“The rights of Workers, Migrant Workers and Trade Unions under the European Convention on Human Rights”[1]

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European Court of Human Rights; Freedom of association; Freedom of expression; Freedom of thought conscience and religion; Human rights; Migrant workers; Resource constraints; Right to respect for private and family life; Trade unions; Workers

Abstract

The European Court of Human Rights (hereafter: ‘the Court’) has contributed immensely to the protection of social rights in general, and labour rights in particular. I would like to highlight four specific areas which demonstrate the richness of the case law in this area. I will firstly expand on individual issues connected to general worker’s rights, by covering unfair dismissal, rights to private and family life, freedom of religion and freedom of expression. Next, I will discuss the strengthening of migrant workers’ rights through the Convention. Thirdly, I will turn to trade union rights in relation to the freedom of association. Finally, mirroring the economic landscape of the past decade, I will utilize case law to demonstrate how austerity measures can impact human rights, and how the Court has responded to this critical issue.

Social rights, in particular labour rights, have profited from being considered in the Court’s case law, because the Court’s jurisprudence has clarified boundaries and limited the state’s unfettered discretion in handling those rights. However, a trend is also noticeable. Whereas protection of workers’ rights and freedoms initially surged, as validated through certain landmark cases of the Court, I cannot but sense a regressive trend, one which more hesitantly deals with labour laws, broadens the scope of the margin of appreciation of Governments and essentially limits the effectiveness of the Court in considering labour rights. This regressive trend should not be seen as irreversible. I will highlight how genuine consideration of soft law principles enables the Court to take on a progressive, labour rights-friendly stance and how it can continue to aid in the protection of workers’ rights.

I. Workers’ Rights

At the heart of the integration of labour rights into the sphere of the Convention stands the principle of indivisibility of human rights, as reiterated by the Vienna Declaration in 1993.[2] Indivisibility calls for an

[1] This text corresponds to the speech delivered on the occasion of the award of my Honorary Doctorate at Edge Hill University on 6 December 2019. These are my views and do not bind the European Court of Human Rights.

[2] See the United Nations General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, which states: “All human rights are universal, indivisible and interdependent and interrelated. (…)” Similarly, the European Union’s Charter on Fundamental Rights recognizes Union’s foundation based on “indivisible, universal values of human dignity, freedom, equality and solidarity; (…)”, see European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C326/02.

"integrated approach to interpretation"[3], aiming to "integrate certain socio-economic rights into civil and political rights documents."[4] The reading of the Convention with its principal focus on civil and political rights as an instrument capable of spanning social rights is based on the evolutionary character of the Convention, one that functions as a "living instrument"[5] and guarantees "practical and effective", as opposed to "theoretical and illusory" rights.[6] The "living instrument" doctrine is supported by interpretative principles not only relating to the emergence of a European consensus[7] but also by the genuine consideration of soft law instruments that underpin the legitimacy of the Court's decision-making[8]. The use of soft law principles is particularly important in instances where the Court is faced with an absence of a European consensus. In addition, it has been a distinct feature of Strasbourg case law that it imposes positive obligations on the Contracting parties to the Convention, from which a sort of horizontal effect of Convention rights in private disputes, such as labour disputes[9] and other types of private disputes[10], may derive. These well-known principles do not represent novel, activist approaches of the Court. They have been used by the Court for over four decades and are of fundamental importance for delivering effective protection under the Convention. The discussion of the following labour rights cases will make this evident.

I.I Workers' Right to Protection against suspension and dismissal of employment

Suspension and termination of employment must be compliant with the civil rights protection under art.6 of the Convention.[11] This includes the right of workers to have, *inter alia,* effective access to a court, to be tried within a reasonable time and without judicial delay and to the enforcement of a final judgment.[12]Article 6 of the Convention also concerns the rights of workers to protection from dismissal contrary to the presumption of innocence.[13] Moreover, art.6 requires the provision of reasons in the event of a dismissal by an employer. In the case of *Lombardi Vallauri v Italy*, the dismissal on grounds of exhibiting views "in clear opposition to the Catholic doctrine"[14] and the consequent failure of the domestic courts to address the omission of the Faculty Board to provide reasons for its decision ran counter to the need for sufficient reasons, as well as the possibility of appeal before a competent authority.[15] The autonomy of religious communities, therefore, is not absolute and must be carefully weighed against the competing interests at stake.[16]

[3] V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13(3) HRLR 1.

[4] Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13(3) HRLR 1, and Franz Ebert and Martin Oelz, "Bridging the gap between labour rights and human rights: the role of ILO law in regional human rights courts", ILO, DP/212/2012.

[5] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1

[6] *Airey v Ireland* (1979-80) 2 E.H.R.R. 305 at [24], 9 October 1979.

[7] *Glor v Switzerland*, (App. No. 3444/04), judgment of 30 April 2009 at [75].

[8] *Shtukaturov v Russia* (2012) 54 E.H.R.R. 27 at [95].

[9] *Young, James and Webster v United Kingdom* (1981) 4 E.H.R.R. 38 at [49].

[10] *Lopez-Ostra v Spain* (1995) 20 E.H.R.R. 277 at [52].

[11] See, *inter alia,König v Germany* (1979-80) 2 E.H.R.R. 170; *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1; *Obermeier v Austria* (1991) 13 E.H.R.R. 290 at [70]; and *Frydlender v France* (2001) 31 E.H.R.R. 52 at [45].

[12] *Pramov v Bulgaria*, (App. No. 42986/98), judgment of 30 September 2004; *Delgado v France* (App. No. 38437/97), judgment of 12 June 2001; *Aurelia Popa v Romania* (App. No. 1690/05), judgment of 26 January 2010; and *Sabeh El Leil v France* (2012) 54 E.H.R.R. 14.

[13] *Teodor v Romania* (App. No. 46878/06), judgment of 4 June 2013.

[14] *Lombardi Vallauri v Italy* (App. No. 39128/05), judgment of 20 October 2009.

[15] *Lombardi Vallauri v Italy* (App. No. 39128/05) at [52].

[16] *Lombardi Vallauri v Italy* (App. No. 39128/05) at [51].

I.II Workers' Right to Private and Family Life

Under art.8 of the Convention, the Court has dealt with cases relating to employee's screening, the monitoring of employee's communications and employee's professional health risks and dismissal due to employee's private choices. [17] I will briefly discuss these in turn.

