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Fundamental Freedoms and the Inability to Pay in the European Financial Crisis. Towards a Collective Human Right for Discharge of States?

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"No one shall be deprived of his liberty
merely on the ground of inability to fulfil a
contractual obligation"[1]

Young people's unemployment in most Member States of the European Union is a sign of social bankruptcy of the development of the single market. It takes away the hope for the future. It in effect breaks the right to "the free and full development of (their) personality" (Art. 29 UN Charta). The main fault may be attributed t6o national politics. But it cannot be overlooked that it has turned into a general phenomena of a single market "à quatre vitesses". Failed EU-policies with regard to the deregulation of the internal labour market as well as the neglect for education in youth unemployment play a role. But in this essay we want to focus on the part the financial crisis plays in this failure.

Especially the Mediterranean countries are most struck by the crisis and also by youth unemployment. There is a close connection. This crisis has been and is still solved on the back of the weakest in order to stabilise a creditor based money system. But these states need money to develop the most precious good we have for our future economy: the labour force of the young. This money is taken away and paid for interest on failed investments to foreign creditors. Its political implications are most visible in the emergence of the Troika modelled after the Roman Triumvirates with dictatorial competences. This global debt collection agency has overtaken tasks which are the basic competences of a sovereign state. In this they also carry the responsibility for the neglect of the rights of young people. This responsibility is not yet discussed. The members of the Troika have no competences for it and the international community no solutions.

We present some preliminary ideas about the argument how the Troika could have violated the human rights of young people. We apologize that with our knowledge as bankruptcy and bank lawyer the part of the human rights analysis can only be a quest to human rights lawyers to take up this question. But the law cannot be tacit where we have effects that are more devastating to collective human rights of a significant group of society than many infractions to fundamental freedoms which are much more discussed by human rights lawyers.

The victims of the financial crisis

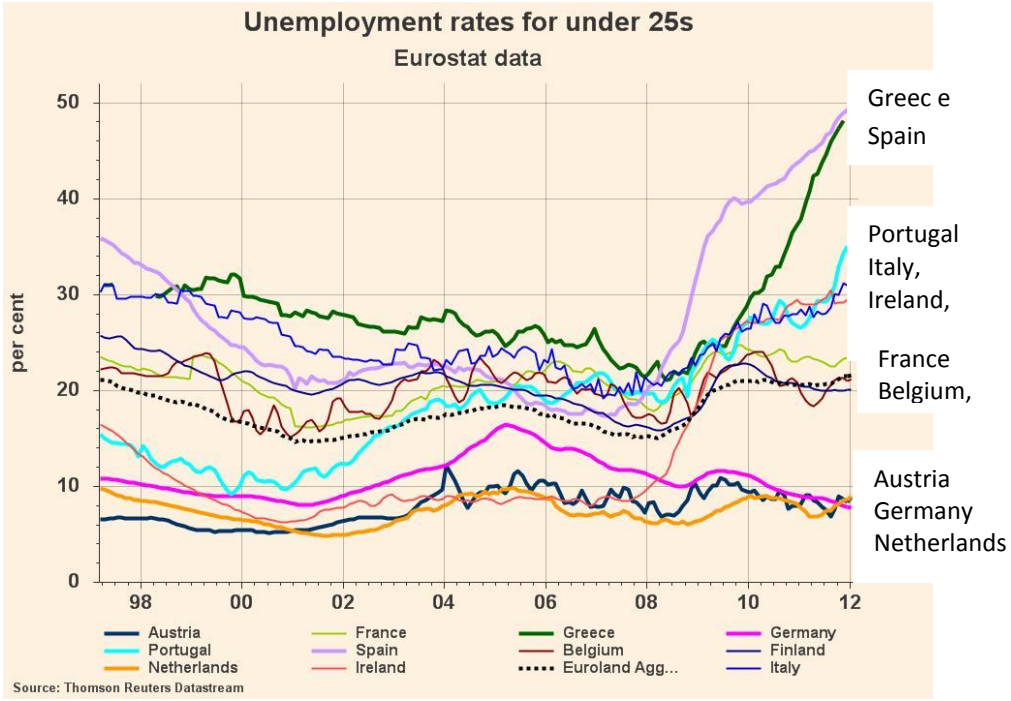
Fundamental rights in Europe provide democratic freedoms and *the right to take part in the government of his country, directly or through freely chosen representatives*.[2]

[1] Art. 1 Prohibition of imprisonment for debt. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Strasbourg 16.IX.1963.
[2] Art. 21 UN Human rights Charta.

