The Greek case as the mirror of the future of Europe

For years now the austerity policies of neoliberalism are implemented trough out Europe, dismantling the social state, undermining the economic performance, disintegrating the social tissue and, finally, destabilizing the political systems. Why, then, the political elites do not change these policies of doom? The reason is very simple. As British prime minister of 19th Century, Benjamin Disraeli said, within every nation there are two nations, the poor and the rich, and their interests are never the same. Everywhere in Europe the inequalities are rising, which is a clear sing that the poor are becoming poor (and the middle class is disintegrating) but the rich (especially the super rich) are becoming richer. And, in the European framework, the economies of the periphery are following a downward death spiral, but Germany is stronger than ever. (However, this is not true for the German workers, who, in absolute terms, have now lower wages than 15 years ago, before the famous Agenda 2010).

Michael Perelman has coined the term Sado-Monetarism in its book The Invisible Handcuffs of Capitalism (Monthly Review Press, 2011), where he explains how governments and orthodox economists have systematically excluded all consideration of work, workers, and working conditions from economic policies, as well as the damage created as a result of that distortion. There is a clear rationale behind these policies: to implement a neoliberal master plan of transformation of the economy at the benefit of the billionaires of this world.

Sovereign debt is a powerful instrument of political subordination, an instrument for enforcing the peripheral countries involvement in neo-liberal policies. Greece has become in recent years the basic laboratory in Europe for this offensive. That's why I will start my presentation with a short description of the Greek Drama.

A- The Greek Drama

Greece's economic troubles are attributed by the official discourse to the profligacy and licentiousness of its citizens, a public sector packed full of redundant workers, a lavish pension system and uncompetitive industries hampered by overpaid workers with lifetime employment guarantees. It is always overlooked the role played by a handful of oligarchs, politicians and the news media — owned by the same magnates who gain their riches by public contracts, exchanging political influence for public money.

Actually, the Greek crisis is the product of a confluence of three factors:

a) the general crisis of neoliberal capitalism, due to the systematic failure of financial deregulation and labour "liberalization".

b) the unbalanced construction of the European Monetary Union and the gradual abandonment of the European social model towards a neoliberal system of social regulation.

c) A corrupt political system which was in deep crisis even before the bail-out, suffering from a distorted relationship between the political and economic elites and a corrupt network of clientelistic policies.

However, despite the pathology of its political system, the Greek crisis should be more widely seen as part of the general crisis of European capitalism, which has surfaced with different facets in various countries, reflecting specific national structural weaknesses: banking overexposure in Ireland, the real estate bubble in Spain, or excessive public debt in Greece.

It is more than everything else a crisis of the imbalance between economic integration and monetary union in the European Union. A single currency, by definition, does not allow currency fluctuation, even when individual countries in the monetary union would benefit from changes in relative values. Therefore, all other things being equal, in a time span and due to the inability of devaluation, a product produced by the weaker economy is becoming more expensive than a similar one produced by the stronger. In consequence, the trade deficit between the respective states is increasing. (This happens not only in monetary unions with single currency but any time a weaker economy pegs its currency to a stronger one, as in the case of Mexico and Argentina vis-à-vis the US $). For this reason, economists, such as M. Feldstein, have from the beginning warned that the euro would inevitably lead to persistent

trade imbalances between the more competitive core countries –especially Germany- and the less competitive countries of the South. Therefore, the deficits of the latter are just the other side of the coin of the surpluses of the former.

Hence, the current economic imbalance of the Union is an externality, not imputable to national politics of the "profligate" southern states but, instead, one imposed to them by the inherent dynamics of the single currency. The same trend is happening in a Federation: There is a flux of capital from weaker to stronger subnational economies, e.g. from Wyoming, to New York. But then, at the end of the economic year, the fiscal union mechanisms ensure through taxes and transfers a partial compensation of Wyoming's losses. The structural funds in the EU could play a similar role, but they cannot, due to their limited resources.

