

The Political Economy of Austerity and Human Rights Law

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A Point of Departure

The 'Great recession' that has been ongoing since 2008 has had a serious impact on the realization of economic and social rights in many countries. This impact cannot solely be attributed to general turmoil, but has been the result of political decisions of states. Measures such as cut-downs in public expenditure have had negative impacts on the lives of vast amounts of people, and while unemployment, cut-downs in benefits and social security, and privatization affect all social groups, the effects are particularly tangible for the poor and vulnerable. By now this detrimental impact is well documented. Both the United Nations High Commissioner for Human Rights and the Council of Europe Commissioner for Human Rights have identified how austerity measures undermine a wide range of human rights.¹

However, while the effect of austerity measures on the rights of individuals is beyond doubt, what is equally striking is the cautiousness in phrasing this impact as a breach of human rights law. Even if the impression is that a body of case law is emerging that engages with the effects of austerity measures, many of these cases emanate from domestic courts or from the European Committee on Social Rights. Neither of these weigh particularly strong as a source for developing common thresholds to retrogressive measures.² The European Court of Human Rights (ECtHR) has declared many of the complaints addressing state budgetary measures as violations of the right to property (Article 1, Protocol No. 1 to the European Convention on Human Rights (ECHR)), as inadmissible. Further, while international institutions, non-governmental

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¹ Report of the United Nations High Commissioner for Human Rights, "The impact of austerity measures on economic, social and cultural rights", E/2013/82, 7 May 2013, Council of Europe, Commissioner for Human Rights, "Safeguarding human rights in times of economic crisis", Issue Paper (2013)2, 4 December 2013.

² See, e.g., Colm O'Cinneide, "Austerity and the faded dream of a 'social Europe'", in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, 2014, 169-201, at 194. On domestic cases, see Aoife Nolan, Nicholas J. Lusiani and Christian Curtis, "Two steps forward, 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, 121-145, at 143-144.

organizations, and academics have piled up information demonstrating the horrifying social effects of retrogressive financial policies, it is a long step from showing for example that austerity measures increase mental health problems, substance abuse and suicide, to pinpoint where exactly in this chain of events any human rights obligations are implicated.³

One of the reasons for why the moment of a breach is so difficult to pinpoint undoubtedly follows from the nature of economic, social and cultural rights (ESC rights), which are to be achieved progressively, with immediate obligations imposed on states solely to ensure non-discrimination and minimum core obligations. States have a direct and immediate duty only “to ensure the satisfaction of, at the very least, minimum essential levels” of economic and social rights, whatever their level of economic development or resource base.⁴ An acceptance of retrogressive measures is built into economic and social rights. Realization over time is characterized 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”.⁵ In fact, it has been demonstrated that not only do austerity measures have an impact on rights, but that an absolute prohibition of retrogression would do so as well.⁶ Instead states have the discretion to adopt policy measures according to their specific economic, social and political circumstances. When economic resources become scarce, retrogressive measures become an expression of the flexibility inherent in the idea of progressive achievement.⁷

As soon as the balancing between limited (and occasionally reduced) economic resources and the discretion granted to states for the realization of ESC rights results in an adverse impact on the lives of individuals, the attention (of at least human rights lawyers) is turned to the state of the ESC rights protection scheme. The

³ World Health Organization, “Impact of economic crises on mental health”, WHO 2011.

⁴ International Convention on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3 (ICESCR), article 2(1), and Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 (The Nature of States Parties' Obligations), para. 10. As to the European Social Charter the idea of progressive realization is included e.g. in article 12 (right to social security) and has been accepted by the European Committee of Social Rights in its case-law (*Autism-Europe v. France*, Complaint No. 12/2002).

⁵ CESCR, General Comment No. 3 (The Nature of States Parties' Obligations), para. 9. Nolan, Lusiani and Curtis 2014, at 123.

⁶ See Nolan, Lusiani, and Curtis 2014, at 130.

⁷ CESCR, General Comment No. 9 (The Domestic Application of the Covenant), para. 1. Also see General Comment No. 15 (Right to Water), para 45.

