

Constitutionalising the Social Minimum in Greece: The Enduring Legacy of the Euro-crisis on the Social Constitution

Maria Kotsoni*

*European University Institute, Italy, email: maria.kotsoni@eui.eu

Constitutionalisation of the decent standard of living in Greece – Euro-crisis and constitutional change – Financial assistance conditionality and minimum income policy – Decent standard of living in crisis jurisprudence

INTRODUCTION

The late 2000s financial and economic crises led to considerable comparative research on their constitutional implications.¹ Similarly, the euro crisis and its legal sources, referring to instruments of increased fiscal oversight, such as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, and financial assistance conditionality that accompanied bail out agreements of EU Member States, have produced substantial constitutional

¹X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013), T. Ginsburg et al. (eds.), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019), T. Beukers et al. (eds.), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017), M. Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Bloomsbury Publishing 2014), A. Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective', in R. Albert and Y. Roznai (eds.), *Constitutionalism under Extreme Conditions* (Springer 2020) p. 175, U. Becker and A. Poulou (eds.), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2020).

European Constitutional Law Review, 20: 222–246, 2024

© The Author(s), 2024. Published by Cambridge University Press on behalf of University of Amsterdam. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.
doi:10.1017/S1574019624000191

outcomes linked to different forms of constitutional change.² Accounts of crisis-produced constitutional change in the form of constitutional amendments have so far focused on the wave of constitutionalisation of European fiscal constraints in EU member states' constitutions.³

Constitutional amendments on balanced budget rules were not, however, the only constitutional amendments shaped by the euro crisis in states heavily involved in the management of that crisis. This is suggested by the last constitutional reform process that took place in Greece. Greece was the first Eurozone country to sign a bailout agreement in May 2010, accompanied by strict financial assistance conditionality, including in the fields of labour and social policy.⁴ Signing three consecutive bailout agreements, Greece implemented severe austerity programmes, as well as structural and transformative reforms in the fields of labour and social laws and policy contained in Memoranda of Understanding for a total period of eight years.⁵ Amid the third bailout programme, in 2016, the then Prime Minister Alexis Tsipras announced the SYRIZA government's intention to mobilise the formal amendment formula to change the Greek Constitution.⁶ This statement inaugurated a period of discussions around constitutional reform, which was followed by the official amendment process in parliament in 2018 and 2019. Draft amendments submitted by the then main governing party, SYRIZA, and by the main opposition party, New Democracy, targeted various provisions relating to labour and social rights, as well as fiscal constitutional arrangements.⁷ Amendment projects on labour and social rights and fiscal provisions were unsuccessful, with one exception. The constitutional reform process added a new social provision into the Constitution – a state guarantee regarding the decent standard of living: 'The State shall ensure decent

²Adams et al., *ibid.*, Beukers et al., *ibid.*

³Adams et al., *ibid.*

⁴European Commission, 'Financial Assistance to Greece', https://economy-finance.ec.europa.eu/eu-financial-assistance/euro-area-countries/financial-assistance-greece_en, visited 17 June 2024.

⁵*Ibid.*

⁶Speech of the Prime Minister with proposals on the Constitutional Reform [in Greek], 25 July 2016, <https://www.primeminister.gr/2016/07/25/15039>, visited 17 June 2024.

⁷Proposal by the President and the members of the SYRIZA parliamentary group for the revision of the provisions of the Constitution, in accordance with Articles 110 of the Constitution and 119 of the Parliament's Rules of Procedure [in Greek], [https://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/1%CE%88%CE%B3%CE%B3%CF%81%CE%B1%CF%86%CE%BF%20%CE%B1%CF%80%CF%8C%20%CE%A3%CE%B1%CF%81%CF%89%CF%84%CE%AE%20\(215135\).pdf](https://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/1%CE%88%CE%B3%CE%B3%CF%81%CE%B1%CF%86%CE%BF%20%CE%B1%CF%80%CF%8C%20%CE%A3%CE%B1%CF%81%CF%89%CF%84%CE%AE%20(215135).pdf), Explanatory report on the proposal of the President and Parliamentary group of New Democracy for the amendment of the provisions of the Constitution [in Greek], <https://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/4854.pdf>, both visited 17 June 2024.

living conditions for all citizens, through a minimum guaranteed income system, as prescribed by law'.⁸

The case of Greece shows that crisis-driven constitutional outcomes in the form of constitutional amendments refer not only to the fiscal constitutional strand, but also to the social constitution. And while the social constitution has been the subject of extensive research in relation to the euro crisis,⁹ its amendment remains an unexplored area in the study of the euro crisis, both from a constitutional and labour and social rights perspective.¹⁰ This article fills this gap, by showing that the constitutionalisation of the decent standard of living in Greece under its current formulation was shaped by both financial assistance conditionality and judicial responses to it. From a marginal discussion in Greek welfare state policy, a minimum income policy, conflated with the decent standard of living, assumed constitutional status. This constitutional amendment mirrors both a shift in the Greek welfare state dictated by financial assistance conditionality (minimum income) and a concept that emerged in the Greek crisis jurisprudence of apex courts (decent standard of living). While constitutionalising the decent standard of living might at first sight appear to advance the social constitution, I argue that, because of what it mirrors, this constitutional amendment further embeds the outcomes of the euro crisis in the social constitution.

This article is organised as follows: I, first, refer to existing knowledge on the links between the euro crisis and constitutional change and I show that the constitutional amendment of the social constitution is an unmapped territory in legal analyses of the euro crisis. In the second section, moving to the case of Greece, after providing the necessary background on the constitutional protection

⁸Resolution of the Greek Parliament of 25 November 2019, published in Government's Gazette on 28 November 2019 [in Greek], <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/FEK%202111-A-24-12-2019%20NEO%20SYNTAGMA.pdf>, visited 17 June 2024.

⁹A. Farahat and X. Arzoz (eds.), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021); S.C. Matteucci and S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (Routledge 2017), C. Kilpatrick and B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (EUI Department of Law Research Paper 2014/05); C. Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry', in Beukers et al., *supra* n. 1, p. 279; C. O'Conneide, 'Austerity and the Faded Dream of a "Social Europe"', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) p. 169; Becker and Poulou, *supra* n. 1.

¹⁰In two cases, where social rights in the euro crisis are discussed, there are some references to the constitutional reform projects in Ireland. See A. Nolan, 'Welfare Rights in Crisis in the Eurozone: Ireland', in Kilpatrick and De Witte, *ibid.*, p. 30, E. Dewhurst, 'The Financial Crisis as a Turning Point for Constitutional Rights Jurisprudence: An Assessment of the Absence of Social Rights Protection in the Irish Constitution', in Becker and Poulou, *supra* n. 1, p. 181.

of fundamental labour and social rights, I show that proposals to amend the social strand of the Greek Constitution by the main government and main opposition parties in the 2018–2019 constitutional reform process were linked to the euro crisis. In the third section, I illustrate how a minimum income policy assumed increased importance because of the implementation of financial assistance conditionality, inducing a shift in the fabric of the welfare state. I, then, move on to the emergence and evolving content of the decent standard of living as a concept in the constitutional jurisprudence of Greek apex courts during the crisis. Last, I discuss the competing proposals over a new constitutional provision for the decent standard of living and I critically reflect on the significance of constitutionalising the decent standard of living under its current formulation for the normative ambition of the social strand of the Greek Constitution.

