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## ***SOLANGE IN ATHENS***

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## ABSTRACT

*In the years following the 2008 global economic downturn, several European states entered a sovereign debt crisis. Most notably, Greece suffered from a soaring deficit, deteriorated credit ratings, increased borrowing costs, and a lack of investor interest. Although Greece received financial assistance from the EU, relief came as part of a harsh austerity package. The bailout measures rekindled the Solange Saga and raised important questions for Greece about the alleged supremacy of Community Law over its constitutional guarantees.*

*In 2011 and 2012, the German Constitutional Court addressed concerns that Germany's considerable contributions to the European bailout breached its citizens' fundamental right to democratic decision-making. The Court reinforced the constitutionality of the funding, but articulated the significance of national constitutional protections and the inherent limitations of EU institutions.*

*In contrast, Greek Courts questioned the alleged supremacy of EU law in the face of severe restrictions, potentially imposed in contravention of the right to collective action and the principle of proportionality (preventing laws that produce disparate impacts), which are guaranteed by the Greek Constitution. Key rulings from the Athens Court of the Peace (a civil court), the Court of Audit (a multifunctional body in part responsible for issuing advisory opinions on pension related laws), and the Council of State (the supreme administrative court of Greece) declared that the austerity measures were unconstitutional. Despite severe financial constraints and considerable EU pressure, Greece has continued to strive to protect the fundamental rights of its citizens.*

## I. INTRODUCTION

Europe has struggled to accommodate European Union law and multiple national constitutional regimes in a non-hierarchical fashion since the inception of the European Economic Community ("EEC"). The difficult coexistence of multiple legal orders has been famously highlighted by a string of decisions delivered by the German Federal Constitutional Court, commonly known as the 'Solange Saga.' In 1974 the German Court established the principle that 'as long as' inadequate protection of fundamental rights existed at the Community level, the guarantees of fundamental rights enshrined in the German Federal Constitution would hold primacy over Community law. Since its first Solange ruling, the German Court has softened its stance, but has continued to emphasize the limits of EU law supremacy over the German legal order. The bailout measures enacted at the EU level in the aftermath of the sovereign debt crisis have brought about new episodes of the Solange Saga. Rulings in 2011 and 2012 have addressed arguments that Germany's considerable

contributions to the European bailout might breach fundamental rules of German democratic decision-making. In both cases the Court in Karlsruhe has given the green light to the bailout measures, but has done so in cautious terms. Once again, the German Court reminded the EU institutions that their powers are inherently limited, and that the national constitutional protections of Germany shall remain of utmost importance.

As always, the pronouncements of the Federal Constitutional Court of Germany generated significant commentary. Much less known, by contrast, is the response of Greek Courts to the alleged supremacy of EU law during the current fiscal crisis. The bailout measures brought significant aid to Greece, but the aid was conditioned on harsh austerity measures. These measures restricted the rights of Greek workers to engage in collective action and imposed across-the-board cuts to salaries, benefits, pensions, and employment. The Greek Constitution expressly protects the right to engage in collective action and upholds a *principle of proportionality* (preventing laws that produce disparate impacts). Key rulings from the Athens Court of the Peace (a civil court), the Court of Audit (a multifunctional body in part responsible for issuing advisory opinions on pension related laws), and the Council of State (the supreme administrative court of Greece) announced that austerity measures were unconstitutional. Thus, in a modern and lyrical chapter in the longstanding struggle between supranational and state law, Greece protected the fundamental rights of its citizens despite a dire economic reality and considerable EU demands.

## II. THE DOCTRINE OF SUPREMACY OF COMMUNITY LAW

European Community law derives from different sources and exists independently from the national law of member states.<sup>1</sup> These legal orders have the potential to produce conflicting outcomes by adjudicating a single set of facts under disagreeing rules.<sup>2</sup> In what has been coined the ‘foundational period’ of Community law,<sup>3</sup> the European Court of Justice (“ECJ”) began to develop the doctrine of supremacy of Community law in order to address this conflict. The doctrine plainly applies to non-constitutional national law, but only applies to national constitutional law to

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<sup>1</sup> Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 229 (1997).

<sup>2</sup> *Id.*

<sup>3</sup> Joseph H. Weiler, *The Transformation of Europe*, 100 YALE L.J., no. 8 (1991), 2043, at 2413 (stating that from 1963 to the early 1970s the European Court of Justice established four doctrines in a series of landmark cases that fixed the relationship between Community law and Member State Law).

the extent a state's constitution allows for a transfer of sovereign powers to the Community in a particular situation.<sup>4</sup> The reach of this doctrine is limited to the enumerated competencies of the European Community and generally does not cover issues of fundamental rights because of the Community's failure, until 2009, to adopt a codified catalogue of fundamental human rights.<sup>5</sup>

The doctrine developed from case law, rather than through formal means in the treaties that established the European Community. In 1963, the ECJ clarified the relationship between states and the overarching EEC to be more than "an agreement which merely creat[ed] mutual obligations" between the contracting states.<sup>6</sup> The Court noted that the EEC "constituted a new legal order for the benefit of which the states have limited their sovereign rights."<sup>7</sup>

In 1964, the ECJ redefined the interplay between the EEC and its member states.<sup>8</sup> The Court affirmed the Community's legislative and adjudicative power over its member states,<sup>9</sup> relying on Article 5 of the Treaty of Rome.<sup>10</sup> The Community – now Union – is recognized as an entity with its own institutions, personality, legal capacity, and real power over its member-states resulting from the transfer of specific powers from the states to the Community.<sup>11</sup> These powers must apply equally to each state, regardless of each state's internal laws, in order to realize the aims of the treaty and avoid discrimination.<sup>12</sup>

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<sup>4</sup> Grimm, *supra* note 1, at 230.

<sup>5</sup> *Id.* at 230-32; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C306) 1.

<sup>6</sup> Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse administraties der Belastingen*, 1963 E.C.R. 1, 2 C.M.L.R. 105 (1963).

<sup>7</sup> *Id.*

<sup>8</sup> Case 6/64, *Costa v. Ente Nazionale Energia Elettrica*, 1964 E.C.R. 585, 3 C.M.L.R. 425 (1964).

<sup>9</sup> *Id.*

<sup>10</sup> *See* Treaty Establishing the European Economic Community art. 5, Mar. 25, 1957, 298 U.N.T.S. 3 (stating that Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from the action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.).

<sup>11</sup> *Costa v. Ente Nazionale Energia Elettrica*, 1964 E.C.R. 585.

<sup>12</sup> *Id.*

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*A. Supremacy Conflict: “Solange” Jurisprudence*

## i. Solange I

The bounds of the supremacy of Community law have long been an issue of contention between national courts and the ECJ. The “*Solange*” (meaning “so long as” in German) jurisprudence from the Bundesverfassungsgericht (BVerfG), or the German Federal Constitutional Court, is demonstrative of this struggle. In the “*Solange I*” decision delivered in 1974, the BVerfG held that although Article 24 of the German Constitution allows for a transfer of sovereign rights to an inter-state institution, the Article would not allow a transfer that amends, qualifies, or obstructs any part of the Constitution dealing with fundamental rights.<sup>13</sup> Fundamental rights were seen as an “inalienable essential feature” of the German Constitution.<sup>14</sup> The Court expressed concern that the Community lacked a democratically elected parliament and a sufficiently codified catalogue of fundamental rights.<sup>15</sup> *So long as* this conflict of norms existed between the Community and the German system, the Constitutional guarantee of fundamental rights would prevail.<sup>16</sup>

## ii. Solange II

In the “*Solange II*” decision of 1987, the BVerfG recognized Community developments in matters of democratic legitimacy and protection of human rights.<sup>17</sup> In light of these developments, the Court held that *so long as* the Community and particularly the European Court ensured effective protection of fundamental rights substantially similar to those required by Germany’s Constitution, the BVerfG would no longer exercise its jurisdiction to review legal acts of the Community.<sup>18</sup> Although the Court’s position in this case is more deferential to Community law, it is important to recognize that *Solange II* is not a surrender of jurisdiction over fundamental rights.<sup>19</sup> The BVerfG only stated that it would not exercise

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<sup>13</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, Internationale Handelsgesellschaft mbH v. Einfur- und Vorratstelle für Getreide und Futtermittel 37 BVERFGE 271 (Ger.), 2 C.M.L.R. 540, 549-50 (1974).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, Re Wünsche Handelsgesellschaft 73 BVERFGE 339 (Ger.), 3 C.M.L.R. 225, 265 (1987).

<sup>18</sup> *Id.*

<sup>19</sup> Jochen A. Frowein, ‘*Solange II*’, 25 COMMON MKT. L. REV. 201, 203-04 (1988); Wulf-Henning Roth, *The Application of Community Law in West Germany: 1980-1990*, 28 COMMON MKT. L. REV. 137 (1991) quoted in PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 359 (Oxford Univ. Press Inc., N.Y., 4th ed. 2008).

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this jurisdiction as long as the present conditions as to the protection of fundamental rights by the ECJ prevailed. The Court's decision preserved its final authority to intervene if real problems concerning the protection of fundamental rights in Community law were to arise.<sup>20</sup>

iii. 'Maastricht' and subsequent judgments

In the 1993 'Maastricht judgment' the BVerfG reasserted their jurisdictional authority to defend fundamental human rights guaranteed by the German Constitution. The Court decided that the German Act formally ratifying the Treaty on European Union was compatible with the German Constitution, but held that any Community action exceeding powers expressly conferred on it by the member states could not be legally binding in Germany.<sup>21</sup> The Court further asserted Germany's right to revoke their adherence to the EU Treaty if German sovereignty was threatened.<sup>22</sup>

Despite this ominous ruling, Germany has continued to adhere to the EU Treaty. In 2000, the BVerfG rejected a claim that EC Regulation 442/93 (on the pricing and taxation of bananas) violated German fundamental rights.<sup>23</sup> In 2005, the BVerfG held a German law implementing the European Arrest Warrant (requiring Germany to recognize arrest warrants from other EU member states) was inconsistent with German fundamental rights and therefore void.<sup>24</sup> In 2009, the BVerfG gave the green light to the expansion of EU competences codified by the Treaty of Lisbon, but it reiterated its cautionary endorsement of EU Law supremacy in the usual 'so long as' terms:

As long as . . . no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the

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<sup>20</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *supra* note 19, at 359-60.

