neoliberalisation of law.

6.3. The increased neoliberalisation of international and EU law since the crisis

6.3.1. The incorporation of the principle of conditionality under EU law

A first element pointing at the reinforced neoliberal character of the supranational legal system is the incorporation of the conditionality principle in EU practice and law, as described in Chapter 5. A well-established practice of international financial institutions, conditionality requires, as mentioned, that in exchange for financial assistance debtor States in financial difficulties implement reforms that are essentially inspired by neoliberal economic policies, such as deregulation, austerity measures, and privatisations.⁸⁴⁰

Besides the neoliberal content of the required economic measures, however, the incorporation of conditionality in the EU legal framework can be interpreted as a manifestation of neoliberalism also in a different sense. It represents the sanctioning by law of a practice based on a relationship characterised by almost certain asymmetrical bargaining power between debtor States and international creditors (see Chapter 5), which consequently submits economic and, indirectly, fiscal policy-making to a contractual, market-modelled logic, making the content of policies which have direct effects on the realisation of socio-economic rights

⁸³⁹ Margot Salomon, 'Winners and others: accounting for international law's favourites' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 275-276.

⁸⁴⁰ John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Readjustment: How Much Has Happened?* (Institute for International Economics, 1989).

negotiable in exchange for assistance. This inevitably reinforces the mechanism of ‘obedience to the market’ that will be taken up in conclusions to this thesis.

Neither the CESCR nor the Independent Expert on Foreign Debt and Human Rights, as I previously noted,⁸⁴¹ appear to have considered conditionality as particularly problematic from a human rights perspective. On the contrary, they appear to have accepted—and this might be interpreted as further proof of the extent to which neoliberal assumptions have become ingrained in our present common understanding of the world—that conditionality has conclusively become the rule in the economic governance of financial assistance, also in the EU. All that can be done is to seek out legal solutions compatible with these circumstances.

The embedding into EU law of a possibly ‘coercive’ practice such as conditionality, on the contrary, signals a further estrangement of the post-crisis legal framework from the well-established international principles of the sovereign equality of States, non-intervention and self-determination, and with the principle of international cooperation (see Chapter 4), which rather represent(ed) an important legal protection for economically and politically vulnerable States against interference by their more powerful counterparts.⁸⁴²

6.3.2. The assimilation of neoliberal ideas in the pronouncements of the CESCR and the ECtHR

Another element that may be interpreted as evidencing the neoliberalisation of international law is the unquestioning absorption of certain neoliberal assumptions in the legal reasoning of the CESCR and the ECtHR, among others. As mentioned in Chapter 4, in 2012 the CESCR released a long-overdue Letter on austerity measures,⁸⁴³ altering the doctrine of non-retrogression, by outlining four criteria to be followed in assessing whether austerity measures that have a regressive impact on ESR may be justified under the ICESCR.

⁸⁴¹ Emma Luce Scali, ‘The Impact of Conditionality on Economic, Social and Cultural Rights in the Latest Reports of the UN Independent Expert on Foreign Debt and Human Rights’ (2017) 11 *Diritti Umani e Diritto Internazionale* 2, 532-541.

⁸⁴² Salomon (n 839) 273.

⁸⁴³ CESCR, 2012 Letter on austerity measures (n 489).

As already noted, such criteria have been later reiterated by the Committee in a 2016 Statement on public debt, austerity measures and the ICESCR.⁸⁴⁴

Besides the substantive concerns and uncertainties raised by the new standards set by the CESCR, discussed in Chapter 4, the 2012 Letter and 2016 Statement require further attention with regard to their implicit and possibly unwitting incorporation of neoliberal assumptions into human rights law.

For instance, the Committee passively ingested a characterisation of the situation at the time as one of crisis that automatically demanded responses of a specific economic nature.⁸⁴⁵ The Committee never questioned that austerity measures were the most appropriate means to cope with the crisis, despite their admittedly negative impact on ESR, nor whether States were actually in good faith when maintaining that austerity was their only possible choice. On the contrary, the Committee endorsed the neoliberal idea that “a lack of growth [...] can lead to regression in the enjoyment of [ESR]”, and that “some adjustments in the implementation of some Covenant rights are at times inevitable”.⁸⁴⁶ In its 2016 Statement, the Committee even asserted that conditionality is not necessarily detrimental to ESR and that, on the contrary, “the adoption of fiscal consolidation programmes may be necessary for the implementation of economic and social rights”.⁸⁴⁷

As has been noted, the Committee’s Letter made “substantial alterations to the doctrine of non-retrogression [...] [and] relie[d] on rhetorical devices to show deference to States and inflate the importance of (neo-liberal) market-based idea(l)s”.⁸⁴⁸ The Letter and the following Statement attempt at reconciling austerity with socio-economic rights by essentially accommodating the requirements of ESR, notably the prohibition of retrogression, to market imperatives, rather than the other way around. This has the inevitable consequence that ESR obligations come out of the new framework as remarkably weakened. This circumstance is evidenced, for instance, by the following statement:

⁸⁴⁴ CESCR, 2016 Statement on Public Debt (n 498).

⁸⁴⁵ See also Warwick (n 493) 256.

⁸⁴⁶ CESCR, 2012 Letter on austerity measures (n 489).

⁸⁴⁷ CESCR, 2016 Statement on Public Debt (n 498) para 2 (emphasis added).

⁸⁴⁸ Warwick (n 493) 256.

Decisions to adopt austerity measures are always difficult and complex, and the Committee is acutely aware that this may lead many States to take decisions with *painful effects*, especially when these austerity measures are taken in a recession.⁸⁴⁹

Portraying State conduct that could actually constitute a violation of a legal right, as a decision with ‘painful’ but somehow ‘inculpable’ consequences, inevitably undermines the legal standing and protection of socio-economic rights.

The legal reasoning of the ECtHR in the case of *Mamatras and others v. Greece*, which was introduced in Chapter 5, also provides elements that can be interpreted as manifesting the incorporation of some neoliberal values in the Court’s assessment of the facts and conduct of those involved. Such values relate particularly to the pre-eminence given to the notions of formal rather than substantive equality (in this case among creditors) and of personal responsibility, and the unconditional prioritisation of economic objectives over the State’s socio-economic rights obligations.

With regard to the notion of formal equality, no mechanism currently exists to differentiate among bondholders, despite the fact that they can represent a very diverse universe, such as small savers, institutional investors, commercial banks, pension funds, hedge funds and vulture funds.⁸⁵⁰ The principle that is generally adopted in debt restructurings, and which the ECtHR reiterated in the case of *Mamatras and others v. Greece*, is that of the equal treatment of bondholders, except for creditors with preferential status. The latter usually refers to the IMF, the World Bank, regional development banks and, in the Greek case, the ECB.