THE EURO CRISIS AND CONSTITUTIONAL CHANGE

The late 2000s financial and economic crises, as well as the euro crisis, provoked substantial reflection on their links to constitutional change. The potential of financial crises to produce substantial constitutional developments is perhaps evident in the extreme case of Iceland. After the collapse of the financial system following the financial crisis, Iceland contemplated extensive constitutional revision and a new Constitution that would be produced through novel participatory processes.¹¹ The processes and discussions around a new Constitution not only responded to the crisis, but also to long-standing local constitutional debates. Nonetheless, the outcome of the financial crisis in Iceland contributed to these developments.¹² The Icelandic example, where a new Constitution was seriously contemplated, is the outlier among the countries most impacted by the financial and economic crisis and when contrasted with the euro crisis countries. With the exception of Hungary,¹³ the countries most affected by

¹¹A.P. Árnason and C. Dupré (eds.), *Icelandic Constitutional Reform: People, Processes, Politics* (Routledge 2020); B. Thorarensen, 'The Impact of the Financial Crisis on Icelandic Constitutional Law. Legislative Reforms, Judicial Review and Revision of the Constitution', in Contiades, *supra* n. 1, p. 263.

¹²Árnason and Dupré, *ibid.*, p. 2-3.

¹³Constitutional change in Hungary has mostly been considered as a political project rather than as a response to the economic crisis. See G. Halmai, 'The Fundamental Law of Hungary and the European Constitutional Values', 39 *DPCE Online* (2019), <http://www.dpceonline.it/index.php/dpceonline/article/view/742>, visited 17 June 2024; K.L. Scheppelle, 'Understanding Hungary's Constitutional Revolution', in A.von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart/Beck 2015) p. 124; B. Bugarcic, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge', *LEQS Paper No. 79* (2014), <https://ssrn.com/abstract=2466340>, visited 17 June 2024.

the economic crisis in Europe and by the euro crisis did not go so far as to engage in such a far-reaching form of constitutional change.

This does not mean that the euro crisis did not produce constitutional change. Quite the contrary. Craig has divided EU responses to the crisis into two broad categories: those of financial assistance, and those aimed at increasing oversight over national economic and budgetary policies,¹⁴ for example, the 2011 Euro Plus Pact of the European Council, which aimed to advance competitiveness and fiscal consolidation.¹⁵ From a constitutional perspective, the most significant measure to increase oversight over national public finances was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the European Fiscal Compact).¹⁶ Article 3 of the European Fiscal Compact imposed an obligation on member states to introduce the balance budget rule in their national legal orders through permanent provisions with binding force, 'preferably constitutional'.¹⁷ Both types of responses, financial assistance conditionality and reforms to increase fiscal oversight, have constitutional implications. As Delledonne points out, 'Since 2010, reactions to the sovereign debt crisis in the Eurozone have triggered a number of far-reaching changes in the composite European Constitution, thereby meaning both the EU constitution and constitutions in the member states.'¹⁸

While a substantial part of constitutional outcomes of the euro crisis is devoted to changes in the constitutional fabric of the EU,¹⁹ accounts have also indicated the far-reaching impact of the crisis on national constitutions.²⁰ Constitutional changes include informal ones produced by judicial and political practice and

¹⁴P. Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications', in Adams et al., *supra* n. 1, p. 19 at p. 20-23.

¹⁵European Council Conclusions, 20 April 2011, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf, visited 17 June 2024.

¹⁶Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

¹⁷Art. 3(2) TSGC.

¹⁸G. Delledonne, 'Crises, Emergencies and Constitutional Change', in X. Contiades and A. Fotiadou (eds.), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020) p. 245 at p. 256.

¹⁹K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); B. De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', 11 *EuConst* (2015) p. 434; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); P. Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022); M. Dawson and F. De Witte, 'Constitutional Balance in the EU after the Euro-Crisis', 76 *ModLRev* (2013) p. 817. See also Part I of Beukers et al., *supra* n. 1; Adams et al., *supra* n. 1.

²⁰'Introduction' in Beukers et al., *supra* n. 1, p. 1.

executive action.²¹ They also include the strengthening of the executive branch²² and the use of decree-laws as a means to govern.²³ The emergence of direct democratic constitutional devices is also a constitutional outcome of the crisis.²⁴ From sovereign debt states, this can be detected especially in the case of Ireland, with its ‘deliberative wave’ in constitutional change. Mini-publics tasked to process constitutional changes were initially a crisis-driven institutional innovation aimed at restoring people’s faith in politics and institutions following crisis.²⁵

A distinct strand of constitutional change – in the form of constitutional amendments triggered by the euro crisis – is the constitutionalisation of European fiscal constraints. For example, in Spain, following the Euro Plus Pact, a 2011 constitutional amendment constitutionalised the principle of budgetary stability applying to all actions of public authorities, thus creating an asymmetry between the economic and the social constitution.²⁶ In 2012 the balanced budget rule became part of the Italian Constitution, following the adoption of the Fiscal Compact.²⁷ Ireland also amended its Constitution to enable the ratification of the Fiscal Compact.²⁸ Beyond these jurisdictions that were heavily impacted by the euro crisis, constitutional fiscal constraints in constitutions can now be found in

²¹X. Contiades and A. Fotiadou, ‘How Constitutions Reacted to the Financial Crisis’, in Contiades, *supra* n. 1, p. 9 at p. 10-19.

²²Ginsburg et al., *supra* n. 1, at p. 7.

²³Beukers et al., *supra* n. 1, at p. 19-21.

²⁴X. Contiades and A. Fotiadou, ‘The People as Amenders of the Constitution’, in X. Contiades and A. Fotiadou, (eds.), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017) p. 9 at p. 11 and 22.

²⁵D. Farrell and J. Suiter, *Reimagining Democracy: Lessons in Deliberative Democracy from the Irish Front Line* (Cornell University Press 2019).

²⁶J. Maldonado Molina and J. Romero Coronado, ‘The Predominance of a ‘Strong’ Economy over a ‘Weak’ Social Constitution: The Legacy of the Financial Crisis in Spain’, in Becker and Poulou, *supra* n. 1, p. 311 at p. 312-314; L. Sanchez, ‘Spain: Dealing with the Economic Emergency through Constitutional Reform and Limited Parliamentary Intervention’, in Beukers et al., *supra* n. 1, p. 199; A. Ruiz Robledo, ‘The Spanish Constitution in the Turmoil of the Global Financial Crisis’, in Contiades, *supra* n. 1, p. 141 at p. 154-163.

²⁷M. De Nes and A. Pin, ‘The Outcome of the Financial Crisis in Italy: A Sea Change for the Doctrine of Social Rights’, in Becker and Poulou, *supra* n. 1; T. Groppi et al., ‘The Constitutional Consequences of the Financial Crisis in Italy’, in Contiades, *supra* n. 1, p. 89 at p. 96-98, 104-109.

²⁸Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012, <https://www.oireachtas.ie/en/bills/bill/2012/23>, visited 17 June 2024; R. O’Gorman, ‘An Analysis of the Method and Efficacy of Ireland’s Incorporation of the Fiscal Compact’, in Adams et al., *supra* n. 1, p. 273; D. Morgan, ‘The Constitution and the Financial Crisis in Ireland’, in Contiades, *supra* n. 1, p. 63 at p. 76-78.

several European constitutions,²⁹ constitutionalised either as an immediate response to the financial crisis with the aim of preventing further turbulence,³⁰ or as an outcome of obligations under the European Fiscal Compact.

The constitutional accounts that looked at the constitutional impact of the crisis or crisis-driven constitutional change at a domestic level involved social rights only at the margins.³¹ These accounts have paid attention to the social strand of the constitution insofar as labour and social rights and associated principles were part of judicial challenges provoked by the application of financial assistance conditionality. This means that fundamental rights adjudication is acknowledged as one outcome of the crisis. A greater focus on the social constitution as a separate strand of inquiry is still missing.