<sup>21</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, Mit dem Maastricht-Urteil 89 BVERFGE 155 (Ger.).

<sup>22</sup> *Id.* at ph. 55.

<sup>23</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 7, 2000, Bananenmarktentscheidung 102 BVERFGE 147 (Ger.), *available (in English)* at [http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607\\_2bv1000197en.html](http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607_2bv1000197en.html).

<sup>24</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2005, 2 BVR 2236/04 *available at* [http://www.bverfg.de/entscheidungen/rs20050718\\_2bvr223604.html](http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html) (German) *and* [http://www.bverfg.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html) (English); *see also*, *Press Release no. 64/2005 (English)*, THE FEDERAL CONSTITUTIONAL COURT – PRESS OFFICE (July 18, 2005), <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg05-064en.html>.

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decisive holders of public authority, including Union authority.<sup>25</sup>

In summary, while Germany has demonstrated a willingness to cooperate, it remains a zealous protector of the fundamental rights guaranteed by its Constitution. Case law demonstrates that the German Court accepts the supremacy of EU law only when there is no conflict with the rights guaranteed by the German Constitution and when the EU is acting within its enumerated powers.<sup>26</sup>

### III. NEW CHAPTERS IN THE SOLANGE SAGA: THE EURO CRISIS AND THE GERMAN RESPONSE

#### A. *First Signs of Crisis*

The case for a single European currency was based on the idea that national monetary autonomy was inconsistent with Community objectives of free trade, capital movements, and fixed exchange rates.<sup>27</sup> Additionally, it became clear that the full benefits of the internal market would be difficult to achieve with high business costs associated with the existence of several currencies and unstable exchange rates.<sup>28</sup> The 1989 Delors Report (named after Jacques Delors, then head of the European Commission) indicated that this could be achieved in stages, culminating in the transition to the euro and the full independence of the European Central Bank in matters of monetary policy.<sup>29</sup> These recommendations and criteria for euro adoption were incorporated into the ‘Treaty of Maastricht,’ and national currencies were officially changed over to the euro in 2002.<sup>30</sup>

Articles 121 and 126 of the Treaty on the Function of the European Union (“TFEU”) form the basis of the Stability and Growth Pact,<sup>31</sup> and establish expectations for Member States seeking to adopt the euro under Europe’s Economic and Monetary Union (“EMU”), including limitations

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<sup>25</sup> *Press Release no. 72/2009 (English)*, THE FEDERAL CONSTITUTIONAL COURT – PRESS OFFICE (June 30, 2009), <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html>.

<sup>26</sup> CRAIG & DE BÚRCA, *supra* note 19, at 362.

<sup>27</sup> *Phase 3: the Delors Report*, EUR. COMM’N ECON. & FIN. AFFAIRS, [http://ec.europa.eu/economy\\_finance/euro/emu/road/delors\\_report\\_en.htm](http://ec.europa.eu/economy_finance/euro/emu/road/delors_report_en.htm) (last visited Sept. 28, 2013).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Phase 4: Three Stages to EMU*, EUR. COMM’N ECON. & FIN. AFFAIRS, [http://ec.europa.eu/economy\\_finance/euro/emu/road/three\\_stages\\_en.htm](http://ec.europa.eu/economy_finance/euro/emu/road/three_stages_en.htm) (last visited Sept. 28, 2013).

<sup>31</sup> *Relevant Legal Texts and Guidelines*, EUR. COMM’N ECON. & FIN. AFFAIRS, [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/legal\\_texts/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/legal_texts/index_en.htm) (last visited Nov. 27, 2013).

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on excessive government deficit and congruence of monetary policy.<sup>32</sup> In reality, these goals were often met with the use of unconventional accounting and flexible application of the criteria. For example, despite Protocol 12 on the excessive deficit procedure establishing a deficit requirement of 3% of GDP,<sup>33</sup> France's 3.02% deficit (achieved only by applying a one-time payment by France Telecom against the existing budget deficit) was considered close enough.<sup>34</sup> Additionally, the German finance minister attempted to revalue Germany's gold reserves<sup>35</sup> and Greece engaged in efforts to disguise borrowing as currency trade.<sup>36</sup>

The euro survived the critical stage following its immediate introduction, but these underlying tensions came to light after the downturn in the global economy in 2008.<sup>37</sup> In 2010, Portugal announced that its deficit reached 9.3% of GDP, France's deficit was estimated to hit 8.2%, and Spain announced a deficit of 11.4%.<sup>38</sup> Italy's deficit was estimated at about 5% with a 119% debt-to-GDP ratio.<sup>39</sup> Additionally, Ireland was struggling to reduce its 2009 deficit of 14.3% of GDP.<sup>40</sup>

### B. *The Greek Bailout*

By the end of 2009, Greece's deficit would hit 12% of GDP, a level

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<sup>32</sup> Consolidated version of the Treaty on the Functioning of the European Union art. 121, 126, 2008 O.J. C 115/24 [hereinafter *TFEU*].

<sup>33</sup> See *Stability and Growth Pact – The Corrective Arm*, EUR. COMM'N ECON. & FIN. AFFAIRS, [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/corrective\\_arm/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm) (last visited Sept. 28, 2013); Protocol (No. 12) to the Treaty on the Functioning of the European Union on the excessive deficit procedure art. 1, Sept. 5, 2008, 115 Official Journal 279-80, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/12:EN:HTML>.

<sup>34</sup> Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 395, 403 n. 47 (2011).

<sup>35</sup> *Id.*

<sup>36</sup> See Loise Story et al., *Wall St. Helped to Mask Debt Fueling Europe's Crisis*, N.Y. TIMES, Feb. 13, 2010, [http://www.nytimes.com/2010/02/14/business/global/14debt.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/02/14/business/global/14debt.html?pagewanted=all&_r=0) (describing Goldman Sachs' role in disguising Greek borrowing as currency trade in order to meet SGP standards) quoted in Turk, *supra* note 34, at 405.

<sup>37</sup> Turk, *supra* note 34, at 403.

<sup>38</sup> Rachel Donadio, *Europe Watches as Portugal's Economy Struggles*, N.Y. TIMES, Feb. 9, 2010, [http://www.nytimes.com/2010/02/10/world/europe/10portugal.html?\\_r=0](http://www.nytimes.com/2010/02/10/world/europe/10portugal.html?_r=0).

<sup>39</sup> Catherine Hornby, *Update 1 – Italy 2010 budget deficit below 5pct/GDP –cbank*, REUTERS: UK (Jan. 18 2011), <http://uk.reuters.com/article/2011/01/18/italy-economy-cenbank-idUKLDE70H1S220110118>.

<sup>40</sup> *Irish deficit balloons after new bank bail-out*, BBC NEWS, Sept. 30, 2010, <http://www.bbc.co.uk/news/business-11441473>.



twice the previous government estimate<sup>41</sup> and four times the level required by the Stability and Growth Pact.<sup>42</sup> The credit rating agency Fitch Ratings downgraded Greece's credit rating from A- to BBB+, which caused an upward spiral in borrowing costs for an already struggling Greece.<sup>43</sup> Rising yields on Greek bonds, resulting from uncertainty and a lack of investor interest, placed further pressure on the possibility of Greece's recovery.<sup>44</sup> The EMU leaders took action in 2010. On April 11, finance ministers from the sixteen EMU states agreed to extend €30 billion in credit to Greece.<sup>45</sup>

This proved to be inadequate, and Greece received further aid from a €110 billion bailout agreement between the Eurozone finance ministers and the International Monetary Fund ("IMF") in return for a commitment to austerity measures designed to increase investor confidence and speed economic recovery.<sup>46</sup> Greek civil servants and labor unions took to the streets immediately to strike and protest the austerity measures.<sup>47</sup> Market uncertainty remained, and Moody's ratings agency cut Greece's credit rating to junk status in June 2010.<sup>48</sup> In July 2011, the Eurozone finance ministers and the IMF extended Greece a second aid package of €159 billion.<sup>49</sup> The IMF expressed the possibility of a third aid package for Greece in September 2012.<sup>50</sup>

Austerity measures imposed on Greece in exchange for receiving the aid packages included: mandatory spending cuts, decreased wages, increased

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<sup>41</sup> Phillip Inman, *Greek Debt Crisis: timeline*, THE GUARDIAN, Mar. 9, 2012, <http://www.guardian.co.uk/business/2012/mar/09/greek-debt-crisis-timeline>.

<sup>42</sup> *Stability and Growth Pact – The Corrective Arm*, *supra* note 33.

<sup>43</sup> Inman, *supra* note 41.

<sup>44</sup> Charles Forelle & Tom Lauricella, *Rates Rise as Fear Returns on Greece*, WALL ST. J., Apr. 7, 2010, <http://online.wsj.com/article/SB10001424052702303493904575167381495748168.html>.

<sup>45</sup> Wall Street Journal Research, *Greece's Debt Crisis Timeline: April 11, 2010*, WALL ST. J., <http://online.wsj.com/article/SB10001424052748703730804576313513356998514.html> (last visited at Sept. 28, 2013) [hereinafter *WSJ Timeline*].

<sup>46</sup> Lefteris Papadimas & Jan Strupczewski, *EU, IMF agree \$147 billion bailout for Greece*, REUTERS: US (May 2, 2010), <http://www.reuters.com/article/2010/05/02/us-eurozone-idUSTRE6400PJ20100502>.

<sup>47</sup> *WSJ Timeline*, *supra* note 45, on May 4-5, 2010.

<sup>48</sup> Ingrid Melander, *Moody's cut Greece's credit rating to junk*, REUTERS: US (June 14, 2010), <http://www.reuters.com/article/2010/06/14/us-greece-junkratings-moodys-idUSTRE65D46W20100614>.