In interpreting the principle of equality, the Court endorsed the strict notion of formal equality already promoted by the Greek Council of State in its earlier decision on the case,⁸⁵¹ which “does not impose a [positive] obligation upon the State to reserve a favourable treatment to some of its creditors, [who are] natural

⁸⁴⁹ CESCR, 2012 Letter on austerity measures (n 489) (emphasis added).

⁸⁵⁰ Annamaria Viterbo, ‘La ristrutturazione del debito sovrano greco allo scrutinio della Corte europea dei diritti umani: nessuna tutela per i piccoli investitori’ (2017) 11 *Diritti Umani e Diritto Internazionale* 1, 295.

⁸⁵¹ Council of State, Judgement No 1116/2014 of 21 March 2014.

persons, in reason of their personal circumstances (life expectancy and economic situation)”, but “requires an action on an ‘equal footing’”.⁸⁵²

The Court, then, provided a list of “objective and reasonable” motivations to justify such interpretation,⁸⁵³ including the difficulty of locating the persons concerned (given the volatility of the bond market and the fact that many bondholders had purchased their securities on the secondary market) and of laying down detailed criteria to differentiate between the bond-holders. Besides, the Court took into account the Greek government’s arguments concerning the risk of jeopardising the whole operation and its interest in maintaining the operation’s dynamics and acting quickly.

As has been observed, however, it could have been technically possible and legitimate under the European Convention on Human Rights to allow a differential treatment of small bondholders who had acquired Greek bonds with no speculative intentions when the Greek default was not yet predictable and imminent, by investing a large part of their personal savings. The Greek government had actually made a proposal along these lines, which was to offer small bondholders who had invested up to a certain amount, e.g. €100,000, a ‘tax refund’ equivalent to the haircut. The international financial institutions involved in assistance to the country nonetheless opposed it (and their reasons where, afterwards, conveniently appropriated by the government itself, to support its position before the ECtHR).⁸⁵⁴

The ECtHR further added that

[i]f dissident bondholders [...] had feared that the value of their bonds would decrease as soon as the collective action clauses were implemented, they could have exercised their rights as bondholders and sold their bonds on the market [...]. Investing in bonds is never risk-free; [...] the private

⁸⁵² ECtHR, *Mamatras and others v Greece* (n 694) para 133: “le principe constitutionnel de l’égalité n’imposait pas à l’État de réserver un traitement favorable à certains de ses créanciers, personnes physiques, en fonction de leur situation personnelle (espérance de vie et situation économique), qui percevaient leur propre comportement comme étant celui d’un épargnant et non celui d’un investisseur. En revanche, ce principe imposait une action ‘sur une base égalitaire’ de sorte que, en cas d’impossibilité de satisfaire l’ensemble des créanciers, chaque créancier puisse être satisfait au prorata de sa créance”.

⁸⁵³ *ibid*, para 135.

⁸⁵⁴ *Viterbo* (n 850) 299.

investors in question [...] were supposed to be aware of the highly instable economic situation causing fluctuations in the value of the Greek debt instruments which they had purchased, as well as highly volatile markets [...] they ought to have known of the said vagaries and risks as regards possibly large drops in the value of the bonds purchased.⁸⁵⁵

Beside the fact that the Court seemed to equate the unilateral amendment of bonds' contractual terms, decided by the Greek State for the purposes of restructuring, to the 'vagaries of the market', it also appeared to embrace a typically neoliberal idea of personal responsibility whereby individual conduct is assessed with no regard for structural and contextual circumstances, in this specific case, *inter alia*, the fact that the liquidity of the applicants' bonds at the time of the restructuring was utterly reduced.⁸⁵⁶

Finally, the absolute pre-eminence attributed by the ECtHR to the aim of preserving the economic and financial stability of the State, transformed such an objective into the actual criterion to evaluate whether the measures adopted by Greece and interfering with the rights of the applicants, were proportionate under the ECHR.

6.3.3. Increased fiscal discipline of Member States of the Euro Area after the reform of the legal framework of the EMU

A further element suggesting the reinforced neoliberalisation also of EU law, which cannot be left out of consideration when discussing the debt-human rights relationship in countries that are also members of the EU, is the post-crisis reform of the legal framework for economic and fiscal policy coordination under the Economic and Monetary Union (EMU). In fact, although it nominally left fiscal policy competences to national authorities, the reform increased pressure towards greater convergence, further limiting the fiscal sovereignty of EU countries, with clear implications for the ability of EU Member States to realise ESRs and comply with their obligations under the ICESCR.

After briefly introducing the core elements of the legal framework for

⁸⁵⁵ ECtHR, *Mamatras and others v Greece* (n 694), paras 117-118.

⁸⁵⁶ *Viterbo* (n 850) 298.

economic governance established by EU primary and secondary law, the next subsection will present its post-crisis revision. A further subsection will discuss the neoliberal character of the reform and the resulting framework.

Since the creation of the EMU with the Treaty of Maastricht on the European Union (TEU) in 1992,⁸⁵⁷ and especially after the Eurozone crisis, the fiscal policies of States that are members of the European Union (EU) have been increasingly subject to significant substantive and procedural constraints under EU law.

As is well known, the EMU essentially rests on an asymmetric two-pillar structure (not altered by the Treaty of Lisbon,⁸⁵⁸ nor by post-crisis regulation), constituted by a monetary union—characterised by a fully centralised, supranational monetary policy run by the European Central Bank (ECB)—and an economic union—which has taken, rather, the form of economic policy coordination. Thus, Member States have retained formal competence for the execution and, to a considerable extent, formulation of their economic policies.⁸⁵⁹

However, after the Eurozone crisis exposed the destabilizing effects of the ‘monetary union without fiscal union’, the EU adopted additional permanent legal measures *(a)* to strengthen the economic dimension of the EMU and increase the convergence of Member States’ economic policies; and *(b)* to make amends for the prior lack of a legal framework to assist Eurozone countries experiencing financial difficulties (as already mentioned in Chapter 5).

At a primary law level, the fiscal policies of EU Member States are regulated under Articles 119-126 of Chapter 1 (‘Economic Policy’) of Title VIII (‘Economic and Monetary Policy’) of the Treaty on the Functioning of the

⁸⁵⁷ Treaty on European Union (signed 7 February 1992, entered into force 1 November 1993) [2012] OJ C326.

