THE IMPACT OF THE FINANCIAL CRISIS ON THE CONSTITUTIONS OF EUROZONE MEMBER STATES UNDER RESCUE PROGRAMS - GREECE AS A LABORATORY OF CONSTITUTIONAL THEORY*

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THE financial crisis of the last decade that broke out in many Member States of the EMU, some of which were under rescue programs, had clear and obvious repercussions: fiscal, financial, recessionary, structural, but also constitutional[1]. Critical political decisions were taken at the level of the Eurozone, particularly by the Eurogroup or the European Council, with the participation of Eurozone members only. Such decisions were followed by legal acts enacted at the level of the EU (mainly by the Council, under the ECOFIN configura-

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[1] See the studies included in XENOPHON CONTIADES (ed.), *Constitution in the Global Financial Crisis. A Comparative Analysis*, Ashgate, 2013. And in THOMAS BEUKERS / BRUNO DE WITTE / CLAIRE KILPATRICK (eds.), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press, 2017.

tion), at the level of side institutions, such as the EFSF and ESM, and at the level of the IMF[2]. Ultimately though, all these measures were enacted as national law in the Member States which either followed rescue programs (Greece, Portugal, Ireland, Cyprus and Spain to some extent for the banking system), or wished to avoid entering such programs (Italy). Greece, on which we shall concentrate our analysis, is the most characteristic example, having undergone three such programs from 2010 to 2018 - a real laboratory[3].

The changes that occurred in the economic governance mechanism of the EU and the Eurozone, in particular, are well-known and were accepted by the CJEU, irrespective of the position taken by certain national, constitutional or Supreme courts[4]. These changes operate at two levels: at the level of the EU legal order and at the level of international economic law, in the form of multilateral treaties among the Member States of the Eurozone and some of the rest of EU members[5].

Even before these mechanisms were formulated, the first Greek rescue program of May 2010 had been put into effect. In technical

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[2] See indicatively ANTONIO ESTELLA, *Legal Foundations of EU Economic Governance*, Cambridge University Press, 2018, pp. 215-233.

[3] EVANGELOS VENIZELOS, *State Transformation and the European Integration Project: Lessons from the Financial Crisis and the Greek Paradigm*, Center for European Policy Studies (CEPS), Special Report No 130, February 2016. Also, XÉNOPHON YATAGANAS / ANASTASIOS BANOS, La constitutionnalité du programme de consolidation financière pour la Grèce, *European Politeia*, 1/2015, pp. 77 *et seq*.

[4] See KAARLO TUORI / KLAUS TUORI, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press, 2014, ALICIA HINAREJOS, *Euro Area Crisis in Constitutional Perspective*, Oxford University Press, 2015.

[5] See MICHAEL SCHWARZ, A Memorandum of Misunderstanding. The Doomed Road of the European Stability Mechanism and a possible way out: Enhanced cooperation, 51 *Common Market Law Review*, 2014, 51: 389-424, DIANE FROMAGE / BRUNO DE WITTE, The Treaty on Stability, Coordination and Governance: should it be incorporated in EU law? *Verfassungsblog*, 2017/11/06.

terms, the program took the form of a multilateral intergovernmental loan to Greece by the other MS of the Eurozone, under the coordination of the Commission (Greek Loan Facility)[6] and in conjunction with the activation of an IMF program[7]. With regard to their European side, the second Greek program (of February 2012) and the third one (of July 2015) had a more complete legal basis, which had been formed in the meantime, after the amendment of Article 136 and the establishment of EFSM (at a first stage) and ESM (ultimately)[8].

The common scheme assumed by all Greek rescue programs was that of granting Greece a loan to cover its financial needs (including the financing of the intervention to reduce the Greek public debt, either nominally or in terms of present value) upon certain conditions, which constituted the terms of those programs and of the respective loans (conditionality). As far as those terms are concerned, there is on the one hand the fiscal adjustment through the drastic reduction of the fiscal deficit and the transition into a state of primary surplus, and, on the other hand, the adoption of structural changes, necessary for enhancing the Greek economy's competitiveness[9].

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[6] See What is the Green Loan Facility (GLF)? In esm.Europa.eu.

[7] On the participation of the IMF, See indicatively ED. TRUMAN, *The IMF and Euro Area Crises: Review of a Report from the Independent Evaluation Office*, Peterson Institute for International Economics, Policy Brief, September 2016. A concise presentation of the three Greek programs is made by F. COLOSANTI, *Financial assistance to Greece. Three programs*. European Policy Center, Discussion Paper, February 2016. The complete *ex-post* "reflection" of the IMF on programs in different countries (among which Greece dominates the scene) during the period 2011-2018 is included in IMF Policy Paper, *2018 Review of Program Deign and Conditionality*, May 2019. Also CHARLES WYPLOSZ / SILVIA SGHERRI, *The IMF's Role in Greece in the Context of the 2010 Stand-By Arrangement*, IMF/Independent Evaluation Office, BP/16-02/11.

[8] See above, fn. 4.

[9] See The Bank of Greece, *2008-2013, The Chronicle of the Great Crisis*, 2014. And now the ESM publication, *Safeguard the Euro in Times of Crisis*, 2019 (especially for the period after the foundation of the EFSF).

The programs in question were adopted by Greece under the pressure of a disorderly default risk as was, ultimately, the program of all Greek Governments of the 2010-2019 period and were enacted as statutes, voted by the Greek Parliament[10].

All these measures and changes exceed the limits of a Member State's participation in the EU and the Eurozone - which, in itself, entails limitations to the national sovereignty. They challenge Greece's external sovereignty, not only vis-à-vis other Member States of the Eurozone, the European institutions and the IMF, but also vis-à-vis the international markets, in a far harder and more intensive way[11]. At the same time, they challenge the function of the democratic principle (people's sovereignty as an expression of internal sovereignty)[12]. The ability of the national electorate to make choices as regards the financial and fiscal policy is practically abolished, since the conditions attached to the rescue programs are clear, tough and perfectly specific. National sovereignty and the democratic principle, however, constitute the fundamental content of every national Constitution; even of the Constitution of a Member State, which is, by definition, a state of limited or shared sovereignty[13].

Thus, the Greek Constitution was put through an ordeal: first and foremost, its organizational part, which regulates the competences of the electorate and the means by which it expresses its will (through parliamentary elections or, directly, through a referendum), the operation of the Parliament and the mode of exercise of the legislative work, as well as the *modus operandi* of the Executive

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Also, EVÁNGELOS VENIZÉLOS, Crise grecque et zone euro, *Commentaire*, Numéro 159, Automne 2017.

[10] The legal description is made mainly by the Judgments of the Plenary of the Council of State (Supreme Court for Administrative Disputes) 668/2012, 1116/2014 and 1307/2019.

[11] See in more detail EVANGELOS VENIZELOS, (fn. 3), pp. 13 *et seq.*

[12] See fn. 11.

[13] GABRIEL REZNICK, Shared Sovereignty and the European Union: The Transition to Post-Westphalian Sovereignty, *academia.edu*.

and of Public Administration, under the circumstances of the financial crisis. Secondly, the Greek Constitution was put through an ordeal also regarding the protection of fundamental rights and guarantees of the rule of law. This section includes also the organization of the judiciary, primarily the judicial review. It also includes the protection of social rights and guarantees of the welfare state. These are the constitutional provisions that were put to the test during the crisis due to fiscal austerity measures and reductions in wages and pensions, as well as changes in the regulatory framework for labor relations[14].

The financial crisis had an impact particularly on the interpretation of the Constitution (meaning the methods of interpretation employed) in the context of judicial review of the constitutionality of national legislation, which specified and implemented the terms of the rescue programs. Classic questions of constitutional theory about the limits of judicial review were sharply raised again[15]. Strangely, there were no issues of conflict over primacy (or priority of implementation) between national Constitution and European Union law. After all, the main argument of those who reacted to the austerity fiscal measures stemming from rescue programs was that they vio-

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[14] PATRICIA PAPARRIGOPOULOU, Constitution, social rights and economic crisis. The case of Greece, *in: Velferd of rettferd, Festskrift til Asbjørn Kjønstad 70ar*. Oslo: Gydendal, 2012. Pp. 449-461, M. YIANNAKOURU, Legal challenges to austerity measures affecting work rights at domestic and international level. The case of Greece, *in: European Journal of Social Law*, Volume 2014, No 1, pp. 25-36.