With regards to mandatory drug testing of employees, the Court indicated in the cases of *Madsen v Denmark*, as well as *Wretlund v Sweden*, that an infringement of the right to privacy may, under limited circumstances, be justified if a careful balance had been struck between "the discomfort[…] to the individual employee"[18] and the interest of protecting personal integrity against interests of public safety and the protection of the rights and freedoms of others.[19]

Article 8 also intersects with arts 9 and 11 of the Convention, as witnessed in the contrasting cases of *Obst* and *Schüth v Germany,* concerning the dismissal of the applicants from their employment at a faith-based institution pursuant to the engagement in extra-marital relationships. An institution's *Weltanschauung* significantly determines the weight attached to the level of loyalty and expectations of the employee's behaviour towards the Church.[20] The expectation of being loyal to the employer is even more profound for employees in higher functions, as demonstrated in *Obst*.[21] Still, the Court applies a careful balancing test. In *Schüth,* therefore*,* the Court found that the domestic court's reasoning omitted weighty considerations of *de facto* family life in relation to the extra-marital relationship and the legal protection afforded to it. Unlike the applicant in *Obst*, the applicant in *Schüth* would have faced significant hardships in finding another employment post.[22] Deriving therefrom, the balancing exercise of the Court in relation to art.8 must carefully examine the employee's precise function, the degree of hardship endured by the applicant through the interference in and of itself, but also from the effects ensuing thereafter, including the extent of the infringement on private and family life, so as not to constitute a "personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce" which would affect the very heart of the right to respect for the private life.[23]

Building on this case law, the case of *Fernandez Martinez v Spain* demonstrated the intertwining nature of private life and professional life, since private life considerations effectively determined the ability to be employed by the Church. The slim majority emphasized the awareness of the applicant in engaging in private activities that ran counter to the Church's *Weltanschauung*. Taking on a deferential attitude whilst balancing the competing interests at stake,[24] the Court placed considerable weight on the ability of the individual to "freely leave the community"[25]. In *I.B. v Greece* the Court applied a social model approach in concluding that a dismissal as a result of discrimination based on personal health issues effectively discriminated and stigmatized the applicant, leading to a predominantly social harm.[26] The Court reiterated its stance in *Kiyutin v Russia*, by determining that "the State should be afforded only a narrow margin of appreciation in choosing measures that singled out this group for differential treatment on the basis of their HIV status (…)"[27]. Dismissal on grounds of sex in the light of a complete lack of indication that the officer was unable to fulfil her duties, as evidenced in *Emel Boyraz v Turkey*, led to an even more

[17] See, *inter alia,Madsen v Denmark* (dec.) (2003) 36 E.H.R.R. CD61 on a requirement for an employee to undergo random urine tests for drug testing. For further discussion on drug testing at the work place see *Wretlund v Sweden* (dec.) (2004) 39 E.H.R.R. SE5.

[18] *Wretlund v Sweden* (2004) 39 E.H.R.R. SE5.

[19] *Wretlund v Sweden* (2004) 39 E.H.R.R. SE5.

[20] See *Lombardi Vallauri v Italy* (App. No. 39128/05) at [41]; See also, on the general expectation of acting loyal and in good faith towards the employer, *Pay v United Kingdom* (dec.) (2009) 48 E.H.R.R. SE2.

[21] *Obst v Germany* (App. No. 425/03), at [48]-[51].

[22] *Schüth v Germany* (2011) 52 E.H.R.R. 32.

[23] *Schüth v Germany* (2011) 52 E.H.R.R. 32 at [71].

[24] *Fernandez Martinez v Spain* (2015) 60 E.H.R.R. 3 at [151].

[25] *Fernandez Martinez v Spain* (2015) 60 E.H.R.R. 3 at [128].

[26] *I.B. v Greece* (App. No. 552/10), judgment of 3 October 2013 at [72] and [80].

[27] *I.B. v Greece* (App. No. 552/10), at [72] and [80].

unequivocal condemnation by the Court.[28] These previous two cases highlight the Court’s increased sensitivity towards the harmful nature of stigmatization, stereotyping and differential treatment of employees. Consequently, in the landmark case of *Konstantin Markin v Russia*, the Court reiterated its stance on differential treatment: “The different treatment of servicemen and servicewomen as regards entitlement to parental leave is clearly not intended to correct the disadvantaged position of women in society or “factual inequalities” between men and women (…) The Court agrees with the applicant and the third party that such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life.”[29] The case not only significantly influenced the Court’s jurisprudence on sex discrimination, moreover, it merged the social right of safeguarding the position of a worker with regards to employment with the civil right protected under the Convention to have a family life.

As far as health risks arising from the particular area of work are concerned, the Court has underlined the importance of the State “to ensure that the applicants received essential information (…) enabling them to assess the risks to their health and safety.”[30] A failure to provide access to information regarding risks may consequently lead to a violation of art.8 of the Convention, as evidenced in *Vilnes and Others v Norway*.[31] Similarly, *Brincat and Others v Malta* emphasised that the governments owe an obligation to make accessible and readily available well-known scientific evidence on the risks of asbestos.[32]

In extending beyond the private sphere into the work sphere, art.8 has also become increasingly relevant for the highly problematic area of surveillance measures at the work place.[33]*Copland v the United Kingdom* set the groundwork for employee’s protection of rights concerning the monitoring of employee’s communication devices.[34] Here, the Court emphasized the need for domestic regulatory measures which set the boundaries of legitimate interference with the right to privacy by way of monitoring employees, but it refrained from providing precise guidelines for this matter. *Barbulescu v Romania* represented an excellent opportunity to clarify the requirements regarding legitimate interferences with the right to privacy, particularly in respect of an Internet surveillance policy. After a disappointing chamber judgment, the Grand Chamber affirmed that retention of the employee’s communications data constitutes an interference with the right to private life,[35] and criticized that the domestic authorities had not determined whether the applicant had received prior notice regarding the monitoring -including the extent of monitoring- of his private communications.[36] In finding the violation of the right to privacy, the Court made extensive use of relevant international legislation and soft law. Crucially, the Grand Chamber set out requirements that would enable domestic courts to test whether an employer had violated the right to privacy of an employee.[37] Due to the persistent blurring of work life and private life, these guidelines were long overdue. Employees do not renounce their right to privacy upon crossing the doorstep to their workplace. When using the internet in the workplace, the employee continues to have a “reasonable expectation of privacy.”[38]

In spite of the guidelines provided for in *Barbulescu*, the Court must display “increased vigilance”[39] about the persisting surveillance of employees by employers. Constant surveillance inevitably has a

[28] *Emel Boyraz v Turkey* (App. No. 61960/08), judgment of 2 December 2014 at [53]-[56].
[29] *Konstantin Markin v Russia* (App. No. 30078/06), judgment of 22 March 2012 at [141].
[30] *Vilnes and Others v Norway* (App. Nos 52806/09 and 22703/10), judgment of 24 March 2014 at [245].
[31] *Vilnes and Others v Norway* (App. Nos 52806/09 and 22703/10) at [245].
[32] *Brincat and Others v Malta* (App. Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11), judgment of 24 July 2014 at [114].
[33] See, *inter alia*, *Niemietz v Germany* (1993) 16 E.H.R.R. 97 at [29]; *Köpke v Germany* (dec.) (2011) 53 E.H.R.R. SE26, *Halford v United Kingdom* (1997) 24 E.H.R.R. 523 at [42].
[34] *Copland v United Kingdom* (2007) 45 E.H.R.R. 37 at [42].
[35] *Barbulescu v Romania* (App. No. 61496/08), judgment of 5 September 2017 at [139].
[36] *Barbulescu v Romania* (App. No. 61496/08) at [136] and [140].
[37] *Barbulescu v Romania* (App. No. 61496/08) at [120] and [121].
[38] *Halford v United Kingdom* (1997) 24 E.H.R.R. 523 at [44]-[45]; *Copland v the United Kingdom* (2007) 45 E.H.R.R. 37 at [43].
[39] *Köpke v Germany* (dec.) (2011) 53 E.H.R.R. SE26.

