Chapter Four: The Public Interest in Times of Financial Crisis

The legal provisions analysed in chapter three may be preserved based on grounds of "*public interest*". The notion of "*public interest*" (or "*general interest*" or "*national* interest") is often used by the executive and legislative power to justify restrictive measures, especially those undertaken to deal with a situation of emergency (*actio pro salute publica*).[560] Public interest justification should allow the public authorities to restrict human rights and retract from any expectations that have been comprehended.[561] The *rationale* of this is the fact that the majority of human rights are not absolute but rather may be restricted for legitimate reasons of public interest.

The aim of chapter four is to focus on the public interest justification elements that have been taken into consideration, in times of economic and financial crisis, when there is an urgent need to balance the protection of the pensioners' rights with the need to reduce the public pension expenditures. More particularly, the present chapter revolves around the question of whether the aims of the public pension reforms introduced within the period 2010-2012 are legitimate grounds of justification.

The outline of the present chapter is as follows: Section A describes which state power is eligible to define and interpret the public interest pursued by the restrictive measures. This section is a necessary introductory point, so the reader may perceive the necessity of exploring the explanatory reports on the laws that introduced the reforms, as well as the respective case law on the interpretation of the "*public interest"* notion, in order to find out whether the aims pursued are legitimate. Following, section B examines whether the Greek financial and economic crisis should be held as a legitimate ground of public interest. This is assessed in order to identify the importance of the financial crisis and to what extent the financial crisis may justify retrogressive public pension reforms. Next, section C analyses the aims of the public pension reforms in the crisis period, which were offered by the Greek legislature as justification for the reforms and tries to

560 *Häberle*, Öffentliches Interesse als juristisches Problem: eine Analyse von Gesetzgebung und Rechtsprechung, p. 126.

561 *Craig,* Cambridge Law Journal 1996, p. 303.

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find answers on whether these aims constitute legitimate grounds of public interest. In view of the close relationship between the reductions in the public pension expenditures and the public deficit, the Greek legislature considered the pension reforms and old-age pension benefits reductions as a means of safeguarding the sustainability of the public pension system (C.I), and the fiscal interests of the state (C.II), as well as the proper functioning of the EMU (C.III).[562] Lastly, the present chapter concludes with remarks on the effect of the financial crisis on the legitimacy of the pursued public interests (D).

A. Public Interest and the State Power

The notion of public interest is used to describe the genuine interests of the whole community, setting out the fundamental values of society.[563] It should be defined by the policies and choices of the executive and legislative power, with simultaneous respect for the general values of a democratic society, the national Constitution and the general principles of international law. Its identification should not be defined *a priori*,[564] but its meaning should be reflective of the constantly changing social and economic challenges,[565] therefore adjusting it to the needs of the society.[566] The public interest should be related to the organic and continually-developing genuine interests of the whole community. It is a general and open-tex-

562 In the academic debate, it has also been argued that the austerity measures undertaken in Greece had nothing to do with objective economic necessity, but instead were driven by an ideological and political project to further entrench neoliberal capitalism. See *O'Connell*, in: *Nolan / O'Connell / Harvey* (eds.), Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights, p. 61. However, the examination of this thesis is not subject of the present book.

563 *Bell*, in: *Brownsword* (ed.), Law and the Public Interest, p. 30; *Bodenheimer*, in: *Friedrich* (ed.), The Public Interest, p. 211.

564 *Viotto*, Das öffentliche Interesse – Transformationen eines umstrittenen Rechtsbegriffes, p. 26.

565 *Giannakopoulos*, EfimDD 2012, p. 100; *Manitakis*, ToS 1978, p. 435.

566 *Vonk / Katrougalos*., in: *Vonk / Tollenaar* (eds.), Social Security as a Public Interest: A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State, p. 68-69; *Bell*, in: *Brownsword* (ed.), Law and the Public Interest, p. 27; *Viotto*, Das öffentliche Interesse – Transformationen eines umstrittenen Rechtsbegriffes, p. 26.

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tured legal doctrine, since its meaning is expressed in very broad and abstract terms.[567]

Each state-policy should be founded on the idea that it serves the socially manifested needs of society.[568] This is, however, somewhat illusory, since it is based on the unrealistic assumption that the public interest is equal to the sum of the interests of all individuals in the given society.[569] This is unrealistic, since any one individual can have antagonistic interests compared to the interests of other individuals, or of the community as a whole.[570] For instance, in times of economic and financial crisis, individuals with high-income that do not make use of social benefits will have an interest that the state will only undertake reductive measures in social insurance schemes, whereas individuals with low-income that do make use of social benefits may have an interest in some tax increase. More correct seems to be the thesis that the notion of public interest consists of whatever the democratically elected legislative and executive power identifies as a concern of public interest.[571]

The Greek constitutional organs eligible to specify the components of public interest are: the legislature, the elected government and the public authorities. The executive power defines the public interest in cases of draft legislation that increases public expenditures.[572]

The law is the official document, in which the legislature defines the policies that optimally serve the public interest. In most cases, however, the aim(s) of the adopted legislation is not referred to in the text of the legislation but in the accompanying explanatory report. Generally, the Greek Constitution does not expressly oblige the legislative power to justify the decisions of its policies, since it is assumed that the exclusive aim(s) of the state should be the fulfilment of the public interest.[573] However, Greek ju-

567 *Viotto,* Das öffentliche Interesse – Transformationen eines umstrittenen Rechtsbegriffes, p. 47; *Wyss,* Öffentliche Interessen – Interessen der Öffentlichkeit? – Das öffentliche Interesse im schweizerischen Staats- und Verwaltungsrecht, p. 16.

568 *Wyss*, Öffentliche Interessen – Interessen der Öffentlichkeit? – Das öffentliche Interesse im schweizerischen Staats- und Verwaltungsrecht, p. 17.

569 *Bodenheimer*, in: *Friedrich* (ed.), The Public Interest, p. 208.

570 *Chrysogonos*, Civil and Social Rights, p.89.

571 *Bodenheimer*, in: *Friedrich*, (ed.), The Public Interest, p. 209.

572 I.e. Art. 73(3) of the Greek Constitution provides that no law should be originated by the parliament when it results in expenditure or a reduction of revenues.

573 *Dagtoglou*, ToS 1986, p. 428.

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risprudence[574] as well as the scientific parliamentary committee[575] held that the public interest should be explicitly referred to either in the text of the legislation or in the explanatory report, in which the aim(s) of the law must be justified comprehensively and in detail.

According to Article 74 of the Greek Constitution, every draft of law must be accompanied by an explanatory report before being introduced to the parliament. In the explanatory report, the legislative power analyses and clarifies the provisions of the bill. This process seems more appropriate, as in case of judicial review of the reasons of public policy, the judicative power can have a point of reference. Otherwise, the courts would have to assume the aim(s) pursued by the disputed measures deriving the aim(s) from the text of the legislation. This could result in the judiciary exceeding the limits of its power and violating the principle of the separation of powers, as foreseen in Article 26 of the Greek Constitution, as well as the principle of popular sovereignty guaranteed in Article 1(2) of the Greek Constitution.

The Greek courts are associated with the control of the legislative and executive power. This position is derived from the constitutional principle of the separation of powers. The principle of the separation of powers, as well as the principle of the rule of law, demands the courts to review the aim(s) of a certain provision. The importance of this principle is enormous, since it prevents arbitrary use of the legislative and executive power. In cases where the legislative or the executive powers do not act according to law, the judicative power (conducting judicial review) may provide a legal remedy by ensuring that the other two powers have acted both within their limitations and for reasons of public interest.

Furthermore, the notion of public interest may be judicially reviewed, on the grounds that the existence of a legitimate public interest is a prerequisite for the constitutionality of a statute enacted by the parliament. In Greece, the existence of a legitimate aim is examined by all national courts, since courts of all instances may review the constitutionality of a law.[576] Nonetheless, only the plenary session of the three Supreme Courts (the Council of State, the Court of Audit and the Aeropagus) may decide

574 Court of Audit, Judgment No. 1562/2005.

575 Report on Law No. 3845 of 2010 and Law No. 3847 of 2010, Official Gazette of the Hellenic Republic 67/A/11.05.2010, EDKA 2010, p. 386 and p. 399.