'underdeveloped' and 'inadequate' nature of this scheme is deplored; 'gaps' need to be closed; the legal system needs to 'mature'; actors in the international legal system need to 'catch up'. Such calls are well in line with the aims of modern international law to civilize international politics through the infusion of normative regularity and rational dispute resolution.⁸ A 'turn to law' (in this case international human rights law) is called for in order to define the level of social protection that individuals are entitled to.⁹

The question is whether technical refinement of the legal framework (proposals ranging from developing the instruments to advocating interpretative boldness) can do the trick? The economic crisis has re-invoked practically all classical ESC rights debates. Yet it seems unclear whether the fact that the foundational debates re-emerge is an indication of an immaturity of the legal regime, or a reminder of ideological/political diversity. This paper approaches the austerity/human rights debate from the latter perspective. The suggestion is that calls for developing the normative system may be overly optimistic, failing to grasp the depth of the contradictions involved. As these contradictions go to the very heart of the question about the role of law in political and economic organization, they can help explain why a further development of the ESC rights protection scheme in face of austerity measures may be an insurmountable task.

An Assumption

Among the many flaws identified in how the human rights framework (fails to) address austerity measures, one of the most fundamental challenges seems to be the pinpointing of a violator and the assertion of responsibility. While it is clear that states bear primary responsibility for protecting the rights of individuals within their jurisdiction, the core question is whether, for example, conditionality can extend (or even move) that responsibility to international institutions (most notably the International Monetary Fund (IMF) or the European Union).¹⁰ In extension, the

⁸ David Kennedy, "Law and the Political Economy of the World ", in 26 *Leiden Journal of International Law* (2013), 7–48, at 31.

⁹ O' Cinneide 2014, at 189.

¹⁰ The tension being central to Social Rights Committee, *IKA-ETAM v Greece*, where Greece claimed that the measures taken were a "result from the Government's other international obligations", European Committee of Social Rights, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012, 7 December 2012, para. 10.

question arises whether international organizations could have human rights obligations, and how the responsibility of financial organizations could be established.

Article 1 of Protocol No. 1 to the ECHR provides that:

[E]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions *except in the public interest* and subject to the conditions provided for by law and by the general principles of international law.

In interpreting the notion of public interest, the ECtHR has stated that it will defer judgment to the domestic legislature (unless that judgment is manifestly without reasonable foundation).¹¹ As to whether a fair balance has been struck “between the demands of the general interest of the community and the requirements of the protection of the fundamental rights”, the Court has concluded that cuts are proportional as long as there is no “risk of having insufficient means to live on”.¹² The European Committee of Social Rights on its part has held that “any decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights”.¹³ The ECtHR has confirmed that the improvement of future economic and financial prospects through balancing the state budget, or rationalizing public expenditure does qualify as an aim in the public interest.¹⁴ As a question of public goods, then, financial stability stands out as a good *on par* with rights of individuals.¹⁵ Further, financial stability can easily be reformulated into rights of the general public (or future generations).

It is part of the mandate of international institutions such as the World Trade Organization, the World Bank and the IMF that they pursue goals of global justice.¹⁶ It

¹¹ Jahn and others v. Germany, 30 June 2005, 46720/99, 72203/01, and 72552/01, para. 91.

¹² ECtHR, Koufaki and Adedy v Greece, 7 May 2013, 57665/12 and 57657/12, paras 39, 42 and 46.

¹³ European Committee of Social Rights, Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012, 7 December 2012, para. 82.

¹⁴ ECtHR, Koufaki and Adedy v Greece, 7 May 2013, 57665/12 and 57657/12, para. 38, and Da Conceicao Mateis and Santos Januario v. Portugal, 62235/12 and 57725/12, 08 October 2013, para. 25.

