Abstract
This paper considers the effective promotion of collective bargaining in the wake of the financial crisis. It is directed to track 4 of the conference, as it considers the challenge of rights enforcement in financially-constrained states and the role that transnational standards, and the adjudication and development of those standards can have in promoting those rights.

On a theoretical level, it engages with debates concerning the value of proportionality in upholding and promoting (collective bargaining) rights. Within these debates, there is discussion as to how far, in times of ‘crisis’, the focus in judicial adjudication should be on the promotion of the ‘minimum core’ of rights, and how far that adjudication should focus on balancing and proportionality mechanisms. On the one hand, it is suggested that a focus on the minimum core of rights allows the most effective promotion of rights, as that minimum core essentially ‘trumps’ economic or political considerations. On the other hand, it is suggested that in times of crisis, a focus on detailed proportionality assessments is the best way to ensure the development and enforcement of rights. The latter argument proceeds by explaining that a focus on the minimum core of rights leads to a defensive
judicial position, whereas engaging with proportionality is a more effective means of opening up dialogue and negotiation between the lawmakers and the judiciary where resources are scarce.

On a practical level, this paper considers the ways in which proportionality has been invoked to either defend or deny collective bargaining rights in the wake of the financial crisis at both national and international levels. It notes the changing attitudes towards such proportionality assessments and the increased willingness to challenge governmental arguments relating to necessity in forcing the erosion of rights. The paper notes the political sensitivity of this judicial engagement, but argues that this is the most effective means of promoting collective bargaining standards. This engagement also means that instead of proportionality and rights promotion being diametrically opposed, proportionality acts to ensure the development and enforcement of collective bargaining rights.

Keywords: Collective bargaining, Employment rights, Judicial minimalism, Proportionality, Social Rights

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Introduction

This article investigates judicial responses to ‘crisis’ in the labour law field. This matter has been brought into sharp focus by the judicial challenges brought against certain deteriorations in labour law protections adopted by states the wake of the 2008 financial crisis, but it is of wider interest and concern. The action of courts in times of crisis goes to the heart of judicial function. Social, economic and political crises imply emergency action on the part of the executive. Some argue that in these kinds of situation, the judiciary must act in a ‘minimalist’ fashion to allow the executive to do its essential work. It is the democratically elected government which is in the best position to judge the correct or consensus position on fundamental issues in this kind of environment. In these kinds of situations, the court should restrict itself to ensuring that certain procedural guarantees are
followed and upheld by the executive. Any cases which do arise by individuals on the question of rights should be decided in a ‘shallow’ and ‘narrow’ way.¹

Of course, such a ‘minimalist’ response only serves to compound the traditional scepticism of labour and its representatives to the role of the courts. This scepticism stems from the perception that judges are hostile to the interests of workers, and particularly the collective interests of workers in trade unions.² Traditional judicial values – individualism, freedom of contract and property rights – have been viewed as favouring employers rather than employees, leading workers to pursue ‘political’ rather than judicial routes to rights enhancement.³ For example in the case of collective bargaining the relationship between employers and trade unions is presented as one of class struggle, through which improvements in working lives are achieved through negotiation and compromise. Traditionally, the perception of labour law has been one of social struggle rather than the codification of legal standards.⁴ Where labour law cases have reached the courts, those courts have been charged with a lack of flexibility in the interpretation of contractual standards or the adoption of a narrow construction of statutory terms to the detriment of workers. What emerges is a vicious circle whereby the concerns of (collective) workers are viewed as too political to justify judicial interference, whilst collective bodies tend to view the courts as unhelpful in the achievement of their political ends. The danger is that in times of ‘crisis’, there is a retrenchment of these positions leading to negative judicial outcomes for workers and an even greater scepticism amongst collective bodies towards the courts.