576 Art. 93(4) of the Greek Constitution: „*The courts shall be bound not to apply a statute whose content is contrary to the Constitution".*

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definitively on the constitutionality of a provision.[577] In a situation of conflicting judgments relating to the constitutionality of a statute among the three Supreme Courts, a Special Highest Court is established to settle the controversies.[578]

The judicial review on the legitimacy of the aim(s) pursued is only marginal.[579] In order to determine whether the legislative power overstepped the bounds of its authority, the steps that the judicative power should take are as follows: at first instance, the judicative power defines which aim(s) is pursued by the legislature. The courts may not define the aim *de novo*, but rather they evaluate the arguments advanced by the legislative power as to why it applied the new policy. These arguments must be derived, as mentioned above, by the law or by the pre-legislative process for the enactment of the legislation. Secondly, the judiciary examines whether the aim(s) identified by the legislative power is legitimate. The courts examine namely whether the aim of the law is compatible with the constitutional provisions that guarantee the protection of constitutional rights.[580]

Public interest, as a legitimate aim for restriction of constitutional rights, must be either drawn from the text of the Constitution; or at least must not be contradictory to the constitutional provisions that guarantee the protection of rights.[581] Within the Greek Constitution, the notion of public interest is provided for by a number of constitutional provisions. Examples of such provisions are found in the following articles: Article 17 (protection of private property; expropriation),[582] Article 24 (protection of

577 Art. 100(5) of the Greek Constitution.
578 Its jurisdiction is described in details in Article 100 of the Greek Constitution.
579 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35.
580 *Voutsaki*, ToS 1998, p. 406.
581 *Venizelos*, The Public Interest and Constitutional Rights' Restrictions, p. 208.
582 Art. 17(1): "*Property is under the protections of the State; rights deriving therefrom, however, may not be exercised contrary to the public interest*" and para 2: "*No one shall be deprived of his property except for public benefit …*".

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the environment)[583] and Article 106 (development of national economy).[584] Article 106(1) of the Greek Constitution provides that the notion of "*public interest*" may constitute *ratio* for legislative interference with the national economy in times of economic crisis. Furthermore, the term "*national interest*" is also referred to in Article 4(3),[585] Article 28(2)[586] and (3).[587] The above constitutional provisions, however, do not provide for that public interest may always *per se* prevail over certain constitutional rights.[588]

Last but not least, both the legislative and the judicative power should consider the reasons of public interest defined in international treaties and by the ECtHR, despite the fact that the national legislature has a broad margin of appreciation to additionally define other grounds of public interest. At international level, the notion of public interest is referred to in a number of treaties and instruments. Article 29 of the UDHR states that "… *everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing … the public order and the general welfare in a democratic society*". Also, Article 31 of the ESC provides that "*The rights and principles set forth in Part I... shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society... for the protection of public interest...*" Both international treaties thus convey the notion of public interest as a justification for restrictions placed on the rights and freedoms which are guaranteed and specified in the text of the treaties.

The ICESCR as well as the ECSS and the ILO Convention No. 102 do not include a general clause that provides "*public interest*" as a factor used

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583 Art. 24(1): "*Alteration of the use of state forests and state forests expanses is prohibited, except where agricultural development or other uses imposed for the public interest prevail for the benefit of the national economy*".

584 Art. 106(1): "*In order to consolidate social peace and protect the general interest, the State shall plan and coordinate economic activity in the State, aiming at safeguarding the economic development of all sectors and the national economy*".

585 Art. 4(3): „*... Withdrawal of Greek Citizenship shall be permitted only in case of … undertaking service contrary to national interest in a foreign country …*".

586 Art. 28(2): "*Authorities…may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest …*".

587 Art. 28(3): "*Greece shall freely proceed by law passed by an absolute majority of the total number of Members of the Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest*".

588 *Chrysogonos,* Civil and Social Rights, p.87.

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for justification. The ICESCR refers to the notion of public interest only in Article 8, providing that the protection of public interest may allow a restriction on the right to form and join a trade union. The ECHR refers to the concept of "*public interest*" in Article 1 of the First Protocol. The aforementioned article allows the Contracting States to restrict the right to peaceful enjoyment of one's possessions on the grounds of general interest. This requirement is expressly stated in Article 1(1), 2nd sentence ("*in the public interest*") and paragraph 2 ("*in the general interest or to secure the payment of taxes and other contributions or penalties*"). A difference between the notions of public interest and general interest is not derived from the jurisprudence of the ECtHR.[589] Furthermore, while Article 1 of the First Protocol does not make any reference to the economic well-being of the state, the ECHR expressly provides for the economic well-being of the State as a ground of justification in Article 8 (Right to respect for private and family life). Moreover, Articles 6 and 9 of the ECHR (respectively covering the right to a fair trial and to freedom of thought) may be restricted in the interests of public order. From the above articles, it may be derived that the idea of "*public interest*" also appertains to the general common interest of increasing the welfare of society. The notion of "*general welfare in a democratic society*" and the notion of "*public order*" are recognised as legitimate grounds of public interest, and are thus eligible reasons to place limitations upon rights guaranteed in the treaties.

The ECtHR is bound to review whether the disputed restrictive measures pursue a legitimate aim(s) by interpreting the general norm of "*public interest*". Although the ECtHR is bound to make an inquiry into the facts with reference to the assessment of public interest made by the national authorities, the court allows a wide margin of appreciation to the Contracting States on evaluating the public interest pursued. The ECtHR has consistently ruled that specially in cases of economic and social policies, it is not in the position to substitute the national authorities and it is primarily for the states to determine what is in the public interest, since the notion of "*public interest*" is particularly extensive and the states are better placed than an international judge to determine public interest due to their

589 *Harris / O'Boyle / Bates,* Law of the European Convention on Human Rights, p. 876.

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direct knowledge of their society and its needs.[590] This is because the notion of "*public interest*" must be determined on the basis of the specific social and economic needs of each state.[591] This has had the effect of the ECtHR failing to comprehensively define the notion of public interest in socio-economic cases. The ECtHR has only declared that it will not respect the legislative interpretations of the notion of public interest if that interpretation is manifestly without reasonable foundation.[592] For instance, the ECtHR reviewed the legitimacy of the aims pursued in the cases *Nencheva and others v. Bulgaria*[593] *and Kuznetsov v. Ukraine*.[594] The case *Nencheva and others v. Bulgaria* concerned the death of fifteen disabled children and young adults in a Bulgarian public institution for physically and mentally disabled young people. They died as a result of reductions in expenditures, sanctioned by the Bulgarian government during a severe economic, financial and social crisis between 1996 and 1997 as the municipal authorities were not able to cover the cost of food, medicine and heating. The ECtHR did not accept the harsh winter and the severe economic crisis as legitimate aims and found a violation of Article 2 of the Convention, which protects the right to life. In the case *Kuznetsov v. Ukraine*, the ECtHR found a violation of Article 3 of the Convention, which prohibits torture or any inhuman or degrading treatment, due to the conditions of the applicants' detention in prison. The ECtHR bore in mind Ukraine's socio-economic problems but it held that the economic problems and the lack of resources could not in any event justify poor conditions of detention and inhuman and degrading treatment.

590 ECtHR, *James and others v. UK*, Judgment of 21 February 1986, Appl. No.8793/79, at para. 46; *Valkov and others v. Bulgaria*, Judgment of 08 March 2012, Appl. No. 2033/04, at para. 91; *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. No. 27458/06, at para. 61; *Khoniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08, at para. 76.

591 *Arai-Takahashi,* The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, p. 157.

592 ECtHR, *James and others v. UK*, Judgment of 21 February 1986, Appl. No.8793/79, at para. 46; *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. No. 27458/06, at para. 61.

593 ECtHR, *Nencheva and others v. Bulgaria,* Judgment of 18 September 2013, Appl. No. 48609/06.

594 ECtHR, *Kuznetsov v. Ukraine*, Judgment of 29 April 2003, Appl. No. 39042/97.

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B. The Financial Crisis as a Public Interest

The domestic financial and economic crisis has been used as a justificatory technique by the Greek state in a number of legislative explanatory reports. The legislative power used the words "*crisis*", "*unprecedented and extraordinary circumstances*" and "*national emergency*" in order to emphasise the severity of Greece's fiscal situation. It is of important interest, for the purpose of this book, to identify whether a financial and economic crisis may be a situation of public emergency to introduce retrogressive public pension reforms. If a financial crisis is regarded as a situation of public emergency, then a crisis could become a legitimate ground of public interest and excuse for the suspension of the Greek Constitution and derogation from constitutional rights.