self-censoring, if not a 'chilling effect'[40], which may infringe on an individual's right to freedom of expression, as well as the right to privacy.[41] In this regard, Bernal emphasized that: "Privacy is not just important for journalists, but crucial for free expression in a wide range of other situations (…) Without a reasonable expectation of privacy, many of these would simply choose not to speak out."[42]

Recently, *López Ribalda and Others v Spain,* concerning covert video-surveillance of employees,[43] leading to the dismissal of the applicants, regrettably demonstrates that the Court is still willing to interpret the State's margin of appreciation widely. The "reasonable suspicion of serious misconduct,"[44] with which the majority intended to justify a legitimate interference of art.8 of the Convention without prior surveillance notification, cannot justify circumventing domestic and international legal standards. The dissenters in this case expressed their dissatisfaction with the failure to strike a fair balance.[45] They warned of the "ease with which video-surveillance can both be carried out and transmitted, thus multiplying significantly the potential infringement of privacy rights under Article 8 of the Convention."[46] In particular, it was argued that the existing legal framework, demanding prior legal warning of the use of surveillance measures did not allow for exceptions to this rule. This is particularly important in the context of an employer-employee relationship, which inevitably creates a power imbalance and heightens the likelihood of abuse of such powers.[47] If employers are enabled to act outside the existing legal framework, this will likely result in arbitrariness and legal uncertainty.

I.III Workers' Freedom of Religion

Next, I will turn to the discussion surrounding freedom of religion and the intersection with workers' rights. Disciplinary measures for workers in relation to the use of religious symbols have been considered in both the public and private spheres. In *Eweida and Others v United Kingdom* the Court seems to accept that employers may justify the dismissal of an employee if the manifestation of religion contravenes with the employer's interest of protecting the order at the workplace. In this instance, the Court displayed a favourable inclination towards the first applicant, taking into account the discreteness of the religious symbol and the company's subsequent flexibility in adjusting its dress code to accommodate the wearing of religious symbolic jewellery, indicating the absence of a real encroachment on the employer's interests.[48] Concerning the second applicant, however, the Court accepted the justification, namely the health of the applicant, for the ban on the wearing of religious symbols.[49]

In general, it can be deduced that the margin of appreciation in the private sector is stricter than in the public sector.[50] In its considerations regarding a justifiable interference of art.9, the Court has shown

[40] The concept of the 'chilling effect' was already acknowledged in 1978, when Schauer sought to define it as "occur[ing] when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." F. Schauer, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' (1978) 58(685) *Boston University Law Review* 693; See also E. Eide, "Chilling Effects on Free Expression: Surveillance, Threats and Harassment", in R. Krøvel and M. Thowsen *Making Transparency Possible. An Interdisciplinary Dialogue* (Oslo, Cappelen Damm Akademisk, 2019), p.228; J. W. Penney, 'Internet surveillance, regulation and chilling effects online: a comparative case study' (2017) 6(2) *Internet Policy Review* 13, on the effects of regulatory activities on internet users.

[41] See, in this regard, *Klass and others v Germany* (1979) 2 E.H.R.R. 214 at [37].

[42] P. Bernal, 'Data gathering, surveillance and human rights: recasting the debate' (2016) 1(2) *Journal of Cyber Policy* 254.

[43] *López Ribalda and Others v Spain* (App. Nos. 1874/13 and 8567/13), judgment of 17 October 2019.

[44] *López Ribalda and Others v Spain* (App. Nos. 1874/13 and 8567/13) at [134].

[45] See the Dissenting Opinion of Judges de Gaetano, Yudkivska and Grozev in *López Ribalda and Others v Spain*, (App. No. 1874/13 and 8567/13) at [1].

[46] Dissenting Opinion of Judges de Gaetano, Yudkivska and Grozev in *López Ribalda and Others v Spain*, (App. No. 1874/13 and 8567/13) at [4].

[47] Dissenting Opinion of Judges de Gaetano, Yudkivska and Grozev in *López Ribalda and Others v Spain*, (App. No. 1874/13 and 8567/13) at [5].

[48] *Eweida and Others v United Kingdom* (2013) 57 E.H.R.R. 8 at [94]-[95].

[49] *Eweida and Others v United Kingdom* (2013) 57 E.H.R.R. 8 at [98]-[100].

[50] To contrast *Eweida and Others v United Kingdom*, see *Kurtulmus v Turkey* (App. No. 65500/01), decision of 24 January 2006, concerning disciplinary investigations and reprimands for the wearing of religious symbols in public spaces, namely Universities. See also *Ebrahimian v France* (App. No. 64846/11), 26 November 2015, concerning disciplinary measures for wearing a headscarf in a hospital. The Court has exhibited a broad acceptance towards Governments in tolerating headscarf bans, not only with regards to teachers who may exert influence on impressionable children, but moreover on all civil servants (See *Kurtulmus v Turkey* (App. No. 65500/01)).

particular sensitivity to the principles of secularism and equality.[51] In *Leyla Sahin v Turkey*, the Court ascertained the state’s discretion to “limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety”[52] In the controversial decision of *Dahlab v Switzerland*, the Court afforded a wide margin of appreciation to the state and, in balancing the competing interests, accepted the Government’s argument that the wearing of a headscarf by a primary-school teacher may, to a certain extent, have a proselytizing effect on young students.[53] It furthermore pointed out that the headscarf was “hard to square with the principle of gender equality” and that “the message of tolerance, respect for others and, above all, equality and non-discrimination (…)”[54] might be incompatible with the wearing of a headscarf.[55] The balancing act required to assess the extent to which “religious beliefs were fully taken into account in relation to the requirements of protecting the rights and freedoms of others and preserving public order and safety.”[56]*Dahlab*, therefore, limits the protection of certain religious groups in their expression of religious freedom, particularly when being employed in the public sphere. In practical terms, this may result in the exclusion of certain religious minorities from the public workplace.[57] Apart from the Court’s consideration of equality and non-discrimination, the Court also affords a wide margin of appreciation to the state in matters concerning the upholding of the constitutional principle of secularism in public institutions of learning.[58] This principle, enshrined in the constitutions of France, Switzerland and Turkey, expands the restriction of the wearing of symbols beyond employees to students.[59]

The Court’s attention to the employee’s ability to freely enter and exit work relationships has also impacted art.9 considerations, as witnessed in *Kontinnen v Finland*. Consequently, the dismissal for leaving work early on account of the applicant’s religious beliefs was justified, since “the applicant was free to relinquish his post”.[60]*Sessa Francesco v Italy* similarly found in favour of the state, since the applicant, a lawyer and practicing Jew, who had required the Italian courts to adjourn a judicial hearing on account of his religious obligations, was not barred from freely manifesting his faith, nor did he experience pressure to change his religion or belief, having the possibility to delegate the representation of his client to another fellow lawyer.[61] Moreover, the Court concluded that “even supposing that there was interference with the applicant’s rights under Article 9(1), the Court considers that it was prescribed by law, was justified on

[51] For a detailed discussion on the Court’s sometimes contradictory jurisprudence see P. Pinto de Albuquerque and A. S. Katz, ‘Is Religion a Threat to Human Rights? Or is it the other way around?’, in R. Uerpmann-Witzzack, E. Lagrange and S. Oeter, *Religion and International Law* (Leiden/Boston Brill Nijhoff, 2018), pp.277-293.