The question is whether such a retrenchment is necessary and whether courts could provide more rather than less assistance to workers in times of crisis. This article draws on the theorisations of the relationship between socio-economic rights and crisis to suggest that times of crisis are precisely those times when a more active judicial role is required, and the options open to courts in pursuing this role. Some authors have argued that the best approach to maintaining rights standards in times of crisis is to focus on the ‘minimum core’ of the rights. This allows for prioritization of (labour) rights against other competing economic considerations. This is the approach also adopted in international human rights law, with the Committee of Economic, Social and Cultural Rights underscoring the need for non-regression in times of crisis. Other authors argue that the doctrine of proportionality

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¹ These terms will be discussed later in the paper.
³ This is the case for example in the UK.
can help to provide content to social rights where economic crisis is identified. The doctrine of proportionality implies that judges are forced into a discourse about the competing interests inherent in each case, and as such avoid excessive deference to dominant interests. It is argued that proportionality allows the consideration of the ‘political’ within particular legal bounds, and because of this provides the best mechanism for workers or other disadvantaged groups to have their voices heard and their rights protected.

The article proceeds as follows. Section 1 identifies the tendency to retrenchment and a ‘minimalist position’ in times of crisis. This minimalist position is assessed in terms of judicial decisions following the financial crisis in the EU. Section 2 turns to consider other possible judicial responses to crisis measures. Firstly, there is a consideration of the minimum core approach, and evidence for this approach at international and national/ supranational level. Secondly there is the discussion of the doctrine of proportionality and whether this provides a better way to address consideration of the operation of labour rights in times of crisis.

Crisis courts and retrenchment

The idea of crisis has come to dominate political discussion over recent years, and has set the agenda for intervention in a number of legal settings. Most obvious perhaps is the global financial crisis of 2008 which caused governments to commit massive funds to economic stimulus packages and the bailing out of banks. These bailouts put countries into significant sovereign debt, resulting in a period of austerity under which labour and other socio-economic rights came under real threat, and continue to do so. However it appears that the idea of ‘crisis’ has been used to describe other social and political effects which may or may not be directly linked to the sovereign debt crisis. As President Jean-Claude Juncker stated in his Opening Address to the December 2015 European Council meeting: ‘We have often talked in recent months about the Greek crisis, the refugee crisis and other crises. But in reality, Europe is confronted by a constellation of multiple crises of complex and multifaceted character, arising both internally and externally, and which are occurring all at the same time.’ In turn, the crises appear to set the agenda for action. For example, in the European setting the work programme for the Netherlands Presidency of the Council of the European Union sets out 4 key targets: (1) a comprehensive approach to migration in the wake of the refugee crisis; (2) job creation in response to the jobs crisis; (3) ‘Sound future proof European finances’ following

the financial crisis and (4) a forward-looking response to climate change and the energy crisis. To this might also be now added the political ‘crisis’ of Brexit, which is set to change the whole dynamic of European functioning.

The idea that we are in a state of crisis or emergency has particular implications for law in general, and labour law specifically. In (liberal) legal scholarship, a distinction is traditionally made between the action of the executive, the legislator and the judiciary in times of emergency as opposed to peacetime. This understanding varies widely, with some authors following the Lockean position that in times of crisis, the executive can exercise the Prerogative and act outside the law to enact measures which restore stability to the rule of law. The judiciary’s role is to assess by means of judicial review whether those measures are in fact in the best interests of the rule of law (and therefore constitutional stability going forward). Other scholars are convinced that extra-judicial action is not possible or valid, and that the law must stretch to accommodate crisis measures. Legality is only possible where action takes place inside the law, and this is the case in both emergency situations and peacetime. There is also considerable disagreement in terms of the interpretation of law in times of crisis. It is often understood that in times of crisis, judges should adopt a minimalist position. This might be based, for example, on a historical understanding of the failure of the judiciary to uphold the rule of law during emergencies, in the face of executive assertions of necessity. It might also be based on an assessment of the appropriateness of judicial action in emergency situations, in the context of a lack of judicial understanding or requisite information to ‘second-guess’ the executive on the balance between security and liberty.