There is no specific legal definition of public emergency.[595] The legal consequence of a case of public emergency is the temporary suspension of ordinary law, including the constitution. A legal state of emergency requires rapid and decisive responses that may temporarily prevent the ordinary legislative procedure from working as according to the Constitution.[596] Therefore, in cases where there is a situation of public emergency, the judiciary is less likely to comprehensively review the constitutionality of restrictive measures as the mere existence of public emergency gives rise to legitimate suspension of the usual constitutional regime.

In light of this, ripe for consideration is whether the Greek economic and financial crisis constitutes a situation of public emergency. The Greek courts have not explicitly set the boundaries of the notion of public emergency and therefore, it cannot acquire a more precise meaning through the Greek jurisprudence.[597] According to the Greek Constitution, under the notion of public emergency falls the emergency situation of war or of an armed group aiming to overthrow the democratic regime (Article 48 of the Greek Constitution). Both cases are regarded as emergency situations that may allow for the derogation from a number of constitutional rights. A severe financial and economic crisis is not foreseen in the Greek Constitution as a situation of public emergency.

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595 *Zwitter,* in: *Zwitter* (ed.), Notstand und Recht, p. 22.

596 *King*, Social Rights and Welfare Reform in Times of Economic Crisis, p. 4.

597 *Contiades / Fotiadou,* in: *Contiades* (eds.), Constitutions in the Global Financial Crisis*,* p. 35.

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The notion of public emergency as a ground of justification for derogation is described in Article 15 of the ECHR. The latter article dictates that "*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation …"* In the case *Lawless v. Ireland*, the ECtHR defined "*public emergency*" for the purposes of Article 15, as "*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*".[598] In another case concerning the military junta in Greece (1967-1974), the European Commission of Human Rights identified four characteristics of public emergency: a. the emergency must be actual or imminent; b. its effects must involve the whole nation; c. the continuance of the organised life of the community must be threatened; and d. the crisis must be exceptional, in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health and order, are inadequate.[599]

The examination of whether there is a situation of public emergency is strongly connected with the political responsibility of the legislative and executive power.[600] The burden of proof whether a public emergency exists should be borne by the state.[601] In the *Lawless v. Ireland* case, it was allowed the state "*a certain margin of appreciation … in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with the exceptional measures derogating from its normal obligation under the convention*."[602] The states are, therefore, granted a so-called "*margin of appreciation*" in assessing whether a public emergency exists.

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598 ECtHR, *Lawless v. Ireland*, Judgment of 1 July 1961, Appl. No. 332/57, at para. 28.

599 It concerns the case of the Greek generals that overthrew democracy in 1961 derogating from the ECHR based on "*internal dangers which threaten public order*". *European Commission of Human Rights* (Plenary Session), Decision of 24 January 1968, Appl. Nos. 3321/67. See also *Nijhoff,* Yearbook of the European Convention on Human Rights: The European Commission and European Court of Human Rights – The *Greek Case (*1969), p. 94.

600 Council of State (Plenary Session), Judgment No. 2289/1987.

601 *UN*(2001).

602 *ECtHR*, *Lawless v. Ireland*, Judgment of 1 July 1961, Appl. No. 332/57, at para. 82.

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To date, the Greek executive and legislative power has not declared the domestic financial and economic crisis as a situation of public emergency, in order to suspend ordinary law and the Greek Constitution. Also, the Council of State did not declare the financial and economic crisis of their countries and the EMU a situation of public emergency. Exceptionally, the minority opinion of the Council of State supported that the Greek economic and financial crisis constituted an exceptional case of emergency.[603] More specifically, in a case concerning the constitutionality of retroactive taxation, the minority of judges expressed the view that the present economic and financial crisis in Greece demanded the implementation of a new legal order functioning *contra constitutionem* that would allow retroactivity of taxation. Similarly, the argument that a severe financial crisis may fall under the notion of a situation of public emergency was also supported in the case of *CMS v. Argentine*.[604] More particularly, from the aforementioned case is derived that a financial crisis may be regarded as a situation of public emergency under extreme circumstances, and especially in cases of difficulties in fulfilling the international obligation of repaying international credits.

It has been suggested by a group of international experts who, in 1984, formulated a list of 76 principles concerning limitation and derogation provisions in the International Convention of Cultural and Political Rights, that economic difficulties cannot *per se* justify derogative measures.[605] The wording "*economic difficulties*" is not always identified with a severe fiscal crisis. Yet, the wording "*per se*" suggests that under specific circumstances a severe fiscal crisis may constitute a situation of emergency. Some financial crises may have the features of public emergency, but most do not.

During the Greek financial and economic crisis, the Greek state had to face a severe and exceptional situation. For this reason, in practice, the executive power and the competent authorities signed the loan agreements

603 See minority opinion of Council of State, Judgment of 09 March 2011, No. 693/2011. See also *Giannakopoulos*, EfimDD 2012, p. 105.

604 International Centre for Settlement of Investment Disputes, *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8, Decision of 12 May 2005. Retrieved February 2015 from http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

605 *UN*(1984). For more information see also *Gross / Ni Aolain,* Law in Times of Crisis: Emergency Powers in Theory and Practice, p. 251.

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and then introduced emergency decree-laws into parliament for ratification, which included the draft of the relevant loan agreement as well as all the necessary measures that should be adopted within the framework of the loan agreement and only in one article.[606] By working this way, the legislative power actually ratified existing valid and operative agreements and was only called upon to ratify *de facto* established situations.[607] Moreover, the executive power made extensive use of the emergency instrument entitled "*acts of legislative content"*, which further reduced the role of the parliament.[608] In this sense, on the one hand, no great deal of legislative participation was witnessed, since the power of the executive was broadened in order to take the necessary measures for the application of the economic adjustment programme. However, on the other hand, it may not be argued that the Greek financial and economic crisis falls under the notion of public emergency merely because of the degradation of the role of the parliament and because of the extensive use of the "*acts of legislative content*". This is because the Greek Constitution was not suspended, nor was the legislative power prevented from adopting laws according to the ordinary constitutional law. In addition, the use of "*acts of legislative content*" constitutes a constitutional law-making procedure foreseen in Article 44(1) of the Greek Constitution.[609]

Furthermore, the Greek financial and economic crisis does not fall under the notion of public emergency, on the grounds that the crisis was not of temporary nature, like in usual cases of public emergency. The permanent nature of the Greek crisis is witnessed from that fact that during the crisis period most of the policies introduced (i.e. public pension reforms) were not temporary, but rather permanent and persisting long after the eventual economic recovery.[610] Reductions in old-age benefits as well as

606 See i.e. Law No. 4093 of 2012.

607 *Coutts / Sanchez / Marketou et al.*, Legal Manifestations of the Emergency in National Euro Crisis Law, p. 15.

608 *Ibid*, pp. 15-16.

609 Art. 44(1) of the Greek Constitution provides that "*Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of article 72 paragraph 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session…*".

610 *Sanchez,* in: *Kilpatrick / De Witte* (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, p. 119.

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in other social security benefits is not exceptional, but instead a natural development of the social rights in the current social and economic order,[611] where the realisation of social rights is dependent on available resources of the state.

The more correct approach would be to argue that the Greek financial and economic crisis is a situation of urgency. The Greek financial and economic crisis was urgent, since the Greek crisis was exceptional, thus requiring serious and urgent response. Greece had to face such extreme fiscal needs after its restoration of democracy in 1974.[612] The exceptional pressure of the financial crisis and its distinctive element of the risk of economic collapse in case of disapproval of the international creditors to release the financial support made the fiscal crisis a special situation of urgency. The crisis derived from a financial disruption and shortage of financial resources. Greece was, to a great extent, dependent on external financial support and any complications with the next release of the financial assistance would have devastating economic consequences for the substance of the state, and thus for the whole population.

Therefore, against this background, the Greek financial crisis is not a legitimate ground of public interest able to justify restrictive measures, on the grounds that it is not a situation of public emergency. It constitutes a situation of urgency because of its distinctive elements, which were the urgent need for external financial assistance and the subsequent element of conditionality. The mere existence of a financial and economic crisis is not adequate and sufficient on its own to justify any restrictions to pensioners' rights; so a further examination of the reasons of public interest given to justify such reductions is considerably essential.

C. The Aims of the Public Pension Reforms

I. The Sustainability of the Public Pension System

One of the objectives of the Greek public pension reforms was the sustainability of the public pension system, which was endangered due to finan-

611 *O'Connell*, in: *Nolan / O'Connell / Harvey* (eds.), Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights, p. 70.

612 *Markantonatou,* Diagnosis, Treatment and Effects of the Crisis in Greece: A "Special Case" or a "Test Case", p.1.