<sup>49</sup> Connor Sullivan, *European Stocks Rally After EU Agrees on Second Bailout Plan for Greece*, BLOOMBERG (July 22, 2011), <http://www.bloomberg.com/news/2011-07-22/european-stocks-post-weekly-rally-after-second-greek-bailout.html>.

<sup>50</sup> *IMF official sees third bailout for Greece*, MARKETWATCH (Sept. 13, 2012), <http://www.marketwatch.com/story/imf-official-sees-third-bailout-for-greece-2012-09-13>.

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flexibility of labor markets, new property taxes, the suspension of 300,000 civil servants on partial pay,<sup>51</sup> and pressure from Germany and other Eurozone members to sell off government assets to reduce its debt.<sup>52</sup> As a result, Greek workers and unions attempt to protect their rights through protests.<sup>53</sup>

#### IV. GERMAN REACTION TO A EUROPEAN STABILIZATION

##### A. German Bundestag Action

In order to establish a national legal basis for providing aid to Greece, the German Parliament (the Bundestag) adopted the Monetary Union Financial Stabilization Act of 7 May 2010 (Währungsunion-Finanzstabilisierungsgesetz or “WFStG”), authorizing the German government to issue guarantees of up to €22.4 billion in loans.<sup>54</sup> The Bundestag also adopted the Act Concerning the Granting of Guarantees within the Framework of a European Stabilization Mechanism of 21 May 2010 (Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus or “StabMechG”), originally giving Germany a national legal basis to issue guarantees of up to €123 billion in loans through the European Financial Stability Facility

<sup>51</sup> *EU austerity drive country by country*, BBC NEWS EUROPE, May 21, 2012, <http://www.bbc.co.uk/news/10162176>.

<sup>52</sup> WSJ Timeline, *supra* note 45, on May 23, 2011.

<sup>53</sup> *See, e.g.*, WSJ Timeline, *supra* note 45, at June 15, 2011 (stating that on June 15, 2011 two of Greece’s major labor unions engaged in a 24-hour strike that crippled public services); Karolina Tagaris, *Greece faces 48 hour strike over austerity cuts*, REUTERS: US (Nov. 5, 2012), <http://www.reuters.com/article/2012/11/05/us-greece-idUSBRE8A400J20121105> (stating that Greek workers, led by Greece’s two largest labor organizations, began a 48-hour strike to protest new austerity measures subject to a vote later that week); *Greeks clash with riot police as politicians pass austerity measures*, THE TELEGRAPH (Nov. 7, 2012), <http://www.telegraph.co.uk/finance/financialcrisis/9662285/Greeks-clash-with-riot-police-as-politicians-pass-austerity-measures.html>.

<sup>54</sup> Währungsunion-Finanzstabilisierungsgesetz [Monetary Union Financial Stabilization Act], May 7, 2010, BGBl. I at 537 (Ger.) *available at* [http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger\\_BGBI#\\_Bundesanzeiger\\_BGBl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl110s0537b.pdf%5D\\_1391796852428](http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI#_Bundesanzeiger_BGBl_%2F%2F*%5B%40attr_id%3D%27bgbl110s0537b.pdf%5D_1391796852428); *noted in* Winfried M. Carli & Hans Diekmann (Shearman & Sterling LLP), *Euro Rescue Package Backed by German Federal Constitutional Court – German Parliament Approves Plan to Boost the Lending Capacity of the Eurozone Bailout Fund (EFSF)*, 23 EUROWATCH, no. 18, Oct. 2011, at 14 *available at* [http://www.fasken.com/files/News/3f24a375-5120-4d06-b6d3-5fe1a0200807/Presentation/NewsAttachment/aed2325c-33d0-4c69-b830-5fe7916b94d3/101511EuroWatch\\_final.pdf](http://www.fasken.com/files/News/3f24a375-5120-4d06-b6d3-5fe1a0200807/Presentation/NewsAttachment/aed2325c-33d0-4c69-b830-5fe7916b94d3/101511EuroWatch_final.pdf).

(“EFSF”).<sup>55</sup> This commitment was increased to €211 billion through amendments to StabMechG in September 2011.<sup>56</sup>

i. Public Reaction

The creation of a monetary union and the adoption of a common currency by Eurozone states inherently affected one of the most important areas of state sovereignty: control over fiscal policy.<sup>57</sup> State sovereignty has been further impacted by promises to provide future loans to states facing financial difficulty through the EFSF<sup>58</sup> and its successor, the European Stability Mechanism (“ESM”).<sup>59</sup> For many German taxpayers, the prospect of assuming a responsibility towards weaker euro economies created anxiety and anger.<sup>60</sup> Eventually the promises to aid these economies, made through parliamentary act, were constitutionally challenged.<sup>61</sup> The challenge was based on the idea that budgetary decisions in the public sector must remain with a parliament elected by the people.<sup>62</sup> In keeping with the BVerfG’s tradition of fervently protecting the fundamental rights of the German people,<sup>63</sup> the Court evaluated this contention on two occasions.

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<sup>55</sup> Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus [Act Concerning the Granting of Guarantees within the Framework of a European Stabilization Mechanism], May 21, 2010, BGBl. At 627 (Ger.) *available at* [http://www.bgbl.de/Xaver/text.xav?start=%2F%2F%5B%40attr\\_id%3D%27bgbl110s0627b.pdf%5D&skin=pdf&bk=Bundesanzeiger\\_BGBI&tf=xaver.component.Text\\_0&hlf=xaver.component.Hitlist\\_0](http://www.bgbl.de/Xaver/text.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl110s0627b.pdf%5D&skin=pdf&bk=Bundesanzeiger_BGBI&tf=xaver.component.Text_0&hlf=xaver.component.Hitlist_0); *noted in* Carli & Diekmann, *supra* note 54, at 15.

<sup>56</sup> Carli & Diekmann, *supra* note 54, at 15.

<sup>57</sup> Turk, *supra* note 34, at 404.

<sup>58</sup> *EFSF FAQ*, EUR. FIN. STABILITY FACILITY 1 (Dec. 20, 2012), [http://www.efsf.europa.eu/attachments/faq\\_en.pdf](http://www.efsf.europa.eu/attachments/faq_en.pdf).

<sup>59</sup> *About ESM*, EUR. STABILITY MECHANISM, <http://www.esm.europa.eu/about/index.htm> (last visited Sept. 28, 2013).

<sup>60</sup> William Boston, *Germany and France Reach Greece Deal, but Problems Remain*, TIME WORLD, June 17, 2011, <http://www.time.com/time/world/article/0,8599,2078352,00.html>; Harriet Alexander, *Germany divided again as Europe grapples with euro bail out plan*, THE TELEGRAPH, July 24, 2011, <http://www.telegraph.co.uk/news/worldnews/europe/eu/8656892/Germany-divided-again-as-Europe-grapples-with-euro-bailout-plan.html>; Ambrose Evans-Pritchard, *Angela Merkel faces revolt in Germany over rescue deal*, THE TELEGRAPH, July 25, 2011, <http://www.telegraph.co.uk/finance/financialcrisis/8658331/Angela-Merkel-faces-revolt-in-Germany-over-rescue-deal.html>.

<sup>61</sup> Carli & Diekmann, *supra* note 54, at 15 (discussing that challenges were brought under Article 38, in conjunction with Article 20).

<sup>62</sup> *Id.*

<sup>63</sup> *See supra* Part II.C.

## ii. Ruling of September 7, 2011

On September 7, 2011, the BVerfG delivered its reaction to the constitutional complaints by German citizens regarding the WFStG and StabMechG acts authorizing financial aid to weaker Eurozone economies. The Court held that the enabling acts do not constitute a violation of Germany's autonomy despite Articles 20 and 38 of Germany's Constitution.<sup>64</sup> These Articles invest state authority in the people through their voting power and declare that the Bundestag is only to be bound by the will of the people.<sup>65</sup> In light of these guarantees, the Bundestag did not impermissibly impair its right to adopt or implement a state budget or leave Germany vulnerable to an "incalculable liability."<sup>66</sup> Additionally, the funding provisions of the acts would be interpreted in conformity with the constitution, meaning that the government would be obligated to obtain prior approval by a Budget Committee before issuing guarantees under the act.<sup>67</sup>

The Court further explained that the WFStG and StabMechG put sufficient restrictions on future promises of economic aid.<sup>68</sup> The restrictions included: commitment amounts, time frames, and mutual agreements between euro currency states.<sup>69</sup> The Court also specifically mentioned the agreement with Greece, laying out the contingencies of assistance.<sup>70</sup> These contingencies, which are an important part of the constitutionality of the bailout mechanisms from Germany's perspective, caused social unrest and protest in Greece.<sup>71</sup>

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<sup>64</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 7, 2011, *Europäische Zeitschrift für Wirtschaftsrecht* [EuZW] 920, 2011 (Ger.) available at [http://www.bundesverfassungsgericht.de/en/decisions/rs20110907\\_2bvr098710.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20110907_2bvr098710.html); see also, *Press Release no.55/2011 (English)*, THE FEDERAL CONSTITUTIONAL COURT – PRESS OFFICE (Sept. 7, 2011), <http://www.bundesverfassungsgericht.de/en/press/bvg11-055en.html>.

<sup>65</sup> See GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1 (Ger.) (showing that Article 38 states that Bundestag are representatives of the people and will not be bound by orders and instructions and that Article 20 states that all state authority emanates from the people, and is exercised through voting and by national organs) available (in English) at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0107](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0107).

<sup>66</sup> *Europäische Zeitschrift für Wirtschaftsrecht* [EuZW], *supra* note 64; *Press Release no.55/2011 (English)*, *supra* note 64.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *supra* text accompanying note 53.

