



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

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## ***Implementing the European Convention on Human Rights in times of economic crisis***

Economic crisis is a phenomenon which concerns real life: the world as it is. The judge's role is to subject the world "as it is", the reality, to the world "as it should be", which is the sphere of standards. In the time allowed to me I will attempt to set out the respective claims of these two worlds when it comes to the observance of human rights in times of economic crisis. In order to do this I will make four assertions which I will endeavour to substantiate. These will enable us to identify the challenges facing the European Court of Human Rights in seeking to act with the consistency required of it during a period of economic crisis.

### **I**

***The first assertion relates to the world "as it should be" and invites us to read the Convention from a "financial" perspective. It reminds us that, according to the Court's case-law, respect for the human rights protected by the Convention entails budgetary sacrifices linked not only to the obligation to execute the Court's judgments but also to the provision of public services.***

The European Court of Human Rights has introduced into its case-law the concept of positive obligations on the part of the State. It considers that it is not sufficient for the State to refrain from doing something in order to meet the standards required of it by the Convention<sup>1</sup>. It must also act. And in order to act the State has no choice but to spend. In public finances there are three different ways of accounting for State expenditure. *Cash-based accounting*, which deals only with incoming and outgoing payments, *accruals-based accounting*, which records rights and obligations and, lastly, *cost accounting*, which calculates the cost of each State product<sup>2</sup>. A court judgment is an example of such a product. Its cost will vary depending on whether it is delivered following a public hearing, in which case a hearing room is required<sup>3</sup>, and whether it is accompanied by detailed reasons, which entails an additional workload for the judge responsible for drafting it<sup>4</sup>.

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<sup>1</sup> *Ilașcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-52, ECHR 2004-VII.

<sup>2</sup> Frank MORDACQ, *La LOFT : un nouveau cadre budgétaire pour réformer l'Etat*, L.G.D.J. 2006, pp. 325 et seq.

<sup>3</sup> *Martinie v. France* [GC], no. 58675/00, § 43, ECHR 2006-VI.

<sup>4</sup> *Gorou v. Greece (no. 2)* [GC], no. 12686/03, 20 March 2009.

From a cost-accounting perspective, all the State's positive obligations involve public spending. The obligation on the authorities to conduct an effective and prompt investigation in the event of an alleged violation of Article 2 or Article 3 of the Convention calls for the setting-up of appropriate public services equipped with the necessary resources<sup>5</sup>. A person whose life is in serious danger must have access to the appropriate police protection<sup>6</sup>; prisons must protect inmates who develop suicidal tendencies<sup>7</sup>. Likewise, in order to ensure that prisoners are not subjected to inhuman or degrading treatment, the State must provide them with sufficient space<sup>8</sup>, clean sanitary facilities<sup>9</sup>, decent food<sup>10</sup> and the requisite medical care<sup>11</sup>. And while access to a judge presupposes the existence of a judge, ensuring that individuals are tried within a reasonable time requires a large number of judges, just as a fair trial accompanied by a full set of guarantees necessitates procedures which are costly because of the input of all the legal officials involved.

Article 13, meanwhile, by requiring fair compensation for the victims of violations of Convention rights, may entail considerable public expenditure in cases of large-scale violations resulting from structural or systemic factors (a failure to satisfy the reasonable-time requirement may concern hundreds of thousands of cases<sup>12</sup>). Article 14 (prohibition of discrimination) may upset the fiscal balance where remedying a violation necessitates the widespread application of a social right (for instance, the extension to male military personnel of entitlement to three years' parental leave<sup>13</sup>). Lastly, Article 1 of Protocol No. 1 requires not only that persons whose property has been expropriated receive fair compensation but also, like Article 6 of the Convention, that the State execute any judicial decision recognising a breach of their rights under Article 1 of the Additional Protocol<sup>14</sup>.

On closer examination, therefore, almost all the Articles of the Convention which enshrine rights can be read from a financial perspective.

## II

***The second assertion takes us into the realm of real-life situations and invites us to view the world “as it should be” by starting from the world “as it is”. The experience of Greece has taught us that a country in economic crisis cannot be regarded as having an inexhaustible fund of resources to meet all its possible human rights-related financial obligations.***

A review of the violations of the Convention by Greece up to 2009<sup>15</sup>, the first year of the crisis, shows clearly that budgetary shortages, an endemic problem for the Greek State, were the main cause of over 90% of the violations found by the Court. As regards the excessive length of proceedings (50% of the violations), the only means by which the Greek State could remedy the problem was to increase the number of judges. To do that, it needed funds. Failure to comply with the obligation to put in place effective remedies (13% of the violations) was due in a large number of cases to the lack of an effective remedy in respect of procedural delays, while the breaches of the right to a fair trial (17% of the violations) often stemmed from intervention by the State aimed at safeguarding its interests.

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<sup>5</sup> *Oğur v. Turkey* [GC], no. 21594/93, ECHR 1999-III.

