From Collective Bargaining to Collective Begging

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"Recent research suggests that higher inequality is associated with lower and less sustainable growth in the medium run… a rising concentration of income at the top of the distribution can reduce a population's welfare…we find strong evidence that lower unionization is associated with an increase in top income shares in advance economies from 1980-2010…. We find that de-unionization is associated with less redistribution of income and that reductions in minimum wage increase overall inequality considerably."

Name That Author #2

Rapid economic adjustments would only take place if "they come out of collective bargaining at a centralised level between business and labour unions, and perhaps the state… a centralized collective bargining structure ready to be used in case of need, representative unions, a continuous dialogue between unions and firms, active financial policy – go very much against the current grain… It is my main concern for the future."

The Awful Truth

THERE IS NO HARD EVIDENCE THAT COUNTRIES WITH HIGHLY DECENTRALISED BARGAINING SYSTEMS AND WEAK UNIONS HAVE STRONGER ECONOMIES OR LOWER UNEMPLOYMENT THAT OTHER COUNTRIES.

The Troika did not have to attack workers' rights. Experience from several central and northern European countries provide examples of alternative policies. Many European countries have demonstrated that the bets way to promote competitiveness is through the coordination of collective bargaining at the industry level.

See, e.g., Nordics, Austria, Belgium, Netherlands, Switzerland, which have used coordinated multi-employer bargaining to enhance productivity, international competitiveness and promote exports.

In current crisis, Iceland pursued dialogue with trade unions about broad economic policy.

The IMF in Europe: Initial Responses to the Crisis

Table 1: Changes to Collective Bargaining

Changes to...	Romania	Spain	Greece	Portugal
...national collective agreements	■		■	
...the regulations concerning sector-wide collective agreements	■	■	■	■
...that allow non-union agents to bargain	■		■	■
...to representativity criteria to establish a union or conduct collective bargaining	■			■
...extension mechanisms	■			■
...to opt out regulations		■	■	

Romania

2011 IMF Standby Agreement and Commission Loan

- By emergency order (no parliament), abolished national collective agreement that established national minimum wage and basic conditions for all workers (contrary to Blanchard)
- Made industry level bargaining redundant by introducing new representative criteria for trade unions and revised definition of sectors (Romanian economy largely small enterprises – 90% < 10 workers; 98% < 20)
- New minimum threshold of 15 members within a single enterprise to be representative and to strike, and 21 to conclude a collective agreement
- Reforms wiped our collective bargaining and led to a dramatic decline in union membership
- IMF had been pushing reforms since 2003 but used crisis to achieve its goals – but economy was actually growing from 2003-2008 – according to IMF

Portugal

IMF promotes union busting:

- "to promote the inclusion in sectoral collective agreements of conditions under which work councils can conclude firm-level agreements without the delegation of unions."

IMF limits wage increases:

- 2011 - "over the program period, any increase will take place only if justified by economic conditions and agreed in context of regular program reviews."

IMF limits extension of collective agreements:

- "A collective agreement subscribed by employers' associations representing less than 50 percent of workers in a sector cannot be extended"
- 23/2012 - working hours and overtime pay excluded from scope of bargaining for 2 years
- Growth dropped, unemployment rose

But is it legal? The Case of Greece

NO

ARTICLE 11

- 11(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 11(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Greek Council of State

The GSEE raised legal questions as to Law 4046/2012, which served as authorization for Act No. 6/28-2-2012 in a petition to the Council of State in March 2012. The petition raised several questions as to the constitutionality of the severe limitations imposed by the government pursuant to the demands of the Troika, including limitations on the right to collective bargaining and the right to strike. On 24 June, the Council of State rendered an opinion which largely confirmed the measures imposed as constitutional.

MAJORITY OPINION

These measures, taken in the totally exceptional circumstances which have been set out (i.e. facing the risk of default and the collapse of the national economy with unforeseeable economic and social consequences), do not seem – taken in the context of a partial review of the constitutionality of the respective regulations of Law 4046/2012 and PYS 6/2012 – to be inappropriate or unnecessary to achieve the above constitutionally legitimate objective. They also have no adverse effect on the core rights which arise from Article 22 paragraphs 1 and 2 and Article 23 of the Constitution, since freedom of association and the right to strike are not affected and the institutions of collective economy are, in principle, preserved in a manner which provides workers with the ability to strive to improve their position and mitigate the adverse effects of the economic crisis and the contested measures.