Equally, social constitutional analyses of labour and social rights in the euro crisis did not use the analytical framework of constitutional change. Such a strand of inquiry is absent, for instance, in the main accounts that trace austerity policies and their impact on the welfare state or fundamental rights challenges.³² Labour and social rights accounts typically put the focus on austerity measures that were introduced following the euro crisis and their impact on the enjoyment and realisation of labour and social rights, or on the issue of labour and social rights' adjudication in times of crisis.³³ Despite the numerous contributions on the outcomes of the crisis for labour and social rights, there has been no detailed investigation into how the crisis jurisprudence interacted with formal constitutional change of fundamental social rights in places where change was debated or occurred.³⁴ This is also true when

²⁹See for Germany, Art. 109 and 115 of the German Basic Law, as amended in 2009; for Spain, Reforma del artículo 135 de la Constitución Española, de 27 de septiembre de 2011; for Italy, Legge Costituzionale del 20 aprile 2012; for Slovenia, Art. 148 of the Slovenian Constitution; for Slovakia, Constitutional Act of 8 December 2011 on Fiscal Responsibility; for Lithuania, 2014 Constitutional Law on the Implementation of the Fiscal Treaty and for Hungary, Art. N of the 2011 Fundamental Law.

³⁰Art. 109 and 115 of the German Basic Law, as amended in 2009. See also G. Delledonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences', in Adams et al., *supra* n. 1, p. 181 at p. 185-187.

³¹See, for example, references to the edited volume by Contiades, *supra* n. 1.

³²Kilpatrick and DeWitte, *supra* n. 9.

³³Becker and Poulou, *supra* n. 1; Matteucci and Halliday, *supra* n. 9; Kilpatrick and De Witte, *supra* n. 9; Kilpatrick, *supra* n. 9; O'Connell, *supra* n. 9; D. Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine', 12 *International Journal of Constitutional Law* (2014) p. 710; X. Contiades and A. Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation', 10 *International Journal of Constitutional Law* (2012), p. 660; X. Contiades and A. Fotiadou, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine: A Reply to David Bilchitz', 12 *International Journal of Constitutional Law* (2014) p. 740; D. Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine: A Rejoinder to Xenophon Contiades and Alkmene Fotiadou', 12 *International Journal of Constitutional Law* (2014) p. 747.

³⁴Becker and Poulou, *supra* n. 1; Kilpatrick and De Witte, *supra* n. 9.

studying the case of Greece in relation to its euro crisis constitutional experience. Despite the many academic commentaries on the treatment of constitutional social rights during the crisis in Greece,³⁵ no special attention has been paid to potential links of the constitutionalisation of the decent standard of living with the euro crisis and its legal sources.

THE SOCIAL CONSTITUTION IN THE FIRST POST-CRISIS CONSTITUTIONAL REFORM PROCESS IN GREECE

The social strand of the Greek Constitution

Like other post-fascist constitutions of Southern Europe, the Greek Constitution of 1975 contains a catalogue of labour and social provisions. Because of the entrenchment of labour and social rights and the acknowledgment of state intervention in private economic relations and the national economy, it has been characterised as a social-democratic constitution.³⁶ Constitutional labour rights are the right to work,³⁷ the right to equal pay for work of equal value,³⁸ the prohibition of forced labour,³⁹ the right to form and join a trade union,⁴⁰ the right to strike.⁴¹ Mention is also made of general working conditions and collective bargaining.⁴² The state's obligations concerning healthcare,⁴³ social security of workers,⁴⁴ and housing⁴⁵ are also constitutionalised. In addition to these provisions oriented specifically to the protection of matters that fall under the ambit of labour and social rights' protection, the Constitution envisages the protection of certain social groups and of social institutions that are targets of

³⁵See e.g. the more recent contributions M. Bakavou, 'Salus Rei Publicae Suprema Lex Esto? Welfare State Reforms before the Greek Courts', in Becker and Poulou, *supra* n. 1, p. 148; A. Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015–2018', in Farahat and Arzoz, *supra* n. 9, p. 275.

³⁶I. Katsaroumpas, 'De-Constitutionalising Collective Labour Rights: The Case of Greece', 47 *Industrial Law Journal* (2018) p. 465.

³⁷Art. 22 para. 1 of the Greek Constitution.

³⁸*Ibid.*, Art. 22 para. 1.

³⁹*Ibid.*, Art. 22 para. 4.

⁴⁰*Ibid.*, Art. 23 para. 1.

⁴¹*Ibid.*, Art. 23 para. 2.

⁴²*Ibid.*, Art. 22 para. 2.

⁴³*Ibid.*, Art. 21 para. 3.

⁴⁴*Ibid.*, Art. 22 para. 5.

⁴⁵*Ibid.*, Art. 21 para. 4.

social policy, referring to persons with disabilities,⁴⁶ children and the elderly,⁴⁷ and – in terms of institutions – marriage, motherhood, and family.⁴⁸

The vindication of these provisions relies on the adoption of laws that give substance and effect to constitutional prescriptions. Laws, in turn, can be subject to constitutional review. Constitutional review in Greece is diffused and it is premised on the general obligation of courts to not apply unconstitutional laws.⁴⁹ In other words, in principle, all courts at all levels are competent to examine unconstitutionality claims and arguments. Nonetheless, appellate review,⁵⁰ the remedy of annulment of administrative actions,⁵¹ and reforms of procedural law and remedies, like test cases,⁵² have to some degree concentrated constitutional review in the apex courts. These are the Supreme Administrative Court (Council of State), the Supreme Civil and Criminal Court (Areios Pagos), and the Court of Audit.

As well as the provisions that explicitly protect labour and social rights, general constitutional principles have also been mobilised to frame the protection of these rights under the Constitution. One such principle is human dignity.⁵³ Another is the principle of equality, in its general form dictating that ‘All Greeks are equal before the law’,⁵⁴ and equality in public charges.⁵⁵ In addition, the principle of proportionality is explicitly established,⁵⁶ together with national and social solidarity.⁵⁷ The same article enshrines the ‘welfare state rule of law’,⁵⁸ complementing the provisions providing for direct protection of social rights.⁵⁹ Last, the right to property has been used as a vehicle to litigate social security cases, especially when they concern the amount of pension benefits.⁶⁰

⁴⁶Ibid., Art. 21 para. 6.

⁴⁷Ibid., Art. 21 para. 3.

⁴⁸Ibid., Art. 21 para. 1.

⁴⁹Ibid., Art. 93 para. 4 states that: ‘The courts shall be bound not to apply a statute whose content is contrary to the Constitution’.

⁵⁰X. Contiades et al., ‘The Constitution of Greece: EU Membership Perspectives’, in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) p. 641 at p. 642-643.

⁵¹Art. 95 para. 1 of the Greek Constitution.

⁵²Law No. 3900/2010.

⁵³Art. 2 para. 1 of the Greek Constitution states that ‘Respect and protection of the value of the human being constitute the primary obligations of the State’.

⁵⁴Ibid., Art. 4 para. 1 states that ‘All Greeks are equal before the law’.

⁵⁵Ibid., Art. 4 para. 5 states that ‘Greek citizens contribute without distinction to public charges in proportion to their means’.

⁵⁶Ibid., Art. 25 para. 1.

⁵⁷Ibid., Art. 25 para. 1 and para. 4, according to which ‘The State has the right to claim of all citizens to fulfil the duty of social and national solidarity’.

⁵⁸Ibid., Art. 25 para. 1.

⁵⁹K. Chrysogonos, *Constitutional Law* (Sakkoulas Publications 2014) at p. 386-387.

⁶⁰E.g. Council of State, decisions 1383/2012, 3177/2014, 3410/2014, 1307/2019.