⁸⁵⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed 13 December 2007, entered into force 1 December 2009) [2007] OJ C306/01.

⁸⁵⁹ Lastra, *International Financial and Monetary Law* (n 614) 291, para 8.15-8.17; European Commission, ‘What is the Economic and Monetary Union? (EMU)’ <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/economic-and-monetary-union/what-economic-and-monetary-union-emu_en> (last accessed 5 April 2017); Alicia Hinarejos, ‘Economic and monetary union’ in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2014) 567-590.

European Union (TFEU);⁸⁶⁰ and Protocol No. 12 on the Excessive Deficit Procedure, annexed to the TFEU.

Articles 119 and 120 TFEU contain general indications on the objectives and principles that should inform the activities of the Member States and the Union in the field of economic policy, while Articles 121-126 TFEU and the Protocol on the EDP, lay out the key mechanisms and requirements for fiscal policy coordination under Treaty law.

EU fiscal rules have been further developed through secondary legislation, i.e. the so called ‘Stability and Growth Pact’ (SGP) which fully entered into force on 1 January 1999.⁸⁶¹ After the crisis, this was followed by the so called ‘Six Pack’,⁸⁶² ‘Two Pack’⁸⁶³ and the Euro Plus Pact, the latter of which is a soft law

⁸⁶⁰ Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C326/49.

⁸⁶¹ The so called SGP is actually constituted by Resolution of the European Council on the Stability and Growth Pact of 17 June 1997 [1997] OJ C236/1; Council Regulation (EC) No 1466/97 of 7 July 1997 on strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1 as amended by Council Regulation (EC) No 1055/2005 amending Regulation (EC) No 1466/1997 on the strengthening of the surveillance of the budgetary positions and the surveillance and coordination of economic policies [2005] OJ L174 and by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306 (see ‘Six Pack’ below); and Council Regulation (EC) No 1467/97 of 7 July 1997 speeding up and clarifying the implementation of excessive deficit procedure [1997] OJ L209/6, as amended by Council Regulation (EC) No 1056/2005 amending Regulation (EC) No 1467/1997 on speeding up and clarifying the implementation of excessive deficit procedure [2005] OJ L174 and by Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306 (see ‘Six Pack’ below). For a history of the SGP, including its reform in 2005 towards a more ‘flexible’ and ‘growth-oriented’ framework, see Lastra, *International Financial and Monetary Law* (n 614) 302-308.

⁸⁶² Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the Euro Area [2011] OJ L306; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the Euro Area [2011] OJ L306; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306; and Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L306.

⁸⁶³ Regulation (EU) No 473/2013 on the European Parliament and of the Council of 21 May

instrument.⁸⁶⁴

In addition, on 2 March 2012, EU Member States (with the exception of the UK and the Czech Republic) concluded a new intergovernmental ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’ (TSCG), entered into force on 1 January 2013, whose fiscal part (i.e. Title III) is generally referred to as ‘Fiscal Compact’.⁸⁶⁵ Finally, the EU has introduced a new mechanism for economic policy coordination, i.e. the European Semester.⁸⁶⁶

As defined in Article 119(1) TFEU, the economic policy of the EU under the EMU must be based on the close coordination of Members States’ economic policies, on the internal market and on the definition of common objectives, and be conducted in accordance with the principle of an open market economy with free competition. It must also follow the guiding principles contained in Article 119(3) TFEU, i.e. stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

Article 120 TFEU reiterates the point that the economic policies of Member States must be conducted in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union (TEU) and in the context of the broad guidelines referred to in Article 121(2) TFEU (below).

As revealed by the language of these articles, economic policy coordination within the EMU is bound by treaty law to comply with the operating principles of a ‘market economy’, whose major defining characteristic is that decisions

2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the Euro Area [2013] OJ L140; and Regulation (EU) 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] OJ L140.

⁸⁶⁴ European Commission, ‘The Euro Plus Pact: How Integration into the EU Framework can Give New Momentum for Structural Reforms in the Euro Area’ (8 May 2015) <https://ec.europa.eu/epsc/publications/strategic-notes/euro-plus-pact_en>.

⁸⁶⁵ Out of the 25 Contracting Parties to the TSCG, 22 are formally bound by the Fiscal Compact (the 19 Euro Area Member States plus Bulgaria, Denmark and Romania).

⁸⁶⁶ European Commission, ‘The European Semester’ <https://ec.europa.eu/info/strategy/european-semester_en>.

regarding investment, production and distribution are exclusively based on the interplay of market forces, i.e. supply and demand, and competition.

Instead, Article 3 TEU, recalled by Article 120 TFEU, makes reference to a different economic system. Among the objectives of the Union to which the coordinated economic policies of EU Member States should be directed, Article 3 TEU indicates, in fact, “a highly competitive *social market economy*, aiming at full employment and social progress [...]”.⁸⁶⁷

‘Social market economy’ is a concept with a long German history. The invention of the term, in the mid-1940s, is ascribed to Alfred Müller-Armack, a German Professor of Economics, who was State secretary of the German Minister of Economic Affairs, Ludwig Erhard, in 1958-63, and chief negotiator on behalf of Germany for the Treaty of Rome on the European Economic Community. He presented the social market economy as a ‘third way’ between laissez-faire liberalism and planned economy.

In fact, social market economy (sometimes called ‘Rhine capitalism’) is an economic system that combines market economy with a “system of social and societal measures, geared to market requirements”,⁸⁶⁸ thus promoting additional interventionist State measures and policies to serve the social balance in society.⁸⁶⁹ Among the latter are, according to Müller-Armack, policies aimed at preventing economic fluctuations and at ‘approximating’ full employment, as well as redistributive policies through taxation and subsidies for those in need, e.g. welfare, pensions, subsidies for homeowners, tenants etc.⁸⁷⁰

In a ‘second phase’ of the social market economy, Müller-Armack also envisaged the adoption of broader ‘societal’ measures, such as investments in higher education, public services, currency stability to protect employees’

⁸⁶⁷ The inclusion of a ‘social market economy’ among the ‘objectives’ of the Union was first proposed by the European Convention in Article 3(3) of the Draft Treaty establishing a Constitution for Europe of 2003 but was incorporated into Article 3 TEU only with the Treaty of Lisbon.

⁸⁶⁸ Alfred Müller-Armack, *Wirtschaftslenkung und Marktwirtschaft* (1946) reprinted in *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepten zur sozialen Marktwirtschaft und zur europäischen Integration* (Verlag Rombach, 1966).