Clearly, a minimalist response to emergency has dramatic implications for legal interpretation. Minimalism implies that judges adopt a ‘thin’ conception of the rule of law and leave out more substantive conceptualisations. Thin conceptions of the rule of law (for example, the formal requirement that all persons should be subject to the law and have a means of exercising their rights) allow both shallow and narrow interpretations of legal provisions. Shallow interpretations of the law leave foundational issues undecided, and so ensure the greatest possible agreement from

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7 This position is discussed in more detail later in the article.
11 Ibid 2018
12 T Bingham *The Rule of Law* (Allen Lane 2010) 8
the people in the outcome of the law.\textsuperscript{13} Narrowness, essentially deciding one case at a time without looking at the broader picture, also ensures that the big decisions are left ultimately through for the people to decide through the conduit of the executive/legislature.\textsuperscript{14} It is argued that minimalism is a way of reducing the potentially destabilizing action of the judiciary in making broad substantive pronouncements about the meaning and direction of the law in times when stability is most needed. As a result, minimalism is an ‘effective way of keeping the peace’ in emergency situations.\textsuperscript{15} More substantive conceptualisations of the rule of law, which include for example a commitment to certain human rights norms are crowded out in emergency situations because such interpretations are viewed as too general, undecidable and value driven to ensure stable judicial decisions.

As such a minimalist approach can be damaging to social rights generally and labour rights specifically. For example, in the EU context, a number of legal challenges have been brought against the negative social conditions attached to European bailout mechanisms. So far the CJEU has refused to allow any preliminary references on this point to proceed.\textsuperscript{16} One of the major sticking points has been that the CJEU is not willing to countenance the possibility that in responding to the social conditionality Member States are acting within the scope of EU law. As a result, the CJEU has found that it is impossible to measure these actions against any of the fundamental rights and principles of the Union (for example as set out in the Charter of Fundamental Rights and Freedoms 2000). For example, in the case of in the case of \textit{Sindicato Nacional dos Profissionais de Seguros e Afins}\textsuperscript{17} a trade union challenged the action of an insurance company to suspend the bonuses of its staff in contravention of a collective agreement. It argued that this action breached articles 20 and 21 of the Charter of Fundamental Rights. The company asserted that it was only applying the provisions of national law invoked in response to the crisis. The CJEU stated that it did not have jurisdiction in relation to these requests, as the requests ‘did not contain any concrete element enabling the view to be taken that that law sought to implement EU law.’\textsuperscript{18} As a result the Charter did not apply. This position was also adopted in the case of \textit{Cozman}.\textsuperscript{19} Here a Romanian civil servant complained that

\textsuperscript{13} C Sunstein, \textit{One Case at a Time: Judicial Minimalism on the Supreme Court} (Harvard University Press 2001) 11
\textsuperscript{14} Ibid 10
\textsuperscript{16} It is worth noting that the CJEU did consider itself competent to decide on whether the terms of a Memorandum of Understanding were consistent with EU law in the context of the right to property under Article 17 (1) Charter of Fundamental Rights and Freedoms. However there has not been a case where this competence has been extended to social rights. See \textit{Ledra Advertising v Commission and ECB} Case C-8/15 P
\textsuperscript{17} Case C-665/13 \textit{Sindicato Nacional dos Profissionais de Seguros e Afins} [2014] EUECJ C-665/13_CO
\textsuperscript{18} Ibid para 14
\textsuperscript{19} C-462/11 \textit{Cozman}, Order of 14 Dec 2012
the reduction of his salary as a result of the introduction of Law 118/2010 (a law introduced to comply with the social conditions of the Romanian bailout) was contrary to his rights under several Articles of the Charter. Again, the Court ruled that the fact that a complaint must fall within the scope of EU law to be considered against the Charter meant that it had no jurisdiction to hear the complaint.