¹⁵ Birgit Lindsnaes, “The Global and the regional outlook: How can global public goods be advanced from a human rights perspective”, in Erik André Andersen and Birgit Lindsnaes (eds), *Towards New Global Strategies. Public Goods and Human Rights*, 71-112, at 75-76. United Nations Industrial Development Organization, *Public Goods for Economic Development*, UNIDO 2008. Inge Kaul, Isabelle Grunberg, Marc A. Stern (eds), *Global Public Goods. International Cooperation in the 21st Century*, UNDP/Oxford University Press 1999.

¹⁶ Frank J. Garcia and Lindita Ciko, “Theories of Justice and International Economic Law”, in John Linarelli (ed.), *Research Handbook on Global Justice and International Economic Law*, Edvard Elgar 2013.

would not seem sensible to assume that international financial institutions when granting loans to states in economic hardship, would do so with the intention of forcing a state to violate rights (even if they can predict an impact, for example, on the level of social welfare). Instead, while cuts in economic spending can have an impact on the rights of individuals, austerity measures are seen as a way of attending to the greater threat of macroeconomic instability and the preservation of the state. In this way, as one author puts it: “all of the IMF's activities contribute directly or indirectly to reducing poverty and fostering human rights”.¹⁷

The IMF explicitly recognizes the impact of its policies on ESC rights.¹⁸ It is only fair to assume that financial institutions may sometimes also have failed to fully appreciate this impact.¹⁹ Yet, it seems equally fair to assume that such an impact is not always the result of lack of knowledge or ignorance. Rather, from the point of view of the institution (and its members) any impact on ESC rights is seen to be within the discretion attached to progressive fulfilment. Similarly, when we revert back to states as the primary duty bearers under human rights law, it seems unintelligible to think that states, when adopting (regressive) economic policies, would think of those policies as inevitable breaches of human rights law. The more important point is that the state can always defend an impact of a measure on ESC rights by referring to other values and preferences which the measure in question seeks to safeguard.

The choice, in other words, is not ‘austerity measures versus human rights’. Instead any claim of a violation of rights becomes a matter of preferring whose rights should be prioritized. The policy choices made are perceived as a way of minimizing the inevitable impact on social conditions.²⁰ But to recognize that any finding of a violation of rights requires balancing towards other rights, and that this exercise also underlies the discussion on retrogressive measures is not the end of the matter. As an order of

¹⁷ Sérgio Pereira Leite, “Human Rights and the IMF”, 38 *Finance & Development* 2001. The article goes on to claim that “inappropriate economic policies”, meaning “unsustainable public deficits, high inflation, unrealistic exchange rates, wasteful subsidies, and obstacles to trade” are contrary to human rights.

¹⁸ See, e.g., Laurence Ball, Daniel Leigh, and Prakash Loungani, “Painfull Medicine”, 48 *Finance & Development* 2011.

¹⁹ See Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors, Fostering Human Rights among European Policies (FRAME), Work Package No. 7 – Deliverable No. 2 (31 March 2015), part IV, <http://www.fp7-frame.eu/>.

²⁰ See, e.g., Mary Dowell-Jones, “The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity”, in Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, social and cultural rights in international law: contemporary issues and challenges*, Oxford University Press 2014, 51-85, at 64.

preference between competing values cannot be struck by looking at human rights alone, interest must be turned elsewhere. In this turn, rights become expressions of particular economic theories.

A Contradiction

Austerity measures and retrogressive policies are no new phenomenon. Cuts in social benefits, increase in prices of government goods and services, and weakening of legislative protection have been recurring features of the political-economic landscape. The CESCR notes that:

... [A]ny deliberately retrogressive measures ... would require the most careful consideration and would need to be 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.²¹

In order to assess the compatibility of state retrogressive action, a number of parameters have been identified. The CESCR has noted that retrogressive measures should be temporary and limited, necessary and proportionate, reasonable, non-discriminatory, take the most vulnerable into account, identify and respect the minimum core content, and ensure participation of affected groups.²² The key notions 'careful consideration', 'maximum available resources', 'consideration/exhaustion of alternatives', 'necessity', 'proportionality', 'minimum core', 'non-discrimination', and 'vulnerability' are all open to interpretation.²³ Assessing retrogression will raise questions of allocation of resources and the role of government with regard to the economy, invoking competing schools of economic thought on the role of the public sector, and with that, more specific questions such as the balancing of protection and flexibility in the labor market.²⁴ But as there is no agreement for example on how to prioritize spending, size and tasks of government, and the efforts needed to end a recession, all of the key notions are uneasy to implement in situations of economic

²¹ CESCR, General Comment No. 3 (The Nature of States Parties' Obligations), para. 9.