Country	Public Debt	Deficit	Refinancing rate
	Billion Euro		
Italy	2,692	47	2,3%
Germany	2,147	190	0,9%
France	1,925	87	1,3%
Spain	960	72	2,2%
Greece	318	23	5,5%

"The reality is that most of the gains in good times – and until the PSI – were privatised while most of the losses have been now socialised. Taxpayers of Greece's official creditors, not private bondholders, will end up paying for most of the losses deriving from Greece's past, current and future insolvency."(Nouriel Roubini)

The price is the unemployment of especially young people without future in Greece, Italy, Spain, Portugal but also in France and the UK. Other weak groups in society like immigrants, single mothers, handicapped are equally forced to pay the price for their states poverty due to irresponsible investments of greedy creditors in the past.



We know what this will cause for the whole of Europe with regard to educational levels, self-esteem, families, creativity, self-consciousness, experience, health and political participation. The workforce we would need to compensate for the damages we have done to infrastructure, environment, generation contract, and climate will be inexistent.

The EU has revealed to be a complete failure with regard to its future. We can only hope that military activity (Ukraine, Irak, Africa) will not become again the ideological way out from the disaster of the

NATO states. The actual policy which in the name of the stability of the financial system (wehich is in fact the stability of its systemic banks whose investment banking has started to prepare the next crisis) impoverishes especially those states which have the highest necessity to invest into their own future and this is their own young generation including those who come as immigrants to work.

The perpetrators

Capitalist societies guarantee and enforce all legally acknowledged money claims and property rights acknowledged as human rights also referred to as the essence of freedom. With it the creditors are allowed to use blind direct state and police power over debtors and *have-nots* to do something which is good for debt service but not necessarily good for society. They even threaten (as Judge Griesa did) third parties if they do not help creditors with their prosecution.[3]

Public debt is therefore not an affair of private banks. Private banks have no power if the state they prosecute does at the same time not act as a debt collection agency for private investors against the State. This is less obvious since the USA emerges as the primary debt collector of the world. This is possible even against sovereign states like Argentina or Greece because financial capital of all states is placed under the custody of Wallstreet and City of London as well as their off-shore subsidiaries.

The private creditors are highly organised as lobby groups in the Paris Club as well as in the European Banking Round Tables and ad-hoc committees like the 2011 "Private Creditor-Investor Committee" for Greece. The main creditors were German (Allianz; Commerzbank; Deutsche Bank; Landesbank Baden-Württemberg) and French (Axa; BNP Paribas; CNP Assurances) financial institutions.[4] The Institute of International Finance (IIF) coordinates the political lobbyism. It regroups more than 700 financial institute from all over the world. Its leaders have constantly commuted between the US government, IMF and private industry. (Adams, Tran, Silverberg) J.P.Morgan's stuff provided the ministers of finance in the defaulting countries as well as in the creditor's countries and in the previous leader of IIF. While they were the more the creditor's parliament its executive agency was the Troika.

It became the factual executive even in those debtor's countries who did not subscribe to the European rescue mechanism. This factual government was composed out of ECB, IMF and EU-Commission. Two Germans (Klaus Masuch (ECB), Matthias Mors (EU-Commission) and a Dan (Poul Thomson (IMF)) acted without "legal and democratic legitimacy and control" (European Parliament

[3] See "Argentina defaulted on its debt in 2001 and took an imperial attitude toward aggrieved creditors. In 2005, it offered a take-it-or-leave-it exchange of new bonds for the old ones, with investors required to accept large losses. Then in 2010 it told investors who had held out that they would have one more chance to take the exchange bonds. Most did, but some, largely hedge funds, did not and demanded full repayment. Argentina vowed that those investors who refused would never receive a dime. Then came Judge Griesa, who was chief judge of the United States District Court for the Southern District of New York until 2000, when he became a senior judge." http://www.nytimes.com/2014/07/25/business/rulings-add-to-the-mess-in-argentine-bonds.html?_r=0

[4] ING (NL), Intesa San Paolo (I) and Greylock Capital Management (USA) who started speculating in Greek debt in 2009.