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cial adversities caused by the increased age of the population, as well as the high public expenditures on pension benefits.[613]

The demographic changes brought about the importance of the sustainability of the social insurance system which started to become underfinanced, since less labour force participants were contributing while the number of beneficiaries was increasing. The sustainability of the public pension system is important and necessary in order to guarantee that current and prospective generations will be provided with adequate pension benefits.[614] Sustainability is based on three principles: adequacy, financial sustainability and capability of adapting itself to economic, social and demographic changes.[615] Sustainability under financial terms (otherwise known as financial sustainability) is achieved by comparing the current financial situation of a social insurance scheme, including its expected future revenues, with its total financial obligations that are expected to occur in a certain period in the future. The expected future revenues and expenses are calculated according to actuarial studies, while various factors are taken into consideration, such as demographic changes.

The financial sustainability is also closely related to the intergenerational justice or "*social sustainability*".[616] The main challenges of the public pension reforms lie thus in ensuring the long-term financial sustainability of the public pension system as well as its "*social sustainability*". The "*social sustainability*" means that the aim of the pension reforms is also "*to underpin or restore expectations of secure and adequate pensions on the part of the current and potential beneficiaries*".[617]

Before the Greek financial and economic crisis, the Greek legislature had enacted a series of pension bills that reformed the public pension system, aiming at the sustainability of the public pension system, the adjustment to the demographic changes as well as the social intergenerational equality. For instance, Law No. 2084 of 1992 "*Reform of the Social Insurance System*" reduced the number of public pension funds and raised the retirement age.[618] In the explanatory report on this law, the legislative

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613 *IMF*(2010) 10/110, p. 5.
614 *UN*(2008), at para. 11.
615 *Council*(2001).
616 *Hinrichs,* in: *Petersen / Petersen* (eds.), The Politics of Age: Basic Pension Systems in a Comparative and Historical Perspective, p. 119-120.
617 *Ibid*.
618 The Law No. 2084 of 1992 is cited in fn. 102.

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power reported that aim of the law was to ensure the sustainability of the system as well as to minimise any social injustice among the generations. Furthermore, Law No. 2676 of 1999 "*Structural and Functional Reconstruction of the Social Insurance Funds and other Provisions*" established the public pension fund of the self-employed OAEE.[619] Its aim was to reduce the number of the self-employed public pension funds and merge them into one. According to its explanatory report, the great number of funds resulted in the emergence of inequalities between benefits and requirements to a pension entitlement, as well as high administrative expenses. Another illustrative example is Law No. 3655 of 2008 "*Administrative and Structural Reform of the Social Insurance System and other provisions*", which reduced further the number of the public pension funds.[620] The aim of this pension bill was the sustainability of the public pension system in view of strengthening its public, universal and compulsory character, its redistributive principle, the similar treatment of the individuals that paid similar amount of contributions as well as the preferential treatment of those individuals that were in need of financial assistance.

After the Greek financial and economic crisis, the aim of the public pension system's sustainability started playing a supplementary role, while the primary role was shifted to the sustainability of public finances, described below. However, the aim of sustainability still remained, since the sustainability of the pension system cannot be viewed separately from the sustainability of public finances given. For example, there are implications for the economy if there is social unrest due to inadequate pension benefits, or due to pension provisions that disregard the increasing ageing of the Greek population. The explanatory report on the Law No. 3863 of 2010, concerning the New Social Security System applicable to the private sector and self-employed, proscribed that the increased retirement age and the stricter calculation formula as well as the introduction of a solidarity contribution granted by pensioners that receive old-age pension benefit more than 1,400 Euros[621] had the aim of achieving the macroeconomic sustainability of the social security system.[622] This was motivated by the state's economic and social situation. In addition, the explanatory report on the Law No. 4093 of 2012 proscribed that the reductions in the old-age

619 The Law No. 2676 of 1999 is cited in fn. 232.
620 The Law No. 3655 of 2008 is cited in fn. 86.
621 Art. 38 of Law No. 3863 of 2010.
622 The Law 3863 of 2010 is cited in fn. 250.

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pension benefits of the private sector pensioners was aimed at the sustainability of the pension system as well as the reduction in the public pension funds' deficit.[623]

Generally, the Greek courts had accepted the sustainability of the social insurance system as a legitimate public interest prior to the financial crisis,[624] as well as after it.[625] For example, the Council of State ruled in the past that the solidarity contribution levy introduced in 1992 (L.A.F.K.A.) on the old-age pension benefits' of the pensioners, was compatible to Article 22(5) of the Greek Constitution, as the latter constitutional provision guarantees *inter alia* the protection of the social insurance capital.[626] In addition, according to the same court, the principle of protection of the social insurance capital requires the continuance and sustainability of the social insurance system, so that both the current and future generations may enjoy adequate social benefits.[627] The Council of State has ruled that the state is not only obliged to found a mandatory social insurance scheme or establish social insurance funds, or monitor and manage their assets, but is also obliged to protect the social insurance capital; namely, the state is obliged to secure the sustainability of the social insurance system in favour of future generations, while its sustainability is secured through the adoption of proper legislation that protects and utilises the assets of the funds and their proper management; moreover, its sustainability is promoted through the amendment of pension retirement requirements, through the imposition of special social contributions and mainly through the financing of the funds from the state budget; the state is obliged to guarantee and ensure the adequacy of the social benefits and the sustainability of the funds as well as to cover their deficit, on the grounds that it is mandatory that the employers and employees pay social insurance contributions to the funds.[628] The Council of State continued arguing that, in times of

623 The Law 4093 of 2012 is cited in fn. 206.

624 I.e. Council of State, Judgment of 04 June 2007, No. 1613/2007; Judgment of 22 September 2008, No. 2522/2008.

625 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012; (Plenary Session), Judgment of 06 June 2014, No. 2115/2014; Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014; (Plenary Session) Judgment of 10 June 2015, Nos. 2287-2290/2015.

626 Council of State (Plenary Session), Judgment of 07 April 1995, No. 1461/1995.

627 Council of State, Judgment of 13 October 2014, No. 3410/2014.

628 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

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exceptional and severe fiscal crisis it may emerge that the state is justifiably unable to provide adequate financing to the social insurance funds, and that it is also unable to ensure their sustainability through other means (amendment of pension retirement requirements, more effective management of their assets, imposition of new special social contributions, increasing of the contributions).[629] When this occurs, the right to social insurance (Article 22(5) of the Greek Constitution), within the framework of a mandatory social insurance system, does not preclude the legislature from readjusting the social contributions and benefits, reassessing the prerequisites for the entitlement of benefits or re-evaluating the percentage of the state to the financial contribution of the system,[630] as well as reducing current pension benefits.[631] In light of this, the Council of State ruled that the protection of the sustainability of the public pension system allows the legislature to reduce the already granted old-age pension benefits, in times of an exceptional financial crisis, when this crisis endangers the sustainability of the system.

Additionally, the Council of State gave priority to the general interest of the sustainability of the public pension system in comparison to the factor of the financial crisis. For example, the Court held that the reductions in old-age pension benefits introduced in the second year of the crisis, in 2011, are legitimate since they pursued the sustainability of the public pension system, on the grounds that the amount of pension benefits that was not provided to the pensioners did not flow into the state budget but remained property of the public pension funds, since it flew to a special account that would cover the deficit of the funds.[632]

The legitimate public interest of the sustainability of the public pension system has also been recognised by the ECtHR. The ECtHR ruled that measures aiming to ensure the financial balance and sustainability of a PAYG follow an objective which is in line with the public interest. The ECtHR ruled that a harmonised pension calculation, aiming at a balanced

629 *Ibid*.

630 Council of State, Judgment of 13 October 2014, No. 3410/2014, Judgment of 23 October 2014, No. 3663/2014.

631 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

632 Council of State, Judgment of 13 October 2014, No. 3410/2014.

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and sustainable welfare system, pursued the public interest.[633] Last but not least, in the case *Valkov v. Bulgaria,* the applicants were retired pilots, whose old-age pension benefits were capped and could not exceed the maximum amount of the old-age pension benefits envisaged by law.[634] The ECtHR noted that the cap pursued a legitimate aim since "*the cap obviously results in serving for the pension system*".[635]

Therefore, the financial crisis and the conditionality imposed by the international creditors for pension reforms do not affect whether or not the sustainability of the public pension system is considered a legitimate public interest. In ordinary times as well as in times of financial crisis, the sustainability of the public pension system is held as a legitimate aim. The only difference is that, in times of crisis, the impugned pension reforms are directly related to the urgent need to balance not only the expenditures and revenues of the social insurance budget but also of the general public budget. More specifically, after the crisis, the need to ensure the sustainability of the public pension system became more urgent and strongly inter-connected with the aim of the fiscal interests of the state. This is because the sustainability of the public pension system is closely related to the overall economic situation of the state and its available resources. Changes to the social insurance budget have an effect on the balance of the entire public budget, for there are financial interconnections between these two budgets.