[52] *Leyla Şahin v Turkey* (2004) 44 E.H.R.R. 99 at [111], and *Refah Partisi (the Welfare Party) and Others v Turkey* (2003) 37 E.H.R.R. 1 at [92].

[53] *Leyla Şahin v Turkey* (2004) 44 E.H.R.R. 99 at [111].

[54] *Dalhab v Switzerland* (App. No. 42393/98), decision of 15 February 2001.

[55] Outside the sphere of the learning institutions, see the case of *SAS v France* (2015) 60 E.H.R.R. 11 at [121], [142] and [157], where the Court accepted the French government’s argument that “under certain conditions the respect of the minimum requirements of life in society [le “*vivre ensemble*”] ” may serve as a legitimate aim of protecting the rights and freedoms of others and may therefore justify a ban on the wearing of face veils in the public space.

[56] *SAS v France* (2015) 60 E.H.R.R. 11 at [121], [142] and [157].

[57] This was criticized by several authors on account of its effective exclusion of women who wear headscarves from interacting with society, as well as accessing workplaces in the public domain. See E. Brems, ‘Face vail bans in the European Court of Human Rights: the importance of empirical findings’ (2014) *Journal of Law and Policy* 540: “(…) instead of increased social interaction, the effect of the ban on these women is a deterioration of their social life, their interactions with society at large, and their mobility.”; J. Freedman, ‘Women, Islam and Rights in Europe: Beyond a Universalist/Culturalist Dichotomy (2007) 33(1) *Review of International Studies* 43: “(…) supporting a ban on Muslim women’s headscarves may in fact be doing a greater disservice to these women, by preventing one of their forms of expression of identity and revolt against discrimination, and by leading their further exclusion from society and thus the further denial of their social and economic rights.”; A. Abdelgadir and V Fouka, “Political Secularism and Muslim Integration in the West: Assessing the Effects of the French Headscarf Ban, *Stanford University Working Paper*, 2019, 29, <*https://vfouka.people.stanford.edu/sites/g/files/sbiybj4871/f/abdelgadirfoukajan2019.pdf*>, [Accessed 12 November 2019]: “By removing this signalling mechanism, veiling bans can thus have the perverse effect of increasing religiosity and decreasing integration.”

[58] *Leyla Şahin v Turkey* (2004) 44 E.H.R.R. 99 at [116]; See also *Dogru and Kervanci v France* (App. Nos. 27058/05, 31645/04) at [72].

[59] *Ranjit Singh v France* (App. No. 27561/08), judgment of 30 June 2009.

[60] *Kontinnen v Finland* (App. No. 24950/94), decision of 15 May 1996. The Commission relied on *Kontinnen* in its admissibility decision of *Stedman v United Kingdom* (dec.) (1997) 23 E.H.R.R. CD168.

[61] *Sessa Francesco v Italy* (App. No. 28790/08), judgment of 3 April 2012 at [37].

grounds of the protection of the rights and freedoms of others — and in particular the public's right to the proper administration of justice and the principle that cases be heard within a reasonable time."[62]

The Court's reluctance in interfering with dismissals from religious organisations was also exhibited in *Duda and Dudova v the Czech Republic*. The Court underlined its incompetence to rule on the dismissal of priests from their posts so as not to contravene "the principles of autonomy and independence of churches."[63] This approach was also taken with regards to the transfer of parish priests, the decision to place a clergyman on leave of absence and to enforce early retirement on another, and to terminate the missionary service of two officers.[64] In *Siebenhaar v Germany*, the Court dealt with cases similar to *Obst* and *Schueth*, except that both the applicant and the defendant government claimed their right to freely exercise their religion. The Court accepted the domestic courts' argument that the upholding of credibility by the protestant church, alongside the risk of influencing the children with principles contrary to the protestant church, weighed heavier than the interest of the individual not to be dismissed for her membership in another ecclesial institution.[65] The Court will, however, interfere in matters where there exists a hidden ground for dismissal, such as a 'policy of intolerance' towards the employee's religious beliefs and affiliations, and where the applicant otherwise exhibited the necessary qualities to fulfil the duties of the post.[66]

I.IV Workers' Freedom of Expression

Generally speaking, employees enjoy a broad protection against threats to their freedom of expression. The Court found a failure on behalf of the Spanish government to adhere to its positive obligation when the applicant was dismissed for critically voicing his opinion on his employer, a Spanish television company.[67] This obligation to protect the right to freedom of expression against interference by private persons, however, is weighed against the employee's duty to be loyal, reserved and discrete vis-à-vis his or her employer[68], a duty that applies to both public and private employment relationships.[69] The Grand Chamber case of *Vogt v Germany,* lodged by a school teacher who was suspended from teaching due to her involvement in the German Communist Party, which allegedly ran counter to the "duty owed by every civil servant to uphold the free democratic system"[70], dealt with the issue of private choices and personal convictions. The Court concluded that being "a teacher of German and French in a secondary school, a post which did not intrinsically involve any security risks", raises the threshold for an acceptable interference in the right enshrined in arts 10 and 11 of the Convention due to the severity of the sanction through dismissal, which led to a tarnished reputation, the loss of livelihood and the inability to be re-employed in similar posts.[71]

In contrast to this, the cases of *Kosiek and Glasenapp v Germany* depicted a more restrictive approach taken on by the Court in assessing the denial of employment in the public sector in the light of Convention rights. Both employees had previously held probationary appointments and were consequently denied the status of permanent civil servants. They were eventually dismissed from their temporary position. These cases were distinct from the *Vogt* judgment, because they concerned access to public sector positions, as opposed to dismissal from a long-standing post, as was the case in *Vogt*.[72]

[62] *Sessa Francesco v Italy* (App. No. 28790/08) at [38].
[63] *Dudova and Duda v the Czech Republic* (App. No. 40224/98), judgment of 30 January 2001.
[64] See *Ahtinen v Finland* (App. No. 48907/99), judgment of 23 September 2008 at [41].
[65] *Siebenhaar v Germany* (App. No. 18136/02), judgment of 3 February 2011 at [45]-[46].
[66] *Ivanova v Bulgaria* (App. No. 52435/99), judgment of 12 April 2007 at [85].
[67] *Fuentes Bobo v Spain* (App. No. 39293/98), judgment of 27 February 2000 at [38].
[68] *Marchenko v Ukraine* (App. No. 4063/04), 19 February 2009 at [45] and [46].
[69] *Heinisch v Germany* (2014) 58 E.H.R.R. 31 at [64].
[70] *Vogt v Germany* (1996) 21 E.H.R.R. 205 at [44].
[71] *Vogt v Germany* (1996) 21 E.H.R.R. 205 at [60].
[72] *Kosiek v Germany* (1987) 9 E.H.R.R. 328 at [38] and [39]. See also *Glasenapp v Germany* (1986) 9 E.H.R.R. 25 at [50]-[53].