Amendment projects for the social constitution and their links to the euro crisis

The Greek Constitution has rarely been subject to formal constitutional change, least of all with respect to its social provisions.⁶¹ With an amendment formula requiring that the constitutional reform process extends to two parliamentary terms and setting supra-majority requirements between the two stages, the Greek Constitution does not change easily or very often.⁶² The last reform that touched upon fundamental rights took place in 2001, with the aim of modernising fundamental rights' protection. The same reform process added to the social strand of the Greek Constitution the 'social rule of law' principle and the right of persons with disabilities to unhindered participation in social and economic life,⁶³ while it also led to the constitutionalisation of the principle of proportionality applicable to fundamental rights' restrictions.⁶⁴

The Greek experience of the euro crisis gave rise to narratives on constitutional change. However, despite voices calling for constitutional change or reading an emerging constituent power into political mobilisation,⁶⁵ the first formal constitutional change process in Greece since the beginning of the crisis materialised in the years 2018 and 2019. Time limitations and consensus requirements set out in the constitutional amendment formula explain why constitutional amendment was not – and could not have been – an immediate

⁶¹Prior to the 2019 reform, the 1975 Constitution was amended in 1986, 2001, and 2008.

⁶²In line with Art. 110 of the Greek Constitution, the amendment process unfolds in two stages that extend to two parliamentary terms. Due to supra-majority requirements, political consensus, especially between the government and the main opposition party, is the decisive factor for the success of an amendment project. A supra-majority of 3/5ths of all members of parliament is required either at the first or the second stage. The first stage refers to the initiation of the amendment process following a relevant proposal by at least 50 out of 300 members of parliament. A 3/5ths majority decides on the need to amend the Constitution and on the provisions that are under amendment in two consequent voting sessions. In the second stage, the next parliament formed after intervening national elections, in its first session, decides by majority on which of the provisions that are considered for amendment are going to be amended. Where the proposal to amend the Constitution was approved by a simple majority instead of the supra-majority in the first stage, the following parliament decides on constitutional amendments by a supra-majority.

⁶³Art. 21 para. 6 of the Greek Constitution.

⁶⁴Resolution of the Greek Parliament of 6 April 2001, Gov. Gazette A84/17.4.2001 [in Greek].

⁶⁵A. Fotiadou, 'The Role of the People in Constitutional Amendment in Greece: Between Narratives and Practice', in Contiades and Fotiadou, *supra* n. 24, p. 156, at p. 158; X. Contiades and I. Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution', in Contiades, *supra* n. 1, p. 195, at p. 213-215; J. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012); C. Douzinas, 'In Greece, we see democracy in action', 15 June 2011, *The Guardian*, <https://www.theguardian.com/commentisfree/2011/jun/15/greece-europe-outraged-protests>, visited 17 June 2024.

response to the crisis until 2013,⁶⁶ including for the purpose of formally constitutionalising European fiscal constraints. In 2014, constitutional amendment was initiated,⁶⁷ with the main opposition party of the time, SYRIZA, abstaining from the process.⁶⁸ This process did not progress further because of the early dissolution of parliament and the snap elections of 2015. The recent constitutional amendment process took place shortly after the end of the third and last bailout programme, after the 2018 initiative of the SYRIZA-led coalition government, and was completed in 2019. At that time, the right-wing New Democracy party had formed a new government, replacing the coalition government led by SYRIZA. Up until the recent amendment, the social provisions of the Constitution had not been considered for comprehensive change by amendment. The constitutional social provisions seemed to be settled for decades. The 2018–2019 amendment process was the first time that these provisions had been considered for extensive re-drafting. Besides its importance due to the infrequency of constitutional amendments, the significance of the recent constitutional amendment lies in the fact that it took place in a context shaped by the experience of an economic crisis and its constitutional challenges.

The constitutional reform agendas of both government and main opposition included amendment proposals on the social constitution. SYRIZA proposed amendments to existing social and labour rights provisions, as well as the addition of a new provision protecting the decent standard of living. New Democracy also proposed a new provision on the decent standard of living, under a different formulation, as well as the incorporation of a balanced budget rule into the Greek Constitution. The only draft constitutional amendment that was approved by the necessary supramajority in the second stage of the reform process,⁶⁹ after intervening national elections that produced a New Democracy government, was the constitutionalisation of the decent standard of living as proposed by New Democracy.⁷⁰

The constitutional reform process was not detached from the constitutional experience of the euro crisis. This is indicated by the fact that amendment drafters, in the material supporting draft amendments, admitted proposals' links to the crisis,⁷¹ and also by the content and function of draft amendments, that were linked to euro crisis legal sources. Austerity as a response to the crisis shaped constitutional amendment projects for socio-economic rights to the extent that it

⁶⁶Fotiadou, *ibid.*, p. 159.

⁶⁷I. Kostaki, 'Constitutional Reform', 16 December 2014, *Vouliwatch*, [in Greek], <https://vouliwatch.gr/news/article/syntagmatiki-anatheorisi>, visited 17 June 2024.

⁶⁸*Ibid.*

⁶⁹*Supra* n. 62.

⁷⁰*Supra* n. 8.

⁷¹*See*, for example, SYRIZA proposal, *supra* n. 7.

shaped the protection of fundamental labour and social rights. At the same time, constitutional amendment proposals interacted with the crisis jurisprudence of apex courts that developed extensively in Greece and produced new ways of treating and interpreting the social constitution.

A basic distinction is between amendments that accommodated euro crisis outcomes and amendments that contested them. Some draft constitutional amendments had a restorative function, meaning that – if successful – they would have restored the pre-crisis application and interpretation of constitutional provisions, while others would further entrench the outcomes of the euro crisis. For example, a proposal by SYRIZA to include age as a prohibited ground of pay discrimination in the constitutional equal pay principle, contested a labour law reform implemented as part of financial assistance conditionality. A sub-minimum wage was introduced for the first time in Greek labour law through the conditionality of the first bailout agreement in 2010. Financial assistance conditionality stipulated that the government ‘adopts legislation on minimum wages to introduce sub-minima for groups at risk such as the young and long-term unemployed’.⁷² In 2011, a law introduced the possibility of a sub-minimum wage (80% of the minimum wage) for workers between 18 and 25 years old who agreed employment contracts with a duration up to two years ‘in order to acquire professional experience’.⁷³ Shortly after, in March 2012, the second Memorandum of Understanding included a specific condition referring to minimum wages. The Greek authorities would cut minimum wages by 22% and by 32% for workers younger than 25 years old.⁷⁴ This measure was initially implemented through an emergency ministerial council act with very questionable democratic legitimisation,⁷⁵ followed by a regular law determining the amounts of the minimum and sub-minimum wage.⁷⁶ Until then, it was national collective agreements that determined minimum wages. Trade unions challenged the constitutionality of the sub-minimum wage (along with a series of other measures) before the Council of State, among others, on the basis of the constitutional principle of equal pay.⁷⁷ The sub-minimum wage was never found unconstitutional by the Supreme Court’s judges, who did not even respond to claims of incompatibility with the constitutional equal pay principle.⁷⁸ SYRIZA

⁷²European Commission, *The Economic Adjustment Programme for Greece (2010)*, Annex II, Memorandum of Understanding on Specific Economic Policy Conditionality, Part 3.iii at p. 73.

⁷³Law 3986/2011, Art. 43.

⁷⁴European Commission, *The Second Economic Adjustment Programme for Greece (2012)*, Memorandum of Understanding on Specific Economic Policy Conditionality, clause 4.1 at p. 147.

⁷⁵Act of Ministerial Council No. 6/2012.