These judgements can be seen as minimalist in nature. They are short judgments and do not enter into a discussion about the nature or importance of the fundamental rights potentially breached. They resolve any uncertainty (for example over whether the EU crisis measures are or are not EU law) in what might be seen as the least controversial way. Each of the judgements follows a consistent line, and essentially relies on a procedural matter to dismiss the claims. However, these judgements are unsatisfactory from a labour law point of view as they do not clarify why these EU measures (for example the Memoranda of Understanding) are deemed outside EU law and thus unsuitable for preliminary reference. Indeed, the argument can certainly be made that many of the Memoranda of Understanding are intimately connected to EU law.20 The Portuguese MoU for example simply repeats the social loan conditions wholly contained in a Council Implementing Decision. Furthermore, no reference is made to earlier case law in which either a distinction between Charter Rights is made in terms of their applicability or a more generous interpretation of Article 51 of the Charter has been adopted.21

A similar approach can be viewed at both national and international levels. Courts have tended to favour governmental arguments about the necessity of labour law deregulation in times of crisis, and this has restricted their ability to promote or uphold challenges against the deterioration of labour and social rights. For example, in July 2012, the Portuguese Constitutional Court ruled on the constitutionality of a provision adopted as part of the government’s response to the demands of its Memorandum of Understanding with the EU, IMF and the ECB.22 Specifically, it was asked to rule whether a law which suspended public employee salaries in successive months was unconstitutional. The Court initially adopted a maximalist approach, considering the provision against the constitutional provision of equality. It found that the contested provision was unconstitutional, as it concerned only public employees rather than all workers. However, it then decided to suspend the effect of its ruling, on the basis of the gravity of the emergency situation facing the state, and the need of the Portuguese government to respond to the demands of ‘exceptional public interest’

20 C Kilpatrick, ‘Are the bailouts immune to EU social challenge because they are not EU law?’ (2014) 10 (3) European Constitutional Law Review 393, 412
21 Ibid 419
22 Portuguese Constitutional Court, Case No 353/2012, judgement 5 July 2012
during the crisis. \(^{23}\) This effect can also be seen in ‘judgments’ at international level. Historically, the Committee of Experts has been guilty of accepting too readily governments’ arguments that restrictions to rights are necessary in light of social or political crisis.\(^{24}\)

These kind of minimalist judgements do not improve the view amongst labour of the distance of the courts. Governmental arguments about crisis unquestioningly override fundamental social rights and undermine social and labour standards. The question is whether there is an alternative approach which can be taken by the courts and the circumstances in which such an alternative approach can be legitimised. It appears that there are two approaches which could potentially be followed. The first approach is that the courts give increased weight to the ‘minimum core’ of social (or labour) rights and this allows those rights to ‘trump’ economic considerations. The second approach is that the courts can enter into a proper proportionality assessment – delving into the detail of the ‘crisis’ to check whether the particular balance adopted by the government can be justified in the circumstances.

**Minimum core of rights**

It has been asserted that in times of crisis, courts should concentrate on promoting the minimum core of social or labour rights. It is argued that the advent of a structural crisis leads to the diversion of funds away from the promotion of social rights towards emergency economic measures. The normal redistributive functions of government are suspended in this scenario. However, it is precisely during times of crisis that individuals are most in need of (government) support.\(^{25}\) A focus on a minimum core of rights determines that government and their agencies give some thought to the prioritization of resources for those in greatest need. This kind of approach is supported at international level by the United National Committee on Economic, Social and Cultural Rights. In a letter released in 2012 to all state parties, the Committee outlined governmental responsibilities in times of crisis. It provided that any crisis measure must identify ‘the minimum core of rights, or a social protection floor, as developed by the International Labour Organisation, and ensure the protection of this core content at all times.’\(^{26}\)

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\(^{23}\) Ibid para 6

\(^{24}\) See Complaint by the Congrès du travail du Canada (CTC) et l’Alliance de la fonction publique du Canada (AFPC) against the Canadian government, Case 1616, Report 284, 595