In the private sector, the Court saw itself fit to rule on a number of cases concerning dismissal as a consequence of the applicant expressing opinions contrary to the employer's interest. In *De Diego Nafria v Spain*, the Court accepted the disciplinary measures as an acceptable measure under art.10(2) of the Convention due to the insulting, serious, and unsubstantiated accusations of irregularities made against the directors of the Bank of Spain.[73] The dissenting Judge Casadevall drew parallels to the case of *Fuentes Bobo v Spain* and pointed out that the accusations had similarly attempted to shed a light on irregularities in the conduct of senior public figures of the Bank. Moreover, the dissenters pointed out that the Bank of Spain, as a public institution, must accept criticism to a greater extent and the weak position of the employee vis-à-vis the employer must also be taken into consideration.[74] Likewise, there is a genuine public interest in the publication of a tax declaration of a big corporation leader in the context of a debate on pay transparency and excessive remuneration of people who run major companies.[75] These cases set out the parameters for when the state has a legitimate expectation to be able to restrict freedom of expression. Personal attacks carrying offensive, intemperate gratuitous and unnecessary undertones will not be protected under art.10.[76]

With regards to whistle-blowers, the Court has been clear that the reporting of illegal conduct or wrongdoing at the workplace must be protected. The Court has established six relevant requirements that must be satisfied to fall within the scope of protection under art.10 of the Convention:

- The disclosure should correspond to a strong public interest;[77]
- There should be no other effective means of remedying the wrongdoing which the employee intends to uncover;
- The interest which the public may have in that particular information should be strong as to override a legally imposed duty of confidence;
- The damage, if any, caused as a result of the disclosure should not outweigh the interest of the public in having the information revealed;
- The disclosure should not be personally motivated;[78] and lastly,
- the whistle-blower must have acted in good faith and in the belief that the information was genuine and that it was in the public interest to disclose it.[79]

In a 2008 judgment, the Court unanimously found a violation of art.10 of the Convention following the dismissal of the Head of the Press Department of the Moldovan Prosecutor General's Office after distributing two letters to a newspaper that had previously been sent to the Prosecutor General's Office. The Court identified that the lack of legislative regulation concerning the reporting of irregularities by employees, as well as the continued misconduct of officers justified the external reporting undertaken by the applicant.[80] In *Matuz v Hungary*, the Court similarly found a violation following the dismissal of a journalist for publishing a book criticizing his employer for alleged censorship. The Court emphasized the role of journalists in a democratic society and their duty to encourage public debate. In spite of the confidentiality agreement between the employer and the employee, this could not have restrained the

[73] *De Diego Nafria v Spain* (App. No. 46833/99), judgment of 14 March 2002 at [40].

[74] See the Dissenting Opinion of Judge Casadevall, joined by Judge Zupancic in *De Diego Nafria v Spain* (App. No. 46833/99) at [2].

[75] *Fressoz and Roire v France* (1999) 31 E.H.R.R. 28.

[76] *Aguilera Jiménez and Others v Spain* (App. Nos. 28389/06 and others), judgment of 8 December 2009 at [28]-[30], and *Palomo Sanchez and Others v Spain* [GC] (App. Nos. 28955/06 and others), judgment of 12 September 2011, in which the Grand Chamber referred to the previous decision in *Aguilera Jimenez* and similarly found no violation of art.10, although it disagreed with the Government that the matter had no public interest bearing. Instead, it reiterated its restrictive stance on gratuitous, grossly insulting manifestations of the right to freedom of expression and declared that such serious misconduct would not be protected under art.10 of the Convention.

[77] See *Guja v Moldova* (App. No. 14277/04), judgment of 12 February 2008 at [88].

[78] See *Langner v Germany* (App. No. 14464/11), judgment of 17 September 2015 at [47], in which the Court found that the motivation was based on personal animosity and not in the interest of contributing to a meaningful public debate.

[79] See *Heinisch v Germany* (2014) 58 E.H.R.R. 31 where the Court took into account the vulnerability of the patients who had been neglected whilst the public had been oblivious to this fact. This demonstrates a strong case for a public interest in the disclosure of otherwise confidential information.

[80] *Guja v Moldova* (App. No. 14277/04) at [81]-[82].

applicant from imparting ideas and information, especially given the weight of the public interest in receiving information on the employee's insights.[81] Lastly, I would like to mention the case of *Heinisch v Germany*, which demonstrated that the principles established in *Guja v Moldova* in relation to public sector employees were similarly applicable to the private sector.

II. Migrant Workers' Rights

Next, I would like to discuss how migrant workers' rights are protected under the Convention. A few cases easily spring to mind, capable of demonstrating the ability of the Convention to uphold core rights of migrant workers. The first case is that of *Rantsev v Cyprus and Russia*. The Court widened the scope of the Convention by reference to international legal rules and soft law principles.[82] By doing so, it was able to apply the Convention "in harmony with other rules of international law of which it forms part"[83], effectively aiding in the identification of the situation at hand, precisely that of a trafficking victim who had died due to a procedural failure to protect her from the perils of the human trafficking business. As a consequence, the Court was able to unanimously agree on the fact that human trafficking, although not expressly mentioned, fell within the scope of art.4 of the Convention. Prior to this finding, the Court had only once dealt with issues of human trafficking before the Convention, namely in *Siliadin v France*. [84] Here, also, the Court relied on findings of the Parliamentary Assembly, which indicated that "today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers…"[85] Moreover, the Court reiterated that, since "the Convention did not define the terms servitude or "forced or compulsory labour", reference should be made to the relevant international conventions in this field to determine the meaning of these concepts (…)"[86].

A case that similarly recognized the rights of migrant workers by engaging soft law principles was the case of *Chowdhury and Others v Greece*. The shooting at migrant workers who went on strike to receive their overdue wages at a strawberry farm and the consequent acquittal of those charged before the domestic courts in Greece represented a blatant, unacceptable lack of protection for migrant workers. More specifically, the Court set out requirements under art.4 of the Convention, which included both preventative and protective measures: "States must, firstly, assume responsibility for putting in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking. In addition, the States' domestic immigration law must respond to concerns regarding the incitement or aiding and abetting of human trafficking or tolerance towards it …in certain circumstances, the State will be under an obligation to take operational measures to protect actual or potential victims of treatment contrary to Article 4."[87]

In *J. and Others v Austria*, the Court applied a more restrictive approach and concluded that the Austrian Government had no obligation to investigate the applicants' recruitment and alleged exploitation which happened outside the Austrian territory.[88] The Court looked favourably upon the domestic authorities' undertakings, namely arranging interviews with specially trained police officers and regularising the applicants' stay in Austria.[89] It concluded that "for the purposes of Article 4 of the Convention, it is

[81] *Matuz v Hungary* (App. No. 73571/10) at [38]-[39].