<sup>6</sup> *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

<sup>7</sup> *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III.

<sup>8</sup> *Karalevičius v. Lithuania*, no. 53254/99, 7 April 2005.

<sup>9</sup> *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

<sup>10</sup> *Tabesh v. Greece*, no. 8256/07, 26 November 2009.

<sup>11</sup> *Kotsaftis v. Greece*, no. 39780/06, § 53, 12 June 2008.

<sup>12</sup> See III below.

<sup>13</sup> *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012.

<sup>14</sup> *Burdov v. Russia*, no. 59498/00, ECHR 2002-III.

<sup>15</sup> Ioannis SARMAS, *Les 60 ans de la Convention européenne des droits de l'homme- spécificités nationales : le cas grec*, Petites affiches, special issue no. 254, 22 December 2010, pp. 44 et seq.

Elsewhere, the cases concerning inhuman or degrading treatment (2% of violations) almost all related to overcrowding in prison or to the inadequacy of services provided to prisoners. As to violations of the right to the peaceful enjoyment of possessions (10%), these resulted by and large from expropriations which were not completed successfully owing to a lack of funds to compensate the owners or to a failure to execute judicial decisions recognising the existence of a claim against the State.

In 2009 the Greek State budget, totalling around 125 billion euros, recorded a deficit of 37 billion euros, or roughly one third<sup>16</sup>. In order to put the public finances back on track a fair balance had to be struck between increasing revenue, in particular by means of taxation, and cutting expenditure, by reducing the State wage bill and social spending. However, the new taxes simply deepened the recession and the revenue forecasts turned out to be inaccurate. The deficit persisted. A haircut on Treasury bills was needed; however, in a climate of fears of a return to the drachma, this resulted in capital flight and in huge losses for the banks, calling for further sacrifices. A vicious circle was created, a downward spiral which threw everything into turmoil. The courts were then called upon to rule on the compatibility of the economic recovery measures with supra-legislative principles<sup>17</sup>: *human dignity*, undermined by cuts in benefits to below the survival threshold; *equality*, infringed by discrimination in the distribution of the tax burden; *property*, jeopardised by the haircut on Treasury bills, the reorganisation of pension funds and the charges imposed on immovable property<sup>18</sup>. Successive governments found themselves unable to satisfy all the rights invoked to the extent demanded by the right-holders.

In view of the perpetual worsening of the economic recession and the impact of the recovery measures on human rights, it was clear that a rise in even the most fundamental public spending would seriously affect the country's fiscal balance.

### III

***The third assertion leads us to the hearing room of the European Court of Human Rights. It is a statement of fact concerning the effect on the Court of cases which stem from the economic crisis. It tells us that the dispute-resolution procedures established by the European Court in order to remedy large-scale human rights violations bring it face-to-face with the financial constraints under which States are operating.***

Three categories of cases concerning human rights protection are more likely than any others to increase during a period of economic crisis. The first category concerns violations of the principle of non-discrimination combined with interference with property rights, stemming from the fact that stabilisation of the State's finances necessitates tax rises, extension of the tax base and cuts in civil servants' salaries and in retirement pensions. There will also tend to be an increase in cases in which a reasonable time has been exceeded and those concerning failure to execute judicial decisions, as the crisis triggers a huge number of appeals against taxation measures and measures dismantling the welfare State, while at the same time emptying the State's coffers and making it impossible for the State to honour its debts. The third and last category of cases concerns inhuman or degrading treatment, as the State's already stretched resources are being used to meet needs deemed to take priority over the needs of prisoners or asylum seekers.

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<sup>16</sup> Ioannis SARMAS, *The Greek Crisis and the Role of Audit*, Ant. N. Sakkoulas Publishers 2012, p. 36.

<sup>17</sup> See the Greek Supreme Administrative Court judgments 668/2012 and 1972/2012 (presented by Eleni THEOCHAROPOULOU in Δ.Φ.Ν. 2012 pp. 1539 et seq.), and the opinion of the Greek Court of Auditors of 31 October 2012.

<sup>18</sup> Kostas CHRYSSOGONOS, Stylianos-Ioannis KOUTNATZIS, *Die finanzielle Tragödie Griechenlands aus verfassungsrechtlicher und institutioneller Sicht: Feudalistische Grundstrukturen hinter demokratischer Oberfläche?* Jahrbuch des Öffentlichen Rechts der Gegenwart, neue Folge/ Band 60, pp. 401 et seq.

The European Court of Human Rights has already had to examine cases of this kind, which place a huge strain on its Registry. The Court has previously found against several States on account of the degrading conditions in their prisons, the inhuman treatment meted out to individuals in police custody and discrimination in the allocation of benefits<sup>19</sup>. It has delivered three pilot judgments requiring Greece to remedy the problem of delays by the courts in hearing administrative<sup>20</sup>, criminal<sup>21</sup> and civil cases<sup>22</sup>. Other countries which are experiencing or have experienced serious economic crisis have also been the subject of pilot judgments on account of the failure to execute judicial decisions ordering the State to fulfil its obligations<sup>23</sup> and on account of prison conditions<sup>24</sup>.