⁷⁶Law 4093/2012, IA.11.3.

⁷⁷Art. 22 para. 1 of the Greek Constitution.

⁷⁸Council of State, 2307/2014, para. 23.

proposed the amendment of the equal pay constitutional provision prohibiting pay discrimination on grounds of ‘sex or other distinctions’,⁷⁹ to include age as a prohibited ground of pay discrimination.⁸⁰ This draft amendment on equal pay seems to target directly the developments concerning the sub-minimum wage and the reluctance of the constitutional adjudicators to apply the principle of equal pay in constitutional review.

Another example concerns the constitutional protection of collective autonomy and the determination of the minimum wage through collective bargaining.⁸¹ Traditionally, the (national) minimum wage was determined by collective agreements. Financial assistance conditionality removed the minimum wage from the scope of collective bargaining and replaced it with determination by law. The Council of State found that this measure was constitutional, despite admitting that it restricted severely collective autonomy.⁸² SYRIZA’s proposed amendment aimed to clarify the constitutional provision protecting collective autonomy, i.e. that collective bargaining is the only method to determine the minimum wage.⁸³

On the other hand, the proposal by New Democracy to incorporate a balanced budget principle in the Greek Constitution is an example of an amendment that, if successful, would have accommodated and constitutionalised euro crisis law. Amendment drafters justified the proposal on a constitutional balanced budget rule by reference to the economic crisis.⁸⁴

While New Democracy’s proposal on a constitutional protection of the decent standard of living was not linked by the amendment drafters to the crisis, in the following sections I show that this amendment was not at all irrelevant to the crisis. Quite the contrary: the amendment incorporates and mirrors crisis-induced constitutional and legal developments.

MINIMUM INCOME POLICY FROM THE MARGINS TO CENTRE STAGE: FINANCIAL ASSISTANCE CONDITIONALITY AND THE GREEK WELFARE STATE’S SHIFT TO MINIMALISM

With three bailout agreements active for an overall period of eight years, Greece is the EU sovereign debt state with the longest and most intense social and labour

⁷⁹Art. 22 para. 1 of the Greek Constitution.

⁸⁰See the proposals on constitutional amendments submitted by SYRIZA, *supra* n. 7.

⁸¹Art. 22 of the Greek Constitution.

⁸²Council of State, decision 2307/2014.

⁸³See proposals on constitutional amendments by SYRIZA, *supra* n. 7.

⁸⁴See the intervention of the New Democracy General Rapporteur in the Parliamentary Committee on Constitutional Reform, Greek Parliament, Report of the Constitutional Reform Committee (2019) at p. 61. See also proposals on constitutional amendments by New Democracy, *supra* n. 7.

policy conditionality.⁸⁵ Conditionality measures included in Memoranda of Understanding touched upon all aspects of the welfare state, labour legislation, and public services. Financial assistance conditionality to Greece was far from mere budget cuts or demands for a smaller public sector. Structural reforms changed the fabric of the welfare state and transformed labour laws in a neoliberal direction.⁸⁶

Five years into austerity a wide part of the population was experiencing deprivation. Social policy scholars report that by 2015 40.7% of the population was experiencing deprivation, and 22.2% of the population extreme deprivation.⁸⁷ By the time the economic crisis hit, there were no comprehensive policies in the field of social assistance to create a social safety net, nor was there a minimum guaranteed income scheme in place, unlike in other European countries.

Until the crisis, there was essentially very little discussion about the introduction of a minimum income scheme in the Greek welfare state.⁸⁸ There were three legislative proposals from different parties in the late 1990s and early 2000s, but none of them gained support in parliament.⁸⁹ The introduction of a minimum income scheme in Greece was requested by Greece's creditors since 2012 and then became part of financial assistance conditionality.⁹⁰ Since 2012, the International Monetary Fund had been pushing in that direction.

⁸⁵For a detailed account of the events and political background of each bail out agreement see Y. Drossos, *The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis* (Hart Publishing 2020).

⁸⁶K. Dimoulas and G. Kouzis (eds.), *Crisis and Social Policy. Dead Ends and Solutions* (Topos 2018) [in Greek]; M. Matsaganis, 'Greece: The Crisis, Austerity, and the Transformation of Welfare', in S. Ólafsson et al. (eds.), *Welfare and the Great Recession: A Comparative Study* (Oxford University Press 2019) p. 83; M. Matsaganis, 'Social Policy in Hard Times: The Case of Greece', 32 *Critical Social Policy* (2012) p. 406; E.S. Rotarou and D. Sakellariou, 'Access to Health Care in an Age of Austerity: Disabled People's Unmet Needs in Greece', 29 *Critical Public Health* (2019) p. 48; E. Achtsioglou, 'Greece 2010–2012: Labour in the Maelstrom of Deregulation', 19 *Transfer: European Review of Labour and Research* (2013) p. 125; E. Achtsioglou and M. Doherty, 'There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm', 20 *European Law Journal* (2014) p. 219; M. Yannakourou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges', in Kilpatrick and De Witte, *supra* n. 9, p. 19; Bakavou, *supra* n. 35; Kaidatzis, *supra* n. 35.

⁸⁷C. Papatheodorou, 'Poverty and Austerity in Crisis Greece: Reinforcing Neoliberalism and Shrinking the Social Protection System', in Dimoulas and Kouzis, *ibid.*, p. 45.

⁸⁸M. Matsaganis, 'Safety Nets in (the) Crisis: The Case of Greece in the 2010s', 54 *Social Policy & Administration* (2020) p. 587 at p. 593; V. Lalioti, 'The Curious Case of the Guaranteed Minimum Income (GMI): Highlighting Greek "Exceptionalism" in a Southern European Context', 26 *Journal of European Social Policy* (2016) p. 80 at p. 85–87; K. Dimoulas, 'The Implementation of the Social Solidarity Income in Greece', 7 *Social Policy* (2017) p. 7 at p. 8–12 [in Greek].

⁸⁹*Ibid.*

⁹⁰M. Matsaganis, 'Poverty and the Social Safety Net', in K. Featherstone and D.A. Sotiropoulos (eds.), *The Oxford Handbook of Modern Greek Politics* (Oxford University Press 2020) p. 521 at p. 529.

The Fund's idea behind a minimum income scheme was to make the welfare system more cost-efficient through the replacement of other wider schemes with a single means-tested minimum income benefit.⁹¹ Generally promoted in an EU context,⁹² the minimum income scheme became part of financial assistance conditionality with a view to creating a 'social safety net' to protect against the worst effects of the internal devaluation that occurred with the application of financial assistance conditionality.⁹³ Initially it was a vague recommendation⁹⁴ and it later became a condition of the last bailout agreement, with all the technicalities and the time-frame of its implementation laid down in detail.⁹⁵

In line with Memoranda of Understanding conditionality, a minimum guaranteed income scheme was first set in motion in 2014, in the form of a pilot programme, followed by a successor scheme, the 'social solidarity income', whose national roll-out as a means-tested benefit began in 2017. To some, this was an anti-austerity measure⁹⁶ or a long-awaited reform towards the modernisation of the Greek welfare state.⁹⁷ However, the introduction of the minimum income scheme also raised serious criticism in social policy literature.

Criticism revolves mostly around two aspects of the reform. The first point of criticism refers to the neoliberal nature of the measure and, because of that, to the shift of the Greek welfare state towards a neoliberal model. Commentators point

⁹¹M. Matsaganis, 'The Contorted Politics of Guaranteed Minimum Income in Greece', 2 *DAStU Working Papers* 2018 at p. 3.