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## iii. Ruling of September 12, 2012

Approximately one year later, the Court spoke to the constitutionality of acts enabling the euro bailout on a second occasion. On September 12, 2012, the BVerfG addressed several calls for temporary injunctions seeking to prohibit the President from signing statutes passed by Parliament that would effectively ratify the ESM Treaty and Germany's fiscal cooperation in the bailout.<sup>72</sup> In its decision, the Court recognized that its choice to deny the injunction would allow the President to bind Germany under international law, a commitment that could not easily be revoked in the event that the statutes constituted a violation of the German Constitution.<sup>73</sup>

Although the decision effectively gave a green light for ratification of the ESM, the Court did qualify the €190 billion in potential aid under the ESM. The Court noted that the current level of aid did not compromise budgetary autonomy but any increases in this amount would be subject to approval by the German representative on the ESM board.<sup>74</sup> The Court declared that although the Treaty did not provide for a right of termination, customary international law always provides for treaty termination by multilateral agreement and by unilateral action upon a fundamental change in circumstances.<sup>75</sup> Both the 2011 and 2012 rulings are important reservations of Germans' constitutional rights. These decisions are significant, especially in light of Germany's strong position in the EU economy, and will surely be the subject of substantial commentary in the international community.

#### V. GREECE'S REACTION TO THE AUSTERITY MEASURES: A MODERN SUPREMACY CONFLICT

##### A. Hellenic Parliament Action

In response to the euro-crisis, which left Greece on the verge of bankruptcy, the state entered into the EU/IMF bailout agreement in May of 2010. This agreement required Greece to adopt various financial policies,

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<sup>72</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, 2 BVERFGE 1390 (Ger.) available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html); see also *Press Release no. 67/2012 (English)*, THE FEDERAL CONSTITUTIONAL COURT – PRESS OFFICE (Sept. 12, 2012), <http://www.bundesverfassungsgericht.de/en/press/bvg12-067en.html>; *Extracts from the decision of the Federal Constitutional Court of 12 September 2012*, THE FEDERAL CONSTITUTIONAL COURT, [http://www.bundesverfassungsgericht.de/en/decisions/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html) (last visited Sept. 28, 2013).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

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with financing contingent on Greece's adherence. Some notable policies included: reducing holiday pay for civil servants and pensioners, decreasing wages, cutting public investment, and raising taxes on items such as fuel and alcohol.<sup>76</sup> The Greek Parliament passed memorandum laws to effectuate these mandated policies. Two pieces of such legislation – Law 3833/2010<sup>77</sup> and 3845/2010<sup>78</sup> – became the focus of significant debate.

On March 5, 2010, Greece adopted Law 3833/2010 on the “Protection of the national economy – Emergency measures to tackle the fiscal crisis.”<sup>79</sup> This law mandated substantial reductions in the benefits of public sector employees, as well as those for employees under private contract in both the public and broader public sector.<sup>80</sup> The most contentious provisions included a 7% reduction in wages and compensation previously set by law and collective bargaining agreements and a 30% reduction in pay over

<sup>76</sup> Maria Petrakis & Natalie Weeks, *Greece Outlines Conditions of EU-IMF Package*, Bloomberg (May 2, 2010), <http://www.bloomberg.com/news/2010-05-02/greece-to-cut-spending-raise-taxes-as-part-of-eu-imf-package-summary.html>.

<sup>77</sup> Nomos (2010:3833), Prostatia tes ethinis oikonomias- Epeigonta metra [Protection of the national economy- Urgent measures for dealing with the economic crisis], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D] 2010, A:40 (Greece), available at [http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wGYK2xFpSwMnXdtvSoClrL8n2mlCsr5UbztI19LGdkF53UIxsx942CdyqxSQYNUqAGCF0fB9HI6qSYtMQEkEHLwnFqmgJSA5WlsluV-nRwO1oKqSe4BIOTSpEWYhszF8P8UqWb\\_zFijLUcdBT634d4pDAXGC85hxNOGwzW47l09w-m5fbp3jXw](http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wGYK2xFpSwMnXdtvSoClrL8n2mlCsr5UbztI19LGdkF53UIxsx942CdyqxSQYNUqAGCF0fB9HI6qSYtMQEkEHLwnFqmgJSA5WlsluV-nRwO1oKqSe4BIOTSpEWYhszF8P8UqWb_zFijLUcdBT634d4pDAXGC85hxNOGwzW47l09w-m5fbp3jXw).

<sup>78</sup> Nomos (2010:3845) Metra gia tin efarmoge tou mixhanismou sterekses tes Hellinikis oikonomias apo ta krati-meli tes zonis tou Euro kai to Diethnes Nomismatiko Tameio [Measures for the application of the support mechanism for the Greek economy by euro area Member States and the International Monetary Fund Act], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D] 2010, A:65 (Greece), available at [http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wGYK2xFpSwMnXdtvSoClrL8-e4JIptYxqTtI19LGdkF53UIxsx942CdyqxSQYNUqAGCF0fB9HI6qSYtMQEkEHLwnFqmgJSA5WlsluV-nRwO1oKqSe4BIOTSpEWYhszF8P8UqWb\\_zFijPdQ-rEE96-yMgiC3USKKJMpJi1yaV5m58n5GldnV3qk](http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wGYK2xFpSwMnXdtvSoClrL8-e4JIptYxqTtI19LGdkF53UIxsx942CdyqxSQYNUqAGCF0fB9HI6qSYtMQEkEHLwnFqmgJSA5WlsluV-nRwO1oKqSe4BIOTSpEWYhszF8P8UqWb_zFijPdQ-rEE96-yMgiC3USKKJMpJi1yaV5m58n5GldnV3qk).

<sup>79</sup> Nomos (2010: 3833), *supra* note 77; *Greek General Confederation of Labor (GSEE) Observations on Austerity Measures to the International Labor Organization*, EUR. TRADE UNION CONFEDERATION 1, 2 (July 29, 2010), [http://www.etuc.org/IMG/pdf/GSEE\\_-\\_Observations\\_on\\_Austerity\\_measures\\_ILO\\_Conventions\\_edit.pdf](http://www.etuc.org/IMG/pdf/GSEE_-_Observations_on_Austerity_measures_ILO_Conventions_edit.pdf) [hereinafter *GSEE Observations*].

<sup>80</sup> *Id.*; Employment in the broader public sector is employment in the following areas: public services, state-law entities, public organizations, municipalities and communities or municipal enterprises, public utilities, state banks, and state-controlled enterprises. *Permanent and temporary employment in public and private sectors*, EUR. WORKING CONDITIONS OBSERVATORY (Jan. 14, 2008), <http://www.eurofound.europa.eu/ewco/2007/09/GR0709019I.htm>.

Christmas, Easter, and periods of annual leave.<sup>81</sup> Additionally, the law prohibited affected laborers and pensioners from entering into collective bargaining agreements in 2010 to attempt to increase their wages.<sup>82</sup> Although the Greek Constitution does not specifically mention certain wage and compensation levels, the right to engage in collective bargaining expressly appears in Articles 22 and 23.<sup>83</sup>

The Parliament simultaneously adopted Law 3845/2010 on the “Measures for the application of the support mechanism for the Greek economy by euro area Member States and the International Monetary Fund.”<sup>84</sup> This structural framework for implementation provides for permanent circumvention of collective bargaining agreements by altering the mechanism for setting minimum wage and working conditions, and for provisions excluding young workers from those standards.<sup>85</sup> Under the law, the workforce could expect an additional 3% reduction in pay and the elimination of paid time off for vacation and holidays.<sup>86</sup> The law also significantly reduced pensions and gave the Greek government the legal basis to implement a plan to activate aid to Greece.<sup>87</sup> At a minimum, this law also implicated the collective bargaining rights protected in the Constitution.

#### i. Public Reaction

In 2010, 230,000 Greek citizens lost their jobs, the unemployment rate rose to 16.2%, consumption fell €1.6 billion from the prior year, private sector wages were cut 10-20%, and homelessness rose 25%.<sup>88</sup> Amid this backdrop, Greek citizens vocalized their dissatisfaction with government policy and the general quality of life in Greece.<sup>89</sup> A May 2010 survey of the Greek workforce revealed that 86% of respondents felt the measures

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<sup>81</sup> *GSEE Observations*, *supra* note 79.

<sup>82</sup> *Id.*

<sup>83</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 22, 23 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>84</sup> Nomos (2010:3845), *supra* note 78.

<sup>85</sup> *GSEE Observations*, *supra* note 79 at 3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 4. Law 3863/2010 clarified Law 3845/2010, and waived minimum wage requirements for workers under twenty-five, lowered severance pay by 50%, increased limits on collective layoffs, and firing workers nearing retirement. *Id.* at 5-7.

<sup>88</sup> Nick Malkoutzis, *Greece – A Year in Crisis: Examining the Social and Political Impact of an Unprecedented Austerity Programme*, FRIEDRICH EBERT STIFTUNG 1, 2-3 (June 2011), <http://library.fes.de/pdf-files/id/ipa/08208.pdf>.

<sup>89</sup> *Id.* at 3.

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were socially unjust, while only 9% supported the measures.<sup>90</sup> Many felt that the economic crisis would be better alleviated by criminalizing tax evasion, reducing corruption in the public sector, and even taxing the Greek Church.<sup>91</sup>

The laws also sparked reactions from industry and labor interest groups. The Hellenic Federation of Enterprises commented that the measures were designed to limit the rise in unemployment and failure of businesses, while adapting the conditions of the Greek labor market to European standards.<sup>92</sup> However, the National Confederation of Greek Laborers stated that these measures would reduce workers' purchasing power and general feelings of security, and had the potential to stall the state's economy altogether.<sup>93</sup> The General Confederation of Greek Small Business and Trades also expressed concern over the policies – specifically the lack of protection for the unemployed and those age fifty-five and over, who would be at risk of losing jobs and pension rights.<sup>94</sup>

The Greek General Foundation of Labor (“GSEE,” as abbreviated in Greek), created in 1928 to protect the rights and interests of Greek workers,<sup>95</sup> expressed extreme concern over the memorandum laws 3833/2010, 3845/2010, and 3863/2010. The GSEE issued an urgent memo to the International Labor Organization (“ILO”) on behalf of the Greek labor force in July of 2010 calling upon the ILO to examine the conditions in Greece.<sup>96</sup> The ILO is a specialized organ of the United Nations that develops labor standards with a focus on social justice and human rights.<sup>97</sup> As an ILO member,<sup>98</sup> Greece is responsible for upholding the standards set by the organization.