²² CESCR, General Comment No. 19 (The Right to Social Security), para. 42. Also see Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16 May 2012.

²³ As to the "minimum core", often thought to be most concrete out of these, see, e.g., Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content", 33 *Yale Journal of International Law* 2008, 113-175.

²⁴ Diane A. Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment*, Oxford University Press 2015, at 304-305, and note 191. Nolan, Lusiani, and Courtis 2014, at 128-129.

crisis. This, of course, is a characteristic feature of the very rights at stake, but also a reason why findings of violations of ESC rights have been scarce.²⁵

The progressive realization of ESC rights, as the ICESCR recognizes, cannot be done through legislative action alone, but requires ideological decisions concerning socio-economic spending and public finance.²⁶ As undertaking the obligations “neither requires nor precludes any particular form of government or economic system being used”, states are left with a margin of discretion in assessing which measures are most suitable to meet their specific circumstances. Furthermore “the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account”.²⁷ Whether it is in the name of security and the fight against terrorism or financial stability that retrogressive measures are undertaken, these formulations express the idea that the rights at stake only get their content in a constant redefinition about the political good.²⁸ The fact that retrogressive measures are taken as a reaction to external circumstances and threats (and for that reason can be more easily portrayed as a necessity) only makes the values in conflict seem more fundamental.

The choice of vocabulary through which to present one’s claim in the austerity debate is therefore also a way of preferring a particular frame through which to decide what is ‘within the margin’. Approaching austerity measures as a matter of preserving individual rights, financial stability or the general interest becomes a way of making a claim as to what kinds of concerns should be prioritized.²⁹ Rights thereby become policies for articulating social objectives.³⁰ This means that any identification of ‘more human rights friendly’ alternatives to austerity measures will also take a stand on socio-economic policies, and for that reason be controversial not only from a human

²⁵ Magdalena Sepúlveda Carmona, “Alternatives to austerity: a human rights framework for economic recovery”, in Nolan 2014, 23-56, at 24-30. Desierto 2015, at 288-289.

²⁶ Article 2(1) ICESCR.

²⁷ CECSR, General Comment No. 3 (The Nature of States Parties' Obligations), para. 8. CESCR, General Comment No. 15 (The Right to Water), para. 45. Also see General Comment No. 9 (The Domestic Application of the Covenant), para. 1.

²⁸ Martti Koskenniemi, “The Effect of Rights on Political Culture”, in Philip Alston (ed), *The European Union and Human Rights*, Oxford University Press 1999, 99-116.

²⁹ Cf. Koskenniemi 1999, at 106-107.

³⁰ Philip Alston, “Introduction”, in Philip Alston (ed.), *Human Rights Law*, Aldershot 1996.

rights perspective, but also (and perhaps foremost) as a matter of economic policy.³¹ Competing prioritizations of rights are hereby turned into competing visions of the economy.³² In fact, a claim can be made that there can never be any commitment to human rights that would not also be a commitment to a particular theory of economic development.³³ As any recourse to rights will also always implicate a preference of a particular economic policy objective, the search for priorities will inevitably engage the human rights lawyer in a discussion on economic efficiency. Unfortunately the question of prioritization will not find a solution in this turn to economics. For however well trained a judge/human rights lawyer may be in economic theory, there is no consensus on the nature of the desirable financial architecture at large, nor on the best solution (in whatever sense) to acute economic crises.³⁴

On the Role of Judicial Bodies

The picture outlined so far suggests two things: Firstly, portraying states or financial institutions as acting in breach of ESC rights is an uneasy task as it requires a choice between competing values. Secondly, the choice between those values cannot be made without promoting a particular economic theory. Any claim of a breach therefore seems to escape the realm of the rights-discourse altogether. This framing has some consequences, among others, for how to understand the controversies attached to the justiciability and responsibility debates.