Report March 2014). The power of the Troika is the threat of the legal system as exposed by Judge Griesa ruling over Argentine's acquired state debt of the past: *pay or die*.[5]

An individual Human Right for discharge

In 1934 the US-Supreme court in Local Loan Co. vs. Hunt held that without a right to discharge debt enforcement would be "peonage", "slavery" and "forced labour" violating a human right for freedom. It thus also violates Art. Article 4 of the UN Human Rights Charta:

> "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

The court argued that discharge "gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." This is also present in Article 4 of the Strasbourg protocol of the European Human rights Charta provided as the motto of this essay. Art. 1 and 4 of the European Social Charta provides a right to sufficient income and a decent life which is also impossible for debtors without discharge.

Debtor protection has since long been regulated into national law of debt enforcement and insolvency.[6] Constitutional law is slow to react.[7] The individualistic concept of "human rights" who favour the creditor over the debtor has not yet been lifted into a general human right. But national exemption and bankruptcy laws are a clear expression to a general right for individual debtors. The right to discharge for consumers and small businesses, the moratorium of Chapter 11 of the US Bankruptcy Code for large enterprises, the turnaround from the "death of debtor" (bankruptcy law) to the "death of debt" doctrine (insolvency law)[8] has revealed that the unconditional borrowing of executional state force to the owners and creditors is increasingly tamed by the idea that the State has to act in the interest of all citizens including those who never have the chance to profit from the unconditional protection of money claims.

If we take the abolishment of slavery as a human right serious we should accept that it also comprise the right for discharge for those who otherwise are not able to live up to a decent life. Only Italy and Spain seem lack such a right for its citizens in the EU.

Can overindebted states argue for a Human right of discharge?

States have no human rights

Can states have a human right for discharge? States are legal entities no humans. Human rights are primarily defined as individual rights or individual freedoms against states. The International Human

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[5] See FN 1

[6] A world summary has been provided in a recent report of the Worldbank: Kilborn, Jason; Garrido, José M. et al.: Report on the Treatment of the Insolvency of Natural Persons, January 2013. For the EU see the report for DG SANCO published as Reifner, U.; Niemi-Kiesiläinen, J. et al.: Overindebtedness in European consumer law. Principles from 15 European states. Norderstedt: 2010.

[7] In Germany the Constitutional Court has developed a duty for civil courts to use general clauses of the civil law like good faith and good morals to limit the power of creditors with regard to overindebted guarantors referring to Art. 1 (dignity) and Art. 20 (welfare state) of the Constitution. (see BVerfG *****). But he has not yet spoken about the constitutional foundations of the right to discharge which is in force in Germany for about a decade.

[8] See Reifner, Udo: "Thou shalt pay thy debts." Personal bankruptcy law and inclusive contract law. In: Niemi -Kiesläinen, Johanna; Ramsay, Iain; Whitford, William C. (eds.): Consumer bankruptcy in global perspective. Oxford: Hart Publishing, 2003. pp. 194; Reifner, Responsible Bankruptcy, in : Nogler/Reifner (eds) Life Time Contracts, Den Haag, 2014 pp 379ff, 380f; Pulgar, A contractual approach to overindebtedness: rebus sic stantibus instead of Bankruptcy; in: Nogler/Reifner ibid. pp 366ff, 371

Rights Charta introduces human rights in each of its articles by attributing the specific right to "*one*" as expressed in the words "every*one*" and "no *one*".[9] Only Art. 16 seems to refer to groups. Women and men (even subdivided by race, religion etc.) have rights to create and live in a family. But also this right could have been formulated in an individualistic manner as it is the case in Art. 3 of the German constitution[10] States are seen as potential violators of human rights. This is why in the present western argumentation for interventions into the civil wars of other states the presumed protection of the human rights of their citizens who have no other shelter than a foreign force plays and important role.

But human rights can be collective right

But before we focus onto the State we should investigate the question whether the individualistic approach about human rights is without question. Especially the situation of indigenous people and their right to develop within their own culture and language has given room to the discussion about "collective human rights".[11] Other than individuals rights a collective right is mostly preventive[12] but may also compensate a whole class for damages. IN the latter case the idea of punishment is often very closely related to the compensational approach so that finally the idea of penal sanctions as prevention of crimes follows the idea of the protection of collective rights.

This idea has also foundations in constitutional law where for example trade unions are directly covered by the fundamental rights for strike and organisation in Art. 9 an German Grundgesetz. Other collectives besides ethnicities and dependent wage workers can be identified in the fundamental guarantees for religious institutions. Also associations may be sheltered by fundamental freedoms.

Especially if they appear in an organised form these collectives are based on meta-individual interests which belong to the group of people or its class. Trade unions are therefore not protected with fundamental rights for themselves but because they are the recognised articulation of the collective interest of workers. Also churches are linked to the human rights of their members to exercise their religion in community with others of the same faith.