[15] With regard to the judicial review of the complex judicial choices of the legislator, the classic study of LON L. FULLER, The Forms and Limits of Adjudication, published in 1957, but republished *in: Harvard Law Review*, Vol. 92, No. 2, 1978, pp. 353 *et seq*., especially pp. 394 *et seq*. From the recent literature, see PAUL YOWELL, *Constitutional Rights and Constitutional Design. Moral and empirical Reasoning in the Judicial Review*, Hart, 2018, especially pp. 56 *et seq*. In particular, for the Greek case, See YIANNIS Z. DROSSOS, Loves' Labour's Lost: Fighting Austerity and Crisis with Obiter Dicta. A gloss on the expediency of constitutional justice in Times of Crisis, *constitutionalism.gr* (post of 11.11.2013).

lated European Union law and the European *acquis*, in particular with regard to the protection of social rights and property. For their part, the national Constitutions of the Eurozone Member States subjected to rescue programs also protect social rights and of course the right to property, as the constitutional basis of the specific right to receive a salary or a pension. Therefore, the issue was not a conflict over primacy (or priority of implementation) between national Constitution and European Union law, but the possibility of differing opinions and reactions between the national judiciary reviewing the constitutionality of these measures and the CJEU that reviews their compatibility with European Union law. The *Pringle* case[16] started in Ireland, but concerned the TFEU review process. In Greece, the country with the longest stay in rescue programs, a preliminary ruling on the compatibility of a structural measure concerning the number of public sector workers was referred by "*Areios Pagos*" (Supreme Court for Civil and Criminal Law Matters) to the CJEU only as late as 2019. Back in 2012, the Council of State (Supreme Administrative Court) had ruled that the relevant legislation concerning civil servants was unconstitutional, without ever referring the matter to the CJEU. Even with regard to the disputes arising out of the 2012 intervention to the Greek public debt - which concerned, through a different judicial channel, the General Court and the CJEU - the Greek Council of State held that the relevant legislative measures do not conflict with the constitution, with-

[16] The amendment to Article 136 TFEU by the "simplified" procedure of Article 48 (6 and 7) was confirmed by the famous *Pringle* judgment of the CJEU (judgment of 27 November 2012 in Case C-370/2012 *Thomas Pringle v. Government of Ireland and Others*), following a preliminary ruling from the Supreme Court of Ireland. From the relevant wealthy literature, PAUL P. CRAIG, Pringle and EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance, 9 *EuConst* 263 (2013), Oxford Legal Studies Research Paper No. 96/2013 (available at SSRN), which focuses, among other things, on linking Article 125 TFEU to the establishment of ESM.

out a preliminary ruling being sent at all to the CJEU, although this was proposed by a dissenting opinion[17].

The experience of the financial crisis has therefore fuelled the dialogue between national constitutional or Supreme courts and the CJEU, initiated not by the constitutional or Supreme courts of the countries subject to rescue programs, but by the German Federal Constitutional Court - *i.e.* the constitutional court of the financially strongest country of the EU - which was concerned about the potential cost of rescue programs and not about their potential opposition to the social rights or property rights *acquis*[18].

Nevertheless, the regulations of the Greek legal order (including the national Constitution) came under the judicial review of the European Court of Human Rights due to the austerity measures (in particular reductions in salaries and pensions) imposed within the frame of rescue programs. The same happened with similar regulations that took place in other Eurozone Member States, mainly in

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[17] The preliminary rules were addressed to the CJEU by judgment 668/2019 of *Areios Pagos* (Supreme Court, B2 Section). The unconstitutionality of the same measures had been diagnosed six years ago in Judgment 3354/2013 of the Plenary Session of the Council of State. A dissenting opinion on the need to refer a preliminary rule to the CJEU is contained in Judgment 1116/2014 of the Plenary Session of the Council of State, which ruled the legislative arrangements on which the Greek public debt intervention was based in 2012 as compatible with the Constitution.

[18] CJEU, judgment of 16.6.2015 in *Gauweiler and others* (C-62/14) following a preliminary ruling by the German Federal Constitutional Court in its judgment of 14 January 2014. See JAN-HERMAN REESTMAN, Legitimacy through Adjudication: The ESM Treaty and the Fiscal Compact before the National Courts *in:* THOMAS BEUKERS / BRUNO DE WITTE / CLAIRE KILPATRICK (eds.), *Constitutional Change through the Euro-Crisis Law*, Cambridge University Press, 2017. Also, CJEU, judgment of 11.12.2018, Case C-493/17 *Heinrich Weiss and Others* following a reference from the German Federal Court of Justice. See the very interesting presentation of MICHALIS IOANNIDIS, CJEU, BVerfG and Mr. Varoufakis. What does Weiss say about the Greek negotiation strategy of 2015, *constitutionalism.gr*, post 6.2.2019 (in Greek).

Portugal. However, the ECtHR case law on austerity measures[19] acknowledges rather wide margins of appreciation to the national legislature concerning Article 3 of the (first) Additional Protocol, in such a way as to allow the implementation of any necessary financial adjustment measures.

There was also further pressure concerning the content of the national Constitution itself. The debate over the need to amend the Constitution, as well as about the new inherent limitations that are placed on the revision of the Constitution by the financial crisis experience, has opened once again (see part *VII*).

The principal argument of this study is that, in spite of all the above, the Greek national Constitution - as the most characteristic example of the Constitution of a Member State subjected to a rescue program - demonstrated adaptability and resilience. Let us examine further, though, certain aspects of this subject, starting from the fundamental issue of the pressures exerted on national sovereignty and the democratic principle.

[19] From the case law of the ECtHR on the Eurozone members who have been involved in rescue projects after 2010, see *Koufaki and Adedy v. Greece* of 7.5.2013, *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* of 8.10.2013, *Da Silva Carvalho Rico v. Portugal* of 1.9.2015, *Mamatas and Others v. Greece* of 21.7.2016 (Judgment). I am not referring here to the decisions of the *Comité Européen des Droits Sociaux* for which see, in particular, CEDS, decisions of 23.5.2012 on reclamations 65/2011 and 66/2011 and then the decision of 23.3.2017 on reclamation 111/2014. See, among other things, the presentation of CEDS member Petros Stangos before the European Parliament's Committee on Employment and Social Affairs.

I. The Public Debate about National (External) and People's (Internal) Sovereignty under Conditions of Financial Crisis was Developed Without Severing the Constitutional Framework

Obviously, the social and political repercussions of entering into rescue programs are enormous. The social layering and electoral behavior of the citizens has changed. Political correlations were radically modified. Severe anti-systemic phenomena appeared. In Greece the reaction to the rescue programs (the so-called memoranda), *i.e.* to the terms agreed with the institutional partners and creditors for the disbursement of the loans corresponding to each program, led to the formation of an "anti-memorandum front". Up until the end of 2011, nearly all forces of the conventional opposition, as well as new, radical anti-systemic entities, coexisted under such a front in Greece: Euro-skeptical and openly anti-European groups, extreme right-wing, nationalist-populist entities, as well as political entities that remain faithful to communist proclamations. Following the formation of an extended coalition government at the end of 2011 and in view of the double parliamentary elections of May and June 2012, the anti-systemic and, at the same time, anti-memoranda forces in Greece, were in agreement about proclaiming a fiscal policy, which promised the abolition of rescue programs, or rather, promised loans from foreign, non-European partners (China, Russia) or from the European partners, but on beneficial terms and without austerity measures - *i.e.* without fiscal adjustment and structural changes. In other words, that meant no changes to the social security system and in the labor market, no interventions to the number of civil servants, no reduction of the broader public sector entities, etc. On the contrary, the political promise was about reinstating, in general terms, what applied before 2010[20].

On the background laid a radically different, "anti-memoranda", view of the sovereign debt. The "anti-memoranda" forces named the

[20] See in more detail Evangelos Venizelos, *op. cit*., pp. 35 *et seq*.

Greek public debt as "odious", thus, essentially illegal and unilaterally cancellable. The cancellation or, at least, restructuring of the sovereign debt was presented as exercise of the debtor's sovereign right. In its mildest version, the Greek sovereign debt was subject to cancellation pursuant to a political agreement in the form of an international conference to this effect, with the participation of the states involved (although, prior to 2012, a large share of the debt was held by the international private sector).

Nevertheless, said views did not prevail in the double parliamentary elections that were conducted in Greece in 2012 (in May and June). A parliamentary majority was formed and a government by the political forces which had either undertaken, from the very beginning in 2010, the responsibility for the country's accession into a rescue program, or had agreed with such policy in November 2011. A fundamental element of the policy that was voted for by the electorate was intervening on the Greek public debt by a major nominal "haircut" thereof. That intervention took place in 2012 with the voluntary participation of the international private sector on an exchange of Greek sovereign bonds (Private Sector Involvement, PSI) and with the support of the official sector - *i.e.* of the European partners that agreed to generous measures which substantially reduced the present value of the outstanding Greek public debt via granting Greece favorable lending terms (Official Sector Involvement, OSI)[21].