\(^{26}\) Letter from Ariranga G Pillay, Chairperson of the Committee on Economic, Social and Cultural Rights (May 16 2012) Ref no CESC\(R/48^{th}/SP/MAB/SW\) available at [http://www2ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf](http://www2ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf) (last accessed 17 May 2017)
Arguably, the advantage of such a minimum core approach is that rights ‘trump’ economic and social considerations. Essentially, the advent of ‘crisis’ cannot be used as an excuse by governments to derogate from constitutionally enshrined rights. The court’s role is to protect rights against such economic and social invasion. Indeed, the requirement under Article 2 (1) CESCR of ‘progressive realisation’ envisages that action is taken to prevent regression of rights, particularly in times of crisis. The 2012 letter aims to reinforce this non-retrogression by a focus on the minimum core and ensuring that any action taken by governments which is deliberately retrogressive only lasts for the duration of the crisis, is non-discriminatory and is necessary and proportionate, in the sense that the adoption of any other policy would be more detrimental to economic, social and cultural rights. Although the Committee has not given a comprehensive account of the measures which it would find to be retrogressive, it has stated the example of the ‘institution of forced labour or the abrogation of legislation protecting the employee against unlawful dismissal’. The possibility of bringing an individual complaint where a state has ratified the terms of the Optional Protocol to the ICESCR means that there is the opportunity for the limits of the minimum core to be further tested. By contrast, there are others that argue that a focus on a minimum core of rights during times of crisis only serves to ensure a shrinking of rights to a fixed minimum content. It is argued that the minimum core approach encourages judicial minimalism, as the courts need only assess whether at any particular moment the very basic rights have been infringed. It does not require that the courts engage with the nature of the crisis, whether or not the crisis did in fact require a reduction in social rights protection, or whether a less restrictive approach to social rights could have been taken. For example in the recent case of *Iraklis*, the Court of Justice of the EU was asked to consider whether the government’s action under the auspices of ‘crisis’ conditions was legitimate. The case was brought by a manufacturing company, AGET Iraklis, who had applied to the government to effect a number of compulsory redundancies at its factories. The government refused to allow the redundancies on the basis of severe financial crisis and the increased detriment to workers and government finances which would ensue from such action. The company complained that this action was in breach of EU Directive 98/59 on collective redundancies and also in breach of its fundamental freedoms under Articles 49 and 63 of the Treaty. The Court said that although the protection of workers was one of the purposes of the collective redundancies directive, financial crisis and economic considerations could not be used to restrict the ability of employers to effect redundancies. Although overriding reasons of public interest could justify the restriction of a

29 AGET Iraklis Case C-201/15
company’s freedom of establishment, the Treaties do not provide that a provision of primary law can be disregarded on account of national economic crisis. No further discussion on the balance between worker protection and the freedom to make redundancies was therefore engaged.\textsuperscript{30}

A focus on proportionality

It has been argued that engaging with the doctrine of proportionality is a much more effective tool than the minimum content approach when it comes to the promotion of socio-economic rights in times of crisis.\textsuperscript{31} Contiades and Fotiadou argue that through proportionality, the judge imposes an obligation on the lawmaker to give reasons for their actions. Governments cannot simply cite the crisis as a justification for the erosion of rights, without at least considering whether the action taken was proportionate. They argue that proportionality opens up the nature of crisis to public debate in which constitutionally entrenched rights inevitably form part. The flexibility of the proportionality doctrine, the translation of a whole range of political, philosophical and moral issues into legal ones means that the content of social rights is continually developed through reference to the doctrine. Furthermore, they suggest that ‘balancing’ is inevitable in times of financial crisis, and proportionality is the best means to undergo this balancing act.\textsuperscript{32} Proportionality as a tool is well known to the judiciary and through applying their expertise to the question of the balance between crisis and socio-economic rights they can develop and strengthen the content of those rights and put pressure on government to respect them.