[82] For a critique on the expansion of the scope of art.4 of the Convention, see J. Allain, 'Rantsev v Cyprus and Russia: the European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) *Human Rights law Review* 555.

[83] *Rantsev v Cyprus and Russia* (2010) 51 E.H.R.R. 1 at [274].

[84] *Siliadin v France* (2006) 43 E.H.R.R. 16.

[85] *Siliadin v France* (2006) 43 E.H.R.R. 16 at [88].

[86] *Siliadin v France* (2006) 43 E.H.R.R. 16 at [91].

[87] *Chowdhury and Others v Greece*, (App. No. 21884/15), judgment of 30 March 2017 at [87]-[88].

[88] *J. and others v Austria* (App. No.5821612), judgment of 17 January 2017 at [114]. In coming to this conclusion, the Court cited the Palermo Protocol and the Anti-Trafficking Convention, which limit jurisdiction to "any trafficking offence committed on their own territory, or by or against one of their nationals (…)"

[89] *J. and others v Austria* (App. No.5821612) at [110].

paramount that the applicants' claims as a whole were taken seriously and the applicable legal framework was applied (…)".[90]

III. Trade Unions Rights

The third area exemplifying the inclusion of labour rights in the Convention is that of collective protection of workers. The collective dimension heavily bases itself on art.11 of the Convention, namely the right to freedom of association. According to *Demir and Baykara*, it includes "the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar…*), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen…*) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others…*).[91] Moreover, the non-exhaustive list includes the right not to join a trade union,[92] and the right of trade unions to "draw up their own rules and to administer their own affairs"[93].

The collective dimension of workers' rights faces particularly heavy scrutiny by the domestic and international courts. This is partly on account of the fact that trade unions are capable of exerting considerable pressure on employers, enabling them to force change. In certain instances, the Court has displayed a willingness to tolerate infringements on the right falling under the scope of art.11, in favour of legitimate justifications from the domestic authorities. This, in turn, has resulted in a 'mixed bag of goods'. The Court's jurisprudence exhibits both progressive and restrictive features, a phenomenon which O'Connell described as "seesaw motion".[94] This has led to uncertainty as to the proper approach to be taken by the Court. What has emerged, however, is that art.11 is not only applicable to persons or associations with favourable or inoffensive views but must, similarly to the requirements under art.10, also provide protection to persons or associations whose views offend, shock, or disturb.[95] Similarly, states must ensure that the domestic judicial system is capable of guaranteeing real and effective protection against discrimination on the ground of trade union membership.[96] In *Danilenkov and Others v Russia*, for example, trade union members of the Dockers' Union of Russia, who were employed by a private company, conducted an unsuccessful strike and, as a result, were dismissed pursuant to structural reorganization of the company. Since the applicants were unable to launch investigations through the national courts, the Court emphasized the importance of non-discrimination based on trade union membership and the ability to pursue legal action.[97]

Before I mention the cases that have demonstrated an increase in pressure on trade unions collective rights, I would like to highlight some of the landmark cases, which revolutionised the rights of workers and have enabled the self-empowerment of the weaker party to a work relationship.

A primary example of a progressive approach is the case of *Demir and Baykara v Turkey*. The president and a member of the trade union Tüm Bel Sen had unsuccessfully complained against non-compliance of a two-year collective agreement by the employer because the trade union had "no authority to enter into collective agreements as the law stood".[98] In the absence of a coherent, unified approach of the

[90] *J. and others v Austria* (App. No.5821612) at [111].

[91] *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54 at [145]; See also *Enerji Yapi-Yol Sen v Turkey* (App. No. 68959/01), judgment of 21 April 2009 at [24], [31]-[32].

[92] *Sorensen and Rasmussen v Denmark* (App Nos 52562/99 and 52620/99), judgment of 11 January 2006 at [73]; Contrast with *Ahmed and Others v United Kingdom* (App. No. 22954/93), judgment of 2 September 1998 at [53] and [63], in which the restriction under art.11 of the Convention was deemed appropriate to maintain senior local government officers' political neutrality. Hence, an absolute ban on trade unions is not justified under art.11, but restrictions may apply for, *inter alia,* the maintenance of political impartiality.

[93] *Associated Society of Locomotive Engineers and Firemen (Aslef) v United Kingdom* (App. No. 11002/05), judgment of 27 February 2007 at [38].

[94] Rory O'Connell, 'Judges of the world united? Collective aspects of the right to work in regional human rights systems', in Buckley and Others, *Towards Convergence in International Human Rights Law* (Leiden: Brill, 2016), 223.

[95] *Redfearn v United Kingdom* (2013) 57 E.H.R.R. 2 at [56]; *Vona v Hungary*, (App. No. 35943/10), judgment of 9 July 2013 at [57].

[96] *Danilenkov and Others v Russia* (App. No. 67336/01), judgment of 30 July 2009 at [124] and [136].

[97] *Danilenkov and Others v Russia* (App. No. 67336/01) at [130].

[98] *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54 at [19].

European member states, the Court "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."[99] The Court unanimously found a violation of art.11 "on account of the interference with the right of the applicants, as municipal civil servants, to form a trade union (…)" and "on account of the annulment *ex tunc* of the collective agreement entered into by the applicant's union following collective bargaining with the authority."[100]

Demir and Baykara had a decisive impact on a number of cases, where it can be witnessed that a social rights friendly and relevant international and comparative law approaches were effectively used to progress the Court's case law.[101] In essence, "the court has opened the door to a more social dimension, reversing its previous (very restrictive) jurisprudence".[102] This broadened scope developed under the Court's jurisprudence regarding trade union rights leads to horizontal, as well as vertical effects, "with implications for the national courts in cases related to limits on the right to strike due to the proportionality principle."[103] In line with this broad interpretation of trade union rights under Convention rights, and acknowledging the vital importance of collective labour rights, the Court found a breach of art.11 of the Convention in *Hrvatski Lijecnicki Sindikat v Croatia,* stating that "in the absence of any exceptional circumstances, the Court finds it difficult to accept that upholding the principle of parity in collective bargaining is a legitimate aim (…) capable to justify depriving a trade union for three years and eight months of the most powerful instrument to protect occupational interests of its members."[104]

Despite these insights on the Court's progressive social rights trends, the Court simultaneously exhibited regressive tendencies, which effectively counteracted some of the achievements of the aforementioned jurisprudence. One such example is *National Union of Rail, Maritime and Transport Workers v United Kingdom*, in which the United Kingdom's ban on secondary action for over two decades garnered critical responses from the ILO Committee of Experts, as well as the ECSR.[105] The Court took into account comparative law and noted that "secondary action is protected or permitted, subject to varying restrictions and conditions, in the great majority of the Member States of the European Union."[106] In examining the case, the Court also acknowledged the existence of relevant international law and the interpretations of the bodies connected to it. Its conclusion, however, reflected an overly broad reliance on the domestic authorities' margin of appreciation. This conclusion was reached despite the Court's realization that the United Kingdom's outright ban on secondary industrial action reflected the most restrictive form of national regulatory approaches.[107] The Court noted the applicant's heavy reliance on *Demir and Baykara*'s stipulation of a narrow margin in respect of the domestic authorities to restrict the freedom of association of trade unions, but distanced itself from this line of reasoning by pointing out that *Demir and Baykara* referred to a more far-reaching interference with freedom of association, namely the dissolution of a trade union.[108] The Court stated that "if it is not the core but a secondary or accessory aspect of trade union activity that

[99] *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54 at [85].