⁸⁶⁹ Christian Joerges and Florian Rödl, “‘Social Market Economy’ as Europe’s Social Model?” (2004) EUI Working Paper Law 2004/8, 16. On the ‘social market economy’ see also Hans F Zacher, ‘Social Market Economy, Social Policy, and the Law’ (1982) 138 *Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics*, 367-388.

⁸⁷⁰ *ibid*

savings, plus several other forms of State intervention.⁸⁷¹ It must be noted, however, that, although they may pursue similar social goals, there is an important difference between Müller-Armack's social market economy and mixed economies more generally in terms of the instruments for the realisation of these goals. In a social market economy, in fact, "all social State policies [are] subordinated to the functionality of market mechanisms. Social policies which threaten to distort market competition and its core, the price mechanism, are excluded from the socio-political agenda".⁸⁷²

Some commentators have remarked that the appeal to a social market economy, at first presumably as a 'constitutional principle' in the failed Draft Constitutional Treaty, may have been related "to a desire to anchor the claim to develop and extend policies of social balance [...] [and was] directed against a strong bias towards free markets and undistorted competition at the EU level".⁸⁷³ Nonetheless, they have contested the adequacy of such an appeal, on the basis that to make the intended social character of the EU explicit with reference to "the key concept of an influential but still specific line of thought in the young Federal Republic of Germany [...] may implicitly and possibly involuntary exclude [...] alternative conceptions of how the State, the sphere of society and their reciprocal interference should be understood in general".⁸⁷⁴

Beyond this reasonable concern, however, it must be noted that any indication in favour of a 'social balance' of market mechanisms has disappeared in relation to economic policy coordination within the EMU, where reference is made only to an open market economy with free competition. Moreover, while the coordinating competence of the EU in this area was strengthened after the crisis, it appears to have been generally inspired by a different, neoliberal, economic model, on which more will be said below.

A second element worth highlighting, and to which I will return, is that, as

⁸⁷¹ Alfred Müller-Armack, 'Die zweite Phase der sozialen Marktwirtschaft. Ihre Ergänzung durch das Leitbild einer neuen Gesellschaftspolitik' (1906) reprinted in *Wirtschaftsordnung und Wirtschaftspolitik* (n 868).

⁸⁷² *ibid.* This characteristic is the reason why the term 'social market economy' has also been used to describe the use of market mechanisms to increase the efficiency of the social functions of the State, see 'Social Market' in 'Economics A-Z', *The Economist*, <<http://www.economist.com/economics-a-to-z/s#node-21529660>>.

⁸⁷³ Joerges and Rödl (n 869) 20.

⁸⁷⁴ *ibid.* 12.

outlined by Article 119(2) and (3) and noted by various commentators, economic policies in the EMU are subordinated to the objectives and requirements of monetary stability.⁸⁷⁵

6.3.3.1. The post-crisis legal framework for fiscal and macroeconomic governance in the EU

Post-crisis regulation has (1) strengthened fiscal policy coordination and surveillance (via a more stringent SGP and the Fiscal Compact), as well as general economic policy coordination (via the Europe 2020 growth strategy⁸⁷⁶ and the Integrated Guidelines, on which more will be said shortly); (2) introduced a new macroeconomic surveillance mechanism, underpinned by sanctions; and (3) synchronised all the mechanisms of economic policy coordination under the European Semester.

The economic and fiscal policies of EU Member States are currently disciplined both in ‘quantitative’ and ‘qualitative’ terms, with the asserted aim to ensure prudent fiscal behaviour and to improve economic competitiveness and growth.

In quantitative terms, the ‘post-crisis’ SGP and the Fiscal Compact have introduced stricter deficit rules. They reiterate the so-called ‘Balanced Budget Rule’ (already established by the ‘pre-crisis’ SGP and going beyond the simple prohibition of excessive deficits contained in Article 126 TFEU), i.e. the requirement that Member States’ budgets are balanced or in surplus. In order to achieve this aim, Member States are under an obligation to reach or to be heading towards country-specific medium-term budgetary objectives (MTOs) – i.e. country-specific numerical values for the structural balance.⁸⁷⁷ These can

⁸⁷⁵ Lastra, *International Financial and Monetary Law* (n 614) 288, para 8.02.

⁸⁷⁶ European Commission, ‘Europe 2020 strategy’ <https://ec.europa.eu/info/strategy/european-semester/framework/europe-2020-strategy_en>.

⁸⁷⁷ The structural or underlying fiscal balance is the difference between government revenues and expenditures corrected by the effects that could be attributed to the economic cycle and one off events. Eliminating possible economic fluctuations (which have an impact on government revenues and expenditures), this indicator aims to capture the underlying structural fiscal trends of a country that are associated with the sustainability of public finances in the long run, see OECD, ‘Government at a Glance 2015: General government structural balance’ <http://www.oecd-ilibrary.org/governance/government-at-a-glance-2015/general-government-structural-balance_gov_glance-2015-9-en>. MTOs are updated every 3 years, or more

vary, depending on the assumed trend growth and debt level, between a surplus of 1 per cent and a deficit of 1 per cent of GDP. Members are also under an obligation to respect a newly-introduced ‘expenditure benchmark’ that essentially demands that net expenditure grows at a rate equivalent or lower than the rate of potential GDP growth.⁸⁷⁸

This new benchmark could have critical implications for States’ ‘available resources’ and the duty to take continuous forward steps in the realisation of ESR. For instance, it potentially represents a first contradiction with the requirement by the CESC that where there is an increase in the availability of resources in a country, which could be presumed in the case of GDP growth, such a country is expected to proportionally increase its allocation of resources for the realisation of ESR.⁸⁷⁹

Article 3(1)(e) TSCG requires that, in the event of a significant observed deviation⁸⁸⁰ from the MTO or the adjustment path towards it, a correction mechanism must be triggered *automatically*, and this must include the obligation of the State concerned to implement measures to correct the deviations over a defined period of time. A deviation will not be considered significant only under specific circumstances. These include the situation when there is an unusual event beyond the Member State’s control that has a major impact on its budgetary position or in the case of a severe overall economic downturn. Or, if a Member State has undertaken structural reforms, especially pension reforms or reforms to enhance potential economic growth having a short-term negative impact on the country’s budgetary position, but improving the long-term sustainability of its public finances.⁸⁸¹ Very reduced margins of deviation from the above-mentioned criteria exist, thus, for purposes that cannot be justified in

frequently in the case of a country that has undergone a structural reform which significantly impacted on its public finances, see European Commission, ‘Medium-term Budgetary Objectives (MTOs)’ <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/preventive-arm/medium-term-budgetary-objectives-mtos_en>.