The GSEE specifically argued that the 2010 laws disallowing workers from engaging in union bargaining violated ILO Conventions No. 98, 87, and 154, which give workers the right to organize and engage in collective

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<sup>90</sup> *New law facilitates dismissals and cuts labour costs*, EUR. INDUS. RELATIONS OBSERVATORY (Sept. 17, 2010), <http://www.eurofound.europa.eu/eiro/2010/07/articles/GR1007019I.htm>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Greece*, Int'l Labour Org. (Sept. 2009), [http://www.ilo.org/labadmin/info/WCMS\\_115425/lang-en/index.htm](http://www.ilo.org/labadmin/info/WCMS_115425/lang-en/index.htm).

<sup>96</sup> *GSEE Observations*, *supra* note 79.

<sup>97</sup> *Origins and History*, INT'L LABOR ORG., <http://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm> (last visited Sept. 28, 2013).

<sup>98</sup> *Alphabetical List of ILO member countries*, Int'l Labor Org., <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited Sept. 28, 2013).



action.<sup>99</sup> The memo also expressed concern that the 2010 laws violated various ILO Conventions relating to minimum wage laws, as well as those providing protection against employment discrimination.<sup>100</sup> The Greek Courts would soon be compelled to evaluate arguments that the laws were also in violation of Greece's Constitution.

*B. The Council of State's Ruling on the 2010 Enactments*

On February 20, 2012, the Council of State, which is the supreme administrative court of Greece, delivered a controversial decision regarding the constitutionality of memorandum laws 3833/2010 and 3845/2010.<sup>101</sup> This Court has jurisdiction over compensation and social security claims against the state and over the legality of state administrative acts generally.<sup>102</sup> Its judgments serve as precedent for constitutional interpretation.<sup>103</sup> The Court considered the petitions of various public-sector employees and labor interest groups requesting remuneration of the full compensation and benefits that they were entitled to before the passage of the memorandum laws.<sup>104</sup> As part of its appraisal of these claims, the Court addressed whether the laws mandating salary, benefit, and pension reductions should be nullified based on their unconstitutionality.<sup>105</sup>

The Court framed its opinion with a discussion of member states' obligations under the TFEU.<sup>106</sup> Articles 119 and 120 instruct the member states to conduct their economic policy in a way that contributes to the objectives of the European Union.<sup>107</sup> Additionally, Article 126 establishes that member states must maintain deficit levels and government debt to GDP ratios or risk involvement by the Commission.<sup>108</sup> The Court also noted Greece's responsibility under the Stability and Growth Pact, which ensures that government debt and deficit ratios remain within a specified range.<sup>109</sup> These commitments were advanced as the basic justification for EU involvement and Greece's decision to pass the labor laws.

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<sup>99</sup> *GSEE Observations, supra* note 79, at 7-19.

<sup>100</sup> *Id.* at 20-32.

<sup>101</sup> Symboulion Epikrateias [S.E.] [Supreme Administrative Court] 668/2012, 624 Armenopoulos (Greece).

<sup>102</sup> *Composition and Structure, THE COUNCIL OF STATE*, [http://www.ste.gr/FL/main\\_en.htm](http://www.ste.gr/FL/main_en.htm) (last visited Sept. 28, 2013).

<sup>103</sup> *Id.*

<sup>104</sup> 668/2012, *supra* note 101.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 5 (as translated).

<sup>108</sup> *Id.* at 6 (as translated).

<sup>109</sup> *Id.* at 8-10 (as translated).

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The Court also laid out the constitutional basis for Greece's passage of the 2010 laws. Article 82 of the Constitution gives the government the right to direct the general policies of the country.<sup>110</sup> In conjunction with Articles 36 and 28, the government also has the right to enter into binding international economic agreements.<sup>111</sup> This right to direct the state in its time of crisis overshadowed arguments that the Greek Parliament relinquished too much control over state policy.<sup>112</sup> The Court dismissed an argument by a member of the council that the 2010 laws affected basic principles of democracy despite the fact that the content and timeframes for implementing reform were dictated by agreements with parties external to Greece.<sup>113</sup>

Further, Article 28 constitutes the foundation of Greece's participation in the European integration process.<sup>114</sup> Paragraph 3 grants Greece the right to limit national sovereignty through parliamentary law when the law is driven by an important national interest, but this right is limited and the laws cannot infringe on democracy or basic rights.<sup>115</sup> Democracy is defined through various provisions: Article 1, paragraph 3, stating that all powers derive from the people and shall be exercised as specified by the Constitution; Article 26, paragraph 1, providing that the legislative powers

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<sup>110</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 82 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>111</sup> *Id.* art. 28, 36.

<sup>112</sup> For corroborating analysis of this issue see Theodora Antoniou, *He apofasi tis Olomeleias tou Symbouliou tis Epikrateias gia to Mnimonio-Mia europaiki upothesi xoris europaiki prosegisi [The decision of the Plenary Session of Court of Audit for the Memorandum-A European case without a European approach]* TO SYNTAGMA (TOΣ) (Jan. 2012), *available at* <http://www.constitutionalism.gr/site/2502-i-apofasi-tis-olomeleias-toy-symbolyoy-tis-epikra/>. Antoniou comments on the Court's approach regarding the relinquishment of state powers under the Memorandum of Understanding law and points out that Article 28, Section 2, of the Greek Constitution allows powers derived from the Constitution to be vested by treaty or agreement in agencies of international organizations when this serves an important national interest and promotes cooperation with other States. Antoniou also notes that the state's power over its own government budget is essential element of sovereignty and thus, the relinquishment of such a power to third parties external to Greece requires 3/5 majority vote of the Parliament (3/5 majority vote of Members of Parliament is necessary to vote on laws ratifying such treaties or agreements). However, the majority opinion of the Court found that there was no relinquishment of power to agencies of international organizations and the supermajority requirement was not triggered (recitals 27 and 28 of said decision).

<sup>113</sup> 668/2012, *supra* note 101, at 48-49 (as translated).

<sup>114</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 28 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>115</sup> *Id.*

shall be exercised by the Parliament and President; and Article 60, paragraph 1, giving members of Parliament unrestricted freedom of opinion and the right to vote according to their views.<sup>116</sup> The Court felt that the 2010 laws contained sufficiently specific content and timelines, and the subject matter was properly limited to areas such as fiscal policy and labor law.<sup>117</sup> The state of Greece's economy, the public interest at stake, and the fact that milder alternatives had been exhausted also justified the present course of action.<sup>118</sup>

The Court then addressed arguments based on substantive rights guaranteed by the Constitution. Petitioners argued that Article 2, setting out that the primary obligation of the state is protecting the people, invalidated the harsh salary and pension cuts.<sup>119</sup> The Court disagreed, finding that Article 2 does not guarantee any right to a certain level of salary or pension as long as basic living needs are being met, and that the levels mandated by the 2010 laws did not fall below this level.<sup>120</sup> Additionally, Article 17 - which states that the protection of property rights may not be exercised contrary to the public interest - supported the government's decision to reduce salary and pension levels as a response to the economic crisis.<sup>121</sup>

Petitioners also argued that the 2010 laws, which mandated flat rate percentage reductions to salary, pension, and holiday pay rather than rates adjusted for overall level of compensation, violated the *principle of proportionality*, guaranteed by paragraph 1 of Article 25, and Article 4, paragraph 5.<sup>122</sup> The Court rejected this argument, however, because, although the method may have some disparate impacts among the population, applying a percentage reduction does not constitute arbitrary and singular treatment of people who are in disparate circumstances.<sup>123</sup> Additionally, Article 25, paragraph 4, gives the state a right to call on all citizens to fulfill their duties of social and national solidarity.<sup>124</sup> According to the Court, the laws struck a proper balance between the needs of Greece,

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<sup>116</sup> *Id.* art. 1, 26, 60.

<sup>117</sup> 668/2012, *supra* note 101, at 47-48 (as translated).

<sup>118</sup> *Id.* at 49 (as translated).

<sup>119</sup> *Id.* at 54, 56 (as translated).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 54 (as translated).

<sup>122</sup> Article 4 provides that Greek citizens contribute to public burdens in proportion to their means. 2008 SYNTAGMA [SYN.][CONSTITUTION] 4 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>123</sup> 668/2012, *supra* note 101, at 58 (as translated).

<sup>124</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 25 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

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the overall public interest, and the protection of property rights for those receiving salaries and pensions.<sup>125,126</sup>

In a secondary discussion, the Court also held that the 2010 laws did not constitute a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) – specifically Article 1 of the First Protocol.<sup>127</sup> This Article provides that all persons are entitled to enjoyment of their property and shall not be deprived of their property except in the public interest or under conditions provided for in international law.<sup>128</sup> Property, as used in Article 1, is a term that often encompasses possessions as well as entitlements to pension payments or social security benefits.<sup>129</sup> However, the Protocol does not limit the rights of a state to laws that it deems necessary to control the use of property in accordance with the best interests of the public.<sup>130</sup> The Court found that Greece’s economic status and the state of its social security organizations were adequate justification for the legislature’s decision to enact the 2010 laws, and that legislative policy is only subject to a minimal level of judicial review.<sup>131</sup>

In summary, the Court heavily emphasized that the 2010 laws were an integral part of the economic adjustment program necessary to reform the Greek economy under the state’s obligation to the European Union.<sup>132</sup> The

<sup>125</sup> 668/2012, *supra* note 101.

<sup>126</sup> For comments on the Court’s application of the ‘principle of proportionality’ see Ksenofontas Kontiadis/Alkmini Foteiadou, *Koinonika Dikaiomata, analogikotita kai dimosionomiki krisi. Theoritikes epismanseis ep eukairia tin S.E. 668/2012 [Civil Rights, proportionality, and financial crisis. Theoretical remarks on the occasion of S.E. 668/2012], DIKAIOMATA TOU ANTHROPOU [D.T.A.] 53/2012, available at <http://www.constitutionalism.gr/site/2377-koinwnika-dikaiwmata-analogikotita-kai-dimosionomi/>. Kontiadis and Foteiadou note that the Court states in recitals 34, 35, and 38 that the political decisions are only subject to “limited” judicial review, but in parallel the Court applies the proportionality doctrine to examine the core of the enacted measures. *Id.**

<sup>127</sup> 668/2012 *supra* note 101, at 49-50 (as translated).