Although the ICESCR recognizes that the legal/judicial system is only one path among many in the realization of ESC rights, from a legal point of view the realization of ESC rights is often addressed as an issue of justiciability. In the context of austerity measures the justiciability question concerns whether judges/courts should intervene in the manner in which the legislator decides to secure social welfare. The classical counter-majoritarian problem can even be said to be particularly acute when dealing with social rights, precisely because of the pronounced economic nature of those

³¹ See, e.g., Sepúlveda Carmona 2014 who admits, after presenting a number of ‘more human rights friendly’ reactions to the economic crisis, that those policies need neither be human rights compliant, nor successful from an economic perspective, at 42, note 110.

³² See Desierto 2015, in chapter 1 reflecting on the Hayekian/libertarian and Keynes/interventionist influences in the discourse on the relationship between human rights and international economic law.

³³ Martti Koskeniemi, “Human Rights Mainstreaming as a Strategy for Institutional Power”, *Humanity* 2010, 47-58, at 54.

³⁴ As to the more general point, see Joseph E. Stiglitz, “International financial institutions and the provision of international public goods”, *European Investment Bank, International financial institutions in the 21st century, Papers Volume 03*, no. 2/1998.

rights, unavoidably engaging the judiciary in questions of economic policymaking.³⁵ As the (re-)allocation of resources always works with a finite budget, no decisions can be made which would not have political consequences and an impact on the rights of others. Furthermore, every decision will have complex economic consequences.³⁶ Given the nature of the rights at stake, the lack of democratic accountability of the judiciary, and the poor capacity of judges to consider the (economic) effects of their decisions, judges should refrain from assessing austerity measures, the argument goes.

A discourse on the role of courts is of course in itself open-ended, perhaps best seen as a process by which the balance of power at any given moment is legitimized. The paradox of 'who decides' is inherent in constitutionalism, and the balance needs to be constantly scrutinized and re-struck. This in itself is the guarantee of limited constitutional power.³⁷ The counter-majoritarian discussion does highlight, however, that the role of the adjudicator is always defined in relation to the legislator. A distance from the policy-making process is the very defining feature of courts. Even if an assumption of the apolitical role of courts can be claimed to be false and counter-majoritarian fears to be unwarranted, courts will nevertheless be wary of their authority. Distancing itself from policy-making is a central element of that authority. The limited and specialized nature of judicial proceedings has been characterized as "an essential requirement of the rule of law, enabling us to maintain a genuine distinction between law and politics".³⁸ In this light, a reluctance to assume a more openly activist role (and more human rights promoting – whatever that means), could be viewed as an expression of self-preservation.

With this in mind, it is interesting to note how the ECtHR in *Koufaki and Adedy v Greece* defined its own role. The Court emphasized that:

³⁵ For this very reason the CESCR in drafting the Optional Protocol adopted the so-called reasonableness-test, Brian Griffey, "The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 11 Human Rights Law Review 2011, 275-327. This is not to deny that also the implementation of civil and political rights raises questions of resources, see, e.g., Frank I. Michelman, "The constitution, social rights, and liberal political justification", 1International Journal of Constitutional Law 2003, 13-34, at 16.

³⁶ See M. Pieterse, "Coming to terms with judicial enforcement of socio-economic rights", in 20 South African Journal of Human Rights 2004, 383-417.

³⁷ See, e.g., Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law", in 62 University of Chicago Law Review 1995, 689-794, at 781, and Neil Walker, "The EU and the WTO: Constitutionalism in a New Key", in Gráinne de Búrca and Joanne Scott (eds), The EU and the WTO: Legal and Constitutional Issues, Hart Publishing 2001, 31-57, at 54.