In Greece, the recipe of the so called "Memoranda" imposed by its lenders, did not address neither the national nor the more general causes of the crisis. Besides some self-evident technical reforms against tax evasion, it has just repeated the same general dictates of the neoliberal orthodoxy. In essence, the recipe called for horizontal reduction of all public expenses, primarily of social expenditures. It also called for a thorough deregulation of labour law legislation, and a massive transfer of wealth from the public to private sector through privatizations of public enterprises. These privatizations are to take place regardless of the strategic nature of public enterprises or their financial utility for the budget.

Equally ideological and untrue are the allegations that Greek citizens have a moral share of responsibility for the crisis, due to their profligacy and licentiousness. They have been likened to the frivolous grasshoppers of the south wanting to live at the expense of the northern, Protestant ants. Not only is the private debt of Greek households considerably smaller than the European average[1], but the average working hours are higher in Greece than in any other European Union member country.

In this framework, the Memoranda could be seen as just one more episode of the neoliberal Washington consensus, imposed by the IMF so far to many countries of the Third World. However, their agenda cannot be legally implemented within the existing constitutional boundaries. The Memoranda imply that the 'troika' of the EU, the IMF and the European Central Bank will have the responsibility for defining and implementing economic, financial and social policies, which are innately contrary to the

[1] The private debt of Greece is estimated at about 123.1 per cent of GDP, compared to 208.3 per cent for Germany, 198.3 per cent for Italy, 240.5 for France, 238.4 per cent for Portugal, and 386 per cent for the UK. This is derived from data based on a 2010 study by the McKinsey Global Institute,

fundamental principle of a social state. Hence, this transfer of sovereignty does not merely put the Greek government and parliament under a direct political control of their debtors, but violates gravely the constitutional order.

B The illegality of austerity program

The austerity measures imposed to Greece by the " Memoranda", their executive legislation and the related international loan treaties constitute a grave deviation from constitutional, European and international legality, both at procedural and substantive grounds: At the first level, neither of the two loan treaties has been ratified by the parliament, contrary to the explicit provision of article 36 par. 2 of Greek Constitution. The reason for that was that both treaties contained some so exorbitant clauses regarding national sovereignty that would make it impossible for an important number of MPs to vote for them.

More specifically, the guarantees of respect and protection of national sovereignty within constitutional and international law have been violated by the inclusion in these treaties of a waiver of immunity on reasons of national sovereignty: Besides the de facto transfer of the economic sovereignty to the "troika" for all important decisions, since a refusal to comply will result in failure to collect the next installment of the loan, the treaties include also an explicit waiver of immunity, which, according to the Legal Opinion attached therein, expands also to issues of "national sovereignty". This goes much further than the generally accepted waivers of immunity from execution known by international law.

And look the significance of it: In October 2012, the vulture fund NML Capital, a subsidiary of US hedge fund Elliot Capital Management which is one of Argentina's former creditors, managed to seize the Argentinean frigate Libertade, in Ghana. However, the UN Tribunal for the Law of the Sea ordered Ghana to release the ship, on the ground that it had immunity, as a military vessel. However, Greece may not have had the possibility to go to the Tribunal for the Law of the Sea, as it has, with the aforementioned waiver of immunity on reasons of national sovereignty.

Fortunately, both international and domestic courts are declaring now unconstitutional or contrary to the European law Recently the Supreme Court of Audit (Cour des Comptes) has unanimously declared unconstitutional the last wave of pensions reductions and the Court of Cassation unconstitutional the cutbacks of judges' salaries. Even the Greek Council of State has partially modified its initial stance and found unconstitutional some of the austerity laws.

However, it is the European Committee of Social Rights, which supervises the European Social Charter, which has issued the more important case law. In a number of decisions issued upon collective complaints

the ESRC has initially made clear that other international agreements, such as included in the Memoranda and the related with them international loan treaties, do not absolve the states from their obligations to respect art. 12 nor remove them from the ambit of the Charter. (This has been already previously concluded to in relation to national provisions enacted by states parties to the Charter which were intended to implement European Union directives or other legal norms emanating from the European Union[2].)