<sup>128</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol art. 1, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>129</sup> Aida Grgić et al., *The Right to Property Under the European Convention on Human Rights*, COUNCIL OF EUR. 1, 6-9 (June 2007), available at google.com (search: The Right to Property Under the European Convention on Human Rights).

<sup>130</sup> 668/2012 *supra* note 101, at 50 (as translated).

<sup>131</sup> *Id.* at 50-51, 57 (as translated).

<sup>132</sup> See also Lampros Karelos, *Nomiki fysi kai ypoxreosi nomothetikis kyrosis tou Mnimoniou (me aformi tin S.E 668/2012) [Legal nature and duty of legislative ratification of the Memorandum law (occasioned by the S.E. 668/2012)]*, NOMIKO VEMA [N.V], no. 60, 2012, at 2709 (arguing, similarly to the judiciary in case 668/2012, that the ‘Memorandum of Understanding’ is a political document and should not be subjected to substantive judicial review).

Court also rejected the idea that the laws were promulgated in violation of the principle of democracy or of the Constitution. Although the measures significantly reduced benefits afforded to Greek laborers, the cuts were not so extreme as to constitute a failure to protect Greece's citizens or unfavorable and disparate treatment of laborers in lower income brackets.<sup>133</sup>

i. Petitions for Help

By 2012, Greece received significant international condemnation for its 2010 laws in response to petitions by various Greek labor unions. In its 365th Report of the Committee on Freedom of Association, the ILO addressed GSEE complaints regarding the prohibition on collective bargaining, the lack of wage protection for young workers, and various other derogations from international labor standards.<sup>134</sup> The report stated that the 2010 laws were in violation of Greece's obligations under the ILO and urged the Greek government to bring its labor laws back into line with the fundamental rights protected by ILO Conventions.<sup>135</sup>

On May 23, 2012 the European Committee of Social Rights ("ECSR") delivered two decisions in response to 2011 complaints filed by Greece's electric power union (GENOP-DEI) and its civil servants' trade union (ADEDY).<sup>136</sup> The ECSR is a committee of the Council of Europe (an

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<sup>133</sup> The same plaintiffs that sought judicial review by the Council of State in case 668/2012 took the matter before the European Court of Human Rights. *Koufaki & Adedy v. Greece* (dec.) - 57665/12 and 57657/12 (May 7, 2013) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627#{"itemid":\["002-7627"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627#{) (arguing that a 20% reduction in their salaries and pensions as well as reductions in other allowances and benefits of public servants enforced by the statutes 3833/2010 and 3845/2010 constitute a deprivation of property). The European Court of Human Rights ("ECtHR") rejected the plaintiff's petition and affirmed the state legislature's discretion in implementing social and economic policies (*Koufaki & Adedy v. Greece*, at 31).

<sup>134</sup> Int'l Labor Org., 316th Sess., Nov. 1-Nov. 16, 2012, U.N. Doc. GB.316/INS/9/1 (2012) available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_193260.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_193260.pdf).

<sup>135</sup> *Id.* at 261-74.

<sup>136</sup> *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece: Decision on the Merits, Collective Complaint No. 65/2011*, EUR. COMM. OF SOC. RIGHTS 1, (May 23, 2012), available at [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC65Merits\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC65Merits_en.pdf) [hereinafter *Complaint No. 65/2011*]; *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece: Decision on the Merits, Collective Complaint No. 66/2011*, EUR. COMM. OF SOC. RIGHTS 1, (May 23, 2012), available at [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC66Merits\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC66Merits_en.pdf) [hereinafter *Complaint No. 66/2011*].

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international organization comprising forty-seven European countries that strives to promote democracy and protect human rights within the region<sup>137</sup>), which is tasked with ensuring compliance with the European Social Charter.<sup>138</sup> The complaints presented to the ESCR alleged that Greek laws including: laws permitting termination without notice or severance pay during the first twelve months of employment, laws allowing derogation from collective bargaining agreements, and laws providing for special employment arrangements for young people were in direct violation of Charter provisions.<sup>139</sup> The ESCR condemned Greece for violations of: Article 4 (providing for a right to fair remuneration), Article 7 (providing for the protection of young persons), Article 10 § 2 (creating an obligation to promote apprenticeship programs), and Article 12 § 3 (creating a right to social security).<sup>140</sup> The ESCR decisions vindicated the views of Greek workers and provided a legal basis for objection to the austerity measures, and a second review of the legality of the 2010 laws under the Greek Constitution followed soon after.

### C. Athens Court of the Peace Reaction

A May 2012 decision from the Athens Court of the Peace resurrected the controversy surrounding the constitutionality of the 2010 laws. The Court took jurisdiction of this case based on its ability to adjudicate on specific labor disputes.<sup>141</sup> Although Greece is a civil law system, meaning that case law is not authoritative and binding like it is in common law jurisdictions such as the United States, the decisions from higher courts are considered very influential on lower court decisions.<sup>142</sup> The Athens Court of the Peace is a civil court, in contrast to an administrative court.<sup>143</sup> Its jurisdiction is limited to monetary disputes rather than claims against the state (like the Council of State, which delivered the February 2012 verdict declaring that the 2010 laws did not constitute a violation of Greece's Constitution).

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<sup>137</sup> *The Council of Europe in brief: Who we are*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> (last visited Sept. 28, 2013).

<sup>138</sup> European Committee of Social Rights (ECSR), COUNCIL OF EUR., [http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault\\_EN.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp) (last visited Sept. 28, 2013).

<sup>139</sup> Complaint No. 65/2011 and Complaint No. 66/2011, *supra* note 136.

<sup>140</sup> *Id.*

<sup>141</sup> Eirindokeia Athens [Erin.] [Athens Court of the Peace] 599/2012, 731 EErgD (Greece).

<sup>142</sup> Dimitrios Ph. Christodoulou, *Introduction to the Greek Legal System*, JURIST LEGAL INTELLIGENCE, <http://jurist.law.pitt.edu/world/greececor2.htm> (last visited Sept. 28, 2013).

<sup>143</sup> *The Greek Judicial System*, UNIDROIT 1, 1-2, <http://www.unidroit.info/mm/TheGreekJudicialSystem.pdf> (last visited Sept. 28, 2013).

Despite this, the Athens Court of the Peace decision was a blatant confrontation of the Council of State's judgment of the constitutionality of the 2010 laws.

Most remarkably, the decision represents a modern and tragic chapter in the longstanding supremacy conflict. The decision came from a low-level tribunal (as compared to the '*Solange*' decisions from the German Constitutional Court<sup>144</sup>), but the Court attempted to protect the constitutional rights of the Greek people in the face of a conflicting Council of State decision and EU demands, which might have literally crashed the state. Additionally, Greece voiced its right to protect its constitutional identity, as protected by Article 4 of The Treaty on European Union,<sup>145</sup> despite the frailty of its economic and social situation. The Court's willingness to protect the constitutional rights of the people came at a truly critical time for Greece and for the Eurozone. The 2010 laws were passed by Greece to effectuate contingencies of the bailout<sup>146</sup> and funding was widely considered necessary for the fiscal health of Greece and the EU as a whole.<sup>147</sup> Despite this, the Court held that the 2010 laws, representing a compromise between Eurozone nations, violated Greece's Constitution. This holding implicitly declared that the state's guarantee of fundamental rights would prevail over EU Law in this instance.

The case was brought by employees of Athens Metro – Operating Company SA ("AMOC SA"), a subsidiary of Athens Metro, organized to develop and manage the Athens subway system and wholly owned by the government.<sup>148</sup> At issue was AMOC SA's decision to reduce the salaries and benefits of all employees under Laws 3833/2010 and 3845/2010.<sup>149</sup> The reduction was challenged on two grounds. First, the petitioners argued that, because the parent company was classified as a "broader public

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<sup>144</sup> See *supra* Part II.C.

<sup>145</sup> Consolidated version of the Treaty on European Union art. 4, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253, available at [http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf).

<sup>146</sup> Maria Petrakis & Natalie Weeks, *Greece Outlines Conditions of EU-IMF Package*, BLOOMBERG (May 2, 2010), <http://www.bloomberg.com/news/2010-05-02/greece-to-cut-spending-raise-taxes-as-part-of-eu-imf-package-summary.html>.

<sup>147</sup> See Stephanie Flanders, *Greece: Default is no soft option*, BBC NEWS, May 6, 2010, [http://www.bbc.co.uk/blogs/thereporters/stephanieflanders/2010/05/greece\\_default\\_is\\_no\\_soft\\_opti.html](http://www.bbc.co.uk/blogs/thereporters/stephanieflanders/2010/05/greece_default_is_no_soft_opti.html) (considering the risk of Greece's sovereign debt holdings leading to a collapse of the national banking system); Greg Robb, *European Leaders set program to defend euro*, MARKETWATCH (May 9, 2010), <http://www.marketwatch.com/story/european-leaders-strike-deal-to-defend-euro-zone-2010-05-09> (noting that measures to stabilize public finances in Greece are key to stabilizing Europe and preserve the global economy).

<sup>148</sup> 599/2012, *supra* note 141, at 3 (as translated).

<sup>149</sup> *Id.* at 2 (as translated).

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sector”<sup>150</sup> company, that legal form extended to AMOC SA as the subsidiary. This meant that the subsidiary, like the parent, was not subject to provisions governing “public sector” companies and therefore the compensation reductions under the 2010 laws were improper.<sup>151</sup> Second, the petitioners contended that the 2010 laws were unconstitutional.<sup>152</sup>

The Court quickly dismissed the petitioners’ first argument, stating that the legal form of a parent company does not control the legal form of its subsidiary, and due to the lack of any express provision of law, the Court could not conclude that the legislature intended to exempt subsidiaries of “broader public sector” organizations from public sector labor law.<sup>153</sup> The second argument, the constitutionality of the 2010 laws, resonated with the Court. The Court addressed the prohibitions on collective bargaining and the flat percentage reductions to compensation in light of Greece’s economic challenges and obligations under international law.