³⁸ Trevor Allan, Constitutional Justice: A Liberal Theory of the Rule of Law, Oxford University Press 2001, at 198. For a critique of this 'convention', see Duncan Kennedy, A Critique of Adjudication {*fin de siècle*}, Harvard University Press 1998, at 28.

... [T]he decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, and the margin of appreciation available to the legislature in implementing social and economic policies is a wide one. The Court will thus respect the legislature's judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation ... In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.³⁹

The Court further noted in respect of alternative solutions, that:

... [T]heir possible existence does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way.⁴⁰

This indicates that not only does the court defer the definition of public interest to the state, but further that it will not take a stand on whether more or less rights-promoting alternatives would exist in adopting retrogressive measures.⁴¹

The exposition of individuals or groups to poor conditions of living has in certain circumstances qualified as amounting to a violation of the right to life. Human rights treaty bodies have found violations of the right to life in particular where states imposed or created conditions that left individuals in a state of destitution (and uncertainty).⁴² In *M.S.S. v Belgium and Greece* concerning adverse conditions faced by an Afghan asylum-seeker who had been left to live homeless and in poverty in Greece, the ECtHR found that the resulting destitution amounted to degrading treatment in breach of Article 3 ECHR.⁴³ In this case, as in *Budina v Russia*, reliance on Article 3 was objected to by the respondent states exactly on the ground that the question at hand in practice ventured into welfare issues, and for that reason would be for the policy-making process to settle.⁴⁴ The *Budina v Russia* case, concerning an alleged

³⁹ ECtHR, *Koufaki and Adedy v Greece*, 7 May 2013, 57665/12 and 57657/12, para. 39.

⁴⁰ ECtHR, *Koufaki and Adedy v Greece*, 7 May 2013, 57665/12 and 57657/12, para. 48.

⁴¹ This is in line with its case-law. See *James and others v the UK*, 8793/79, 21 February 1986, *Markovics and others v. Hungary*, 77575/11, 19828/13, 19829/13, 24 June 2014, para. 39.

⁴² See Lutz Oette, "Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?", 15 *Human Rights Law Review* 2015, 669-694, at 682.

⁴³ ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, 30696/09.

⁴⁴ ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, 30696/09, para. 243.

insufficiency of old-age pension to maintain an adequate standard of living, also demonstrates the high threshold required for austerity measures to fall within the scope of Article 3. It does not seem enough that “the applicant’s situation was difficult”. Instead, the pension and social benefits would have to be “wholly insufficient”, so as to cause damage to the physical or mental health or human dignity of the applicant, in order to constitute a violation of Article 3.⁴⁵ This approach is echoed in *Koufaki and Adedy v Greece* whereby only “insufficient means to live on” would render austerity measures a violation of the peaceful enjoyment of possessions (Article 1, Protocol No. 1 to the ECHR). This high threshold can be seen to express a hesitance by the Court to venture into matters of budget allocation.⁴⁶ It is also for this very reason that the Court concludes that in matters of prioritizing resources, the margin of appreciation of states is even wider than usual.⁴⁷ Notably, the European Committee of Social Rights is far more intrusive in its review of state action, for example in *GENOP-DEI and ADEDY v. Greece* making an explicit assessment of the effects of state policies on the economic crisis and general welfare.⁴⁸

It should be noted that the ECHR is not primarily concerned with ESC rights. As to bodies monitoring ESC rights, an assessment of the effectiveness of the range of possible policy measures that states may undertake is a crucial part of the review of state compliance.⁴⁹ At the same time the impact of the decisions for example of the European Committee of Social Rights, suffer from their non-binding character. As a consequence it has been regretted that courts (at both the domestic and European levels) have not been keen to take a more active role in ESC matters. The political/economic nature of ESC rights can easily be proved to be no exception in comparison with other rights. A democratically justifiable role for the adjudication of ESC rights can easily be constructed. Mechanisms that enable judicial reasoning on complex questions of balancing are available. Yet, any reinterpretation of the role of courts needs to deal with more than just constitutional imagination.