Along the same line the Committee held in 2013 that despite the later international obligations of Greece associated with the Loan Treaties and "Memoranda", there is nothing to absolve the state party from fulfilling its obligations under the 1961 Charter and that the Committee is competent to examine, whether the claims made in the complaint establish that the measures taken by Greece with regard to old-age benefits are not in conformity with Article 12 of the 1961 Charter. The Committee has readopted the aforementioned analysis and précised that "*doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection*"[3].

In a series of collective complaints against Greece[4] with regard to the level of pension benefits under the Charter, the Committee referred to Article 12§3, in conjunction with Article 4§1(a) of the 1988 Additional Protocol, which also appears with identical wording in Article 23§1(a) of the 1996 Revised Charter, providing for the right of the elderly to adequate resources in order to enable them to lead a decent life.. Basing its evaluation on the entirety of the above criteria, the Committee considered that the reductions that have been introduced by the Government individually taken may considered to legitimate. In contrast, the Committee considered that the *cumulative effect* of these restrictions brought about a significant degradation of the standard of living of the pensioners concerned.

Under this light the ESRC concluded:

"Even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Committee furthermore considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned,

---

[2] Confédération générale du travail (CGT) v. France; Complaint No. 55/2009, decision on the merits of 23 June 2010, §32; Confédération Française de l'Encadrement (CFE-CGC) v. France, Complaint No. 16/2003, decision on the merits of 12 October 2004, §30.

[3] General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011, decision on the merits of 23 May 2012, § 18, cf. also Complaints 78-80/2012.

[4] See supra, note 47.

despite the fact that they represent the interests of many of the groups most affected by the measures at issue. (…) In general, the Committee thus concludes that the Government has not established, as is required by Article 12§3, that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population, as has been observed by various international organizations[5].

It is noteworthy that even the European Commission recognized in one of its Reviews of the Program the unconstitutionality of the last austerity measures, stating that *"important budgetary measures are likely to be challenged in courts, which could lead to the need to fill a fiscal gap emerging as a consequence"*.[6] Hence, the Commission is not preoccupied by the illegality of the measures, but it mentions it just as a compelling factor for introducing a new wave of them!

Along the same line, Commissioner Kaitanen has replied to a question I submitted to him as MEP with regard to the conformity of the Memoranda legislation to the EU Charter of Fundamental rights quite unexpectedly: According to him, *"the programme documents are not EC law, but instruments agreed between Greece and its lenders: as such, the Charter cannot be used as a reference, and it is for Greece to ensure that its own obligations on fundamental rights are respected. "* In other words, even the Commission understands that the Memoranda violate the European legal order, and is trying to avoid the consequences by declaring inapplicable the European law, although the two of the three members of Troika are the same European Commission and the European Central Bank!

Although the legal dimension is important, it should not hide the basic political essence of the Memoranda, which is to serve a double objective: The first is the one overtly admitted, to help the debtors take back their money. The second is to implement a vast programme of social engineering with two

[5] Paragraphs 75-76, cf. also paragraphs 36 and 47 of the Collective Complaint 80/2012 Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece. The Committee held, consequently, that due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place, contained in the laws Nos. 3845 of 6 May 2010, Act No. 3847 of 11 May 2010, Act No. 3863 of 15 July 2010, Act No. 3865 of 21 July 2010, Act No.3896 of 1 July 2011, Act No. 4024 of 27 October 2011, Act No. 3833 of 15 March 2010, Act No. 3866 of 26 May 2010, Act No. 3986 of 1 July 2011, Act No. 4002 of 22 August 2011, Act No. 4051 of 28 February 2012 and Act No. 4093/2012 of 12 November 2012, this statutory legislation constitutes a violation of Article 12§3 of the 1961 Charter.