The benefits of such an approach can be seen in a number of national judgements, where the courts have considered the actual position and effects of the crisis. For example, in July 2012, the Portuguese Constitutional Court ruled on the constitutionality of a provision adopted as part of the government’s response to the demands of its Memorandum of Understanding with the EU, IMF and the ECB.\textsuperscript{33} Specifically, it was asked to rule whether a law which suspended public employee salaries in successive months was unconstitutional. The Court initially adopted a maximalist approach, considering the provision against the constitutional provision of equality. It found that the contested provision was unconstitutional, as it concerned only public employees rather than all workers. However, it then decided to suspend the effect of its ruling, on the basis of the gravity of the emergency situation facing the state, and the need of the Portuguese government to respond to the

\textsuperscript{30} Ibid para 107
\textsuperscript{31} It has already been argued that in the context of labour law, proportionality can be useful to impose a higher standard of behaviour. See P Alon-Shenker and G Davidov, ‘Applying the Principle of Proportionality in Employment and Labour Law Contexts’ (2013) 59 (2) McGill Law Journal 375
\textsuperscript{32} X Contiades and A Fotiadou, ‘Socio-economic rights, economic crisis and legal doctrine: A reply to David Bilchitz’ (2014) 12 (3) Journal of Constitutional Law 740
\textsuperscript{33} Portuguese Constitutional Court, Case No 353/2012, judgement 5 July 2012
demands of ‘exceptional public interest’ during the crisis.  

The Court reversed its previous decision of July 2012 in April 2013. It found that the provision in the Budget Law 2013 setting out a reduction and suspension of salary for public sector workers as in breach of the principle of equality and proportionality and therefore void. The wording of the judgment suggested the Court entered into an assessment of the nature of emergency, and also suggested a scepticism of the necessity of asking (public sector) workers to ‘bear an additional effort’ indefinitely. Similarly, the Constitutional Court of Italy found that certain labour law measures introduced in the wake of the crisis were unconstitutional, given in particular their length of application and effect. As an example, measures which extended the freezing of bargaining procedures were deemed to have ‘structural effect’ leading to the conclusion that ‘the regime itself violates the principle of freedom of association’ enshrined in the Constitution. The impact on the constitutional values was not ‘occasional’ but (semi-) permanent and therefore unconstitutional.

This kind of approach, and a willingness to enter into a proportionality assessment in relation to the crisis can also be seen at ILO level. The position of the ILO as an international body requires that there is a margin of appreciation for states when undergoing ‘crisis’. Indeed, the Declaration of Philadelphia states this recognition, in the sense that the promotion of rights will depend on economic and social development: ‘The conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.’ In terms of collective bargaining, the balance of considerations was set out in the AFPC case. In this case the Committee of Experts recognised that the law under challenge restrained collective negotiation for public servants for a period of 24 months. However, it accepted the government’s argument that in certain exceptional economic circumstances, measures restraining collective bargaining were acceptable. Those actions must fulfil certain criteria. They must be truly exceptional and temporary. They must also be necessary and taken in order to preserve the quality

34 Ibid para 6
35 Portuguese Constitutional Court, Case No 187/2013, judgement of April 5, 2013
36 Ibid para 40. See also the commentary in F Fabbrini, ‘The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective’ (2014) 32 (1) Berkeley Journal of International Law 64
37 Constitutional Court of Italy, Judgment No 178/2015, 24 June 2015
38 Ibid Para 15.2
39 Declaration of Philadelphia, para V
40 Complaint by the Congrès du travail du Canada (CTC) et l’Alliance de la fonction publique du Canada (AFPC) against the Canadian government, Case 1616, Report 284, 595
of life of workers during the crisis.\textsuperscript{41} This judgement has been criticised, on the basis that it was too accepting of the nature of the crisis, and too ready to accept the government’s arguments. In particular, it is argued that the measures adopted by the Canadian government could not easily be considered ‘temporary’ given the length of continuation of the measures.\textsuperscript{42}