[100] *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54 at [169] and [183].

[101] See, *inter alia*, *N.K.M. v Hungary* (2016) 62 E.H.R.R. 33 at [20]-[21]; *Gáll v Hungary* (App. No. 49570/11), judgment of 25 June 2013 at [20], and *R.SZ v Hungary* (App. No. 41838/11), judgment of 2 July 2013 at [19].

[102] F. Dorssemont, K. Loercher and I. Schömann, *The European Convention on Human Rights and the Employment relation* (London: Bloomsbury Publishing, 2013), p.418.

[103] Julia Lopez Lopez, *Collective Bargaining and Collective Action: Labour Agency* (London: Bloomsbury Publishing, 2019), p.47. For further comments on the impact of the decision in *Demir and Baykara*, see K. D. Ewing and J. Hendy, 'The Dramatic Implications of Demir and Baykara" (2010) 39(1) *Industrial Law Journal* 41, stating that "it is a decision in which social and economic rights have been fused permanently with civil and political rights, in a process which is potentially nothing less than a socialisation of civil and political rights."; and C. Barrow, 'Demir and Baykara v Turkey: Breathing Life into Article 11', (2010) *European Human Rights Law Review* 419.

[104] *Hrvatski Lijecnicki Sindikat v Croatia* (App. No. 36701/09), judgment of 27 November 2014 at [59].

[105] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 E.H.R.R. 10 at [31]-[37].

[106] (2015) 60 E.H.R.R. 10 at [38].

[107] (2015) 60 E.H.R.R. 10 at [91].

[108] (2015) 60 E.H.R.R. 10 at [86].

is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade union freedom are concerned."[109] The far-reaching interference and effect of this ban on secondary strikes which effectively minimized the trade union's ability to protect its members' interest was disregarded. Furthermore, the Court distanced itself from the findings of the international organs whose task it was to interpret the respective international documents.[110]

These findings run counter to the previous developed case law, which took into account that in a democratic society, the ultimate practical means to persuade the employer to hear the demands of the workers is obviously strike action. The outcome in the this recent case truly represents a setback for the rights of trade unions and only strengthens the stronger party at the bargaining table- employers, who will benefit from the wide margin of appreciation, set by domestic authorities in the domain of economic and social policy. The effect of this regressive trend will also be witnessed in my final topic, namely the area of austerity measures.

IV. Austerity Measures and Workers' Rights

Recent years have seen a surge in the number of applications dealing with the effects of austerity measures invoked by governments through structural adjustment programs, including higher taxation and reductions in public welfare programs. Austerity measures have considerably tarnished the laudable image of the Court as a "fortress of the protection of socio-economic rights"[111]. Not only can austerity measures potentially weaken the protection of rights under the Convention, they may also target and thereby exacerbate the quality of protection of the weakest members of society.[112]

The Court has attempted to set out boundaries indicating that certain rights cannot be disregarded, regardless of the existence of economic hardship through a domestic or even global financial crisis.[113] Yet some of the recent decisions of the Court do not paint a particularly bright picture of the Court's willingness to incorporate social rights considerations into the Convention. I wish to highlight why, especially in times of crisis, it is imperative that the Court is cognizant of its role to defend Convention rights, including the established social dimension of the Convention.

The United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights highlighted the indivisibility of human rights and indicated how austerity measures are not only potentially harmful to the protection of economic and social rights, but moreover, can substantially influence civil and political rights: "Budget cuts to public services (…) may result in a failure to guarantee the civil rights to a fair trial, family life, non-discrimination, freedom from torture and cruel, inhuman and degrading treatment, or even the right to life."[114]

These findings are in line with the cases that have emerged before the Court as a result of austerity measures. The case of *Koufaki and ADEDY v Greece* concerned the indiscriminate 20% cut in salaries

[109] (2015) 60 E.H.R.R. 10 at [87].

[110] (2015) 60 E.H.R.R. 10 at [98].

[111] A. Baraggia, M. E. Gennusa, 'Social Rights Protection in Europe in Times of Crisis? A Tale of Two Cities' (2017) 11(4) *Vienna Journal on International Constitutional Law* 479.

[112] See N. Lusiani, and S. Chaparro, 'Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation' (2018) *Center for Economic and Social Rights* 20: "the ultimate end-goal of any fiscal measures—whether expansive or contractionary—must be the realization of human rights."

[113] See, *inter alia*, *Nencheva and Others v Bulgaria* (App. No. 48609/06), judgment of 18 June 2013 at [117], concerning the death of 15 children in a care home in the context of an economic crisis and the resulting deprivation of basic survival necessities.

[114] It was further pointed out that states need to be "guided by existing international human rights (…) which includes core international human rights treaties, as well as their authoritative interpretation in general comments, statements, open letters, decisions, concluding observations and recommendations issued by treaty monitoring bodies". See United Nations Human Rights Council, Guiding principles on human rights impact assessment of economic reforms – Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, A/HRC/40/57, 19th December 2018, Principle 5; see also the Council of Europe's Feasibility Study on the Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe, adopted by the Steering Committee for Human Rights (CDDH) on 11 December 2015, para.20.

and pensions for public sector employees.[115] The Court found in favour of the respondent Government and argued that Greece had acted within its limits of the margin of appreciation.[116] It decided that the reduction of the first applicant's salary did not consist of a draconian measure that would place the applicant in circumstances below a generally accepted subsistence level.[117] Noting the "existence of an exceptional crisis without precedent in Greek history"[118], it accepted that an interference of art.1 Protocol 1 had occurred, but was justified by the correct weighing of the public interest vis-à-vis the applicants.