Still, in the 2012 elections, the main anti-memoranda party found itself in the position of the major opposition. In January 2015 elections that were mandatorily called for, in accordance with the Constitution (Article 32), due to the inability to elect a President of the Republic by a qualified majority of three fifths of the total number of Members of the Parliament, "the anti-memoranda forces" prevailed, which formed a coalition government. This was a paradoxical cooperation, given the radical leftist rhetoric of the first governmental partner (SYRIZA) and the radical right-wing nationalist

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[21] JEROMIN ZETTELMEYER / CHRISTOPH TREBESCH / MITU GULATI, *The Greek debt Restructuring: An Autopsy*, July 2013.

rhetoric of the second one (ANEL, "Independent Greeks"). The first semester of 2015 led to the July 2015 referendum by which the electorate rejected, by an overwhelming majority (62%), the European partners' technical proposals about the third rescue program on the basis of the fiscal and structural conditions that accompanied it[22]. Within a few days, the triumphal rejection at the referendum, which, as a matter of fact, heavily flirted with the country's exit from the Eurozone, was converted into an agreement on the third program and on the loan that came along it under stringent fiscal and structural terms. What is particularly striking is that the agreement for the third program was founded on the 2012 intervention on the Greek public debt and on an utter and absolute abandonment of the views about "odious" debt, unilateral write-off, etc.[23].

After at least fifty Members of the Parliament withdrew from the major coalition partner following the dissolution of the Parliament and the September 2015 election, a slim parliamentary majority was formed by the same coalition. This was, though, a government for the implementation of the third rescue program and, moreover, the government which adopted the fiscal policy of primary "over-surplus"; namely, the enactment of harsh fiscal measures that exceed the target of the high primary surplus imposed by the institutional partners and creditors. The logic of fiscal over-performing return is connected with the ability to finance certain social policy counter-measures; nonetheless, it clearly operates in a counter-

[22] For the constitutional problems of this referendum, see the report of the European Commission for Democracy through Law (Venice Commission), Code of Good Practice of Referendum, Study 371/2006, 20.1.2009. The Hellenic National Commission for Human Rights (Best Practices, Report May 2018) now identifies similar problems (especially regarding the minimum duration of the period between call and conduct and the clarity of the question).

[23] See, more specifically, EVANGELOS VENIZELOS, *op. cit.* (fn. 3), pp. 35 *et seq*.

developmental way, on account of the excessive taxation and excessive burdening with social security contributions[24].

The constitutionally critical point is the curve traced in the Greek example by the objection about the democratic legitimization of the decision to be subjected to rescue programs with the harsh fiscal and institutional (structural) measures that came along them. This is an objection connected, first of all, with the respect for the state's external sovereignty vis-à-vis the European partners, the European institutions and international organizations, such as the IMF, which came to contribute to dealing with the financial crisis and the risk of disorderly default, not on their own motion, but at the request of the Hellenic Republic. Secondly, it is connected with the respect for the people's (internal) sovereignty, which is expressed either through parliamentary elections or directly, through referendum. Further above, we saw the curve traced by the electoral and parliamentary correlations between 2010 and 2019[25].

Factual internal and international correlations, economic data, risks and fears enter invariably in every democratic procedure - be it elections or a referendum. People always express themselves within a complicated, contradictory and coincidental framework. This is something that used to happen in the EU and the Eurozone prior to the financial crisis and continues to happen thereafter. After all, democratic procedures - be they electoral, parliamentary or referenda - apply in all Member States of the Eurozone - to debtors

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[24] See, indicatively, Foundation for Economic and Industrial Research (IOBE), *Quarterly Report on the Green Economy 01/19*, 18th April 2019.

[25] See GEORGIOS KARYOTIS / WOLFGANG RÜDIG, Blame and Punishment? The Electoral Politics of Extreme Austerity in Greece, *Political Studies*, Volume 63, issue 1, ALEXANDER KAZAMIAS, The Political Effects of the Greek Economic Crisis: The Collapse of the Old Party System, *in:* VASSILIS K. FOUSKAS / CONSTANTINE DIMOULAS (eds.), *Greece in the 21st century: The politics and economics of a crisis*, Routledge, 2018. In the parliamentary elections of 7 July 2019 SYRIZA received 31.53% (86/300 seats) and New Democracy 39.85% (158/300) seats). A New Democracy government was formed, with Kyriakos Mitsotakis as the Prime Minister.

and lenders alike. All European governments have political, electoral and parliamentary limitations. All of them claim democratic legitimization and all invoke the will of the majority of their electorates and parliaments[26]. Therefore, the issue is transposed into that of the democratic principle (at national level) and of the solidarity principle (at European level)[27]. In other words, it concerns the classic relationship between national sovereignty and European integration, through the acknowledgment of powers conferred to the EU; predominantly though, through a continuous intergovernmental negotiation among the Member States. In the field of the financial crisis in the Eurozone, such intergovernmental negotiation, in which each Member State possesses a degree of influence that is proportionate to its economic size and its fiscal, developmental and financial status, has been and still is a continuous one[28].

Every Member State that finds itself in crisis has the right to choose to exercise its national sovereignty intently and by democratically legitimized decisions (through elections or referenda), drive itself to financial ruin, bankruptcy, to exiting the Eurozone, etc.[29]. However, when there is no such national will and, in fact, one that is democratically legitimate and when, on the contrary, the will is to stay within the European framework, overcoming simple objections that are raised in the name of national (external) and popular (internal) sovereignty, is a relatively easy task[30]. More

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[26] See more specifically EVANGELOS VENIZELOS, *op. cit.* (fn. 3), pp. 6 *et seq*., 12 *et seq*.

[27] See more specifically EVANGELOS VENIZELOS, Democratic Legitimacy at the National Level and Solidarity between Financially Unequal Member States. Two Structural Problems of European Integration, *European Politeia*, issues 1-2, 2017.

[28] See more specifically EVANGELOS VENIZELOS, *op. cit.* (fn. 3) pp. 19 *et seq*.

[29] On the Greek referendum of 5 July 2015 and the immediate reversal of its effect in practice, see more specifically EVANGELOS VENIZELOS, *op. cit.* (fn. 3), pp. 35 *et seq*.

[30] See fn. 26.

complex answers relating to the existence and the future of the state, society and the economy are sought.

In any case, the fact remains that the Greek Constitution - as a characteristic example of the national Constitution of a Member State that went through the experience of the crisis - endured that curve of the debate regarding national sovereignty and democratic legitimization. The debate was opened, sharpened and finally abandoned politically, without the constitutional framework being severed[31].

II. The Financial Crisis and the Change in the Degree of Fiscal and Financial Awareness at the Level of the EU Legal Order and the National Constitution

From a legal perspective, the fundamental elements of the crisis - namely, the exclusion of a Member State from the markets, the conversion of a liquidity and a sovereign debt refinancing crisis into an insolvency one and the present danger of disorderly default - laid outside the regulatory framework of the EU and of the Member States, which could not adopt, at national level, measures against their membership in the EU and, especially, in the Eurozone, such as measures mainly related to monetary policy[32].

All legislative provisions for preventing and managing the crisis, pertained to multiple levels or, more precisely, to the level of many legal orders. These are not only the legal order of the EU or the national legal order (the Greek, in our example), but also the legal order of the ECHR and the international legal order. As such, disputes arose, which led to the judicial review of legislative and administrative measures by the CJEU[33], the national courts of other Member States[34], the ECtHR[35], the arbitration tribunal of ICSID[36].

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31 See *infra VIII* and fn. 103.

32 See K. Tuori / K. Tuori, *op. cit.* (fn. 4).

33 See a summary by Michail Vilaras, Novel legal instruments: the sovereign debt crisis and the case law of the Court of Justice, seminar on

Meanwhile, there has been no change in the general framework of the theoretical discussion over the relationship between the national Constitution and the European legal order, or between the national Constitution and international law: the questions of supremacy, self-reference, multi-level constitutionalism and constitutional pluralism, the question of the legal nature of the powers conferred to the EU and of the either monistic or dualistic conception of the relationship between national and international law, continue to be vividly discussed, as was the case before the crisis[37].

Nevertheless, under the pressure of the crisis and of the need to save the existence of the Eurozone itself, under the pressure of the need to avoid disorderly default of its Member States, the interpretation of EU law and of the national Constitutions of Member States was influenced to a great extent. Moreover, the financial crisis brought about situations that had not been predicted either at the level of EU law or at the level of national Constitutions. Until 2010,

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the quality of legislation, Brussels, 26th of October 2016, with specific references to the *Pringle* judgment (27 November 2012, Case C-370/12), *Ledra Advertising v. Commission and ECB* (20 September 2016 in Joined Cases C-8/15P to C-10/15P 2016, *Malli and Malli v. Commission and ECB* (20 September 2016 in Joined Cases C-105/15 P to C-109/15P), and the judgments of the General Court, *Alessandro Accorinti v. ECB* (7 October 2015, Case T-79/13) and *Nausicaa Anadyomène SAS - Banque d'escompte contre BCE* (24 January 2017, Case 1-745/15).

[34] SEBASTIAN GRUND, The legal consequences of sovereign insolvency - A review of Creditor Litigation in Germany Following the Greek Debt Restructuring (May 14, 2017), *Maastricht Journal of European and Comparative Law*, available at SSRN.

[35] See *supra*, fn. 19.