II. The Fiscal Interests of the State

The fiscal interests of the state are identified with financial sustainability and the improvement of public finances. Due to the urgent Greek financial and economic crisis, the focus has shifted from the sustainability of the public pension system to the fiscal interests of the state. Namely, the explanatory reports on the laws that introduced pension reforms and old-age pension benefits reductions, as well as the Greek economic adjustment

633 ECtHR, *Poulain de Saint Pere v. France*, Judgment of 28 February 2007, Appl. No. 38718/02; *Maggio and others v. Italy*, Judgment of 31 May 2011, Appl. Nos. 46286/09 etc..

634 ECtHR, *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. Nos. 2033/04 etc.

635 *Ibid*, at para. 92.

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programmes and the memoranda, took into account primarily the need to reduce public pension expenditures for the "*fiscal interests of the state*". The "*fiscal interests of the state*" were described in different ways, either as "*sustainability of public finances*", "*decline of public deficit*", "*decline of public expenses*", "*covering the lack of liquidity*", "*proper functioning of the state*". A more concrete meaning and context of the "*fiscal interests of the state*" has been given by the fiscal objectives mentioned in the first economic adjustment programme for Greece. More particular, the fiscal interests of the state were to be achieved through fiscal consolidation by decreasing public sector expenditures and improving the government's revenue-raising capacity.[636]

As described in chapter two, in all explanatory reports on the laws that imposed pension reforms and old-age pension benefits reductions, the legislature reported that the main and initial aim of the adopted relevant measures is the medium and long-term fiscal sustainability of the state. The threatening situation of Greece was characterised as a situation of national urgency that necessitated strict and rash pension reforms. Reducing the public pension expenditures generates savings in public sector expenditure and improves the government's revenue-raising capacity, achieving thus a balanced public budget. This aim was characterised by the legislature as a supreme national interest and not as a mere public interest. For example, according to the explanatory report on the Law No. 3833 of 2010 "*Protection of National Economy – Emergent Measures to Confront the Fiscal Crisis*"[637], the combat of the fiscal crisis constituted a historical and national responsibility. Besides, the legislature reported in the explanatory report on the Law No. 3845 of 2010 „*Measures for the Implementation of the Economic Adjustment Programme for Greece as was set in Agreement with the Member State of the EMU and the IMF*" that the measures were "*painful*", but necessary for the protection of the public interest, which under the present circumstances was identical to the national interest.

In light of this, ripe for legal consideration is whether the fiscal interests of the state may be considered as a legitimate public interest. This legal question is subject to judicial review. The courts' interpretation on the fiscal interests of the state as well as the depth of judicial review should depend upon the existence of a severe and urgent fiscal crisis as well as upon

636 *EU-COM*(2010) 61 final, p. 10.
637 Law 3833 of 2010, Official Gazette of the Hellenic Republic 40/A/15.03.2010.

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Greece's obligation to address the demands of commitments to international creditors in return for financial support. These two factors should determine the legitimacy of the fiscal interests of the state as aim.

The ECtHR has delivered an extensive case-law on the issue of the fiscal interests of the state in cases concerning state's privileges in civil law procedure. More particular, the ECtHR held that the lower rate of interest in arrears owed by the state and public entities in relation to the rate of interest in arrears owed by individuals and private entities violates Article 1 of the First Protocol, on the grounds that "*the mere financial interests of a public corporation could not be considered as a public or general interest*."[638] The mere fact that such privileges were provided because of the status quo of the state was not sufficient in itself to justify the preferential treatment, since such privileges were not essential to the proper performance of public duties. Similarly, in the case *Varnima Corporation International v. Greece*, the Court ruled that the mere interests of the public treasury could not by itself fall under the notion of public interest.[639] The dispute in question concerned a rule setting a 20-years limitation period for claims of the state, while a private person's claim was time-barred after one year. The court held that the application of a 20-year limitation period for the state's claim against the applicant company was not justified by the need to ensure the efficient management of the public finances.

Yet, the ECtHR acknowledged in cases of tax liabilities and old-age pension benefits' reductions that the fiscal interests of the state constitute a legitimate aim. More particular, as far as the recovery of tax liabilities is concerned, the ECtHR acknowledged the effective recovery of tax-liabilities as a legitimate ground for restricting the freedom of movement guaranteed by Article 2 of the Fourth Protocol of the ECHR. In the case *Riener v. Bulgaria,* the Bulgarian public authorities imposed a travel ban on the applicant because of tax-debt until the payment of the debt.[640] The ECtHR considered that the non-recovery of tax liability may fall within the scope

638 ECtHR, *Meidanis v. Greece*, Judgment of 22 May 2008, Appl. No. 33977/06, at para. 31; *Zoumpoulidis v. Greece*, Judgment of 25 June 2009, Appl. No. 36963/06.

639 ECtHR, *Varnima Corporation International v. Greece*, Judgment of 28 May 2009, Appl. No. 48906/2006, at para. 34.

640 ECtHR, *Riener v. Bulgaria*, Judgment of 23 May 2006, Appl. No. 46343/99, at paras. 114-117.

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of the requirements of *ordre public*.[641] The severity of the recovery of tax liabilities is also mirrored in the text of Article 1 of the First Protocol. The latter expressly foresees in paragraph 2 that the right to peaceful enjoyment of one's possessions may be restricted to secure the payment of taxes and therefore, according to the Convention, the recovery of tax liabilities falls within the norm of public interest.

In a more recent case, relating to the Hungarian financial and economic crisis of 2008, the ECtHR held that the "*sense of social justice*", in combination with the interest to distribute the public burden, satisfies the Convention's requirement of a legitimate aim, despite the open-textured nature of the aim.[642] More particularly, the applicant had 98 percent tax imposed on the upper bracket of her severance, and the Hungarian government pointed out that the circumstances of a deep world-wide economic crisis warranted additional burdens on individuals.[643] Similarly, in a Latvian case relating to the financial crisis in this country, the ECtHR declared that the reduction in paternity benefits pursued a legitimate aim, on the grounds that the aim was to re-establish a balance in the state social budget.[644]

Concerning the cases of old-age pension benefits' reductions, the ECtHR mostly accepted the proposed aim alleged by the legislative action. For instance, in the case of *Khoniakina v. Georgia,* the applicant had served as a judge and was entitled to life-long pension in an amount equal to the final salary, adjustable in line with changes in the salary scales of serving Supreme Court judges.[645] The adjustment clause was amended. As

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641 In addition, the CJEU declared that the purpose of securing the payment of taxes is a legitimate aim in a case relating to restriction to the free movement of persons (see CJEU, *Aladzhov v. Zamestnik*, C-434/10, Judgment of 17 November 2011, EU:C:2011:750). However, the same court declared that restrictions to the free movement of capital cannot be justified by any overriding reasons of purely economic nature such as the need to preserve the cohesion of the tax system (see CJEU, *Staatssecretaris van Financien v. B.G.M. Verkooijen,* C-35/1998, Judgment of 06 June 2000, EU:C:2000:294, at para. 48) or the safeguard of the financial interest of the state (see CJEU, *Commission of the European Comminities v. Portugal*, C-367/1998, Judgment of 04 June 2002, at para. 52).

642 ECtHR, *N.K.M. v. Hungary*, Judgment of 14 May 2013, Appl. No. 65529/2011.

643 *Ibid*, at para. 28.

644 ECtHR, *Sulcs v. Latvia*, Decision of 06 December 2011, Appl. No. 42923/10, at para. 25.

645 ECtHR, *Khoniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08.

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a result, the amount of the applicant's old-age pension benefit was reduced. The government used the justification of facing a budget deficit.[646] The ECtHR accepted the government's argument and regarded that the amendment pursued the aim of maintaining the sustainability of the public budget, which is a legitimate aim, thereby rationalising public expenditure.[647] Furthermore, in the case of *Lakicevic and others v. Montenegro,* the government suspended the old-age pension benefits of the applicants, on the grounds that they were working part-time.[648] The ECtHR accepted that the suspension pursued the legitimate aims of securing social justice and the state's economic well-being, on the grounds that the notion of "*public interest*" is extensive, in the sense that the decision to enact laws concerning pensions or welfare benefits involves consideration of various economic and social issues.[649] The aim of the state's economic well-being was also identified as a legitimate aim by the ECtHR in the case *Hoogendijk v. The Netherlands.*[650] In this case, the applicant lost her entitlement to disabled benefits because of the introduction of the "*income requirement*" as a new statutory condition for entitlement to such benefits. The ECtHR found that this measure pursued a legitimate aim for the purposes of protecting the state's economic well-being.