While human rights as the “religion of (an agnostic) modernity” has elevated rights beyond political debate, the same is true of economics.⁵⁰ Just like human rights have

⁴⁵ ECtHR, *Budina v. Russia*, 18 June 2009, 45603/05.

⁴⁶ Oette 2015, at 682-688.

⁴⁷ ECtHR, *Koufaki and Adedy v Greece*, 7 May 2013, 57665/12 and 57657/12, para. 31.

⁴⁸ European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011, 23 May 2012, para. 18.

⁴⁹ Griffey 2011, at 284.

⁵⁰ For this characterization of human rights, see Koskeniemi 2010, at 207.

been perceived apolitical, so too have economics been disentangled from political contestation.⁵¹ The two projects (human rights and global economy) have turned into ideologies in that they highlight (as well as hide) particular values, and present those values as beyond dispute. Hence, when human rights are invoked against austerity measures, not only does this pose a particular conception of rights against a particular concept of the economy. What is also at stake, adding another layer to the complexity, is a hegemonic struggle over which vocabulary is the proper one in which to frame the discussion to begin with. If we are to believe Kennedy, overcoming this dilemma is only possible through active engagement in questions of political economy. It requires extending the reach of the judiciary beyond definitions of 'means to live on', into an exploration of the role of law in questions such as the reproduction of poverty. But such a turn is at odds with an entire legacy of dividing international law into distinct sub-disciplines and the technical specialization of international legal arrangements.⁵² It is also a question, as our liberal conception of the rule of law for so long has taught us, which is far beyond the competence of courts.⁵³

On the Role of Rights

Apart from noting that the economic crisis has revealed gaps on many levels of human rights protection, the possibilities of asserting international responsibility have been an additional source of concern.⁵⁴ Apart from the question of justiciability, a corresponding question to ask is whose actions should be adjudicated to begin with. This search is frustrated by the fact that the current state of international law allows all actors involved to escape responsibility (the focus here being on states and international financial institutions). While the point of departure is that the state bears primary responsibility for realizing human rights, the question is whether conditionality relieves it of that responsibility. While the Greek government has been found to have failed, for example, to undertake even a minimum impact assessment of austerity

⁵¹ Kennedy 2013, at 12 *et seq.*

⁵² Kennedy even concludes that to grasp international law's political-economic significance as a constituter of centres and peripheries, the traditional Westphalian narrative and its twentieth-century modernizations will need to be sacrificed altogether. Kennedy 2013, at 31-35.

⁵³ In this respect it is, again, interesting to note that the European Committee of Social Rights in *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, Complaint No. 79/2012, 7 December 2012, para. 76, discusses as one aspect of its finding of a violation, the "pauperization" of significant parts of the population.

⁵⁴ See, e.g., Margot Salomon, "Of Austerity, Human Rights and International Institutions", 2 LSE Working Papers 2015, at 24 and 29.

measures,⁵⁵ the question always looms in the background what the actual room for choosing the means of domestic implementation has been. It has been demonstrated in the case of Greece, that the conditions imposed were substantiated to a level of detail leaving little room for maneuver, questioning the idea of sole state responsibility for the impact of retrogressive measures.⁵⁶

A reluctance to engage with human rights (for example, by enacting political prohibition clauses) and the difficulties with constructing direct human rights obligations for international organizations are well-debated obstacles for holding financial institutions responsible. While it is possible to argue that as subjects of international law, financial organizations are bound by international law (and the IMF in particular as a specialized agency of the United Nations), one cannot automatically infer from this that the institutions have human rights obligations. In respect of the IMF (part of the Troika with which Greece negotiated), even if it would be accepted that it has at least very basic human rights obligations, those obligations are arguably weak in the ESC rights context. And while the Articles on the Responsibility of International Organizations also provide for the possibility of extending responsibility to the members of an organization,⁵⁷ a reduction of the legal personality of the organization to an aggregate of the acts of its member states is contested.⁵⁸ But there is also another layer to the responsibility debate as far as financial institutions are concerned.