⁹²E. Marlier and H. Frazer, 'Minimum Income Schemes in Europe: A Study of National Policies 2015', European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2016), <https://data.europa.eu/doi/10.2767/860513>, visited 17 June 2024; R. Peña-Casas et al., 'Towards a European Minimum Income: Contribution Workers' Group: Final Report' (European Economic and Social Committee 2015), <https://data.europa.eu/doi/10.2864/35488>, visited 17 June 2024.

⁹³S. Papanastasiou and C. Papatheodorou, "Liberalising" Social Protection Amid Austerity in Greece', in S. Blum et al. (eds.), *Routledge Handbook of European Welfare Systems* (Routledge 2019) p. 220 at p. 222.

⁹⁴European Commission, Directorate-General for Economic and Financial Affairs, *The Second Economic Adjustment Programme for Greece: Second Review – May 2013* (Publications Office 2013), <https://data.europa.eu/doi/10.2765/49914>, visited 17 June 2024.

⁹⁵Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece of 19 August 2015, cl. 2.5.3 titled 'Social safety nets', https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-greece_en, visited 17 June 2024. See also European Commission, Commission Staff Working Document (2015), 'Assessment of the Social Impact of the New Stability Support Programme for Greece', <https://data.consilium.europa.eu/doc/document/ST-11502-2015-INIT/en/pdf>, visited 17 June 2024.

⁹⁶Kaidatzis, *supra* n. 35.

⁹⁷Matsaganis, *supra* n. 90, at p. 532.

to the association of this form of social policy with neoliberal economic thinking.⁹⁸ In addition, they suggest that minimum income schemes are usually combined with the weakening of other types and forms of social provision.⁹⁹ If such means-tested targeted policies are advanced instead of universal social policies, households still have to resort to the market for services and goods, a situation that compresses their income.¹⁰⁰ To its critics, the introduction of the minimum income scheme in a moment where the discourse around this reform was that it sought to address *extreme* poverty, signifies a shift for the Greek welfare state, moving from social welfare to the mitigation of extreme deprivation through means-tested benefits.¹⁰¹ This has been viewed as a form of liberalisation of the welfare state or entrenchment of neoliberal social policies.¹⁰² This is only reinforced by the purpose of the reform, which was to consolidate welfare spending.¹⁰³ At the same time, commentators point out that the launch of the minimum guaranteed income scheme did not lead to stronger efforts in the field of social protection – quite the opposite. Social assistance policies were weakened, and the overall social spending dropped.¹⁰⁴

The second set of arguments against the minimum income reform in Greece refers to its effectiveness. Empirical research has shown that in the first pilot phase of the scheme, the design of income requirements and deficiencies in administration led to the exclusion of many vulnerable groups, such as some categories of unemployed persons, precarious workers, migrants, homeless people, and persons with disabilities.¹⁰⁵ As for the national implementation of the programme, it has been proved that it offers very low coverage, both in terms of beneficiaries and the value of the benefit.¹⁰⁶ This low coverage, combined with the shrinking of social spending and wages and deregulation of labour, makes it impossible to fulfil its function as a social safety net.¹⁰⁷

Beyond these critiques, which I find well-placed, I think it is also relevant to consider the minimum income policy's function in the internal architecture of financial assistance conditionality. The critique should not only be focused on the

⁹⁸Papatheodorou, *supra* n. 87.

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹Ibid.

¹⁰²K. Dimoulas, 'Crisis and Social Solidarity Income', in Dimoulas and Kouzis, *supra* n. 86, p. 173 at p. 183.

¹⁰³Papatheodorou, *supra* n. 87.

¹⁰⁴Papanastasiou and Papatheodorou, *supra* n. 93, at p. 222.

¹⁰⁵Dimoulas, *supra* n. 102, at p. 184-190.

¹⁰⁶Dimoulas, *ibid.*; A. Feronas, 'Social Assistance in Greece During the Crisis', in Dimoulas and Kouzis, *supra* n. 86, p. 193 at p. 204-207.

¹⁰⁷Dimoulas, *ibid.*; Feronas, *ibid.*

fact that it is just a sticking plaster on very deep wounds, but also to its interaction with other financial assistance conditionality measures. For example, in the same document that lenders gave instructions for the rollout of the minimum income scheme,¹⁰⁸ they also gave instructions for the liberalisation of the protective framework of overindebted households, which included the exemption of homes from auctioning.¹⁰⁹ The Troika demanded that this protection be restricted, and that home auctioning be liberalised.¹¹⁰ At the same time, it demanded that debtors affected by this condition be prioritised as beneficiaries of the minimum income benefit.¹¹¹ That is, financial assistance conditionality included a policy that could deprive people of their homes and to mitigate the extreme results of its own measure it advanced the minimum income scheme. Therefore, any narrative about the creation of a 'social safety net' in this context fails to convince.

THE EMERGENCE AND EVOLUTION OF THE DECENT STANDARD OF LIVING IN THE CRISIS JURISPRUDENCE

There are many social and labour rights-related cases challenging austerity measures that reached apex courts and have a constitutional aspect. Trade unions and individuals, through different procedural avenues (applications of annulment, appellate review, test cases), turned to courts claiming the unconstitutionality of austerity measures, thus leading to the emergence of a distinct body of case law. The Greek 'crisis constitutional case law' of apex courts that involves labour and social rights issues consists of dozens of cases. The themes that typically occupied constitutional review included social security, adjudicating both on cuts in social security benefits and on changes in social security schemes;¹¹² civil service, referring to the reduction of public sector employment or cuts in remuneration and benefits, including for those on special wage arrangements such as members of armed forces, judges, medical doctors of the national healthcare system, academics;¹¹³ labour rights.¹¹⁴ Other cases concerned the privatisation of water

¹⁰⁸Supplemental Memorandum of Understanding of 16 June 2016, p. 1-2, https://economy-finance.ec.europa.eu/system/files/2017-11/ecfin_smou_en1.pdf, visited 17 June 2024.

¹⁰⁹Memorandum of Understanding of 2015, *supra* n. 95, at p. 18; Supplemental Memorandum of Understanding of June 2016, *ibid.* at p. 21 and 38.

¹¹⁰*Ibid.*

¹¹¹Supplemental Memorandum of Understanding, *supra* n. 108, at p. 1-2.

¹¹²E.g. Council of State, 668/12, 1283/2012, 1031/2015, 2287/2015, 2288/2015, 734/2016, 1880/2019, 1888-1890/2019.

¹¹³E.g. Supreme Civil and Criminal Court, 1459/2018, 663/2019, Council of State, 3354/2013, 3177/2014, 1125/2016, 431/2018 and 479 – 481/2018, 1307 – 1316/2019, Court of Audit, 244/2017, 32/2018, 930/2019, Special Court of Art. 88 of the Constitution, 88/2013 and 1/2018.

¹¹⁴Council of State, 2307/2014, 18/2019, 510/2019, 511/2019.

and sanitation services¹¹⁵ and the collection of the emergency property tax through electricity bills.¹¹⁶

In terms of direction, the constitutional crisis case law produced by apex courts does not flow just one way. The first phase of the crisis case law was mainly permissive to austerity. After 2015, unconstitutionality findings appeared with more frequency. But these findings did not signal a new stance of apex courts towards austerity overall. For a finding of unconstitutionality, a new decision would find other measures constitutional. Regardless of outcomes, courts did not challenge or question the necessity of austerity measures and structural reforms adopted in the application of economic adjustment programmes. On occasion, however, they did more rigorously review the details of more extreme elements of austerity as time progressed.