Taking into consideration the above mentioned ECtHR's jurisprudence, it appears that the ECtHR chose a different level of judicial activism, dependent on the importance and severity of the subject-matter at hand. Its judicial review ranged from a more rigid public interest review in cases of state's privileges in civil law procedure to a less intensive judicial activism in cases of social policy matters. In cases of recovery of tax-liabilities and old-age pension benefits' reductions, the ECtHR adopted a more conservative approach when determining the depth of its review, since they involve political, economic and social considerations.

The ECtHR' jurisprudence after the emergence of the Greek economic and financial crisis was also conservative in nature, giving strong weight

646 *Ibid*, at para. 62.
647 *Ibid,* at para. 76.
648 ECtHR, *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. Nos. 27458/06 etc., at para. 68.
649 ECtHR, *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. Nos. 27458/06 etc., at para. 61.
650 ECtHR, *Hoogendijk v. The Netherlands,* Decision of 06 January 2005, Appl. No. 58641/00.

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to the existence of a severe fiscal crisis and the conditionality imposed by the international creditors. Both factors influenced the rationale of the ECtHR's jurisprudence underlying the idea of urgency. In the cases *Koufaki and ADEDY v. Greece*[651] and *Da Conceição Mateus and Santos Januário v. Portugal,*[652] the ECtHR had to decide on the restrictive measures that Greece and Portugal had to undertake in the framework of the implementation of the economic adjustment programmes imposed by the EU and the IMF. Both cases concerned the first round of reductions in the old-age pension benefits applied to public servants. In the Greek case, the applicants, an employee of the public sector and ADEDY, which is the civil servants' confederation, sought judicial review before the ECtHR for the reductions in the first applicant's remuneration and in the salaries and the pensions of the second applicant's members. The ECtHR, taking into consideration the decision of the Council of State,[653] ruled that the adoption of these measures were justified by the exceptional financial and economic crisis in Greece, which is unprecedented in the recent history of the country. Similarly, in the Portuguese case, the ECtHR accepted that the disputed austerity measures were justified because of the unprecedented financial and economic crisis, which was indicated by the fact that an economic adjustment programme of great magnitude had been put in place.

Turning now to the Greek jurisprudence, the Greek courts declared prior to the crisis that the mere fiscal interests of the state do not constitute a legitimate aim that could justify a restriction of a constitutional right.[654] More particular, the Court of Audit ruled that the unfavourable indexation of the old-age pension benefits of the pensioners employed in pedagogic institutes, which pursued the aim of a decrease in public expenses so that Greece may enter the EMU, did not pursue a legitimate aim; this was on the grounds that it exclusively concerned the fiscal policy and the fiscal interests of the country, which could not justify the restriction to Article 1

651 ECtHR, *Koufaki and ADEDY v. Greece,* Judgment of 07 May 2013, Appl. Nos. 57665/12 etc.

652 ECtHR, *Da Conceição Mateus and Santos Januário v. Portugal,* Decision of 08 October 2012, Appl. Nos. 62335/12 etc.

653 Council of State (Plenary Session), Judgement of 20 February 2012, No. 668/2012.

654 I.e. Court of Audit, Judgment of 30 May 2002, No. 674/2002, Judgment of 19 January 2004, No. 27/2004; Council of State, Judgment of 12 October 2009, No. 3072/2009.

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of the First Protocol.[655] Moreover, the Court of Audit did not accept the mere fiscal interests of the state as a legitimate aim in the case of reduction in the old-age pension benefits of the retired judges by altering the indexation of their pensions.[656] The Court held that the acknowledged claim of the pensioners to the indexation of their old-age pension benefits according to the increase of the salaries of their colleagues in service interferes with Article 1 of the First Protocol, and that interference was not justified on grounds of fiscal interests. This is because the necessity of fiscal interests as an aim set out in the explanatory report on the law was very general and indefinite, given that no actuarial, statistical and comparative data was mentioned that could explain and analyse the real occurrence of the state's fiscal interests. The necessity of actuarial data was also declared in the case of unfavourable indexation of the old-age pension benefits of the university professors, where the same court stated that a mere reference to fiscal interests of the state in the explanatory report was not adequate to justify reductions.[657]

Furthermore, the Greek jurisprudence ruled that the fiscal interests of the state may not constitute legitimate grounds of public interest, when no other reasons of public interest co-exist with such fiscal interests; the further reasons must also be derived from the text of the law itself or from the explanatory report. One illustrative example of this is the case law concerning the special contributions of pensioners that flowed into the public pension funds.[658] The special contributions were introduced by Article 20 of the Law No. 2084 of 1992 and were then increased by Article 26 of the Law No. 2592 of 1998.[659] These contributions were challenged before the Court of Audit. The judicial review of the Court of Audit was limited to the existence of a legitimate aim. The court took the aim defined by the legislature in the explanatory report on the Law No. 2084 of 1992 as reference point, since the explanatory report on the Law No. 2592 of 1998 did not make any reference to the aim pursued. The court held that the only aim derivable from the explanatory report was the fiscal interests of the state. The latter aim was not declared as legitimate ground of public inter-

655 Court of Audit (Plenary Session), Judgment No. 730/2006.
656 Court of Audit, Judgment No. 550/2000; Judgment No. 1317/2001.
657 Court of Audit, Judgment of 30 May 2002, No. 674/2002.
658 Court of Audit, Judgment No. 36/2006; Judgment No. 1562/2005.
659 Law No. 2592 of 1998, Official Gazette of the Hellenic Republic 57/A/18.03.1998.

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est, since the fiscal interests of the state always exist in case of old-age benefit's reduction, while the existence of co-existing aims was rather essential. Although the legislature indeed defined certain co-existing aims of the measure, such as the maintenance of the favourable conditions for a pension entitlement,[660] the adjustment of the social insurance system to the new demographic and socio-economic changes as well as the sustainability of the social insurance system, the court, remarkably, did not accept that the introduction of the special contributions of pensioners pursued the sustainability of the pension system or the maintenance of the favourable conditions to pension entitlement as co-existing adequate legitimate aims.

After the emergence of the Greek economic and financial crisis and the signing of the first financial facility agreement with the international creditors, a shift of the Greek jurisprudence was witnessed. The financial crisis has brought the limitation of the public interest justification under review and has derogated from prior jurisprudence. This can be clearly witnessed in the case-law of Article 21 of the Code of Public Procedure, concerning the preferential treatment of the state towards individuals.[661] More particularly, before the crisis, the Council of State and the Court of Audit ruled that Article 21 of the Code of Public Procedure violated the right to equality as well as Article 1 of the First Protocol of ECHR.[662] Article 21 of the Code of Public Procedure provides that the rate of default interest payable by the state and public entities is four times lower than the rate of interest payable by private individuals and private entities. The Greek courts declared, before the crisis, that this differentiation in favour of the state could not be justified on the grounds of fiscal interests. However, after the outbreak of the financial and economic crisis, the Council of State declared that Article 21 was justified by the public-interest of ensuring the financial stability of the state. The court supported that the shift of its jurisprudence was due to the economic and financial circumstances that were different in relation to the situation of the public finances at the time

660 In particular, the maintenance of the required contributory period of 35 years.

661 Council of State, Judgment of 30 May 2011, No. 1620/2011.

662 Council of State, Judgment of 12 October 2009, No. 3072/2009, Judgment of 15 November 2009, No. 3713/2010; Judgment of 04 October 2010, No. 3098/2010; Judgment of 25 October 2010, No. 3431/2010; Judgment of 23 June 2011, No. 1880/2011; Judgment of 29 June 2011, No. 426/2011; Court of Audit (Plenary Session), Judgment of 02 February 2011, No. 192/2011; (Plenary Session) Judgment of 02 November 2011, No. 2812/2011.