[36] International Centre for Settlement of Investments Disputes, Award in the arbitration proceedings between Poštová Banka, A.S. and Istrokapital SE and the Hellenic Republic, ICSID case No ARB/13/8, April 9, 2015 and International Centre for settlement of Investment Disputes, Decision on Poštová Banka's Application for Partial Annulment of the Award, September 29, 2016.

[37] See *infra*, fn. 98.

the institutional edifice of the EU was configured in such a way so as to punish deviation from constancy and fiscal failure, prohibiting monetary financing and bail-out rescue[38].

Article 136 TFEU was amended following the crisis and on the occasion of the Greek case, in order that there may be an explicit legal basis in EU's primary law for rescue programs of Member States[39]. Thereafter, the financial crisis experience leads to the emergence of the fiscal (golden) rule and of the Member States' obligation to demonstrate fiscal awareness. These are rules with a triple foundation: they are founded on the European legal order, through the TFEU and the relevant regulations, on international law (through the multilateral international Treaty on Stability, Coordination and Governance) and on the national legal order, preferably at the level of the national Constitution. In this way, the fiscal awareness obligation is clear and undisputed, regardless of whether one follows a monist or a dualist approach and regardless of the conflict regarding primacy (or priority of implementation) between the national Constitution and European law. The Treaty on Stability, Coordination and Governance provides for and also expects the introduction of the fiscal golden rule within the national legal order, and even at the level of the national Constitution or national fiscal law itself, an issue which is, at any rate, a major historical subject of the national Constitution[40]. Thus an attempt is made to overcome any conflict between European, international economic and national law, by harmonizing the essential content of their regulations. This is a typical example of the mutual respect that ought to exist between the European and international legal order on the one hand and the national Constitution on the other.

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38 See K. TUORI / K. TUORI, *op. cit.* (fn. 4).

39 *Op. cit.*

40 See *infra*, fn. 97.

III. THE FINANCIAL CRISIS: A STATE OF EMERGENCY?

The Constitutions of the Member States contain provisions for special circumstances; they even provide for the declaration of a state of emergency and for the entry into force of the law for a state of siege[41]. In the Greek Constitution, however, such provisions have nothing to do with the state of the economy; rather they address issues of internal and external security and the protection of democratic institutions. The uncontrollable dynamics of sovereign debt, huge fiscal deficits, the inability to borrow from the markets at a reasonable interest rate in order to cover financial needs, have not been explicitly the subject matter of national constitutional provisions.

Up until the outburst of the crisis, the main discussion related to the inclusion of the golden fiscal rule of balanced budget in the national Constitution[42]. The crisis, though, concerned the stage subsequent to the incurrence of excessive deficits and of sovereign debt.

Thus, the crisis brought to surface a lack of sufficient institutional and legal awareness about the fiscal and financial risks involved at the level of both the EU legal order and of the national Constitutions of Member States. At the level of the EU legal order, this gap was filled - as we have seen - through an amendment of its primary law and by the formation of collateral institutional mechanisms[43]. At the level of the national legal order, we have seen that there is already an obligation to introduce the fiscal rule in the national

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[41] See now ALAN GREENE, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Hart, with particular reference to Economic Emergencies, pp. 57 *et seq*. Also WILLIAM FELDMAN, Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege, *Cornell International Law Journal*, Volume 38, Issue 3, 2015, pp. 1022-1058, ANNA KHAKEE, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper, No. 30, 2009.

[42] See *infra*, fn. 97.

[43] See *supra*, fn. 3.

Constitution or the national legislation concerning the budget. However achieved, such awareness will definitely influence, or should influence, every future amendment of the national Constitutions. The question is in which way is this multiply founded legal obligation of fiscal awareness and respect of the fiscal rule perceived by the national judge in the context of judicial review. This question is posed in light of the fiscal consequences of the obligation to comply with a judgment finding a legislative provision to be unconstitutional, particularly when this entails the retroactive obligation to pay amounts out of the public fund[44].

In the field of parliamentary procedures, the financial crisis led to the implementation of provisions found in the national Constitutions for the expedited enactment of special legislation, in order to tackle such urgent needs. In the Greek case, the "extremely urgent" procedure for voting bills, per Art. 76 par. 4 of the Greek Constitution, was implemented several times[45]; likewise, the procedure for issuance by the Executive of "acts of legislative content", which enter into force immediately and are then submitted to the Parliament for ratification, according to Art. 44 par. 1 of the Greek Constitution[46].

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[44] The budgetary cost of judgments issued by the Greek courts in the period 2014-2019, if they are fully implemented and for all persons falling under the unconstitutional rules, is estimated between EUR 3 and 9 bn. However, the Plenary Session of the Council of State with the 1307/2019 judgment made a shift in relation to the case law of the 2014-2018 period and ruled the legislative cut of holiday and vacation allowances paid to civil servants and employees in the public sector to be in accordance with the Constitution.

[45] "A Bill or law proposal designated by the Government as very urgent shall be introduced for voting after a limited debate in one sitting, by the Plenum or by the Section of article 71, as provided by the Standing Orders of Parliament" (Article 76 par. 4 of the Greek Constitution).

[46] "Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of article 72 paragraph 1,

Still, although the financial crisis led to the enforcement of provisions in the Constitution aimed for handling unforeseeable emergency circumstances, it did not lead to declaring and implementing a state of siege, as envisaged by the national Constitution (Art. 48)[47],

within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force" (Article 44, par. 1 of the Greek Constitution).

[47] "1. In case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof the statute on the state of siege, establishes extraordinary courts and suspends the force of the provisions of articles 5 paragraph 4, 6, 8, 9, 11, 12 paragraphs 1 to 4 included, 14, 19, 22 paragraph 3, 23, 96 paragraph 4, and 97, in whole or in part. The President of the Republic publishes the resolution of Parliament. The resolution of Parliament determines the duration of the effect of the imposed measures, which cannot exceed fifteen days. 2. If the Parliament is absent or if it is objectively impossible that it be convoked in time, the measures mentioned in the preceding paragraph are taken by presidential decree issued on the proposal of the Cabinet. The Cabinet shall submit the decree to Parliament for approval as soon as its convocation is rendered possible, even when its term has ended or it has been dissolved, and in any case no later than fifteen days. 3. The duration of the measures mentioned in the preceding paragraphs may be extended every fifteen days, only upon resolution passed by the Parliament which must be convoked regardless of whether its term has ended or whether it has been dissolved. 4. The measures specified in the preceding paragraphs are lifted ipso jure with the expiration of the time-limits specified in paragraphs 1, 2 and 3, provided that they are not extended by a resolution of Parliament, and in any case with the termination of war if this was the reason of their imposition. 5. From the time that the measures referred to in the previous paragraphs come into effect, the President of the Republic may, following a proposal of the Cabinet, issue acts of legislative content to meet emergencies, or to restore as soon as possible the functioning of the constitutional institutions. Those acts shall be submitted to Parliament for ratification within fifteen days of their issu-

or by the provision about derogation in time of emergency that is stipulated under Art. 15 of the ECHR[48]. The latter was activated in France for reasons connected to terrorism[49]; not to the financial crisis. In Greece, it was not activated at all; neither on grounds of the crisis itself nor due to the social and political tensions that resulted from the financial crisis and the painful measures which were implemented in order to deal with it. This shows that there is a distinct difference between an urgent and unforeseeable necessity that is dealt with measures provided for in the Constitution and an exceptional situation, which leads to a suspension of critical constitutional provisions and to partial suspension of guarantees of the rule of law[50]. The financial crisis and the need to apply harsh fiscal adjustment measures are not a reason for suspending the provisions of the Constitution, but a challenge to judicial review of these measures, that concern mainly economic freedom, protection of prop-

ance or of the convocation of Parliament in session. Should they not be submitted to Parliament within the abovementioned time-limit, or not be approved by it within fifteen days of their submission, they cease henceforth to be in force. The statute on the state of siege may not be amended during its enforcement. 6. The resolutions of Parliament referred to in paragraphs 2 and 3 shall be adopted by a majority of the total number of members, and the resolution mentioned in paragraph 1 by a three-fifths majority of the total number of 63 members. Parliament must decide these matters in only one sitting. 7. Throughout the duration of the application of the measures of the state of emergency taken in accordance with the present article, the provisions of articles 61 and 62 of the Constitution shall apply ipso jure regardless of whether Parliament has been dissolved or its term has ended" (Article 48 of the Greek Constitution).

[48] See Parliamentary Assembly, Council of Europe, Resolution 2209 (2018), the State of Emergency: Proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights, 24 April 2018. See, however, TRIESTINO MARTIELLO, Prolonged Emergency and Derogation of Human Rights: Why the European Court of Justice should raise its immunity system, *German Law Journal*, 2018, 20, pp. 46-71.

[49] PACE, Resolution 2209 (2018); (fn. 47), paragraph 18.

[50] See fn. 41.

erty, protection of social rights, the constitutional framework of labor relations. The financial crisis was not therefore a "state of emergency" in the legal sense of the term, but a need that affects, through the concept of general interest and the principle of proportionality, the exercise of judicial review (see part *IV* below). As we have seen, it also affects the legislative process itself through the use of constitutional provisions that allow procedural acceleration.