Pervou critiqued the viewpoint of the Court by stating that "as a human rights court, the European Court of Human Rights ought to have used the right's field of application as its starting point, and then assessed the extent of the interference. After all, interference should be the exception, while human rights protection is the rule in the ECHR system."[119] It is also regrettable that the Court disregarded the findings of other international bodies. Prior, the European Committee of Social Rights assessed the austerity measures taken by Greece and identified the infringement of rights resulting from the "cumulative effect of the restrictive measures and the procedures adopted to put them in place".[120] The decision in *Koufaki*, therefore, was reached by emphasising the domestic states' margin of appreciation and the particularly weighty public interest. This emphasis detracts from the individual's burdensome infringement on their right to possession under art.1 Protocol 1, and moreover overlooks international soft jurisprudence that could have aided in the assessment of the impact of the measures. Loercher further noted the absence of consideration with regards to other national constitutional decisions within Europe.[121] The Court's approach essentially runs counter to *Demir and Baykara* and weakens the protection under the Convention. Similarly, *Giavi v Greece*[122] is indicative for a regressive trend in the Court's awareness of the inextricably interwoven nature of civil, political, and economic and social rights.

In contrast to the *carte blanche* which was issued in *Koufaki,* the decision in *da Silva Carvalho Rico v Portugal* offered a more nuanced approach towards the implementation of austerity measures. Although the Court ultimately declared the application inadmissible, it carefully analysed the effects of the austerity measures, and furthermore it set out two important requirements that had been fulfilled by the Portuguese government. Firstly, unlike in *Koufaki*, the restrictive measures occurred as a temporary measure. Secondly, the austerity measures had not been implemented uniformly, which would have burdened the least wealthy population in a disproportionate manner. Moreover, the Portuguese Constitutional Court relied on the incorporated German concept of "proviso of the possible", known in German as *Vorbehalt des Möglichen*,[123] which, in turn, underpins the proportionality principle.[124] Accordingly, economic, social and cultural rights are fulfilled within the 'proviso of the possible', and therefore according to the available economic resources. The principle is based on the premise that the state is not always strictly under the same duty to protect social rights, since this duty will be influenced by the overall context of the state's budgetary well-being. Moreover, the principle restricts the infringement of social rights by stipulating that the core of the social right is not for sale. Consequently, even in times of crisis, a minimum protection of social rights must be afforded and the principles of equality and human dignity must remain intact. The Court

[115] *Koufaki and ADEDY v Greece* (App. Nos. 57665/12 and. 57657/12) , decision of 7 May 2013 at [20].

[116] *Koufaki and ADEDY v Greece* (App. Nos. 57665/12 and. 57657/12) at [31].

[117] *Kjartan Asmundsson v Iceland* (App. No. 60669/00), judgment of 12 October 2004 at [45]. Cuts in pensions could be justified if they represented a "reasonable and commensurate reduction rather than the total deprivation of his entitlements."

[118] *Kjartan Asmundsson v Iceland* (App. No. 60669/00) at [37].

[119] I. Pervou, "Human Rights in Times of Crisis: The Greek Cases before the ECtHR, or the Polarisation of a Democratic Society" (2016) 5(1) *Cambridge Journal of International and Comparative Law* 113, 119-120.

[120] See European Committee on Social Rights, *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* (App. No. 80/2012), decision of 24 September 2012 at [78].

[121] See K. Loercher, '*EGMR prüft drastische Sparmaßnahmen*', *https://www.hugo-sinzheimer-institut.de/hsi-newsletter/europaeisches-arbeitsrecht/2013/newsletter-022013.html*. [Accessed 20 November 2019.

[122] *Giavi v Greece* (App. No. 25816/2009) judgment of 3 October 2013 at [43], concerning the reduction of wage supplements and allowances.

[123] See, for example, BVerfGE 43, 291 (314f); 33, 303 (333): "Vorbehalt des Möglichen im Sinne dessen, was der Einzelne vernünftigerweise von der Gesellschaft beanspruchen kann". Translation: 'proviso of the possible, with regards to what the individual can reasonably claim from society.'

[124] *Da Silva Cavalho Rico v Portugal* (App. No. 13341/14), judgment of 1 September 2015 at [21].

has acknowledged this by assessing whether restrictions would result in "a total deprivation of entitlements resulting in the loss of means of subsistence"[125]. In *da Silva Cavalho Rico*, this level was not reached and the Court concluded that in moments of extreme financial crisis, as was the case in Portugal at the time, measures reducing the amount of pension were based on legitimate public interests.[126]

The Court's nuanced assessment of proportionate austerity measures was further elaborated in *N.K.M. v Hungary*[127]. The applicant, a long-term civil servant, faced a 98% tax on her severance payment due to a novel regulation that had been implemented shortly before her dismissal. The Court recognised the "substantial deprivation of income" suffered by the applicant, which constituted an "excessive and individual burden on the applicant's side."[128] Consequently, the Court determined that workers must be protected against dismissal and therefore the state does not have unlimited leeway to tax the workers' compensation for employment termination, even in times of crisis. The Court quite rightly voiced that "serious doubts remain whether the general justifications apply to the applicant, because she could not have been made responsible for the fiscal problems which the state intended to remedy"[129]. This case, along with the case of *R.SZ v Hungary*[130], stands out because the Court has taken into account a social dimension of the right to property and confirms that the right to property is determinative in the protection of workers' rights, particularly in the unfortunate event of a dismissal. In dealing with austerity measures, the Court has gone to some lengths in attempting to shed some light on its process of reasoning when dealing with infringements of rights due to crises. Progressive taxation of higher-income households is more likely to comply with the principle of proportionality[131] whereas socially "blind" measures, which effectively target all citizens as if they were all in the same financial situation, will not be accepted as falling within the margin of appreciation of a state.

V. Conclusion: Regressive trends in the Court's case law and the way forward

The regressive trend of the Court's case law is noticeable, but not unstoppable. *Demir and Baykara v Turkey,Konstantin Markin v Russia* and *Barbulescu v Romania* represent three landmark cases that have significantly contributed to the social dimension of workers' rights in light of the Convention. Following these landmark cases, the Court's jurisprudence has not been linear and regressive elements have crept into a number of cases, notably in the area of trade union rights and austerity measures. Generally, it can be observed, that when the Court applies a harmonious, integrated approach to the interpretation of a Convention right and genuinely considers present-day findings of international bodies, as well as European trends, it will rise to the challenges of upholding Convention rights- especially in times of upheaval tainted with social and economic unrest. Alexy quite rightly states: "it is precisely in times of crisis that even a minimal constitutional protection of social rights seems indispensable".[132]

[125] *Da Silva Cavalho Rico v Portugal* (App. No. 13341/14) at [42].
[126] *Da Silva Cavalho Rico v Portugal* (App. No. 13341/14) at [40].
[127] *N.K.M. v Hungary* (2016) 62 E.H.R.R. 33 at [40].
[128] *N.K.M. v Hungary* (2016) 62 E.H.R.R. 33 at [70] and [72].
[129] *N.K.M. v Hungary* (2016) 62 E.H.R.R. 33 at [59].
[130] *R.Sz. v Hungary* (App. No. 41838/11) at [31]-[34].
[131] *Mateus and Others v Portugal* (App. No. 62235/12 and 57725/12), decision of 8 October 2013 at [29]; *Da Silva Cavalho Rico v Portugal* (App. No. 13341/14).
[132] R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), p.344.