⁸⁷⁸ The expenditure benchmark requires that, for Member States at MTO, net expenditure growth does not exceed the medium-term potential GDP growth, while, for Member States not at MTO, net expenditure grows at a lower rate.

⁸⁷⁹ See Chapter 4.

⁸⁸⁰ i.e. a deviation of at least 0.5 per cent of GDP over a given year, or at least 0.25 per cent of GDP per annum average over two consecutive years.

⁸⁸¹ Lastra, *International Financial and Monetary Law* (n 614) 316, para 8.127.

terms of economic performance.

The Fiscal Compact introduced an obligation for the contracting parties to the TSCG to incorporate, within a year after the Treaty's entry into force, the Balanced Budget Rule, MTO rules and the correction mechanism within their national legislation, "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes" (Article 3(2) TSCG).⁸⁸² These rules must be monitored at the national level by an independent institution. To corroborate this obligation, Article 8(1) TSCG also contains an 'indirect threat' of sanction, providing that one or more contracting parties may call upon the Court of Justice of the European Union (CJEU) to verify (with a binding ruling) compliance with this obligation.⁸⁸³

The requirement to transpose the new fiscal rules into national law has encountered severe criticism both in terms of its legitimacy—as an externally-imposed legislative and in many cases constitutional reform—and in terms of its content. In Greece, for instance, during the debates on its implementation which mainly took place during the parliamentary session of 28 March 2012, the parties of the opposition (at the time, mainly LA.O.S., SY.RIZ.A., DIM.AR., and K.K.E.) raised objections. They stated that "by imposing balanced and exceeding budgets and sanctions in case of noncompliance, the Fiscal Compact was imposing neoliberal policies [entailing] austerity, infringement of labor and social rights, and cuts on public services, for the profit of business groups and the capital in general".⁸⁸⁴ Despite criticism, however, EU countries enacted specific legislation, in many cases of a constitutional character, to incorporate these fiscal rules in their domestic frameworks.⁸⁸⁵

⁸⁸² See also European Commission, 'Communication from the Commission: Common principles on national fiscal correction mechanisms', COM(2012) 342 final (20 June 2012); Contiades (ed), *Constitutions in the global financial crisis: a comparative analysis* (Routledge 2016); Kaarlo Tuori and Klaus Tuori, *The Eurozone crisis: a constitutional analysis* (CUP 2014).

⁸⁸³ Lastra, *International Financial and Monetary Law* (n 614) 316, para 8.129.

⁸⁸⁴ See European University Institute (EUI), 'Constitutional Change through Euro Crisis Law: A Multi-Level Legal Analysis of Economic and Monetary Union', Greece – IX. Fiscal Compact – IX.5. Debate Balanced Budget Rule <<http://eurocrisislaw.eui.eu/country/greece/topic/fiscal-compact/>>.

⁸⁸⁵ In Greece this has occurred through Law No 4270 of 28 June 2014 on Fiscal Management and Supervision Principles, as amended by Law No 4336 of 14 August 2015. In Italy, for instance, among other EU countries, this requirement led to a revision of Article 81 of

Greater ‘consistency’ between national and European fiscal rules has also been promoted through Council Directive 2011/85/EU (part of the Six Pack). In addition to laying down detailed rules on the characteristics of Member States’ public accounting systems, including book-keeping, internal control, financial reporting and auditing, the Directive also requires Member States to introduce strong numerical fiscal rules in their budgetary frameworks. These must be “based on the reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy *vis-à-vis* the fiscal authorities of the Member States”.⁸⁸⁶

In qualitative terms, convergence of the fiscal policies of EU Member States is achieved, first of all, through the broad economic policy guidelines (BEPGs) foreseen in Article 121(2) TFEU.⁸⁸⁷ These are, in principle, non-binding recommendations formulated and adopted by the Council, based on a proposal from the Commission and the conclusions of the European Council. They are meant to instruct the national reform programmes that, each spring, Member States have to submit to the Commission as part of the multilateral surveillance mechanism provided for in Article 121(3)-(6) TFEU. In 2010, the BEPGs were brought together with the Employment Guidelines under the single heading of the Integrated Guidelines (IGs), as part of the adoption of the Europe 2020 Strategy.⁸⁸⁸ The BEPGs remain valid for an indefinite period and the most recent BEPGs were adopted in July 2015.⁸⁸⁹

As it has been remarked, the BEPGs often resemble reports and economic

the Constitution with Constitutional Law No 1 of 20 April 2012, ‘Introduzione del principio del pareggio di bilancio nella Carta Costituzionale’, GU No 95 of 23 April 2012 and to the adoption of Law 243/2012 of 24 December 2012 on Provisions for implementation of the balanced budget principle pursuant to Article 81 paragraph 6 of the Constitution, as amended by Law No 164 of 12 August 2016. For country-specific reports from the Commission in this regard, see European Commission, ‘The Fiscal Compact – Taking Stock’ (22 February 2017) <https://ec.europa.eu/info/publications/fiscal-compact-taking-stock_en>.

⁸⁸⁶ Council Directive 2011/85/EU (n 862) Preamble 16 and Chapter IV.

⁸⁸⁷ European Parliament, ‘At a Glance: Broad Economic Policy Guidelines and Employment Guidelines’ (2015) <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/542652/IPOL_ATA\(2015\)542652_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/542652/IPOL_ATA(2015)542652_EN.pdf)>.

⁸⁸⁸ European Commission, *Europe 2020: Integrated guidelines for the economic and employment policies of the Member States* (27 April 2010) <<http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf>>.

⁸⁸⁹ Council Recommendation (EU) 2015/1184 of 14 July 2015 on broad guidelines for the economic policies of the Member States and of the European Union [2015] OJ L192, 27-31.

surveys prepared by the IMF or the Organisation for Economic Co-operation and Development (OECD).⁸⁹⁰ The 2015 BEPGs contain four Guidelines, respectively on boosting investment; increasing growth via structural reforms in EU countries; eliminating the main obstacles to sustainable growth and employment in the EU; and making public finances more sustainable and growth friendly.

The TSCG also contains an obligation for the contracting parties to report *ex ante* on their public debt issuance plans to the Council and the Commission (Article 6), and to discuss *ex ante* and, where appropriate, coordinate among them all the major economic policy reforms that they plan to undertake (Article 11 TSCG).