In this crisis jurisprudence of apex courts, the decent standard of living was developed as a concept with different contents and functions. In the first case dealing with the constitutionality of the first Memorandum of Understanding, there was a first reference to human dignity in an *obiter dictum*. The constitutional principle of human dignity, along with other principles, was seen as a limit to the legislative power in times of crisis to introduce economic burdens for wide sections of the population.¹¹⁷ But it was not until 2015 that the decent standard of living, alternatively the ‘dignified existence’, started emerging as a more concrete concept in constitutional review.

The decent standard of living first appeared in the case law of the Council of State in a 2015 key judgment concerning the constitutionality of further pension cuts that were implemented following the second Memorandum of Understanding in 2012. The court stated that by the time pension cuts were applied, the Greek government’s ‘surprise’ at the start of the crisis had passed.¹¹⁸ As a result, furthering restrictions to social security benefits should have resulted from careful assessment and examination. In this context, the legislator should have conducted studies assessing the compatibility of the cuts with the Constitution (protection of social security, principles of equality and proportionality, protection of human dignity) and exploring alternatives. In addition, according to the court, it should have examined whether the impact of the measure on pensioners’ standard of living, in combination with other measures adopted in the context of the crisis and the general socio-economic situation, violated the core of the right to social security.¹¹⁹ Under the influence of

¹¹⁵Council of State (Plenum), 1906/2014, 190-191/2022.

¹¹⁶Council of State (Plenum), 1972/2012.

¹¹⁷Council of State (Plenum), 668/2012, para. 37.

¹¹⁸Council of State (Plenum), 2287/2015, para. 24, decision 2288/2015, para. 23.

¹¹⁹Ibid.

the Federal German Constitutional Court,¹²⁰ the Council of State determined the core of the right to social security as comprising of such benefits as allow pensioners to live a life with dignity and secure their physical condition (nutrition, clothing, housing, basic household goods, heating, hygiene and medical care) along with their participation in social life in a way that does not substantially deviate from the corresponding conditions of their working life.¹²¹ This interpretation of the right to social security has been reiterated since in cases concerning the constitutionality of further reforms in the social security system that affected the amounts of the relevant benefits.¹²²

Dignified existence was also used in a series of more recent cases dealing with employees' income-related claims, but with a different approach. The Council of State and the Supreme Civil and Criminal Court reviewed the constitutionality of cuts in holiday benefits for public sector employees.¹²³ Substantially deviating from the previous elaboration of the 'dignified existence', they held that the decent standard of living is not determined by the previous income of the persons affected. Instead, they held, it is determined by reference to the 'general prevailing conditions' and the standard of living of the general population.¹²⁴ The courts found that public sector employees' wage levels after the cuts could guarantee a decent standard of living, because they were beyond the poverty threshold and higher when compared to the minimum wage in the private sector.¹²⁵ The courts did not construct the decent standard of living as a minimum core to another right, nor as component of the constitutional protection of human dignity, and they did not reiterate the elements that had previously, in 2015, been seen as part of the 'dignified existence'. In fact, there is nothing to show that apex courts' judges made sure that these elements were effectively met. Instead, they referred to the case law of the European Court of Human Rights, according to which the right to property does not guarantee benefits of a specific amount, and as a result the legislature has the power to

¹²⁰BVerfG 09 February 2010, 1 BvL 1/09.

¹²¹Council of State (Plenum), decision 2287/2015, para. 7: 'In any case, the cuts in pensions cannot violate what is, as above, the constitutional core of the right to social security, namely the granting to the pensioner of such benefits that allows them to live with dignity, securing not only their physical condition (nutrition, clothing, housing, basic household goods, heating, hygiene and medical care at all levels), but also their participation in social life in a way which does not, however, substantially deviate from corresponding conditions of working life.'

¹²²E.g. Council of State (Plenum), 1307/2019, para. 20, Supreme Civil and Criminal Court, 77/2022.

¹²³Ibid.

¹²⁴Ibid.

¹²⁵Ibid.

limit such benefits.¹²⁶ The decent standard of living was considered a limit to this power of the legislator.¹²⁷

Content aside, the decent standard of living as a concept in the crisis jurisprudence had a defensive, rather than a positive function. It did not raise a positive, direct, and enforceable right to a social minimum. It was rather perceived either as a minimum core of the right to social security,¹²⁸ or a limit to rights limitations, in particular to the right to property.¹²⁹ In social security litigation, the concept was also used to target the procedural fairness of the process through which the decisions to cut benefits were taken.¹³⁰ It, therefore, functioned as a threshold, which for procedural or substantive reasons precludes the state from reducing benefits, should such reduction lead to a situation where the recipient does not enjoy a level of dignified existence, or, in other cases, falls below the poverty threshold.

On the evolution of its content, the concept of ‘dignified existence’ was quite elaborate in 2015, and one could even argue that the bar was set high. In its initial appearance, the decent standard of living covered all subsistence needs and participation in social life.¹³¹ In income-related cases, however, the concept appears much thinner and lacking any elaboration. The ‘dignified existence’ was conflated with living conditions that, viewed with an oversimplifying numerical approach, indicate that someone is not under the poverty threshold.¹³² The use of the private sector’s minimum wage levels as a comparator and indicator of a dignified existence is particularly problematic, considering that these wage levels had been found to violate human rights’ standards.¹³³ In addition to the methodological shortcomings in the use of the concept by apex court judges, turning the decent standard of living into a one-size-fits-all interpretative tool also has broader implications for the social constitution. The normativity of many rights that assume different purposes and functions was reduced only to the protection of dignified existence, a poverty-orientated concept that became thinner with reference only to extreme poverty. With these varying contents, the concept of the decent standard of living was applied across the board, disregarding the solidaristic or redistributive potential of labour and social rights.

¹²⁶Council of State, 1307/2019, para. 17, Supreme Civil and Criminal Court, 77/2022.

¹²⁷Ibid.

¹²⁸Council of State (Plenum), 2287/2015, para. 7.

¹²⁹Council of State (Plenum), 1307/2019, para. 17, Supreme Civil and Criminal Court, 77/2022.

¹³⁰Council of State (Plenum), 2287/2015, para. 7.

¹³¹Ibid.

¹³²Council of State (Plenum), 1307/2019, para. 20, Supreme Civil and Criminal Court, 77/2022.

¹³³See European Committee of Social Rights, Conclusions XX-3 – Greece – Art. 4(1) (2014).

CONSTITUTIONALISING THE DECENT STANDARD OF LIVING AS A BARE MINIMUM

Competing visions or why formulation matters

At a first glance, the constitutionalisation of the decent standard of living in Greece might to some appear to be in a protective or even progressive direction for social rights' protection under the Constitution. However, its normativity appears more ambivalent if we consider, first, its formulation, and, second, how this formulation mirrors the euro crisis context in which the amendment emerged. Looking at the formulation of the constitutional provisions of social rights is important, because different formulations convey different visions on the purpose and function of social rights, ranging from neoliberal retrenchment to progressive or redistributive prescriptions. Different formulations also lead to varying obligations for states.

The battle over different, and to some extent competing, formulations of the right to a decent standard of living in Greece is telling on this point. Some form of protection of the decent standard of living was proposed by both SYRIZA and New Democracy. Draft amendments suggest competing views of how a decent standard of living is supposed to materialise and what it requires in terms of state efforts. SYRIZA proposed the introduction of an article providing for the state guarantee to a decent standard of living for all, through universal social services and income transfers.¹³⁴ The content of the 'decent standard of living' would be determined through 'scientific methods' – not specified in the proposal – and based on current social conditions, while state authorities' obligation to employ scientific means for the determination of the decent standard of living would be cognisable by courts.¹³⁵ The New Democracy party initially proposed a provision that would put under the states' care safeguarding a decent standard of living for its *citizens* through a minimum guaranteed income policy.¹³⁶ This is mirrored in the final formulation that made its way through the amendment process, stating that decent living conditions of *citizens* should be insured through a *minimum guaranteed income* system.¹³⁷

The new constitutional provision is restrictive in its scope and minimalistic in the state obligations to which it gives rise. Beginning from the personal scope, the term 'citizen' that was advanced, instead of 'for all', is restrictive and exclusionary, bearing in mind that there are serious hurdles in place that make the acquisition of

¹³⁴SYRIZA proposals, *supra* n. 7.