Since that judgement, it is possible to discern an increased willingness on the part of the Committee to consider more fully the proportionality of measures in relation to the crisis, as well as to evaluate the nature of the crisis itself. Both of these positions potentially lead to a greater upholding of rights in the field of collective bargaining. For example, in case CTC,\textsuperscript{43} the Committee stated scepticism towards the government’s justifications for restrictions on collective bargaining. The Committee pointed out that the length of the measures imposed exceeded the balance permitted: ‘Therefore, in the light of these various legislative interventions over the last four years, the Committee considers that Bill 52 and Bill 41 cannot be defined as exceptional measures and clearly go beyond what the Committee has found to be permissible restrictions on collective bargaining, especially as regards the duration of the period covered.’ There was also a question mark over the quality of collective bargaining restrictions which should be imposed, suggesting that the government should first seek to maintain collective bargaining rights in the face of economic crisis. Reference was made in the judgement to the General Survey in which it was stated: ‘The Committee therefore takes full account of the serious financial and budgetary difficulties facing governments, particularly during periods of prolonged and widespread economic stagnation. However, it considers that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; where the circumstances rule this out, measures of this kind should be limited in time and protect the standard of living of workers who are the most affected. In other words, a fair and reasonable compromise should be sought between the need to preserve as far as

\textsuperscript{41} The actual wording is as follows: ‘As regards the economic stabilization measures which limit collective bargaining rights, the Committee has acknowledged that when a government, for compelling reasons of national economic interest, and as part of its stabilization policy, considers that pay rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers’ living standards, in particular those who are likely to be the most affected’ (Digest, para. 641; 222nd Report, Case No. 1147, para. 117; 230th Report, Cases Nos. 1171 and 1173, paras. 162 and 573; 284th Report, Cases Nos. 1603, 1604, 1605, 1606, 1607 and 1616, paras. 78, 321, 500, 542, 587 and 635; 286th Report, Case No. 1624, para. 223; 292nd Report, Cases Nos. 1715 and 1722, paras. 187 and 547; and 297th Report, Cases Nos. 1758, 1779 and 1801, paras. 225 and 264). The Committee of Experts has taken the same view (General Survey on Freedom of Association and Collective Bargaining, 1994, para. 260).

\textsuperscript{42} M Choko, ‘L’evolution du Dialogue entre le Canada et l’OIT’ (2011) 56 (4) Revue de Droit de McGill

\textsuperscript{43} Complaint presented by the Congrès du travail du Canada (CTC), le Syndicat national des fonctionnaires provinciaux (NUPGE), le Syndicat de la fonction publique de la Nouvelle-Écosse (NSGEU), l’Association canadienne des professeurs d’université (CAUT), la Confédération des associations d’enseignants universitaires de la Nouvelle-Écosse (NSCUFA), l’Internationale des services publics (ISP) et la Confédération internationale des syndicats libres (CISL) against the Canadian government. Case n° 1802, Report 299 (248)
possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other.\textsuperscript{44}

This increased scepticism towards restrictions imposed in the name of financial crisis can also be detected in more recent judgements. There are two judgements in particular which can be cited in this regard. First, in case GSEE, the Committee of Experts was asked to consider complaints that a number of trade union and collective rights had been breached in the wake of the financial crisis of 2008.\textsuperscript{45} In its judgement it listed the arguments made by the trade unions involved that the actions of the government were neither temporary, necessary nor proportionate. They could also have long term damaging effects on workers rights and so could not be considered as maintaining workers living standards for the duration of the crisis. In its conclusions the Committee stated: “While noting the reasons advanced for the exceptional circumstances in this case, the Committee considers that such repeated and extensive intervention in collective bargaining can destabilize the overall framework for labour relations in the country if the measures are not consistent with the principles of freedom of association and collective bargaining. In this regard, the Committee observes that in a case in which the Government had, on many occasions over the past decade, resorted to statutory limitations on collective bargaining, the Committee had pointed out that repeated recourse to statutory restrictions on collective bargaining could, in the long term, only prove harmful and destabilize labour relations, as it deprived workers of a fundamental right and means of furthering and defending their economic and social interests.” The Committee considered that the government should not impose restrictions, but rather should rely on negotiation and voluntary acceptance of restrictions by the trade unions. Only this response would be proportionate given the violation of rights involved. Furthermore, the Committee demonstrated scepticism that the measures involved were in fact crisis driven, by asking to be kept informed about ‘the evolving impact of these measures on the overall environment and to keep it informed of the efforts made for their duration to be temporary.’\textsuperscript{46}