Two of the legislative texts of the Six Pack,⁸⁹¹ furthermore, establish a new macroeconomic surveillance framework, aimed at identifying, preventing and addressing the emergence of potentially harmful macroeconomic imbalances that could adversely affect economic stability in a particular EU country, the Euro Area, or the EU as a whole.⁸⁹² The macroeconomic imbalance procedure (MIP) starts around November, when the Commission issues an ‘alert mechanism report’ (AMR), in conjunction with the annual growth survey.

The AMR uses a scoreboard of selected indicators to screen EU Member States for potential economic imbalances needing policy action, and to identify countries that need an in-depth review (IDR) by the Commission. A country may be found to have ‘no imbalances’, ‘imbalances’, ‘excessive imbalances’, or ‘excessive imbalances with corrective action’, which may trigger the Excessive Imbalance Procedure (EIP).

Lastly, the Excessive Deficit Procedure (EDP), provided for by Article 126 TFEU, was strengthened under the post-crisis rules, particularly for Euro Area Member States. It would be beyond the scope of this section to go through the various stages of the procedure in detail, so I will only briefly report the most relevant innovations introduced after the crisis.

⁸⁹⁰ Lastra, *International Financial and Monetary Law* (n 614) 294, para 8.27.

⁸⁹¹ Regulation (EU) No 1174/2011 and Regulation (EU) No. 1176/2011 (n 862).

⁸⁹² European Commission, ‘Macroeconomic imbalance procedure’ <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/macroeconomic-imbalance-procedure_en>.

Similar to the previous system, an EDP can be launched if a country's deficit exceeds or risks exceeding the threshold of 3 per cent of GDP, or if its public debt exceeds 60 per cent of GDP and is not diminishing at a satisfactory pace (i.e. the gap between the debt level and the 60 per cent reference must be reduced by 1/20th annually, on average over three years). The new governance framework has introduced the possibility to gradually impose financial sanctions already from the so-called 'preventive arm' of the SGP (i.e. before an EDP is actually launched, which is a possibility not foreseen under the previous system) to the latest stages of the EDP. Sanctions may eventually reach 0.5 per cent of GDP. Furthermore, Member States subject to an EDP procedure must set a 'fiscal and economic partnership programme', entailing, in practice, the implementation of reforms similar to the structural reforms implemented by countries under the EU/IMF financial adjustment programmes.

A new sanction has also been introduced, which is a fine for the statistical misrepresentation of budgetary data on deficit and debt. Figures must not be manipulated; serious negligence may, in principle, already lead to a fine.⁸⁹³ Since the 2011 reforms, moreover, a reverse qualified majority voting mechanism has been introduced for the imposition of most sanctions, whereby a qualified majority of Member States is needed to reject, rather than to adopt, a Commission proposal for a Council decision.

Under the EIP, countries with macroeconomic imbalances or excessive imbalances may receive policy recommendations for reducing them, and, depending on the nature and severity of their imbalances, their policy commitments will be monitored through specific monitoring. In addition to increased monitoring, countries in the Euro Area can also face sanctions. As with the EDP, the Council takes the decision in these cases by means of reverse qualified majority voting.⁸⁹⁴

⁸⁹³ Lastra, *International Financial and Monetary Law* (n 614) 320.

⁸⁹⁴ *ibid*, 320-321.

6.3.3.2. *The neoliberal character of the post-crisis reform of the EMU and the consolidation of the Neoliberal State in Europe*

The post-crisis legal framework for economic and fiscal policy coordination under the EMU here succinctly outlined, reveals a ‘hardening’ of EU fiscal rules that goes temporally and substantially beyond the crisis and the responses thereto. Although EU institutions still have no formal legislative competence over national fiscal policies, as this has been nominally left to the Member States, the rules introduced especially after the crisis, enable stricter economic and fiscal policy coordination, surveillance and ultimately ‘direction’/‘control’ by EU institutions (especially for Euro Area countries). Thus, the fiscal sovereignty of EU Member States has become considerably limited, although ‘voluntarily’ so.

This can be, of course, beneficial for the prevention, in theory, of irresponsible State conduct, including irresponsible borrowing and lending practices and the accumulation of unsustainable debt burdens, which, as mentioned, can be a threat to the realisation of ESR. Nonetheless, the new rules stand in potential contradiction with the requirements of social policy/ESR both because, together with their fiscal policies, the social policies of EU Member States have been made increasingly contingent upon the objectives of financial stability, and because of the specific, neoliberal nature of the required qualitative adjustments. There is no qualitative difference, in this sense, between the broad economic policy objectives pursued by the EU in the EMU or through the MoUs agreed with EU Member States in financial difficulties.

The new arrangements appear to preserve and enhance in particular the stabilisation function of fiscal policy-making, while restricting, to say the least, its redistributive function. Accordingly, the only social policies *de facto* allowed by the new rules are those that satisfy the economic condition of enhancing or at least being compatible with the financial stability and the economic objectives of the EMU.

Furthermore, as it has been remarked, one of the key aims of the regulatory changes introduced after the crisis was to make fiscal (and social) policy convergence more “automatic”,⁸⁹⁵ i.e. less politically manoeuvrable. This has

⁸⁹⁵ *ibid*, 319.

occurred, for instance, through the requirement to transpose EU fiscal rules, including an automatically activating corrective mechanism, into domestic legislation. It has also come about through the introduction of reverse voting in the corrective arm of the EU framework, in order to limit the discretionality of the Council in following the Commission's recommendations in the Excessive Deficit and Excessive Imbalance Procedures.

Fiscal policy decision-making has, thus, not only been partially isolated from the control and authority of Member States, but also from the political process itself, in a successful attempt to make it—and, consequently, social policy decision-making—*appear* as a purely technical/regulatory exercise, ostensibly devoid of political and social significance. This idea has been eloquently summarised as follows:

Fiscal rules are explicitly pitched as devices to constrain the sovereignty of democratic institutions. 'Such rules,' according to one analyst, 'remove legislators' discretion in making spending and taxation decisions.'⁸⁹⁶ [...] The ideal rule was one that constrained 'successive governments [...] over a reasonably long period of time'. Limiting discretion seemed reasonable because it was understood that this discretion was usually abused. 'The main underlying cause' of fiscal indiscipline, an IMF study reported in 2007, is 'the injudicious use of discretion [...] in the context of competing electoral constituencies and political and redistributive conflicts.' [...] Fiscal rules [...] shared the purpose of restraining democratic processes, on the premise that those processes were prone to misbehaviour. [...] A well-designed fiscal rule could establish 'a depoliticized framework for fiscal policy' just as central bank reforms appeared to depoliticize monetary policy.⁸⁹⁷

The current phase of EU fiscal and social policy-making has been, thus, defined as 'authoritarian', because "it understands the market and social policies as structurally distinct from political and representative processes, and suggests that EU social policy is something to be managed by technocrats rather than

⁸⁹⁶ Marion Wrobel, *Fiscal rules for the control of government* (Research Branch, Library of Parliament, Ottawa 1993).