¹³⁵*Ibid.*

¹³⁶New Democracy proposals, *supra* n. 7.

¹³⁷*Supra* n. 8.

the Greek citizenship extremely difficult for migrants.¹³⁸ While at a legislative level migrants are not excluded from the minimum income benefit, to the extent that the constitutional text also mirrors ‘what is worth protecting’ in terms of social values, the formulation of the provision is not inclusive. In terms of the content of the new provision, the formulation that was advanced conflates dignified existence with the level of a minimum income benefit, while it limits state obligations to a minimum guaranteed income scheme as the designated channel of state support. But as noted above, the minimum income benefit offers very low coverage, and by design – as a minimum income policy – does not address the reasons of poverty, but only tries to mitigate its very extreme outcomes.

Constitutionalising the state’s obligation to secure a dignified level of subsistence exclusively through minimum income policies further embeds the outcomes of the euro crisis. First, the amendment mirrors the focus on minimum protection that was developed in the crisis jurisprudence of apex courts as a way to respond to challenges for social and labour rights induced by the implementation of financial assistance conditionality. Second, the materialisation of this minimum protection through minimum income schemes mirrors the neoliberal shift in Greek welfare state policies produced by the social policy conditionality of the bailout agreements. This constitutional amendment is a legacy of the euro crisis on the social constitution. Apart from shaping the laws through which the social constitution is applied (or disapplied) or the way it is read in court, the euro crisis now has a register in the text of the social constitution with long-lasting potential. The changed constitutional text, that lives and operates beyond a period of stringent conditionality, frames with a sense of permanency state action in the field of social rights.

‘Best game in town?’

Depending on how judges respond to it, the constitutional provision on the decent standard of living may offer avenues of accountability for state omissions and a tool to address failures in the minimum income scheme on an individual level through judicial claims. Another important practical aspect of the constitutionalisation of the decent standard of living through a minimum income scheme is that the already existing social assistance benefit will be hard to repeal or abolish by ordinary law, without risking potentially being overturned by the courts. However, beyond this practical contribution, the constitutional

¹³⁸X. Contiades and I. Tassopoulos, ‘Constitutional Change in Greece’, in X. Contiades (ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) p. 151 at p. 169-170.

amendment is not without significance for the overall social ambition of the social strand of the Constitution. If we think of constitutional social rights, not only under their practical aspect expressed in the possibility of judicial claims, but also under their redistributive and transformative potential, that is as expressions of solidarity or aspects of social citizenship and social justice, the constitutionalisation of a very minimalist approach to state obligations is not to be received without concern.¹³⁹

A shift towards minimalism might prove degrading to the overall potential of social rights already entrenched into the constitutional text. The experience of the euro crisis jurisprudence suggests that the normative and practical power of minimum thresholds should not be underestimated. Considering that such thresholds were used extensively by the judiciary even before their formal constitutionalisation, there is a risk that judges will now find a constant safe refuge in them. First, because they respond to the alleged indeterminacy of socio-economic rights – and the Greek list of social rights is no exception to vagueness. Second, because they also respond to potential accusations of judicial activism, especially in cases questioning fiscal and economic decisions. There is, therefore, the risk that the decent standard of living will serve as a *passpartout* provision, a lens through which every fundamental social right is viewed and understood in courtrooms. At the same time, the provision not only sets out the end (i.e. a decent standard of living), but also the means (minimum guaranteed income system) and therefore precludes from its prescriptions other more proactive and comprehensive social protection policies – i.e. policies that target the causes of poverty, and do not just try to modestly mitigate its extreme results. The identification of the concept with the means might lead to minimal efforts in the political branch, especially considering the already existing lack of political commitment to social rights.

The constitutional amendment on the decent standard of living followed a decade during which the social constitution was seriously challenged and displaced as a result of the euro crisis. Topped by this most recent reform and its neoliberal underpinnings one cannot help but worry that the set of constitutional social rights norms will turn into a system that has abandoned any promise of high

¹³⁹E. Christodoulidis, 'Social Rights Constitutionalism: An Antagonistic Endorsement', 44 *Journal of Law and Society* (2017) p. 123; F. Atria and C. Salgado, 'Social Rights', in E. Christodoulidis et al. (eds.), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) p. 363; F. Atria, 'Social Rights, Social Contract, Socialism', 24 *Social & Legal Studies* (2015) p. 598. See also Young's critique of the 'minimum core approaches' with a potential wider application to minimalist approaches, in K. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', 33 *Yale Journal of International Law* (2008) p. 113 at p. 113-114. Similarly, see J. King, 'The Future of Social Rights: Social Rights as Capstone', in K. Young (ed.), *The Future of Economic and Social Rights* (Cambridge University Press 2019) p. 289 at p. 314.

protection of labour, healthcare, and social security, and its only aspiration is to mitigate extreme poverty. Then, there is the risk – to put it in Atria and Salgado's words – that social rights as minimums will be the best game in town and the alternative will be nothing at all.¹⁴⁰

CONCLUSIONS

The constitutionalisation of the decent standard of living in Greece enhances our current understanding of the interaction between the euro crisis and constitutional change. First, it shows that the euro crisis has shaped constitutional change by amendment beyond constitutional balanced budget rules. The 2019 Greek constitutional amendment on the decent standard of living tells us that the euro crisis shaped formal constitutional change for the social constitution as well. Second, it shows that the outcomes of the euro crisis for fundamental labour and social rights are not exhausted in rights' adjudication. A look at constitutional change as an important constitutional site for the evolution of fundamental social rights revealed that the outcomes of the euro crisis for fundamental social rights can also be seen in projects that amend their textual foundations.

That the euro crisis shaped the 2019 constitutional amendment on the decent standard of living is mirrored both in the amendment itself and its content. The social minimum as a concept developed during the crisis both in the juridical sphere (decent standard of living) and in welfare state policies (minimum guaranteed income scheme, social solidarity income). It was transferred into constitutional narratives and, most importantly, into the visions of social rights constitutionalism that they reflect. As is shown above, the crisis jurisprudence developed as a response to judicial challenges to austerity measures brought attention to minimum protection. In this context, the decent standard of living emerged as a concept for addressing social rights and income-related judicial challenges to austerity. The minimum income scheme was introduced in the Greek welfare state as part of financial assistance conditionality. In turn, the constitutional amendment mirrors and brings together these developments, incorporating them into a new provision and awarding them a constitutional status and a long-lasting potential. The crisis drove the decent standard of living to enter constitutional interpretation and narratives, and the minimum income policy to develop from a discussion that was essentially very marginal to the main technique via which social assistance could materialise. The constitutional protection of the decent standard of living under a very minimalist understanding of it is a legacy of the euro crisis. The 2019 constitutional amendment will stay

¹⁴⁰Atria and Salgado, *ibid.*, at p. 375.

and, through it, the euro crisis will continue to shape social rights' protection for the future. Whether the new provision will escape its crisis origins and restrictive scope through interpretation, only time will tell.

Acknowledgements. I would like to thank Claire Kilpatrick and Ioannis Katsaroumpas. I am also grateful to the Editors for their helpful comments and suggestions.

Dr Maria Kotsoni is a Researcher at the Law Department of the European University Institute.