Compared to the World Bank, the IMF can be seen to operate in greater isolation from human rights concerns. In part, this is due to the IMF's primary concern which is implementing macroeconomic policies. The primary purpose of the IMF is to uphold international financial stability and monetary cooperation. In looking to ensure economic stability, reduce vulnerability to economic and financial crises, and raise the

⁵⁵ European Committee of Social Rights, Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece, Complaint No. 80/2012, 7 December 2012, para. 75.

⁵⁶ Salomon 2015, at 9-10 and 28. For the level of detail, see, for example, European Commission, DG for Economic and Financial Affairs, The Second Adjustment Programme for Greece, Fourth Review – April 2014.

⁵⁷ International Law Commission, Draft Articles on the Responsibility of International Organizations with Commentaries, A/66/10, Article 6(1): "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".

⁵⁸ For an overview, see, e.g., Matthias Goldmann, "Human Rights and Sovereign Debt Workouts", in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (eds), *Making Sovereign Financing and Human Rights Work*, Hart Publishing 2014, 79-100, at 92-95. Also see, e.g., F. Gianviti, *Economic, Social and Cultural Rights and the International Monetary Fund*, Doc. E/C.12/2001/WP.5, para. 51, and Salomon 2015, at 28.

standard of living, it can be considered to enhance social goals, albeit from a different point of view than the individualistic focus of the human rights regime.⁵⁹ At the same time, as concluded above, macroeconomic policy-making and human rights protection can both be described as public goods, and as mutually supportive. While the IMF has been careful not to engage with the human rights rhetoric, it does consider the social dimensions of its work, for example, by being explicit about taking into consideration vulnerable groups.⁶⁰

By saying this, the point is not to relieve financial institutions of responsible policy-making, but to illustrate how the ideological points of departure affect the responsibility discourse. While there may be many reasons why the IMF is reluctant to engage in the human rights discourse, the ideological positions of the global economy and human rights can be seen to loom in the background. To criticize the IMF (or the current state of the responsibility regime) for not taking ESC rights into consideration misses its target as one of the purposes of the conditionality mechanism, from a macroeconomic perspective, is to improve social conditions of the state. The point is not whether the IMF acts in breach of human rights or not – it actually admits that its policies have social effects. Instead, what is far more crucial, is that the IMF can be seen to allow for those effects in the name of the greater good of financial stability, and hence the social welfare of the general public. In making this assessment, the IMF is balancing between the same competing values as human rights bodies.

In this light, what the critique seems to take hold of is that the balancing is (again) done in the wrong vocabulary. By unambiguously asserting human rights responsibilities for international financial institutions, the hope is that the IMF would substitute its 'social approach' for human rights rhetoric, this way infusing IMF activities with the perceived compelling quality of rights.⁶¹ Yet, as the discussion above has sought to demonstrate, there is good reason to doubt whether a 'human rights based approach to austerity measures' is at all separable from economic considerations. It also seems questionable whether a change of rhetoric would affect IMF policy-making. After all, the aims and purposes of the IMF will not change. As a result the ideological point of departure of the IMF will always differ from that of human rights bodies. If anything, as the IMF aims and purposes can be turned into

⁵⁹ F. Gianviti, *Economic, Social and Cultural Rights and the International Monetary Fund*, Doc. E/C.12/2001/WP.5, para. 57. Pereira Leite 2001.

⁶⁰ See e.g. International Monetary Fund, *Protecting the Most Vulnerable under IMF-Supported Programs*, Factsheet (17 september 2015).

⁶¹ Cf. the Dworkinian idea of rights as trumps.

social goals in themselves,⁶² the stronger the insistence on human rights considerations to be introduced into IMF policy-making, the more clearly the IMF would transform into a human rights interpreter. In the process, macroeconomic policies would become an inherent element of defining the content of rights. It is difficult to think of a clearer situation where rights become an extension of struggles of economic policy-making.

⁶² See, e.g., Christiana Ochoa, "Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse", 23 Boston College Third World Law Journal 2003, 57-114, at 109.