⁸⁹⁷ Alasdair Roberts, *The Logic of Discipline: Global Capitalism and the Architecture of Government* (OUP 2011) 57.

decided by political actors”.⁸⁹⁸ This trend clearly reflects one of the main neoliberal tenets mentioned at the beginning of this chapter.

Nonetheless, the purported de-politicisation of fiscal and social policy is deceptive. As it has been observed, “[t]he purpose of these rules is clear: they serve to force Member States into adjusting their social and economic policies towards a specific model”,⁸⁹⁹ i.e. that of neoliberalism and the Neoliberal State. Both these models have precise distributive and normative implications that undermine the capacity of States to comply with their ESR obligations.

6.4. Conclusions

The Eurozone debt crisis has had an enormous impact on ESR and the welfare systems of many European countries. It furthered a pre-existing regressive trend in the realisation of ESR, which has been linked, among other variables, to the progressive ascent, since the 1970s, of neoliberalism, firstly as the dominant theory of international economic relations and then, progressively, as a far-reaching ‘morality’—the ‘common sense’ of our age—called upon to justify and realise market social order. The current international human rights framework has not been able to effectively prevent this regression, also because, as this chapter has argued, the nature and content of the law itself reflect neoliberal morality.

On the contrary, the crisis has corroborated and actually reinforced the ‘neoliberalisation’ of international and EU law (at least so far as it concerns the relationship between sovereign debt and human rights), a character that is manifested not only in the neoliberal content of specific legal prescriptions, or in the market-oriented reinterpretation of legal concepts relating, *inter alia*, to freedom, personal responsibility, equality, or the rule of law, but also, more generally, in the transformation of the law itself into a means to implement the ‘market as a method’ for the ordering of social relations, i.e. a rule-governed order supposedly uncommitted to the attainment of any particular collective end(s) (i.e. a nomocracy).

⁸⁹⁸ Floris de Witte, ‘The Architecture of a “Social Market Economy”’, *LSE Law Society and Economy Working Papers 13/2015* (2015) 17.

⁸⁹⁹ *ibid*, 15.

This Chapter has reviewed and discussed some of the legal developments that occurred since the crisis in relation to the issue of sovereign debt and ESR, which evidence the reinforced neoliberalisation of international and EU law that has been posited.

Firstly, the incorporation of the principle of conditionality under EU law represented, as mentioned, the legal formalisation of an asymmetrical power relationship between debtors/States requiring financial assistance and their creditors. Such a relationship, and consequently conditionality, are prone to intensify the influence of market imperatives and logic, over States' economic and fiscal policy-making. They also confirm a departure of economic governance in the EU from the principles of the sovereign equality of States, non-intervention, self-determination and international cooperation, which characterised, instead, a different interstate order concerned, at least to a certain extent, with the protection of economically and politically more vulnerable States. Quite surprisingly, while acknowledging that conditionality can be detrimental to the realisation of ESR, its assimilation in the EU legal framework has not been challenged by the CESCR nor by the Independent Expert on Foreign Debt and Human Rights.

Secondly, the CESCR and the European Court of Human Rights have absorbed, in their legal assessment of responses to the crisis, neoliberal assumptions regarding, *inter alia*, the inevitability of austerity, the nature of equality, and an understanding of personal responsibility that completely overlooks structural and contextual variables. As previously mentioned, the alterations made by the CESCR to the doctrine of non-retrogression appear to reconcile ESR with austerity by adjusting the legal requirements of the former to the necessities of the latter. In such a context, the legal protection of ESR has been substantially undermined.

Finally, as mentioned, the reform of the EU legal framework for economic governance has increased the convergence of national fiscal policies towards neoliberal standards, considerably restricting the fiscal sovereignty of EU Member States and making their policy choices increasingly contingent upon the objectives of financial and monetary stability. Importantly, the reform has also strengthened, in line with the concept of the Neoliberal State and with neoliberal

scepticism against democratic governance, the purported depoliticisation of economic and fiscal decision-making, by promoting, in some cases, a more automatic application of EU fiscal rules, to prevent politics, especially national parliaments, from ‘interfering’ with the ostensibly technical nature of such decisions.

The overall trend that emerges from the debt crisis in Europe is thus one characterised by 1) unresolved or even increased legal uncertainty with regard both to the debt issue and ESR, since sovereign debt remains largely unregulated under international law (also considering that the principles elaborated at the UNCTAD and the UN have so far received only very scarce attention by States’ and monitoring bodies) and the legal protection of ESR has been ‘weakened’ by the latest declarations of the CESCR in particular; 2) increased ‘opacity’ of economic governance in the EU, due to the formal adoption of conditionality as the standard principle for economic assistance, as well as to some elements of the post-crisis reform of the EMU; 3) increased supranational control over the fiscal and social policies of EU Member States, and increased subordination of their social policy-making to the objectives and requirements of economic and monetary policy; 4) the consolidation and diffusion of the Neoliberal State model, which implies a progressively greater disengagement of the State with its welfare responsibilities; 5) a greater risk of legal opportunism, encouraged and supported by neoliberal morality, and, consequently, the danger that the idea of law itself, as a means to achieve and protect social order, is progressively compromised (on this aspect, see further the thesis’ conclusions); 6) the consolidation of an interstate order in Europe that is increasingly divided between ‘powerful’ and ‘weak’ States, and in which the interests and needs of the more vulnerable are increasingly ignored; and, finally, 7) the thus far completely unchallenged, expanded and expanding impoverishment and indebtedness of many States, including, increasingly, some advanced economies.

Hence, in order to fully understand the nature and meaning of contemporary sovereign indebtedness and its implications for the realisation of ESR, and to account for the regrettable irrelevance of human rights law in responses to the Eurozone debt crisis, the ‘debt problem’ and the relationship between sovereign

debt and ESR must be (re)framed and addressed *contextually*. This requires taking into account the current neoliberal nature of the global economic system and of international law itself. This is how I understand a ‘macro’ approach to the analysis of sovereign debt and human rights.