IV. The Financial Crisis as Subject Matter of Judicial Review

At the level of the Greek Constitution and the Greek legal order, the financial crisis was handled, first of all, by adopting, via an expedited conclusion of the ratification procedures provided by the national Constitution (Art. 28 thereof), measures that had been introduced at the level of EU primary law or at the level of international law[51].

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[51] Greek Law 4063/2012 is entitled "Ratification of the European Council Decision amending Article 136 TFEU, the Treaty establishing the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union". The first, second and third article respectively, ratify and acquire the power laid down in Article 28 (1) of the Greek Constitution, the above decision and the two Treaties. Article 28 (1) of the Greek Constitution provides that "generally accepted rules of international law and international conventions from their ratification by law and their entry into force in accordance with the terms of each of them are an integral part of Greek domestic law and override any other law provision to the contrary. The application of the rules of international law and international conventions to foreigners is always subject to reciprocity". Law 4063/2012 also considers the European Council's decision to amend Article 136 TFEU pursuant to Article 48 (6) of the TEU as an international treaty which is ratified by law and acquires the legal force provided for in Article 28 (1) of the Greek Constitution in the context of a mild dualistic concept that places international treaties after their ratification by law above any other national law, but under the national Constitution. The reflection on the relationship of primacy (or prior-

Secondly, through the enactment by the national legislature of the fiscal and structural measures that had been agreed with the European institutions and the IMF within the framework of the Greek economy rescue programs (Memoranda)[52].

Thirdly and lastly, through the judicial interpretation of the Constitution in the context of judicial review. In this respect, the financial crisis was introduced at the level of the national Constitution through the judicial review of national legislative provisions related to the management of the crisis. More specifically, methodological tools, such as the principle of proportionality and, more prominently, the concept of public interest, were utilized as criteria for

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ity of implementation) between the national Constitution and the European law, even primary, as in this case, is not reflected in Law 4063/2012. The Treaty establishing the ESM and the Treaty on Stability, Coordination and Governance are seen as multilateral international treaties in the field of international economic law. The question of the procedural and substantive conditions of the legal ratification of treaties recognizing in the bodies of international organizations (in this case the EU institutions) the powers provided for in the Constitution, namely the question of the application of Article 28 (2) which requires an increased majority of three-fifths of the total number of Members (180/300), is not set out in Law 4063/2012. There is no question of the possible application of Article 28 (3), according to which Greece restricts its sovereignty, under strictly substantial conditions, by an absolute majority of the total number of MPs (151/300). Paragraphs 2 and 3 of Article 28 govern the conditions under which certain treaties may be ratified. Paragraph 1 regulates the position of treaties ratified by law in the hierarchy of norms according to the perception of the Greek domestic legal order. Therefore, the big question of the relationship between the national Constitution and the European law as well as international law remains open in Greek law.

[52] The three consecutive Greek programs were approved by the Greek Parliament with laws it passed and the measures envisaged in the programs also take the form of national laws. See in particular Laws 3845/2010 and 3847/2010 (for the first program), 4046/2012 (for the second program) and 4336/2015 (for the third program). See DIMITRIOS KIVOTIDIS, The Form and Content of Greek Crisis Legislation, *Law and Critique*, March 2018, Volume 8, issue 1, pp. 57-81.

the judicial review of the purpose and reasoning of the aforementioned legislative provisions[53].

Actually, we can discern two big phases of judicial review of the legislative measures that were enacted over the so-called memoranda period in Greece. During the first phase, the judge (in this case, the Plenary session of the Council of State - Supreme Administrative Court) conducts an overall review of the first 2010 program[54] and of the constitutionality of the 2012 drastic intervention in the Greek public debt, by way of voluntary exchange of the bonds held by the private sector[55]. As we have seen, the result of such exchange was a nominal reduction by 53.5% of the public debt held by private entities and an even more drastic decrease in present value of the public debt held by entities of the formal sector[56]. In this first phase, judicial review confirmed the constitutionality of said basic legislative measures. The Greek judge reviewed the so-called memorandum as a totality of measures constituting a governmental program, which was adopted by the Greek government and enacted by the Greek Parliament. The aim of these basic statutes was found to be in accordance with the Constitution, while the individual fiscal measures (mainly salary and pension cuts and tax burdens) were considered to lie within the framework of the principle of proportionality[57]. Even the nominal reduction of the debt through the retroactive enactment of Collective Action Clauses (CACs) of each issue's bond holders, was found neither to violate the legal expectations principle nor the right to protection of property, nor even

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53 See EVANGELOS VENIZELOS, *op. cit.* (fn. 3).

54 See judgment 668/2012 of the Plenary Session of the Council of State.

55 See judgment 1116/2014 of the Plenary Session of the Council of State.

56 JEROMIN ZETTELMEYER / CHRISTOPH TREBESCH / MITU GULATI, *op. cit.* (fn. 21).

57 This position was followed by the majority in the Plenary Session of the Council of State in its fundamental judgment 668/2012, however many dissenting opinions were also recorded.

the principle of equality - equality in the distribution of public burdens, in particular[58].

However, the second phase of judicial review followed, regarding fiscal measures (chiefly, cuts to salaries and pensions since the start of the second 2012 program and thereafter). Initially, unconstitutionality was identified in cuts to the salaries and pensions of civil servants and employees that are, directly or indirectly, accorded special constitutional protection (judges[59], military officers[60], university professors[61], doctors of the national health system[62]). Gradu-

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[58] L. BUCHHEIT / G. MITU GULATI, Sovereign Bonds and the Collective Will, *Emory Law Journal*, volume 51, issue 4, pp. 1317. L. BUCHHEIT / M. GULATI / IG. TIRADO, Reprofiling Sovereign Debt, 30.11.2014 *in: scholarship.law.duke.edu.* Also THIBAULT MARTINELLI, *Euro CAC and the existing rules on sovereign debt restructuring in the Euro area: an appraisal four years after the Greek debt swap*, ADEMU Working Paper Series, 2016/043. On the development of the idea of introducing CAC in the legislation of the euro area Member States see MATHIAS AUDIT, A Debt Restructuring idea *in:* CHRISTOPH G. PAULUS (ed.), *A Debt Restructuring Mechanism for Sovereigns. Do we need a legal procedure?* C.H. BECK-Hart-Nomos, 2014.

[59] See in relation EVANGELOS VENIZELOS, *op. cit.* (fn. 3) and judgments 4327/2014 and 1277/2018 of the Plenary Session of the Court of Auditors. The case law of the Special Court on the salary and pensions of judges provided for in the Greek Constitution (Article 88 (2)) has been preceded. See, for example, judgment 88/2013.

[60] See judgments 2192-2196/2014 of the Plenary Session of the Council of State and, following the partial compliance of the legislator with Law 4307/1414, the judgments of the same Court 1125-1128/2016, which consider that the corrective intervention of the legislator is inadequate and therefore once more contrary to the Constitution. On the contrary, the Court of Auditors, in its plenary judgment 137/2019, considered that the partial replacement (provided by Law 4307/2014) of the salary and pension losses of armed forces and security forces personnel provided for in Law 4093/2012 (second memorandum) is satisfactory.

[61] See judgment 4471/2014 of the Plenary Session of the Council of State and judgment 1506/2016 of the Plenary Session of the Court of Auditors (on retired University professors).

ally, the judge's strict position towards further cuts to salaries and pensions was extended to all categories of employees and pensioners[63].

This second phase of intensive judicial review, however, seems to have reached its limits by the end of 2018, when the enormous fiscal impact that judgments had on the constitutionality of the legislation imposing reductions on pensions, salaries and allowances after 2012, that is after the second memorandum, became apparent. It is indeed curious that while the legislator (with a Parliament composition that is radically different from the one that decided to enter into the first and second programs) decided in 2015 to resort to a third program, the judiciary now considers unconstitutional key fiscal measures of the second program. The fiscal awareness of the judge is though gradually returning. Initially, case law seeks to limit the financial consequences of its decisions - decisions which find unconstitutionality. This is the issue of the retroactive effects, and therefore the time of effect of decisions which declare unconstitutional certain legislative measures. Subsequently, case law seems to become once more hesitant about the diagnosis of unconstitutionality[64]. The second phase seems to come to an end, and this in es-

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[62] See judgment 7412/2015 of the Plenary of the Court of Auditors (on retired physicians of the National Health System).

[63] See mainly judgments 2287-2289/2015 of the Plenary Session of the Council of State.