[6] EUROPEAN COMMISSION DIRECTORATE GENERAL ECONOMIC AND FINANCIAL AFFAIRS , The Second Economic Adjustment Programme for Greece – First Review November 2012

prongs: a) to shrink and remodel the state according to neo-liberal postulates and b) to reconstruct the Greek society by deregulation of the labour and other protective legislation.

Therefore, the most destructive impact of the Memoranda was at the level of labour law. After all, the deregulation of the latter is one of the structural reforms that the IMF intends to impose on all countries it 'helps'. The reform (a genuine counter-revolution) comprised a complete annulation or premature termination of all collective labour agreements. Even the national collective agreement has been unilaterally modified, so as to reduce the minimum legal salary. Obviously, as nobelist Amartya Sen recently remarked in New York Times:

'*Such indiscriminate cutting slashes (constitute) a counterproductive strategy, given huge unemployment and idle productive enterprises that have been decimated by the lack of market demand*'

Moreover, the abrogation of the law permitting trade unions to ask for an arbitration award if the employers refused to negotiate wages, in association with the statutory imposed termination of the collective agreements, means practically the end of all collective agreements in the immediate future.

Even with regard to the reform of the public sector, the Memoranda failed to be the 'handmaiden of change', as hoped by its proponents. They have imposed an horizontal reduction of personnel, which has just deteriorated the structural problems of Greek administration. The only public agencies that have been terminated by the new legislation were those mostly needed(i.e., the Organization of Social Housing and the Public Institute of Geology and Mineral Exploration (IGME), vital for future investments and the exploitation of physical resources). Thus, instead of improvement, the gaps of a skewed organization were accentuated rather than diminished.

The few advocates of the Memoranda are presenting them as the remedy to the institutional vicissitudes of the country. Actually, the truth is that none of these has been touched by the (counter)reform. The gaps in welfare protection remain, and the Greek administration has been always irrationally organized and badly coordinated.

Moreover, the unilateral way that these measures has been imposed to the Greek political system by the Troika represents a real danger not only for the economy but for the Democracy, as well.

To quote again Amartya Sen :

'*Both democracy and the chance of creating good policy are undermined when ineffective and blatantly unjust policies are dictated by leaders. The obvious failure of the austerity mandates imposed so far has undermined not only public participation — a value in itself — but also the possibility of arriving at a sensible, and sensibly timed, solution.*'

C- The way out of the Memoranda: Proposals of SYRIZA and International Law norms

The forthcoming government of SYRIZA has declared that it is going to abrogate all the implementing legislation of the memoranda, that is all internal legislation which has imposed the neoliberal counter-reforms. Moreover, an important write off of bigger part of the Greek Debt should be discussed and decided in the framework of an International Conference, similar to this of London of1953, which has absolved the German Debt and allowed West Germany to rebuild its economy. The reasons for this proposal are mainly political. First of all, the sovereign debt does not concern just Greece, or just the peripheral countries, it is a problem of the European Union. The deficits of the countries of the South are just the flipping side of the coin of Germany's surpluses. If this situation of a Europe of two speeds and of win-lose situation is not remedied the cohesion itself of Europe will be at stake.

In other words, the current economic imbalance between core and peripheral countries is not an externality, imputable to national politics of the "profligate" southern states but, instead, one imposed to them by the inherent dynamics of the single currency. Therefore, a consensual solution of the Greek Debt should be accompanied by a more general reorientation of the European policies.

Unfortunately, such prospective does not seem realistic, under the current balance of powers. (However, this balance is not frozen as it is forever, as I will try to show at the conclusion of this presentation. Fortunately, if the lenders of Greece will ignore its proposals for a consensual regulation of the debt and opt for unilateral measures, the country is not without defense. International law and practice provides for a number of juridical and political countermeasures.

First of all one should examine if the Greek debt is an illegitimate, "odious" debt.