Together, Articles 22 and 23 of the Greek Constitution establish a right to collective action. Article 22, paragraph 2, provides that “[g]eneral working conditions shall be determined by law, supplemented by collective labour agreements concluded through free negotiations and, in case of the failure of such, by rules determined by arbitration.”<sup>154</sup> Article 23, paragraph 1, further states that “[t]he State shall adopt due measures safeguarding the freedom to unionise and the unhindered exercise of related rights against any infringement thereon within the limits of the law.”<sup>155</sup>

Greece is also under an obligation to respect international labor law. Article 28, paragraph 1, of Greece’s Constitution stipulates that “[t]he generally recognized rules of international law, as well as international convention . . . shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.”<sup>156</sup> The Court pointed to several international sources supporting the right to collective bargaining and fair remuneration. Article 8 of International Labor Organization Convention 151 (1978) requires that disputes over the terms and conditions of employment be settled through an independent mechanism.<sup>157</sup> Article 5 of ILO Convention 154 (1981) requires that states take measures to promote

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<sup>150</sup> See *supra* text accompanying note 80.

<sup>151</sup> 599/2012, *supra* note 141, at 3 (as translated).

<sup>152</sup> *Id.* at 2 (as translated).

<sup>153</sup> *Id.* at 3 (as translated).

<sup>154</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 22 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>155</sup> *Id.* art. 23.

<sup>156</sup> *Id.* art. 28.

<sup>157</sup> 599/2012, *supra* note 141, at 6 (as translated).



the right to collective bargaining.<sup>158</sup> Articles 6 and 12 of the European Social Charter guarantee this same right.<sup>159</sup> In addition, Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of every person to enjoy fair and non-discriminatory pay.<sup>160</sup>

However, despite Greece's national and international legal obligations to promote a right to collective bargaining, the temporary deviation was excusable in the view of the Court. The 2010 laws only prohibited collective bargaining until December 31, 2010 rather than permanently obstructing the right.<sup>161</sup> Article 106, paragraph 1, of the Constitution gives the government the right to protect the general peace and security by coordinating economic activity in order to safeguard economic development of the national economy.<sup>162</sup> Because the restrictions were based on a policy to rehabilitate the national economy, interference with the right to collective bargaining was permissible in this case. However, the Court noted that this measure was only appropriate in extraordinary circumstances and should not exceed a reasonable amount of time, meaning a return to the status quo at some point was constitutionally required.<sup>163</sup> Provisions of the ECHR, providing that labor rights may be limited in accordance with public interest, supported this conclusion.<sup>164</sup>

The Court then addressed a more problematic aspect of the 2010 laws. AMOC SA reduced the salaries of all employees by 7% and reduced payment during Christmas, Easter, and annual leave by 30%, as authorized by the laws.<sup>165</sup> This reduction applied to all employees regardless of their total level of compensation, which meant that laborers on the lower end of the income scale would be impacted more severely than those on the higher end. Article 25, paragraph 1, of Greece's Constitution states that any restrictions on rights under the Constitution must respect the *principle of proportionality*.<sup>166</sup> Article 4, paragraph 5, similarly notes that Greek citizens should contribute to public charges in proportion to their means.<sup>167</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *GSEE Observations, supra* note 79, at 2.

<sup>162</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 106 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>163</sup> 599/2012, *supra* note 141, at 8 (as translated).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 8 (as translated).

<sup>166</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 25 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>167</sup> *Id.* art. 4.

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The Court held that the 2010 laws were passed in violation of these Articles. This disparate impact on the portion of the population falling at the lower end of the income scale was a direct violation of the *principle of proportionality*, regardless of the fact that the reductions were percentage based.<sup>168</sup> The government had implemented an aggressive compensation reduction scheme without creating any measures, such as tax or price reductions, to compensate for the disproportionate effects on the most vulnerable groups.<sup>169</sup> For this same reason, the 2010 laws failed to ensure that all citizens contributed to the public charge in proportion to their means.<sup>170</sup>

Although this decision, declaring Laws 3833/2010 and 3845/2010 unconstitutional, came from the Athens Court of the Peace, it created a substantial question about the legitimacy of the prior Council of State ruling. The European Parliament reached out to the Commission in July of 2012 for its perspective on whether the collective bargaining restrictions and across-the-board pay cuts violated Greece's Constitution as well as international law.<sup>171</sup> The Commission declined to comment on either ruling by the Greek Courts and deferred to Greece's judgment on its labor laws, but noted it would continue to monitor the situation.<sup>172</sup> Greece would be left to determine for itself, through future judicial determinations and legislative acts, whether the 2010 laws sufficiently protected the rights of the Greek people.

#### *D. The Court of Audit Speaks*

On October 31, 2012, the Court of Audit issued an advisory opinion declaring that specific provisions of a pending labor law were unconstitutional.<sup>173</sup> The bill was submitted to the Court of Audit by the

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<sup>168</sup> 599/2012, *supra* note 141, at 8-9 (as translated).

<sup>169</sup> *Id.* at 8 (as translated).

<sup>170</sup> *Id.* at 9 (as translated).

<sup>171</sup> Parliamentary Question for Written Answer to the Commission, *Social injustices arising from interference in collective autonomy and pay cuts across the board under the first Loan Memorandum for Greece* - E-00667/2012, EUR. PARLIAMENT (July 3, 2012), <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-006671&language=EN>.

<sup>172</sup> Mr. Rehn (on behalf of the Commission), *Social injustices arising from interference in collective autonomy and pay cuts across the board under the first Loan Memorandum for Greece* - E-00667/2012, EUR. PARLIAMENT (Aug. 22, 2012), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-006671&language=EN>.

<sup>173</sup> Elegktiko Synedrio [E.S.] [Court of Audit] Plenary Session Minutes 3/2012 and 4/2012 [Minutes from the 3rd special session of the plenary on October 30, 2012 and Minutes from the 4th special session of the plenary on October 31, 2012] (Greece) *available*

Greek Ministry of Finance, which was seeking an opinion on the legitimacy of the bill.<sup>174</sup> Under the Greek judicial system, the Court is classified as a supreme public financial court and has jurisdiction to decide the constitutionality of laws in specific arenas.<sup>175</sup> The Court of Audit has various responsibilities, as laid out in Article 98 of the Greek Constitution,<sup>176</sup> including auditing the State and government agencies and adjudicating disputes regarding the grant of pensions.<sup>177</sup>

Most importantly, the Court must issue advisory opinions.<sup>178</sup> Article 73, paragraph 2, of the Greek Constitution further states that bills pertaining to the “granting of a pension and the prerequisites thereof” shall be introduced [to Parliament] by the Minister of Finance *only* after an opinion of the Court of Auditors.<sup>179</sup> Therefore, the Court of Audit is required to provide an opinion for each bill relating to a pension issue before the bill can be submitted to Parliament for approval.

Pursuant to this jurisdiction, the Court assessed the proposed bill. The increase in retirement age from sixty-five to sixty-seven as well as provisions in Article 1, paragraphs 3 and 4 (regarding the reduction of pensions for retirees previously employed in the public sector) posed a risk of invalidating the law in its entirety.<sup>180</sup> Although neither the Greek Constitution nor the First Additional Protocol of the European Convention on Human Rights guarantees a certain level of salary or pension,<sup>181</sup> the Court noted that enacted measures must serve the public interest, respect the

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at <http://www.elsyn.gr/elsyn/files/anakoinoseis/syn.eidik.3.pdf> and <http://www.elsyn.gr/elsyn/files/anakoinoseis/syn.eidik.4.pdf>; see also *Greek Court Rules that Key Austerity Measures Violate the Greek Constitution*, HELLASFRAPPE (Nov. 7, 2012), <http://hellasfrappe.blogspot.com/2012/11/greek-court-rules-that-key-austerity.html>; *Γνωμοδότηση-“βόμβα” του Ελεγκτικού Συνεδρίου Συνεδρίου*, ΜΕΓΑ ΓΕΓΟΝΟΤΑ (Nov. 1, 2012), <http://www.megatv.com/megagegonota/article.asp?catid=27369&subid=2&pubid=29944650>

<sup>174</sup> Plenary Session Minutes 3/2012 and 4/2012, *supra* note 173.

<sup>175</sup> *State Audit in the European Union*, HELLENIC CT. OF AUDIT 2, 9, <http://www.elsyn.gr/elsyn/files/Greece0012.pdf> (last visited Mar. 30, 2013). If the Court of Audit rendered a judgment inconsistent with the Council of State’s views on the constitutionality of labor laws under the bail out, the Special Supreme Court would make a final determination on the matter. *Id.*

<sup>176</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 98 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* art. 73

<sup>180</sup> Plenary Session Minutes 3/2012 and 4/2012, *supra* note 173.

<sup>181</sup> *Id.* at 7 of 4/2012.

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principle of equality in the distribution of public burdens (Article 4, paragraph 5 of the Greek Constitution), and respect the principle of proportionality (Article 25 paragraph 1 of the Greek Constitution).<sup>182</sup>

Moreover, the Constitution establishes that reductions to pensions must not compromise a decent standard of living for the financially weaker classes of Greek citizens.<sup>183</sup> The Court took issue with provisions in paragraph 3 that reduced public servants' pensions for the fifth time in less than two years.<sup>184</sup> The reductions, which were not of limited duration, did not consider other financial burdens born by pensioners and had the potential to compromise a decent standard of living for the affected group.<sup>185</sup> Lastly, the Court reasoned that the indiscriminate elimination of holiday bonuses, combined with the large pension reductions (provided for in paragraph 3 of the bill), may be incompatible with Articles 22 § 4 and 2 § 1 of the Constitution.<sup>186</sup>

Introductory remarks by the General Commissioner of the State addressed to the Court of Audit echo the Court's sentiment regarding the constitutionality of the proposed bill.<sup>187</sup> In his view, the legislature does have discretion to reduce government expenses by placing a financial burden on major categories of the population to address a prolonged economic crisis.<sup>188</sup> Additionally, the Judge noted that while there is an ongoing reduction of pensions and salaries in 'regular intervals' to address the deficit, the same attention is not being paid to revenue generation from tax collection, thus alluding to the problem of tax evasion in Greece.<sup>189</sup> He cited Memorandum law 3845/2010 and its provisions for reducing labor costs and increasing government revenue via taxation.<sup>190</sup> This selective, unilateral, and permanent burden on public sector pensioners (through

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 8 of 4/2012; 2008 SYNTAGMA [SYN.][CONSTITUTION] 2 §1 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> (providing that respect and protection of the value of the human being constitute the primary obligations of the State); *Id.* art. 22 §4 (stating that "the State shall care for the social security of the working people").