[64] The issue of the fiscal implications of judicial decisions, which overturn legislative measures as unconstitutional and effectively invalidate them, has concerned jurisprudence in relation to the time of application of the consequences of unconstitutionality, that is, in relation to the retroactivity of the effects of judicial judgments. Characteristic of attempts to limit these impacts are judgments 2287-2288/2015 and the most recent 431/2018 of the Plenary Session of the Council of State. From the relevant case law of the Court of Auditors, judgment 32/2018 of the Plenary Session. The more structured position of the Plenary of the Council of State on this issue is reflected in its plenary decision 815/2019. The end of the second phase of judicial review and the point of return to "fiscal awareness" can be seen as a rejection by the Plenary of the Council of State of

sence coincides with the change in the balance of political forces on the path to the European elections and, immediately after that, the 2019 national elections.

Such fragmentary review of specific legislative measures, instead of the rescue program as a whole, was inevitable in Greece, where judicial review is not exercised *in abstracto* and in a concentrated manner by a single constitutional court of a "Kelsenian" character, but in a diffuse, incidental and *in concret*o way by any court whatsoever[65]. In practice, judicial review of such legislation is, directly and speedily, channelled to the Council of State (Greece's Supreme Administrative Court); more specifically, to its Plenary session, which, in effect, acts as a constitutional court. Nonetheless, even in this case, the complete set of facts which the legislator took into consideration and all the balances struck by it cannot be taken into account by the judge, as a matter of procedure[66].

The judge reviews the constitutionality of the purpose of the statute in question and the proportionality of the provisions that are critical in the specific situation; however, procedurally-wise, he cannot review the anguish of the legislator about the risk of disor-

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the position taken by the majority of the 6th section of the Court on the unconstitutionality of the cuts in holiday and vacation allowances imposed by law on civil servants within the budgetary targets of the second rescue program.

[65] This is a consequence of the procedural organization of the judicial review on the constitutionality of laws in Greece. The control is carried out in a diffused, incidental and specific manner by all courts, but in practice, control is concentrated in the three Supreme courts and especially in the Council of State. It therefore takes the form of centralized, direct and abstract control through various procedural mechanisms provided for either in the Constitution itself (Article 100 (5) which provides that Supreme courts can decide the unconstitutionality of the law only at the level of their Plenary) or as an ordinary legislation that has organized the so-called pilot trial of the Council of State and the Court of Auditors. See EPAMINONDAS SPILIOTOPOULOS, Judicial Review of Legislative Acts in Greece, 56 *Temp. L. Q.* 463 (1983).

[66] See EVANGELOS VENIZELOS, *op. cit.* (fn. 3).

derly default, about the inability to finance the functioning of the State (hospitals, schools, etc.), or about the collapse of the banking system.

Perhaps the issue is better understood by posing a question: what would have happened at the level of the national constitutional order in case the Government and the Parliament (*i.e.* the Executive and the Legislature) had not taken any unpleasant or disturbing legislative or administrative measures and, as a result, the country was led to "disorderly default" *i.e.* to inability to pay salaries and pensions, to bank holiday and to a practical impossibility to finance the operation of the State and of the broader public sector. A factual situation of inability to perform state obligations and the dissolution of the productive and social network would have been in place, without enacting a crisis legislation subject to judicial review[67]. In such case, what would the judge put under constitutional scrutiny? What would have been the constitutional framework of disorderly default?

In spite of the above limitations, through the concept of public interest and the principle of proportionality, the constitutional judge comes into contact with the factual framework of the financial crisis and gains awareness of the presumptive impact of his judgment and final decision; an impact which transcends the judicial framework of the case, as well as the limits of the *res judicata*. An irrevocable and final judgment of the Plenary session of the Council of State (or of the Court of Auditors or of the Court of Cassation, in their fields of competence) by which a legal provision is found unconstitutional, leads to some broader compliance with such judgment. The Administration and, ultimately, the Legislator, complies with it as if it were a judgment of a Constitutional Court, ascertaining the law's constitutionality in a general and abstract manner. Although such a judgment is issued on the occasion of a specific case, the obligation for compliance therewith exceeds the limits of the concrete case and is rendered general, in practice. This applies *a fortiori* when a judgment of the Plenary session of the Supreme Court is issued in

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[67] See more specifically EVANGELOS VENIZELOS, *op. cit.*

the context of a "pilot trial", the outcome of which is anticipated by the lower courts, in order to follow it[68].

Classic issues of constitutional theory, such as the methods of constitutional interpretation and the dilemma "judicial activism vs. self-restraint" were addressed under the heavy pressure of the facts of the crisis. In any case, a judge does not provide epistemological answers to abstract questions of constitutional interpretation; he looks for providing such reasoning to his judgment so that it is not only legitimate, as the ruling of a court exercising its jurisdiction, but also compliant with the sequence of the arguments it contains.

The participation of the CJEU and of the ECtHR in the broader national system for the judicial review of legislative provisions in terms of their constitutionality and compatibility with EU law and the ECHR, has assisted the national judge in handling extremely difficult cases that have been adjudicated by said courts. The Greek courts did not submit to the CJEU a request for a preliminary ruling regarding the provisions that were enacted by the Greek Parliament in compliance with the decisions of the EU over the excessive deficit procedure[69]. However, via other procedural ways, both the Gen-

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[68] See *supra*, fn. 64.

[69] A proposal for a preliminary ruling by the CJEU was made by 4/25 members of the Court in judgment 1116/2014 of the Plenary Session of the Council of State in the case of the "haircut" of Greek public debt. The Court of Cassation's preliminary rule was addressed with the 668/2019 judgment of the B2 Section, as we saw in fn. 17. See relatedly GEORGIA SKIADA, The Greek Debt Restructuring Program and Buy-back Schemes of 2012 under Judicial Review by the Supreme Administrative Court (Judgments 1116/2014 and 1117/2014), *European Politeia*, 1/2016, Digital Edition. DIMITRIOS TSIBANOULIS / IAKOVOS ANAGNOSTOPOULOS, The Greek PSI and the Litigation Surrounding it, *Revue internationale des services financiers / International review of financial services*, 2014/2, pp. 18 *et seq.* ARISTIDIS CHIOTELLIS, Sovereign Debt Restructuring and the Internal Legal Framework: The Greek experience *in:* CHRISTOPH G. PAULUS, *op. cit.*, fn. 58. For a comprehensive presentation of the evolution of disputes that the Greek PSI caused, see SEBASTIAN GRUND, Enforcing Sover-

eral Court, as well as the CJEU, were faced with the legal issues of the Greek support and adjustment programs; particularly with issues relating to the 2012 intervention in the Greek public debt held by private entities. All relevant legislative provisions were found compatible with the EU legal order and claims for damages due to actions or omissions of the Commission or of the ECB, were dismissed[70].

Individual applications before the ECtHR on the same issues were dismissed, as it was held that there is no violation of provisions of the ECHR and of its Additional Protocols[71].

All in all, therefore, the challenge of the financial crisis allowed for truly useful conclusions to be drawn in relation to the judicial structure, the limits of judicial review and the inclusion of the

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eign Debt in Court - A Comparative Analysis of Litigation and Arbitration following the Greek Debt Restructuring of 2012, *VLR*, vol. 1 (2017).

[70] See CJEU, Judgment of the Court (First Chamber) of 15 November 2018, *Hellenische Republik v. Leo Kuhn* (C-308/17), where the Court found that Regulation "Brussels Ia" does not apply to the dispute in question (exchange of bonds, PSI, CACS), because such dispute does not fall within "civil and commercial matters" within the meaning of said Regulation. The origin of such dispute stems from the manifestation of public authority and results from the acts of the Greek State in the exercise of that public authority. CJEU, Judgment of the Court (First Chamber) of 11 June 2015, *Stefan Fahnenbrockand and Others v. Hellenische Republik* (C-226/13) (Retroactive introduction of a CAC pursues a public interest objective: restructuring of the public debt / preventing the risk of failure of the restructuring plan / of a failing to pay decision / ensuring the financial stability of the euro area). CJEU, Judgment of the Court (Grand Chamber) of 20 September 2016, *Ledra Advertising v. Commission and ECB* (C-8/15). Judgment of the Court of First Instance of 7 October 2015 in the case of *Accorinti and Others v. ECB* (T-79/13). Judgment of the General Court (Third Chamber) of 24 January 2017, *Nausicaa Anadyomène SAS and Banque d'escompte v. ECB* (T-749/15). JAN VON HEIN / ANASTASIA GIALELI, The procedural Impact of the Greek Debt Crisis: The CJEU Rules on the applicability of Service Regulation, *Conflict of Laws.net*.

[71] ECtHR, 21 July 2016, *Mamatas and Others v. Greece*, final 30.1.2017.

CJEU and of the ECtHR in the national system of judicial review. From that point of view, both the CJEU, as well as the ECtHR seem to be particularly cautious and to follow the path of judicial self-restraint as regards the judicial control of the national legislator's options in the context of Eurozone's economic governance for the purpose of dealing with the severe financial crisis.

V. The Financial Crisis as Lever for the Reassessment of Constitutional Interpretation Rules and Methods

As it has already been noted, the judicial review of the crisis measures in Greece was connected to all the important chapters of constitutional, international and European law. It was particularly linked with the legal nature of the support programs, the relationship between the national Constitution, European law and international law, the protection of property, as well as of social rights and of institutions, such as that of collective autonomy.