The following conclusions will, thus, attempt at providing some closing remarks on their relationship, precisely from this perspective.

Chapter VII

Conclusions

7.1. Conclusions

In the current neoliberal global economic system, debt seldom represents a genuine opportunity for poorer nations. For these countries, contrary to rhetorical assertions, indebtedness often corresponds, more realistically, to a necessity rather than a choice, the only way to survive in the existing economic environment. Hence, *in this context*, sovereign debt more often epitomises the product and perpetuating instrument of economic vulnerability, unfair economic relations and structural injustice. It provides a temporary illusion of redistribution, while *de facto* transferring resources from those who do not have enough to those who should not need more, and increasing both the wealth and influence of the ‘powerful’ over (and against) the ‘weak’. Debt has become an expedient to ‘counterweight’ the increasingly widespread public and private impoverishment and the “structural deprivation and exclusion” that are, actually, “systematically produced and maintained by the current [neoliberal] arrangement” of international economic relations.⁹⁰⁰ Rather than an enabling tool, debt thus constitutes, more often than not, a tool of oppression and dispossession.⁹⁰¹

The fact that States generally, and some of them more than others, increasingly ‘choose’ to rely on external borrowing for the resources necessary to implement their functions (Chapter 2), including the realisation of ESR, should raise questions and concerns not only about the *sustainability* but also, most importantly, the *justice* of indebtedness and the current global state of the economy. Moreover, it raises questions about the inevitable repercussions that economic injustice and (asymmetrical) relationships of indebtedness have, more generally, on the structure of the international State-system and the nature of

⁹⁰⁰ Richard Dienst, *The Bonds of Debt: Borrowing Against the Common Good* (Verso 2011) 26-32.

⁹⁰¹ Harvey (n 816) 159-165, describing the springing of the ‘debt trap’ and the use of the credit system as primary means of capitalist ‘accumulation by dispossession’.

international law. Something can be made ‘sustainable’, while remaining nonetheless unjust.

Thus, the problem underlying the debt-ESR relationship—one that has not been minimally touched upon by debates about the Eurozone debt crisis, including by large part of the academia and, even more surprisingly, by those responsible for the promotion and the monitoring of ESR, such as the CESCR or the Independent Expert on Foreign Debt and Human Rights—remains primarily a problem of economic justice (“who is to have more and who less, or how much is to have who, according to which criteria”).⁹⁰²

The relationship between sovereign debt and socio-economic rights is not limited to the regressive impacts of austerity measures on the enjoyment of ESR, in countries threatened by or facing a debt crisis (Chapter 1). It is more intimately founded upon the reality that the resources that are necessary to realise ESR have become increasingly dependent, because of the increasing debt financing of States, on the fate and mood of international credit and of sovereign bond markets. If a State is economically dependent upon its (largely private) international creditors, the realisation of welfare rights, as well as that of other State functions more generally, can become contingent upon and subordinate to market imperatives. In other words, their realisation is left to the erratic ‘benevolence’ of the market.

This circumstance represents a *structural* problem for which the existing international, and especially human rights, legal framework provide no solution. As mentioned in Chapters 2 and 4, international law on sovereign debt, on one side, is currently underdeveloped. With regards to the issue of sovereign borrowing and human rights in particular, as mentioned in Chapter 4, the only existing standards are represented by the 2011 UNCTAD Principles on Responsible Sovereign Borrowing and Lending, and the 2012 UN Guiding Principles on Foreign Debt and Human Rights. Both are soft law instruments with no legal binding force and, apart from some very few exceptions among the UNCTAD Principles, cannot be said to correspond to customary international law.

On the other hand, the international socio-economic rights regime does not

⁹⁰² Carlo Focarelli, *Economia Globale e Diritto Internazionale* (Il Mulino 2016) 18.

offer sufficient safeguards. As noted in Chapter 4, the normative content of the ICESCR in particular, remains quite elusive, and the legal protection of ESR under international law is *de facto* relatively weak, as the irrelevance of socio-economic rights considerations in responses to the Eurozone crisis and the deferential approach adopted by judicial and monitoring bodies, both reveal.

More worryingly, there are no signs, at present, that this deficit will be altered or reversed any time soon. In fact, the measures adopted to respond to the Eurozone debt crisis have essentially evidenced and reinforced the neoliberal character of contemporary international law, by buttressing certain transformations in the nature and function of the law and the State themselves. There is a clear link between the ascent of neoliberalism, current global economic arrangements and, most importantly, international law developments (or lack thereof). Given the absence, at the international level, of a centralised political and legal authority, the content of international law—including human rights law—is necessarily the outcome of the systematic competition between States and groups of States with divergent interests and values. Since the 1980s and still today, despite multiple crises, neoliberal morality has been hegemonic. As long as alternative systems of beliefs will not reach sufficient endorsement, so to overcome neoliberalism's ideological dominion, international law will necessarily reflect the latter.

These closing remarks are not just a conclusion to my inquiry but are also an invitation to further research. The analysis that I conducted throughout this thesis was necessary to reach this point: to attempt at reconstructing a faithful narrative of the facts, to take stock of the existing law and to identify the underlying problem(s). Most importantly, it has helped to bring into focus, especially in the last chapter, the relationship between the law and its material and ideological preconditions and thus, possibly, the limitations of the law itself to change the current state of things.

In fact, a final general observation on law's neoliberalisation is compelling, especially because of its significance for the possibilities of 'neoliberalised' law to constitute a useful means to promote an alternative social order. It has been correctly observed that "[l]aw's embedded and constitutive role in the formulation and dissemination of neoliberal social relations forecloses or

severely limits law as a useful terrain for transformative change to those social relations”.⁹⁰³

Alternative means to promote such changes are proposed, including a resurrection of the agonistic element of politics, a tactical use of law in political resistance and, even, alternative regulatory frameworks outside the law. I endorse the need, in particular, for a critical approach to law, and more precisely, in a neoliberal context, “a subversive engagement with law that contains an implicit critique of the legal form” itself.⁹⁰⁴ In the human rights context, this means, *inter alia*, the willingness to engage with the limits not only of the normative content of the existing framework, but also of the legal form of rights itself.

Nonetheless, I also believe that for law to move away from its current neoliberal inclination, the existence of a radically different, non-neoliberal ‘common sense’ will be necessary. And this appears to be foremost a task for culture, education and politics to realise.

⁹⁰³ Brabazon (n 817).

⁹⁰⁴ Honor Brabazon, ‘Dissent in a juridified political sphere’ in Brabazon (n 817).

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