Departing from the classical definition of Sack, according to the current theory of international law [7] a debt is generally assumed as odious if:

(a) it was contracted against the general consent of the nation

(b) it was not used for the needs of the population of the borrower State or/and its clauses involved clear misconduct by the lender

and (c) the creditor was aware of these two facts

These preconditions seem to exist in the case of Greece. Although one cannot claim that the Greek regime, despite its pathologies, is not democratic, it is clear that the accumulation of debt through the loan treaties is rejected by the vast majority of the population (ranging at the polls from 60% to 81%). Even the existing governing coalitions has been elected under the promise of renegotiating it.

Moreover, it is a debt which does not benefit the population of Greece. Almost none of the money is going to the Greek government to pay for vital public services. Instead, it is flowing directly back into the lenders pockets. Actually, the European authorities are effectively lending Greece money so Greece can repay the money it borrowed from them[8]. Therefore, the debt has swelled as a result of interest rates and negotiating conditions imposed by creditor countries. It was 120% of GDP when Greece entered the Stability Mechanism, it is already 189% of the GDP and is projected to reach 200% of the GDP in next years.

Finally, one could claim that lenders were aware of the previous facts. They have, despite that, imposed "unacceptable" conditions, involving clear misconduct and violating the national law of the borrower[9].

However, the odious debt doctrine is yet to be recognized by international law. It is true that a 2007 United Nations Conference on Trade and Development (UNCTAD) discussion paper authored by Robert Howse identified 12 instances in which the odious debt doctrine had been invoked and in none of

[7] Cf, among others, Y. Wong, Sovereign Finance and the Poverty of Nations: Odious Debt in International Law, 2012.

[8] Alderman and Ewing, New York Times, 30 May 2012.

[9] J. Hanlon, "Defining illegitimate debt and linking its cancellation to economic justice" (Milton Keynes, Open University, 2002), p. 53.

these was a claim rejected on the grounds that no such doctrine existed under international law. Still, what usually the courts dismiss the applicability of the doctrine in the concrete cases they examine. For instance, at the United States v. Iran (1996) Case B, the Iran-US Claims tribunal dismissed the applicability of odious debt, although without taking "any stance in the (related) doctrinal debate".

So, as it neither yet recognized by an internationally treaty, nor reconfirmed at the case law, it would be hard to claim it is a customary rule. Moreover, the creditors' knowledge of the "odiousness" of the Greek debt, although basically true, it would be politically difficult to be supported before the public audiences of lenders, eg. the German electorate, which has formed a completely different story about the loans "they" give to the European South.

Under the light of these remarks, I consider preferable a combined use of a Human Rights approach to the debt with the principle of State necessity. They have both support on international instruments and case law. For instance, in its General Comment No. 2, on article 22 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has indicated that "[i]nternational measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation". In the same line, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights deem a human rights violation of omission, "[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations"[10].

In this framework, the European Committee of Social Rights has recently declared contrary to Article 4 of the European Social Charter (right to a fair remuneration) a number of provisions of the first package of austerity measures imposed to Greece.[11]

Human Rights instruments should be used in conjunction with the "State of Necessity" principle. This principle is recognized by the 1969 Vienna Convention on the Law of Treaties, as well as by international customary law, and as such is applicable to all debtors and creditors. There is a state of

[10] para. 15 (j)).

[11] Decisions on the Complaints Nos. 65 and 66, both lodged by the complainant trade unions GENOP-DEI and ADEDY. These decisions are the first the Committee has taken in this context.. Further decisions on social rights restrictions due to the economic crisis in Greece will be taken by the Committee in the framework of the examination of Complaints Nos.76/2012, 77/2012, 78/2012, 79/2012 and 80/2012

necessity when there is a grave danger to the existence of the State itself, its economic survival, the continued functioning of its essential services and the maintenance of internal peace[12].