DISSENT:

The disputed provisions of the contested PYS impose **particularly significant limitations on the labour rights and collective autonomy protected by Article 22 of the Constitution.** These limitations, in view of their purpose, severity and duration, and given the seriously restrictive measures which have already been taken by the legislation which preceded them, as well as the general economic and social context, considered as a whole, **affect the core of the said rights and, particularly, the right of collective autonomy enshrined in the constitution.** Under these circumstances, in order to justify them it is not sufficient to invoke the serious, as above, grounds of public interest (which, in effect, is the country's need to get out of the current economic crisis) or just the further general reference to the need to reduce labour costs and improve competition, made by the Administration. It is also not sufficient to refer to European Union documents and to cite the Memorandum, (as a government programme, as was found in Council of State 668/2012). Given the above, and in view of the particularly complex nature of the issue, a specialist economic feasibility study should have been carried out to prove, in view of Article 22 of the Constitution, the appropriateness and, in any case, the necessity of the contested regulations in order to achieve the said public objective.

Interpreting Article 11

The ECtHR has explained that the European Convention is to be read to give effect to the protection of human rights and should be treated as a living instrument which evolves with national and international law and practice. The ECtHR has essentially deferred to the observations of the ILO supervisory system to interpret the scope of Art 11.1. The ILO CEACR and CFA have found that many of the specific measures taken by the Govt of Greece violate C98.

- *Demir and Baykara v. Turkey*, paras. 85, 100-102, 122: ("The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.")(para 85).

- *Enerji Yapi-Yol Sen v. Turkey*, para 24 (La Cour note également que le droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT) comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical (pour la prise en compte par la Cour des éléments de droit international autres que la Convention, voir *Demir et Baykara*,précité). Elle rappelle que la Charte sociale européenne reconnaît aussi le droit de grève comme un moyen d'assurer l'exercice effectif du droit de négociation collective. Partant, la Cour rejette l'exception du Gouvernement).

- *National Union of Rail, Maritime and Transport Workers v. The United Kingdom*, para 76

But Article 11.2

Art 11.2 provides that the right to freedom of association can be subject to "interference". In order for the interference to be lawful, it must meet the following three requirements:

1) be "prescribed by law"
2) pursue a legitimate aim (i.e. be in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others),
3) be "necessary in a democratic society" to achieve those aims.

See e.g., RMT, para 78.

If a measure passes those tests, a proportionality test is also often applied.

Prescribed by Law

This test merely requires that there have been a law or regulation that served as the basis for the government's interference, and that such law was known or knowable to the persons aggrieved. Probably not an issue in this Greek case.

In one recent Art 11 case, however, the Court did find that the interference by the Govt of Ukraine was not prescribed by law.

In *Veniamin Tymoshenko,* the Court struck down a ban on airline cabin crew's right to strike on the basis that the ban was not based on clear and foreseeable legislation. See *Veniamin Tymoshenko*, para 80. "The Court reiterates that the expression "prescribed by law" in Article 11 of the Convention not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

But see, António Augusto DA CONCEIÇÃO MATEUS v. Portugal and Lino Jesus SANTOS JANUÁRIO v. Portugal (Application nos. 62235/12 and 57725/12). There, the Court, in analysing the alleged interference in Art 1 of Protocol 1, had no problem finding that the interference was "subject to the conditions provided for by law."

Purse a Legitimate Aim

Case law reflects that this is not usually a difficult test for governments to meet. The alleged interference must be, e.g., in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. However, the Court has however signalled that it will not simply accept the assertion of a "legitimate aim" at face value but will in fact scrutinise the legitimacy of the assertion.

Notably, the economy is not a basis for interference with the right to freedom of association under Art 11. The drafters of the Convention could have included such a provision in Article 11 but failed to do so. Indeed, the fact that "the economic wellbeing of the country" is a basis for interference under Article 8 (right to respect for private and family life) demonstrates that the drafters could have done the same in Art 11 but refused to do so.

Of note, the Court has sided with trade unions on the "legitimate aim" test when a right protected under Art 11 was interfered with. See, e.g., *Kaya and Seyhan v Turkey and Karacay v. Turkey*. In both cases, public servants participated in days of strike action called by their union. Each was subjected to a disciplinary inquiry and subsequently disciplined for leaving their workplaces without authority. Each was given a written warning "to be more attentive to the accomplishment of his/her functions and in his/her behaviour". The Court held that this constituted a breach of their right of freedom of association under Article 11(1).

Portuguese/Greek Austerity Cases: Further, Art 1 of Protocol 1 has a much broader scope for interference – namely "the public interest" and subject to the conditions provided for by law and the principles of international law. "Public interest" is a much broader basis to interfere than those provided in Art 11. Also, cases about pension reforms, not right to collective bargaining and to strike.