<sup>187</sup> Plenary Session Minutes 3/2012, *supra* note 173. The General Commissioner of the State plays an important role in the Court of Audit and represents the public interest. Dr. Ioannis P. Karkalis, *The preventive audit of public contracts by the Supreme Court of Audit as an anticorruption guarantee*, United Nations Public Administration Network 1, 2, <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan049600.pdf> (last visited at Dec. 6, 2013).

<sup>188</sup> Plenary Session Minutes 3/2012, *supra* note 173, at 14.

<sup>189</sup> *Id.* at 15.

<sup>190</sup> *Id.*

reduction pensions, special contributions, and tax measures) may constitute an efficient way of balancing the government budget, but it also constitutes unequal treatment of individuals and conflicts with provisions of the Constitution.<sup>191</sup>

According to his remarks, repeated reductions of pensions lead to a deterioration of the standard of living for pensioners.<sup>192</sup> Moreover, cutting back the largest pensions at a disproportionate rate, as compared to the smaller ones, leads gradually to a leveling of pension payments.<sup>193</sup> All retirees will end up receiving about the same amount of money regardless of years of work, position held, contributions paid, and responsibilities undertaken.<sup>194</sup> The Judge also noticed that, although all the pensioners coming from the public sector are subjected to measures enacted to address the adverse financial circumstance, there are exempted categories of pensioners, such as the retired employees of the Parliament, who still fall under special pension schemes without convincing arguments for their exemption.<sup>195</sup>

As provided for in Article 98 of the Greek Constitution, the Court of Audit's opinions on bills relating to pensions are *advisory*, which means they are not binding on the Greek Parliament.<sup>196</sup> Despite the fact that this opinion did not block the austerity measures from passing into law, the opinion represents a significant milestone for the Greek people. This is the first time that this Court, or any Greek supreme court, has spoken out against the provisions of the EU bailout since it became effective.<sup>197</sup> It vindicates the sentiment of the Greek people, who have continued to protest in the face of significant opposition from the government.<sup>198</sup> As with the Athens Court of the Peace decision, the Court of Audit opinion implicitly supports the idea that the State's guarantee of fundamental rights should prevail over EU Law, which has not provided adequate protection.

#### *E. Council of State Decision 3354/2013*

Among the many austerity measures enacted by Greece as a condition for

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 16.

<sup>195</sup> *Id.*

<sup>196</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 98 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>197</sup> *Greek Court Rules that Key Austerity Measures Violate the Greek Constitution*, *supra* note 173.

<sup>198</sup> *Protests in Greece*, EURONEWS, <http://prod-euronews.euronews.net/tag/protests-in-greece/> (last visited Feb. 23, 2013).

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the bailout funding, Statute 4024/2011 first introduced the status of ‘redundancy’ (or ‘labor reserve’) applicable to public servants.<sup>199</sup> Redundancy is the dismissal of a public sector employee, accomplished through the abolition of the permanent position they hold. According to Article 33 of the statute, a public servant will be forced to retire after thirty-five years of employment (even if this occurs before the retirement age is reached) and, thereafter, their position is abolished.<sup>200</sup> Under this provision, the employment contract of the public servant is terminated without good cause.

However, Article 103 of the Greek Constitution establishes permanent working positions for public servants.<sup>201</sup> A public servant can only be dismissed after: a judicial decision, a decision of a service council, or attainment of the retirement age.<sup>202</sup> Statue 4024/2011 appears to directly contradict this provision. However, Article 103 also provides that “no one may be appointed to a post not provided by law.” If a position ceases to exist, the public servant holding the position is no longer entitled to it, and must be dismissed.

The Council of State, the Supreme Administrative Court,<sup>203</sup> ruled on the constitutionality of Article 33 of 4024/2011 in its October 2013 decision (3354/2013).<sup>204</sup> The Court reasoned that the criteria of redundancy were not based on organizational needs of the public sector.<sup>205</sup> The purported aim of 4024/2011 was the reduction of public expenditure and the

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<sup>199</sup> Nomos (2011:4024) Syntaksiodotikes rythimeis, eniaio misthologio-vathmologio, ergasiaki efedreia kai alles diatakseis efarmogis tou mesoprothesmou plaisiou stratigikis efarmogis 2012-2015 [Pension provisions, uniform pay scale – grading system, labor reserve and other provisions for the implementation of the Medium-term Fiscal Strategy Framework 2012-1015], EPHEMERIS TES KYVERNESEOS TES HELLINIKES DEMOKRATIAS [E.K.E.D] 2011, A:226 (Greece), available at [http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wFYAFdDx4L2G3dtvSoClrL84tQ3Uej7Zml5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnK13nP8NxdnJ5r9cmWyJWElDvWS\\_18kAEhATUkJb0x1LIdQ163nV9K—td6SlueAli-Rp\\_kyvW2o6VTNMEFx8h6ObxX6nbVHtd9PZSJmV](http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wFYAFdDx4L2G3dtvSoClrL84tQ3Uej7Zml5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnK13nP8NxdnJ5r9cmWyJWElDvWS_18kAEhATUkJb0x1LIdQ163nV9K—td6SlueAli-Rp_kyvW2o6VTNMEFx8h6ObxX6nbVHtd9PZSJmV).

<sup>200</sup> *Id.* art. 33.

<sup>201</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 103 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

<sup>202</sup> Article 103 of the Greek Constitution stipulates that public servants may not be transferred, lowered in rank, or dismissed without an opinion or decision of a service council. *Id.*

<sup>203</sup> *Composition and Structure, supra* 102.

<sup>204</sup> Symvoulio Epikarteias [S.E] [Supreme Administrative Court] 3354/2013 (Greece), available at <http://www.ste.gr/portal/page/portal/StE/ProfatesApofaseis#a281>.

<sup>205</sup> *Id.*

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efficiency of the public sector,<sup>206</sup> but the Court noted that the dismissal of public servants based on age is a criterion that is irrelevant to the restructuring needs of the public sector and the original purpose of the law.<sup>207</sup> The Court also found that since a public servant can only be dismissed pursuant to Article 103,<sup>208</sup> and since there is no judicial decision or attainment of the retirement age, a decision of the service council would always be required.<sup>209</sup>

Lastly, the Court reasoned that ‘redundancy’ violates the constitutional principle of equality, which provides for the equal treatment of all public employees and the enactment of rules based on objective criteria.<sup>210</sup> It found the provisions of 4024/2011 to be discriminatory because no objective procedures were introduced to evaluate the qualifications, skills, efficiency, or experience of the public servant.<sup>211</sup> Thus, even if the reorganization of the public sector and the reduction of governmental expenditure constitute a legitimate purpose, so long as the statute fails to outline a specific legal process of evaluation, and the selection of the servants to be dismissed is based on age, the provision will remain unconstitutional.<sup>212</sup>

## VI. CONCLUSION

A comparison of the Council of State’s arguments in case 668/2012 (supporting the constitutionality of Law 3833/2010 and 3845/2010) with the Athens Court of the Peace arguments (opposing the constitutionality) begs the question of whether the latter’s reliance on the *principle of proportionality* and Articles 4 and 25 of the Greek Constitution is enough given the current social and fiscal conditions in Greece. The arguments do not appear to be sufficiently cogent to refute the Council of State ruling or to provide a basis to overcome Greece’s obligations to the Eurozone under the bailout mechanism. However, the subsequent opinion of the Court of Audit (recognizing that further cuts in benefits may potentially compromise adequate standards of living for the Greek people<sup>213</sup>) reinforces the

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 103 (Greece) available (in English) at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> (providing that the dismissal of a public servant is conditioned on: judicial decision, decision of a service council, or attainment of the retirement age).

<sup>209</sup> 3354/2013, *supra* note 204.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Γνωμοδότηση-“βόμβα” του Ελεγκτικού Συνεδρίου Συνεδρίου, *supra* note 173.

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legitimacy of that position.

These rulings do not technically bind the Greek government or other Greek courts. The Athens Court of the Peace ruling is non-binding because Greece is a civil law system, which means that the law is codified rather than contained in the decisions and interpretations of Greek courts.<sup>214</sup> The Court of Audit opinion is also non-binding, but because it was an advisory opinion rather than a judicial decision.<sup>215</sup> Despite this, the legal arguments have resonated internationally and vindicated the feelings of Greek laborers, pensioners, and citizens suffering from the cutbacks and shrinking economy. The true significance of the Athens Court of the Peace decision and the Court of Audit opinion is that they have given judicial stature to the concerns of the Greek people at a critical time for Greece. The declarations were made in the face of a conflicting Council of State decision, a dire economic reality, and pressure to conform by the EU as a whole.

The Council of State decision in case 3354/2013 serves as further evidence that the lower court's fervent protection of constitutional rights served as a basis for future challenges to the austerity measures in the courts of law. This decision, as well as views advocated in case 599/2012 and during the Court of Audit plenary session minutes 3/2012 and 4/2012, are powerful affirmations that the supremacy of EU law has definite and principled bounds. As the German judiciary did in its *Solange* decisions, and continues to do through its recent pronouncements on the bailout, Greece also recognizes that guaranteeing fundamental rights is a prerogative of the state. Fundamental rights will be protected in state courts, in contravention of EU law if necessary, so long as the EU does not have adequate mechanisms in place to secure and protect those rights.

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<sup>214</sup> Dimitrios Ph. Christodoulou, *supra* note 142.

<sup>215</sup> 2008 SYNTAGMA [SYN.][CONSTITUTION] 98 (Greece) *available (in English) at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.