A similar position was adopted in case FSC-CCOO.\textsuperscript{47} The conclusions in GSEE were stated even more starkly. Here the Committee observed that in the context of economic stabilization, priority should be given to collective bargaining as a means of determining the employment conditions of public

\textsuperscript{44} Ibid Paras 263-264
\textsuperscript{45} Greek General Confederation of Labour (GSEE), Civil Servants’ Confederation (ADEDY), General Federation of Employees of the National Electric Power Corporation (GENOP–DEI–KIE) and Greek Federation of Private Employees (OIFE) supported by the International Confederation of Trade Unions (ITUC) against the Greek government, case 2820, Report 365, November 2012 (784-1003)
\textsuperscript{46} Ibid Para 995
\textsuperscript{47} Citizens’ Service Federation of the Trade Union Confederation of Workers’ Commissions (FSC-CCOO) against the Spanish government, case 2918, Report 368, June 2013 (323-364)
servants, rather than adopting legislation to restrain wages in the public sector. \(^{48}\) Furthermore, collective bargaining could actually provide a way out of crisis conditions, and so should not automatically be restricted in times of economic uncertainty (even if temporary, necessary etc). The Committee stated the importance of maintaining permanent and intensive dialogue with the most representative workers’ and employers’ organizations and that ‘adequate mechanisms for dealing with exceptional economic situations can be developed within the framework of the public sector collective bargaining system’. In its conclusions therefore it requested the government in the future to consider using collective bargaining and social dialogue to help improve the lives of workers in times of economic difficulty or crisis.

This latter judgement helps to demonstrate how an increased engagement with the nature of crisis and crisis measures actually helps to develop and strengthen rights. This is an evolutionary process, but actually increases the scope of rights rather than reducing them. Of course, the recommendations of the Committee of Experts may not have judicial strength as such, but their judgements have been referred to in national and supranational settings, and have boosted (collective) rights here.\(^{49}\) These judgements are part of the international dialogue of the development of rights. It is suggested that this kind of deliberation should be encouraged: judges should evaluate the nature of crisis and the proportionality of measures in relation to the crisis. Otherwise, reference to ‘crisis’ appears only as a tool to avoid rights and to avoid proper scrutiny of restrictions on those rights.

**Conclusions**

It has long been assumed that there is no place for judges in political action. The role of the judge is to stay out of politics and provide an independent review of rights without getting involved in day to day governmental action. This is particularly argued at international level, where political pressure means that the enforcement of labour rights is dramatically restricted. Labour rights are viewed as taking second place in the advent of severe economic or political crisis. However, the recent economic crisis and the length of continuation of crisis measures invites scepticism as to the genuineness of crisis conditions, and the necessity of rights reductions in these circumstances. Rights are reduced in the name of crisis, but actually the reduction of those rights can be permanent. It is very important that judges are able to assess rights against government action, and that this review is detailed and deep. This is important also because this kind of assessment allows the development as well as the maintenance of social rights. As shown from the conclusions of the ILO Committee of

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\(^{48}\) Ibid Para 362

\(^{49}\) *Demir and Baykara v Turkey* [2008] ECHR 1345
Experts, the assumption that collective bargaining rights must be restricted in times of economic uncertainty, that this reduction necessarily means improved rights for workers down the line often turns out to be false. Rather a commitment to voluntary collective bargaining and social dialogue can actually strengthen workers’ positions during crisis and hence strengthen the resilience of the economy. A proportionality assessment is one means through which to ensure that consideration is given to these issues.

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