Necessary in a Democratic Society

The Court has been generally protective of the right to freedom of association.

See, e.g, *Cemiyyeti and another v Azerbaijan*, 2010, “The Court reiterates that the exceptions to freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable". In determining whether a necessity within the meaning of 11(2) exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (see, among other authorities, *Gorzelik v Poland* [2004] ECHR 44158/98 at para 95, and *Sidiropoulos v Greece* [1998] ECHR 26695/95 at para 40).”

See, RMT, para 85, *Demir and Baykara*, para 141; *Sindicatul “Păstorul cel Bun”*, para 34.“What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members’ interests.”

See also *DISK v Turkey*, 2012, para 27 (concerning the right to peacefully assemble in Taksim Square), “Although the essential object of art 11 is to protect the individual against arbitrary interference by public authorities in the exercise of the rights protected, there may also be positive obligations to secure their effective enjoyment.”

A first line of inquiry is to determine the nature of the right, as it influences the balancing that is undertaken by the court – namely whether the action undertaken by the applicant is an "essential element" of the right protected by the Convention.

Collective bargaining has been identified as an essential element of Art. 11.1. See, e.g., RMT, para 85; Demir, para 145, 154 ("the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention.

The right to strike is not yet considered an essential element. However, the Court in *Enerji Yapı-Yol Sen,* the court referred to the ILO's finding that the right to strike is an **indispensable corollary** of freedom of association.

Pressing Social Need?

The “necessary in a democratic society” test is met if the interference fulfils a ‘pressing social need’ and which is proportionate (and which relates to one or more of the legitimate aims) and which takes into account the govt’s limited margin of appreciation.

See, e.g., *Demir and Baykara*, para 119. “The exceptions set out in Article 11 are to be construed strictly; **only convincing and compelling reasons** can justify restrictions on such parties’ freedom of association. In determining in such cases whether a “necessity” – and therefore a “pressing social need” – within the meaning of Article 11 § 2 exists, States have only **a limited margin of appreciation**, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.” These sub-elements are explored further below.

In Demir, the annulment of the CBAs, the interference did not correspond to a “pressing social need” as the right for civil servants to organize was recognized in international law, Turkey had ratified C98.

If it is a breach of Art 11 to annul a collective agreement in Turkey (inconsistent with ILO standards, as found in Demir), it must also be a breach of Art 11 to destroy an entire system of collective bargaining in Greece, also in a manner which the CEACR and CFA have described as inconsistent with ILO Standards. While the govt may succeed in convincing the ECtHR that certain cuts in public expenditures were necessary, they would have less success explaining why it made deep and permanent reforms to the collective bargaining system, which erases generations of struggle and tripartite dialogue, and which cannot be replaced. The ILO’s injunction that any measures taken in an emergency be temporary and no longer than necessary must be recalled here.

Margin of Appreciation

Jehova's Witnesses of Moscow v. Russia, para 108, holding the Court "is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; *it must look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reason adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."*

Further, "The nature and severity of the sanction are factors to be taken into account when assessing the proportionality of the interference." See Jehova's Witnesses, para 154.

Conclusions

"legitimate aim" (notably, Art 11.2 does **not** refer to "the economic wellbeing of the country" as does Art 8). However, this does not often appear to be a high threshold for governments, and the gravity of the economic situation may lead the court to find a legitimate aim nonetheless. But, there are a number of cases under Art 11 where the govt failed this test.

"necessary in a democratic society" test, where we will need to argue that there was no "pressing social need," that the measures exceeded the limited margin of appreciation and/or were disproportionate.\

- measures exceeded authority of the troika memos (if possible)
- the measures cut to the core of the right to freedom of association and thus the margin of appreciation is narrow
- the fact that the measures are far reaching and permanent in nature (to address a short term economic crisis) they fail the pressing social need, margin of appreciation and/or proportionality tests. We can look to the ILO here for support.
- There were no compensatory measures to offset the limitation in rights (also ILO helps here)
- The measures (as to collective bargaining and right to strike) actually failed to improve the economy and thus could not have been necessary; indeed, we could argue that the impact measures in fact further reduced the rights of all Greek citizens.

In short, there is no pressing social need in effectively eliminating a collective bargaining system. The Govt exceeded its limited margin of appreciation in doing so, and in any case, the measures were disproportionate. The national authorities clearly did not apply standards which were in conformity with the principles embodied Art 11 of the Convention. It is also not clear that they based their decisions on an acceptable assessment of the relevant facts – indeed decision-making was motivated by panic and ideology. The severity of the interference is probably among the most extreme to be examined by the Court.