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of the publication of the previous jurisprudence. The court explained that under the new economic and financial circumstances, the financial stability of the state was not identical to the mere public fiscal interests, since the state had to face exceptionally high public deficit and debt; which was something unprecedented in the modern history of Greece. Along the same lines was the jurisprudence of the Aeropagus. The Aeropagus ruled that Article 21 of the Code of Public Procedure pursued the legitimate ground of public interest, which was the protection of the property of the state.[663] Aeropagus held that, protecting the public property, the state was able to fulfil its duty to serve its citizens. On the conflicting judgments of the courts before and after the crisis (Court of Audit[664] and the Aeropagus[665]) concerning whether the fiscal interests of the state constitute a ground of public interest in cases of preferential treatment of the state, the Special Highest Court declared the legitimacy of the aim, on the grounds that this provision aimed to ensure the financial stability of the state by reducing the public expenditures and thus decreasing the public debt.[666] Similarly, in another case, the Council of State declared as constitutional the yearly 6 percent interests rate on the debt of the social insurance funds, because this measure aims the achievement of an urgent public interest, which is the protection of the financial sustainability of the state and of the state's property in a broad sense and of the social insurance funds' in a narrow sense.[667] Therefore, under the new economic circumstances, the fiscal interests of the state were defined as an overriding matter of public interest.

The changes in the Greek jurisprudence can also be witnessed in cases concerning the first round of old-age pension benefits reductions. While the Court of Audit held before the crisis that the aim pursued by the old-age pension benefits' reduction to reduce the public expenses was not legitimate, since it concerns exclusively the fiscal policy of the country; under the newly economic reality, the Council of State held that the reduc-

663 Aeropagus, Judgment of 15 June 2010, Nos. 1127-1128/2010.
664 Court of Audit (Plenary Session), Judgment of 02 November 2011, No. 2812/2011.
665 Aeropagus Judgment of 15 June 2010, Nos. 1127-1128/2010.
666 Special Highest Court, Judgment of 13 December 2012, No. 25/2012.
667 Council of State (Plenary Session), Judgment of 06 June 2014, No. 2115/2014.

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tions in the old-age pension benefits pursued a legitimate aim.[668] The court ruled that the improvement of public finances through the reduction in public debt constitutes a reason of public interest besides the sustainability of the social insurance funds. The court justified this shift by claiming that the first round reductions in old-age pension benefits introduced by Law No. 3845 of 2010 and by Law No. 3847 of 2010 did not aim to satisfy the mere fiscal interests of the state, but instead to confront the urgent fiscal needs of the country as well as protect against an eventual economic collapse, since according to the legislature the Greek state was not able to serve its public debt and this could lead to the state's insolvency.[669] Obliviously, therefore, after the economic and financial crisis, the Greek courts did not require the criteria of proving the fiscal interests through statistical data or the co-existence of other legitimate aims besides the fiscal interests of the country.

Therefore, the current interpretation of the notion of fiscal interests appears to be an insurmountable hurdle for the current pensioners claiming protection. Under a severe fiscal crisis and its distinctive element of external pressure for strict monetary and fiscal policies in return for financial support, the notion of public interest was interpreted more broadly by the courts than in relation to ordinary times. A similar shift occurred in the jurisprudence of the Supreme Court of the United States of America in the context of the severe economic crisis of 1929 and the New Deal under the presidency of Franklin Roosevelt. Namely, due to the economic crisis of 1929 there was a shift of the Supreme Court from the emphasis on freedom of property, which dominated the Supreme Court for the half century, to a highly regulated welfare state, with the aim that the USA would face and thus survive its recession.[670]

The severity of the financial crisis created a graduation in the severity of the aim of the fiscal interests of the state, influencing the process of reviewing whether this aim pursed constituted a legitimate ground of public interest or not. The financial crisis legitimised the fiscal interests of the state as an aim. In normal times, restrictive measures, such as old-age pen-

668 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at paras. 34 and 35; Judgment of 13 October 2014, No. 3410/2014.

669 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012; (Plenary Session), Judgment of 02 April 2012, Nos. 1283-1286/2012.

670 For more information about the New Deal, the shift of the jurisprudence and its connection with the Greek crisis see *Geropetritis,* EfimDD 2011, pp. 460-472.

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sion benefits reductions, could not have been invoked to merely serve the fiscal interests of the state and purely economic ends. In times of crisis, however, the aim of protecting the fiscal interests of the state was not seen as a mere aim to ensure the sustainability of public finances, but rather as a superior and urgent national interest aimed at the avoidance of an economic collapse of the country. Therefore, the effort to avoid the economic collapse as well as the fact that the contested provisions of domestic law sought to fulfil the requirements of financial facility agreements constituted exceptional grounds of justification which amounted to a situation of urgency. These two influential factors rendered the crisis as a situation of urgency, resulting in the legitimacy of the fiscal interests of the state following the doctrine *salus patria suprema lex esto*.

III. The Proper Functioning of the EMU

Another aim of the old-age pension benefits reductions is to remedy the situation of excessive deficit by securing the proper functioning of the EMU.[671] The Council of State accepted that the old-age pension benefits reductions introduced by Law No. 3845 of 2010 constituted essential measures for the common interest of the Member States of the EMU, which is the fiscal stability and discipline in the EMU.[672]

The proper functioning of the EMU demands from its Member States fiscal discipline and decline of public deficit so that economic growth and fiscal stability can be achieved. In light of this, the main question is who is actually legally competent to prescribe that fiscal discipline and reduction of public deficit serve the proper functioning of the EMU.

The answer lies on the fact that all Member States of the EU are legally competent to decide collectively on this policy direction. Strict fiscal policies were prescribed to all the Member States of the EU by their signing of the Treaty of Lisbon. These fiscal policies are defined in the consolidated versions of the Treaty on European Union (hereinafter: TEU) and the TFEU. More specifically, the obligation of fiscal discipline and balanced public budgets is derived from Article 3 of the TEU that proscribes the objectives of the Union and in particular, Article 3(4) TEU proscribes that

671 See Explanatory Report on the Law No. 3833 of 2010.

672 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35; Judgment of 23 October 2014, No. 3663/2014, at para. 22.

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"*The Union shall establish an economic and monetary union whose currency is the euro*". Besides this, according to Article 4(3) of the TEU, the Member States must respect the principle of loyalty and take any measures to ensure the fulfillment of the obligations arising from the treaties. Member States shall thus refrain from measures which could jeopardise the attainment of the union's objectives. In this framework, Article 119(1) of the TFEU indicates that the economic policy of the Member States must be conducted in accordance with the principle of an open market economy with free competition, while 119(3) of the TFEU proscribes that the coordination of economic policies is to be founded on stable prices, sound public finances and monetary conditions and a sustainable balance of payments. Furthermore, Article 126 of the TFEU demands that "*Member States shall avoid excessive government deficits*" and Article 136 of the TFEU proscribes budgetary discipline obligations. This broad rule is supplemented by the Fiscal Compact, which requires the Member States to keep sound public finances respecting their fiscal discipline in order to keep balanced (or in surplus) public budgets with a lower limit of a structural deficit of 0.5 percent of the gross domestic product at market prices, price stability, general government debt below 60 percent of GDP and low long-terms interest rates.[673]

Therefore, all Member States of the EMU are legally competent to prescribe the policy direction of fiscal discipline, while this policy consists of common interest of the Member States, on the grounds that the proper functioning of the EMU is an objective of the EU. What remains questionable is whether serving the common interest of the proper functioning of the EMU is a legitimate national interest.

Under the notion of national interest fall the policies and choices of the executive and legislative power of a nation[674] that respect the general values of a democratic society, the national Constitution as well as the general principles of international law. The national interest is a policy notion that is interrelated with the national identity and the constitutional identity. The notion of common interest has a broader meaning. It is used to describe the genuine interests of the whole community, setting the funda-

673 Art. 9 in combination with Art. 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

674 *Bodenheimer,* in: *Friedrich*, (ed.), The Public Interest, p. 209.