Collective Human Rights may be represented by the State

While in all these cases organised interest do not need any representation by third parties since trade unions, churches, associations etc can persue their own rights another group of collective interest has led to special institutions in procedural law.

For example with regard to general racial discrimination the collective interest of unorganised ethnicities can be taken car of in the form of affirmative action. This may be exercised as an individual right but may also concern the structure and procedure in which the whole class is discriminated. Even more known all over the world is the class action with regard to environmental and consumer issues. Here we find all kind of acceptance of collective interest either in the form of

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[9] Art. 1 refers to "all" human beings and has to be understood as "everyone".
[10] Art. 3 (3) "No person shall be favoured or disfavoured by sex …"
[11] See Jones, Peter (2010): "Cultures, Group Rights, and Group-Differentiated Rights," in: Dimova-Cookson, Maria / Stirk, Peter M. R. (eds.): Multiculturalism and Moral Conflict (Routledge Innovations in Political Theory, vol. 35, Routledge, New York), pages 38-57, at 39ss. ISBN 0-415-46615-6.
3.Jump up ^ Bisaz, Corsin (2012), The Concept of Group Rights in International Law. Groups as Contested Right-Holders, Subjects and Legal Persons (The Raoul Wallenberg Institute of Human Rights Library, vol. 41, Martinus Nijhoff Publishers, Leiden/Boston), p. 7-12. ISBN 978-9004-22870-
[12] See the Law on Preventive Legal Action (Unterlassungsklagegesetz) in Germany.

representation by attorneys “in the name of the class” or through state subsidised consumer centrals like in Germany who have got a nearly exclusive right to represent these interest s although they are not democratically membership based. This is widely accepted because consumers due to their multitude of relations to the supplier side are difficult to organise and can therefore not sufficiently mobilise the enforcement of their collective rights in court.[13]

IN the debate about “access to justice for diffuse interest”[14] it has also been mentioned that state agencies can be mandated to represent such collective interests which can neither be organised nor attributed to private law institutions. This has been called the “Private General Attorney” approach. It can be seen with certain administrations like the Scandinavian Ombuds-institution. But also agencies to protect indigenous people somethime have the right enforce their collective rights in court.

Returning to the financial system and the overindebtedness of States who are effectively hindered to fulfil their compensatory social tasks with regard especially to young unemployed people it is interesting to note that the different regulations with whom the new EU banksupervisory mechanisms have been created oblige these institutions to actively take care of the collective interest of consumers in what is called “collective consumer protection.” Since these tasks are attributed also national bank supervision there is unanimity that this does not so far as to represent individual consumers is much more than what traditional supervision for safe and sound banking had in mind. The legal discussion about its practical effects is under way since bank supervisors seem still to a large extent ignore their new tasks.

But can there be a collective human right for social investment in favour of young unemployed people by the State. Obviously not since this would interfere with the democratic decision making mechanisms which is in the hands of the parliament and not the courts and especially not supranational Human Rights Courts.

The Debtor States should be supported in defending the collective Human Rights of Young people for the “free and full development of their personality”

But young people are also citizens and have another “right to take part in the government of his country, directly or through freely chosen representatives” (Art. 21 UN Charta). If the Troica decised over the budgets and social policy of a State as in sanctions all programmes which are not directed towards the creditors of this country they obviously impede that this class of people is able to pursue their right of political participation which alone can lead to their rights for active state programmes to promote their future. If a state by international debt enforcement mechanisms is hindered to fulfil his obligations with regard to the democratic rights of his citizens especially those who have the right to demand state action for “the free and full development of (their) personality” (Art. 29 UN Charta) the installation of a mere creditor’s regime exercised through an illegitimate Troika can be seen as the neglect of collective human rights.

In the round tables which are set up by creditors to monitor debtor states there would be sufficient room to bring forward the collective social interest of defined groups.

[13] Usually for this the work Mancur Olson, The Logic of Collecitve Action, is cited.
[14] See Cappelletti/Gordley, Access to Justice

Although states cannot argue a right to discharge they can argue that the idea of discharge with regard to human beings is also present where special target groups of social welfare policies are concerned.

We come to the conclusion that there could be a collective human right of diffuse social interests which a State can argue if self-representation is excluded in its bargaining with the creditors. It could lead to a duty of the creditors to orientate their proposals at social policy goals of a given debtor society. This could lead from a right to a moratorium up to a partial right for discharge.