Between 2010 and 2018, the major issues Greece had to face, were the following:

- the entry into support programs, *per se*[72];
- the curtailment of public expenditure by cutting down salaries and pensions[73];
- the increase of state revenues through raising taxes[74];

[72] See fn. 55, in particular judgment 668/2012 of the Plenary Session of the Council of State.

[73] See fn. 59-63.

[74] See, for example, judgment 1972/2012 of the Plenary Session of the Council of State and judgment 7/2016 of the Plenary Session of "*Areios Pagos*" (Court of Cassation) for the special fee for powered buildings imposed in September 2011 which has since remained as a single real estate tax. The two Supreme Courts (Council of State and Court of Cassation) deemed the imposition of the fee to be in accordance with the Constitu-

- the limitations imposed on property rights in order for a nominal haircut and restructuring of the sovereign debt to be achieved, leading to a reduction of the latter's present value and of its annual servicing cost[75].

- the changes in labor relations and in collective autonomy[76].

The judicial review of the measures adopted in these fields brought out all the issues related to the rules and methods of constitutional interpretation, according to the continental European tradition. The major issue was, in principle, the normative density of the Constitution, especially in respect of social rights[77], and the degree of the

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tion. However, they deemed the threat of disruption of the electricity supply in the event of failure to pay was contrary to the Constitution, because the collection was firstly organized through the bills of power companies.

[75] Pivotal is Judgment 1116/2014 of the Plenary Session of the Council of State, see above fn. 55, 56, 58.

[76] Judgments 2307/2014 of the Plenary Session of the Council of State and 11/2017 of the Plenary Session of "*Areios Pagos*" (Court of Cassation) are characteristic.

[77] As regards the point at which this issue was raised in 2009, at the beginning of the financial crisis that several Eurozone countries have come to, see NOËLLE BURGI, La Construction de l'état social minimal en Europe, *Politique Européenne*, 2009/1 (no 27), pp. 201-231 and on post-crisis effects, KOSTAS JOSIFIDIS / JOHN B. HALL / NOVICA SUPIC / EMILIJA BEKER PUCAR, The European Welfare State Regimes: questioning the typology during the crisis, *Technological and Economic Development of Economy*, volume 21, 2015, issue 4, pp. 577-595. For the legal foundation of the social state governed by the rule of law, see DIANE ROMAN, La justiciabilité des droits sociaux ou les enjeux de l'édification d'un Etat de droit Social, *La Revue des droits de l'homme* [en ligne], 1/2012. The European Commission's 2017 reflection paper is now treated as reference. See European Commission Reflection Paper on the Social Dimension of Europe, Com (2017) 206 of 26 April 2017. See also from the recent bibliography: SOUHILA CANALES, *La justiciabilité de la Charte sociale européenne*, Thèse de doctorat en Droit Public, Nice, 2012, GIOVANNI GUIGLIA, Le

legislator's margin of appreciation in introducing regulations relating to the protection of property rights and reasonable expectations[78].

The judicial review of the legislative provisions that were enacted in the above fields led to a redefinition of the normative content of the Constitution and of its relationship with economic phenomena, circularities, crises and fiscal balance through the experience of the financial crisis. Moreover, new rules of constitutional interpretation emerged as a result of the application of the concept of public interest; for example, the parameter of fiscal awareness and security, the

"socle européen des droits sociaux": une contribution à la synergie entre le droit de l'Union européenne, Introduction at: Atelier, Strasbourg, Palais de l'Europe, 8.12.2016. For a concise presentation of the landscape of constitutional protection of social rights in Europe, see DIANE ROMAN, La jurisprudence sociale des Cours constitutionnelles en Europe: vers une jurisprudence de crise? *Les Nouveaux cahiers du Conseil Constitutionnel*, (Le Conseil constitutionnel et le droit social), Nº. 45, Octobre 2014. ELISABETH KOCH, *Human Rights As Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights*, Martinus Nijhoff Publishers, pp. 291 *et seq*. OLIVIER DE SCHUTTER, La Charte sociale européenne par temps de crise, https://rm.coe.int/16806ad0be. Presentation of country by country development *in:* CLAIRE KILPATRICK / BRUNO DE WITTE (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, European University Institute, Morning Papers Law 2014/04. For Greece in particular, see the contributions of EVANGELIA PSYCHOGIOPOULOU, pp. 8 *et seq.* and MATINA YIANNAKOUROU, pp. 27 *et seq.*, where further references in literature and case law can be found. Also, CHRISTINA DELIYANNI-DIMITRAKOU, Les transformations du droit du travail et la crise: les réponses du droit grec, *Lex Social: Revista de Derechos Sociales*. Vol. 5 núm. 2/2015, pp. 52 *et seq*.

[78] These issues have been insisted upon by the dissenting opinions expressed in judgment 1116/2014 of the Plenary Session of the Council of State. See *supra*, fn. 75.

importance of the stability of the banking system, the need for long-term sustainability of the sovereign debt[79].

[79] These interpretative perceptions dominate the first phase of the judicial review of legislation during the period of the rescue programs. See above fn. 55. On the complexity of legislative choices in the field of financial policy and on a judge's self-restrictive disposition see LON L. FULLER and PAUL YOWELL, *supra*, fn. 15. From the Greek discourse, see EVANGELOS VENIZELOS, National Constitution and National Sovereignty in Times of International Economic Crisis - The problem has been and remains political, rather than constitutional, *Efimerida Dioikitikou Dikaiou* (*Journal of Administrative Law*) 1/2011, pp. 4-5 (in Greek). APOSTOLOS VLACHOGIANNIS, The Constitutionality of the "Memorandum" in the light of the (American) Theory of Judicial Self-Restraint, *contitutionalism.gr*, (post 22.3.2011- in Greek), GEORGE GERAPETRITIS, Review of Financial Choices by the judge: New Deal Views, *constitutionalism.gr*, (post 28.7.2011 in Greek). Towards the same end is YANNIS DROSSOS, Loves' Labour's Lost: fighting austerity and crisis with obiter dicta. A gloss on the expediency of constitutional justice in times of crisis, *constitutionalism.gr*, (post 11.11.2013). On the context of the debate on the interpretation of the Constitution and the limits of judicial review of the constitutionality of laws in Europe, see from the relevant very extensive bibliography, Aix Marseille Université / Université de Toulon / Université de Pau et des Pays de l'Adour, XXXIII[e] Table Ronde Internationale, *Juge Constitutionnel et interprétations des normes*, Aix-en-Provence 8 au 9 septembre 2017, in particular national reports for Greece (C. YANNAKOPOULOS, 271-325), USA (C. VROOM, 235-270) and Germany (R. ARNOLD, 41 *et seq.*). Also, PIERRE BRUNET, Le juge constitutionnel est-il un juge comme les autres? Réflexions méthodologiques sur la justice constitutionnelle *in:* O. JOUANJAN / C. GREWE / E. MAULIN / P. WACHSMANN (eds.), *La notion de justice constitutionnelle*, Dalloz, 2005, pp. 115-135. Also see the comparative presentation by MAARTJE DE VISSER, *Constitutional Review in Europe: A comparative Analysis*, Hart 2014, in particular Chapter 6 (Testing and Remedying Unconstitutionality). MICHEL ROSENFELD, Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts, *I·CON*, Vol. 2, No 4, 2004, pp. 633-66. The ECtHR expressly states that it applies the interpretative principles of the Vienna Convention on the Law of Treaties. Characteristic are the references to the judgments: *Golder v. the United Kingdom*,

In the field of social rights, the financial crisis should have reasonably led to a severe curtailing of the rhetoric and voluntarist approach of the constitutional text, as the importance of fiscal conditions was rendered apparent and the so-called absolute social *acquis* was questioned[80]. However, from a certain point onwards, cuts in pensions and salaries, in order to accelerate the fiscal adjustment goals, began running against the criterion of dignified living, a case law which appears to become a component of the principle of proportionality and, more specifically, of the protection of the relevant rights' core[81].

21.2.1975, para. 30, and *Hassan v. The United Kingdom* (Grand Chamber), 16.9.2014, para. 100. For the so-called evolutionary interpretation of the ECHR that the ECtHR perceives as a "live instrument", see E. KASTANAS, *Unité et diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruylant, 1996, G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007.

[80] See *supra*, fn. 77.

[81] See notably Council of State judgments 2287-2289/2015 which explicitly refer to the German theory of *minimum Existenz* as the ultimate criterion of judicial review, based on the principle of proportionality. See by way of example, JAN SIECKMANN, *The Principle of Proportionality: A German Perspective*, European Commission for Democracy Through Law (Venice Commission), Report, 23 January 2019, CDL-JU (2019) 002.