In simple words the principle implies that the basic priorities of a State are towards its citizens and if it cannot simultaneously satisfy its lenders' claims and its basic social functions must give priority to the latter. As the government of South Africa has put it "*A State cannot be expected to close its schools and universities and its courts, to disband its police force and toneglect its public services to such an extent as to expose itscommunity to chaos and anarchy merely to provide the money where with to meet its money lenders, foreignor national. There are limits to what may be reasonably expected of a State in the same manner as with an individual. If, in such a contingency, the hardships of misfortune are equitably divided over nationals as well as foreigners and the latter are not specially discriminated against, there should be no reason for complaint*."[13]

What is important is that the principle is accepted by recent decisions of international and constitutional courts. For instance, the International Centre for Settlement of Investment Disputes –ICSID-) of World Bank in recent decisions of 2010 related to the Argentinian default –and contrary to its previous jurisprudence- has accepted the state of necessity as customary rule of international law.[14] Similar decisions have been taken by the Italian Court of Cassation[15], the German Constitutional Court[16] and the European Court of Human Rights[17].

Till now, the "State of necessity" has been used by the Greek government as an argument before national courts in order to justify the unconstitutionality of the austerity measures. It can be used the other way around, as an argument taken by the International Law in order to reject their implementation.

---

[12] See Addendum to the eighth report on State responsibility, in: Yearbook of the International Law Commission 1980, Vol. II.

[13] Ibidem, note 44 with reference to Secretariat Survey, para. 64.

[14] ICSID Case No. ARB/02/16 Sempra Energy v. Argentina (annulment) of 2010, ICSID LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.1 v. Argentine Republic (ICSID Case No. ARB/02/1, Decision on Liability), para. 267.

[15] Corte Suprema di Cassazione, Ordinanza of 27/5/2005, R.G.N. 6532/04.

[16] BVerfG, 2 BvR 120/03 of 4/5/2006.

[17] Malysh v. Russia, para 80.

Actually, this was in 1938 the argument of the Greek government in its dispute with Belgium the case Societé Commerciale de Belgique:

"*There occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country's resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. (...) Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts. No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration the Government is authorized to suspend or even to reduce the service of debt*".[18]

D- Instead of a Conclusion

In 2012 I have been again the honour to be invited by CADTM at the same annual seminar. I have concluded then my speech like this:

"The last year we have seen the rise of a very genuine and massive political movement, an independent movement that has escaped this trap of fear and tried to reinvent democratic solutions. It is still an amorphous movement and it mainly has negating features, without a very clear and precise agenda. I am very optimistic that it is going to evolve not only to a movement of resistance but a movement that is going to produce concrete political and economic alternatives."

I do not claim to be a prophet, but this prediction at least proved right: Just some months after, SYRIZA, the party of Greek Radical Left, has risen to the second place at the two successive

[18] Addendum to the eighth report on State responsibility, in: Yearbook of the International Law Commission, op. cit., p. 25.

parliamentary elections, acquiring the 18% of the votes in May and the 27% in June. Last June, SYRIZA has taken at the elections for the European Parliament the first position. It is the first time in Greek political history (and actually the second in European one, after the victory of the PCI at the European Elections of 1984) that a party of radical left holds this position. Moreover, the polls suggest that SYRIZA is going to form the first government of the left next March, when very probably we are going to have parliamentary elections in Greece due to the failure of Parliament to elect a new president.

This is going to be a historical chance not only for our country, but for Europe, as well. We cannot hope anything from the existing political status quo. However, in all European states the political systems are in different states of instability. That's why we see unexpected phenomena as the meteoric rise of Ms LePen or Mr Farage. The success of a leftist government in Greece could trigger a domino of political changes that would result to a new balance of social and political power first at the South of Europe and then at the rest of the continent.

Of course, a prerequisite for that is not just the governmental change at one remote corner of Europe. The decisive factor will be the building of a massive social movement that would not only resist to the current sadomonetarism but will have the power to impose new policies to the benefit of the peoples.

Let us hope that Greece will become the mirror of the future of Europe.