The number of cases which have been the subject of pilot judgments is alarming and the budgetary implications of executing the Court's judgments in this sphere are enormous. The *Broniowski* judgment concerned the immovable property of 80,000 people<sup>25</sup>, *Hutten-Czapska* related to the housing of 100,000 people<sup>26</sup> and *Kurić* concerned the social rights of 26,000 people<sup>27</sup>. And while the pilot judgments against Greece may relate to only a few thousand applications, in reality they involve close to a million cases in which a reasonable time has been exceeded. It is clear to even a casual observer that the Court's work, when it comes to the so-called repetitive cases, no longer consists solely in dealing with individual applications but means finding solutions to major societal problems affecting large categories of persons.

Having undertaken, via its pilot judgments, to assist Contracting States in their efforts to solve their structural and systemic problems linked to human rights protection, the Court is thus confronted at first hand with the constraints imposed on States as a result of budget shortages.

#### IV

***The fourth and final assertion invites us to combine a series of elements into an enriched concept of the role of the European Court of Human Rights. It thus helps us to identify the requirements which the Court must meet in terms of consistency and leads us to conclude that the Court cannot adopt an approach that would deprive human rights of their universal character.***

The European Court of Human Rights has already acknowledged Contracting States' positive obligations and is conscious that these entail spending which has a severe impact on national budgets. It cannot overlook the fact that in times of economic crisis States do not have an inexhaustible fund of resources but have to make painful compromises in order to meet their human rights obligations. Lastly, the Court is mindful of the fact that, in ruling on a case, it is laying down a doctrine for the interpretation of the Convention which concerns not just the case before it, or even the State in question, but 47 different legal systems. Indeed, in the 47 member States of the Council of Europe there is scarcely a branch of the law which is not profoundly affected by the Court's case-law. The Court has acquired the status of a European supra-legislative body which, by pointing up States' positive obligations, requires them, indirectly but nevertheless bindingly, to incur certain types of public expenditure. In its historic judgment in *Refah Partisi*<sup>28</sup> it taught us that legal standards in a democracy do not emanate from an immutable Platonic world but from contact with real-life

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<sup>19</sup> See in this connection the factsheet on pilot judgments produced by the Press Unit of the European Court of Human Rights, available on the Court's website.

<sup>20</sup> *Vassilios Athanasiou and Others v. Greece*, no. 50973/08, 21 December 2010.

<sup>21</sup> *Michelioudakis v. Greece*, no. 54447/10, 3 April 2012.

<sup>22</sup> *Glykantzi v. Greece*, no. 40150/09, 30 October 2012.

<sup>23</sup> *Burdov v. Russia (no. 2)*, no. 33509/04, ECHR 2009.

<sup>24</sup> *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012.

<sup>25</sup> No. 31443/96, ECHR 2004-V.

<sup>26</sup> No. 35014/97, 28 April 2008.

<sup>27</sup> [GC], no. 26828/06, ECHR 2012.

<sup>28</sup> [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

situations. Its judgments could scarcely be exempt from this rule when they bring to light positive obligations which, if complied with, affect fiscal balance to such an extent that other positive obligations are also affected.

It is true that the absolute prohibition on inhuman and degrading treatment<sup>29</sup> raises a specific issue. Article 3 of the Convention would appear to impose a pan-European standard, since, even if it entails public spending, it must be applied uniformly everywhere irrespective of Contracting States' economic situations. The truth of this is beyond dispute. However, the threshold of severity beyond which treatment is deemed contrary to Article 3 must not be defined according to economic standards which only wealthy countries can attain. Human rights are universal: to view them otherwise is to betray their very nature. Respect by a democratic State for those rights cannot therefore depend on a mathematically fixed level of public spending. We should bear in mind in that regard that, according to the Court, although the right enshrined in Article 3 is absolute, the threshold of severity which determines whether there has been a violation is subject to the principle of proportionality<sup>30</sup>. It could therefore be argued that this threshold cannot be set at the same level for the poorest and the wealthiest countries of the Council of Europe when it comes to making budgetary sacrifices.

To conclude, the implementation of the Convention in times of economic crisis confronts the European Court of Human Rights with the painful compromises made necessary by States' efforts to meet all their positive obligations simultaneously. This enriches the Court's experience and imposes on it a significant duty of consistency in order to safeguard the character of human rights as universal rights which are not the preserve of wealthy nations.

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<sup>29</sup> *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010.

<sup>30</sup> *Caloc v. France*, no. 33951/96, §§ 98, 100 et seq., ECHR 2000-IX, and *Galotskin v. Greece*, no. 2945/07, § 38, 14 January 2010.