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mental values in the society.[675] It shall be understood as "*a consensus according to which respect for certain fundamental values is not to be left to the free disposition of State, individually or inter se, but is recognised and sanctioned by international law as a matter of concern to all States*".[676]

Generally, it is not unusual for the common interest of the community to conflict with the national interest of the Member State. One of the regular defences advanced by the Member States facing an action brought against them for failure to comply with EU's common objectives consists of the invocation of national public interest. For example, in an action against Italy for failure to fulfill its obligations relating to the freedom to provide services, the CJEU did not accept Italy's attempts to justify certain national restrictions on the grounds that they were necessary for the national interest.[677] The CJEU accepts only the legitimacy of national interests that express the same policy objectives of the EU. The legal claim that these policies contradict the economic interests of the Member State has not been accepted by the CJEU, except in a number of cases. For instance, a Member State is allowed to restrict the free circulation of goods when this restriction pursued the national interest of tax control, protection of health and of the consumers.[678] Moreover, the Court has declared that restrictions on the free movement of capital (through direct investment by means of shareholding or the acquisition of securities on the capital market) is justified by the legitimate national interest of safeguarding energy supplies in the event of a crisis.[679]

In order to define the notion of national public interest, the Council of State extensively and pointedly made reference to the legislation of the EU regarding the fiscal stability of the EMU. In other words, the Court defined the notion of national public interest through the means of this normative pattern of the EU legislation. This was precipitated by the fact that Greece as a Member State of the EMU is legally bound to defined com-

675 *Bell*, in: *Brownsword* (ed.), Law and the Public Interest, 1993, p. 30; *Bodenheimer*, in: *Friedrich*, (ed.), The Public Interest, p. 211.

676 *Weiss,* in: *Fastenrath / Geiger / Khan et al.* (eds.), From Bilateralism to Community Interest, p.406.

677 CJEU, *Commission of the European Communities v. Italian Republic,* C-439/99, Judgment of 15 January 2002, EU:C:2002:14, at paras. 27,33,28.

678 CJEU, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, C-120/78, Judgment of 20 February 1979, EU:C:1979:42.

679 CJEU, *Commission of the European Communities v. Kingdom of Belgium*, C-503/99, Judgment of 04 June 2002, EU:C:2002:238, at para. 46.

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mitments, such as the fiscal stability and growth of the EMU and is thus required to regard its own national policies as a matter of "*common interest*".

The EMU represents a notable example of common interest, due to the very idea of economic integration. The EMU has created endogenous interdependence among its Member States, which became stronger after the crisis.[680] The creation of the EMU involves itself a transfer of national sovereignty to the Union itself. For instance, the Member States can no longer determine their own interest rate or their exchange rate policy. Economic policies in the field of taxation, borrowing, social policy and privatisation of public property remain, generally, within the competence of the Member States, but these fields of policies are subject to constraints indicated by the fiscal objectives of the EU. For instance, excessive increase in the domestic public pension spending, which constitutes a large part of the public budget, could endanger the proper functioning of the EMU. As the EMU has affected the core areas of its Member States, namely the monetary, fiscal and indirectly welfare policies, the proper functioning of the EMU has turned to depend on the diverging national public policies. Therefore, the common interest of the EU is strongly intercorrelated with the national interest, which is the economic growth of the domestic economy. The EMU seeks to encompass the national interests of its Member States collectively, seeking to protect mainly one of the common interests of the EU, which is the establishment of a successive economic and monetary union.

Against this background, Greece is legally obliged to respect and implement the common objectives, and therefore the strict and disciplined fiscal policies, of the EU and the EMU. The proper implementation of these objectives and policies constitutes a national, legitimate public interest in times of economic and financial crisis. This is on the grounds that, by doing so, Greece will remain a Member State of the EMU and thus use the Euro as its national currency. The governor of the Bank of Greece supported the idea that the economic effects of Greece exiting the EMU would be devastating for Greece. Should there be an new national currency, it depreciate 60 to 70 percent which would lead to hyperinflation; while additional austerity measures would still be necessary, because Greece's tax revenues would fall short of its public spending, thus creating

680 *Schimmelfennig,* Journal of European Integration 2014, p. 329.

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primary deficit.[681] Simultaneously, an exit of Greece from the EMU would jeopardise the proper functioning of the EMU and the national economy of the other Member States, while the international credibility of the Euro could also be undermined.[682] Therefore, the proper functioning of the EMU constitutes a national interest, and is therefore able to justify reductions to public pension expenditures. The severity and urgency of the financial crisis, as well as Greece's lack of liquidity and urgent need for external financial assistance, plays a strengthening role in this context. The fiscal crisis created stronger pressures on Greece to fulfil its commitments geared towards the proper functioning of the EMU. Fulfilling the commitments in a rigorous manner should be conceived as fulfilling a legitimate national interest in times of public urgency, as it would be in order for Greece to stay in the EMU and therefore avoid an unorderly and uncontrolled default.

D. Concluding Remarks

Chapter four concluded that the financial crisis does not constitute a legitimate ground of public interest but a crucial factor that influences the importance of other legitimate grounds of public interest. The financial crisis and its distinctive element of conditionality impose that the need for restrictive measures during economic recession and in times of austerity may legitimise and upgrade the severity of the aims pursued. The more severe the financial crisis is, the more crucial a role it has in justifying the severity and importance of the aims pursued.

Legitimate grounds of public interest of the Greek public pension reforms and old-age pension benefits reductions were primarily the fiscal interests of the state and secondly the sustainability of the public pension system and the proper functioning of the EMU. These aims were defined by the Greek legislature in the explanatory reports on the laws that introduced the relevant measures and they became also subject of judicial review. The Greek jurisprudence as well as the ECtHR exercised judicial deference because of the severe fiscal situation of Greece and because any active judicial review could have negative consequences on the economic

681 *Provopoulos, George*, The Drachmae would be like in Hell, Newspaper Kathimerini, 2nd of January 2012.

682 *Proctor,* European Business Law Review 2006, p. 934.

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policy of the state. The Greek courts as well as the ECtHR declared the legitimacy of the fiscal interests of the State as an aim of pension reforms, on the grounds that under the recent circumstances the reductions in public pension expenditures do not constitute mere fiscal interests of the state but a superior national interest; this being the ability of the state to avoid eventual economic collapse, which identifies the financial crisis as a national crisis. The recent Greek jurisprudence is contradictory to previous domestic case law, according to which the fiscal interests of the state does not constitute a legitimate ground of public interest, unless there are co-existing aims as well as comprehensive actuarial studies and statistical data proving exactly what the public fiscal interests are. The recent jurisprudence of the ECtHR is in line with its previous case law relating to reductions in social benefits, on the grounds that the ECtHR has always allowed a wide margin of appreciation for the Contracting States to define what falls under the notion of public interest.

The fact that the fiscal interests of the state were declared a legitimate aim by the Greek courts after the Greek economic and financial crisis shows, to a great extent, that the financial crisis actually constitutes the decisive factor on the legitimacy of the aim pursued. The financial crisis was the reason behind re-interpretation of the notion of fiscal interests being able to transform the fiscal interests of a state into a legitimate national interest, while in ordinary times the fiscal interests would not have been held as a legitimate aim for the restriction of pension rights. This shift may also be explained from the fact that the Greek crisis was not a temporary and usual crisis, but an exceptional one. The intensive public urgency leads further to the thesis that in times of intensive public urgency, the fiscal interests shall be regarded as legitimate ground of public interest. Its importance is further strengthened by the urgent need for external financial support and the element of conditionality, on the grounds that this financial support is dependent upon the proper implementation of stringent national fiscal and monetary policies. Due to the element of conditionality of the financial facility agreements, the recourse to the financial facility agreements between Greece and its international creditors became an important influential factor in examining the legality of the pension reforms. Accomplishing the fiscal targets set in the financial facility agreements with the Member States of the EMU and the IMF was due to the state's liabilities towards its international creditors and it was considerably important since it secured the continuing of the financing and the release of the next instalments.

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Therefore, during economic turmoil and with the emerging need for financial assistance, the same aim was interpreted differently as a reason of public interest. They transformed the improvement of the public finances from mere fiscal interests to a national interest, vital for the substance of the state.

The same was observed in the case of the proper functioning of the EMU. In times of fiscal crisis that could put the EMU in jeopardy, it became an urgent and intensive need to undertake retrogressive pension reforms so that the proper functioning of the EMU is ensured. The imminent crisis and economic collapse of the EMU created stronger pressure on the domestic legislature. The domestic legislature felt more pressure on ensuring the proper functioning of the EMU in times of fiscal crisis, since this may protect against the economic collapse of the EMU and also the economic collapse of the Member State itself. Therefore, the identification of the common interest with the national interest was strengthened in times of urgent fiscal crisis, making the pursuit of the common interest a legitimate public interest.

The sustainability of the public pension system was also given exceptional gravity by the two factors of the financial crisis and the conditional external financial assistance, making the need to ensure the sustainability of the public pension system incredibly urgent. In this way, pension reforms ensuring the sustainability of the system became more than necessary. However, both factors did not play any role on whether the sustainability of the public pension system constitutes a legitimate aim or not. Prior to the crisis as well as after it, the Greek jurisprudence as well as the ECtHR's case law declared the legitimacy of the sustainability of the public pension system as a legitimate ground of public interest.

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