For a summary of issues raised in the euro area member countries that have been subject to rescue programs see in the collective work by CLAIRE KILPATRICK / BRUNO DE WITTE (eds.), *Social Rights in Times of Crisis in the Eurozone: the Role of Fundamental Rights' Challenges*, European University Institute, Department Law, EUI Working Paper Law 2014/05 the studies by EVANGELIA PSYCHOGIORGOU (p. 5 *et seq.*) and MATINA YANNAKOURU (p. 19 *et seq.*) for Greece, AOIFE NOLAN (p. 30 *et seq.*) and ANTHONY KEZZ (p. 41 *et seq.*) for Ireland, MIGUEL NOGUEIRA DE BRITO (pp. 67 *et seq.*) and JULIO GOMES (p. 78 *et. seq.*) for Portugal. Also from a similar perspective, GIORGIO BARUCHELLO / ÁGÚST PÓR ÁRNASON, Europe's Constitutional Law in Times of Crisis: A Human Rights Perspective, *Nordicum-Mediterraneum*. To the Greek Experience is dedicated the 7th Volume of the Annuaire International des droits de l'Homme (AID),

In the context of the diffused, specific and incidental judicial review applicable in Greece[82], the judge does not examine the legislator's obligation to limit the aggregate public expenditure on salaries and pensions, or to improve the ratio between public revenues and public expenditure for reasons related to the Greek economy's exit from the crisis and to safeguarding the long-term sustainability of the social security system itself. The judge merely reviews the specific measure which cuts down certain categories of salaries and pensions. This way, however, the problem is transferred to the legislator who, on the one hand, has to comply with the court judgment, while securing on the other hand the country's fiscal existence. Thus, the legislator fully assumes the burden of socially unpleasant measures, having against them not only those politically opposed, but also the judiciary, which exercises its own jurisdiction. The judge rejects unpleasant measures as unconstitutional without having either the competence or the ability to suggest or impose other, more complete solutions that would fully respect social rights, as well as achieve fiscal adjustment. Thus, the legislator is called to manage a situation which is even more complicated because a series of measures have already been excluded as unconstitutional. On the other hand, the general fiscal goals, particularly regarding the curtailment of public expenditure for salaries and pensions, must be served, because this is required not only by the rescue programs, but also by the markets, in order to accept that Greece has returned to normalcy and is capable of covering its financial needs.

2014, where the studies by CHRISTINA AKRIVOPOULOU, Eurozone Crisis and Social Rights Protection in the South European Jurisprudence, pp. 3-13, XENOPHON CONTIADIS / ALKMINI FOTIADOU, The debt crisis proving ground: social rights theory revisited, pp. 573-582, STAVROULA KTISTAKI, Les droits sociaux en période de crise économique. Le cas de la Grèce, pp. 615-634, are published.

[82] See *supra*, fn. 54.

VI. The Financial Crisis and Informal Constitutional Changes[83]

As we have seen, the financial crisis was a huge interpretational challenge for the national Constitutions of Member States which were subject to rescue programs or close to being subjected to such programs and which took fiscal austerity measures for their fiscal and financial protection or to strengthen the competitiveness of their economies[84].

The Greek Constitution was interpreted in the light of a new, much more complex and opportune, version of the concept of public interest, under conditions of financial crisis which bordered the risk of disorderly default or non-implementation of the rescue programs[85]. It also had to be interpreted in the light of new multilateral agreements, concluded at the level of international economic law, such the Treaty on Stability, Coordination and Governance[86]. This was an interpretation of the Constitution compatible with European and international law[87]. In any case, Greek courts did not touch the

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[83] See from the recent literature M. Altwegg-Boussac, *Les changements constitutionnels informels*, Institut Universitaire Varenne, 2013 and Reijer Passchier, *Informal Constitutional Change: Constitutional Change without Formal Constitutional Amendment in Comparative Perspective*, PhD Thesis, Leiden University, 2017.

[84] See *supra V*.

[85] On the concept of the general interest in Greek theory and case law, see Evangelos Venizelos, *The General Interest and Constraints of Constitutional Rights*, Paratiritis Editions, 1990 (in Greek).

[86] See fn. 51.

[87] This methodological scheme is based on the interpretation of the law in accordance with the Constitution, see Gustavo Zagrebelsky, Interprétation de règles en conformité à la Constitution comme méthode pour assurer la stabilité de l'ordre juridique versus interprétation de la Constitution comme moyen de développement de l'ordre constitutionnel, Rapport, Conférence sur "*Le rôle de la Cour constitutionnelle dans le maintien de la stabilité et le développement de la Constitution*", Moscou, 27-28 février 2004, Commission Européenne pour la démocratie par le droit, Commis-

issue of "national constitutional identity" vis-à-vis the rules of EU law relating to the rescue programs[88].

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sion de Venise, 26.2.2004. See by way of example, ANNA JONSSON CORNELL, *In Search for a Theory of Constitutional Interpretation in Congruence with European Human Rights Law*, Uppsala Faculty of Law, Working Paper 2014, pp. 2 and OLIVIER PEIFFERT, L'encadrement des règles constitutionnelles par le droit de l'Union européenne, VIII[ème] Congrès de l'Association française de droit constitutionnel, Faculté de droit de Nancy, 16 au 18 juin 2011. See a recent overview concerning the Relations of International Law and National Law by PIERRE-HUGUES VERDIER / MILA VERSTEEG, International Law in National Legal Systems: An Empirical Investigation, *American Journal of International Law*, Vol. 109, Issue 3, July 2015, pp. 514-533. Interesting is the analysis by KRISTEN WALKER, *International Law as a Tool of Constitutional Interpretation*, The University of Melbourne, Faculty of Law, Public Law and Legal Theory Research Paper No 33, 2002.

[88] On the discussion on "national constitutional identity" in the EU, see a comprehensive overview by STELIO MANGIAMELI, *The European Union and the Identity of Member States*, L'Europe en Formation, 2013/3 (no 369), pp. 151-168. Also, DAVID BAILLY, *La notion d'identité constitutionnelle de l'Etat membre de l'Union européenne: Etude de droit constitutionnel européen*, Thèse, Université Montpellier I, 2014, EDOUARD DUBOUT, "Les règles ou principes inhérents à l'identité constitutionnelle de la France": une supra-constitutionnalité? *Revue Française de Droit Constitutionnel*, 84, 2010, DOROTA LECZYKIEWICZ, The 'national identity clause' in the EU Treaty: a blow to the supremacy of Union law? *in: UK Constitutional Law Association, blog*, SÉBASTIEN MARTIN, L'identité de l'Etat dans l'Union Européenne: entre "identité nationale" et "identité constitutionnelle", *Revue Française de Droit Constitutionnel*, 91, 2012, supplément électronique, pp. 1-44, DOMINIQUE ROUSSEAU, *L'identité constitutionnelle: Bouclier de l'identité nationale ou Branche de l'étoile européenne?, L'identité constitutionnelle saisie par les juges en Europe*, Editions Pedone, Paris, 2011, DENYS SIMON, L'identité constitutionnelle dans la Jurisprudence de l'Union Européenne *in:* L. BURGORGUE-LARSEN (dir), *L'identité constitutionnelle saisie par les Juges en Europe*, A. Pedone, 2011, JULIEN STERCK, *The Constitutional Identity of Member States and the European Primacy. Union Law: A Comparative Study of Ireland and*

Constitutional practices were also developed, relating to urgent legislation, as well as to economic governance; such is, for instance, the practice of combining the voting and implementation of the budget (an issue regulated by the national Constitution; Art. 79 of the Greek Constitution) with fiscal procedures provided by EU law (*e.g.* the European semester, the so-called "2- and 6- packs", or the Medium-Term Fiscal Strategy Framework), or by the Treaty on Stability, Coordination and Governance[89].

All of the above introduced changes to the normative content of the national Constitution, ensuring its smooth coexistence with EU law and international economic law, in the context of a mutual respect and mutual concessions process, which leads to the creation of a single European constitutional space[90]. The debate regarding

France, Thesis University College Dublin, Université Montesquieu-Bordeaux. See also above *IV*, fn. 51.

[89] On the changes brought about by the crisis in the structure of EU economic governance and the Eurozone see K. TUORI / K. TUORI, *op. cit.* (fn. 4). The authors present the gradual development of the EU's economic governance mechanism before and after the crisis. Also, ALICIA HINAREJOS, *op. cit.* (fn. 4).

[90] See now MARTA CARTABIA, Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling, *German Law Journal*, 2015, vol. 16 No 06, pp. 1791-1796. The approach to a single European constitutional area can be paralleled by the scientific debate on 'multilevel constitutionalism' and 'constitutional pluralism' in the European Union and in general. See on the studies included in: MATEJ AVBELJ / JAN KOMÁREK (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, 2012. The term "multilevel constitution" was used by INGOLF PERNICE, The Treaty of Lisbon: Multilevel Constitutionalism in Action, *Columbia Journal of European Law*, Vol. 15, 2009, pp. 349-407 *et seq*. See also ARMIN VON BOGDANDY, Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area, *I·CON* (2014), vol. 12, No 4, 980-1007, TOMI TUOMINEN, The European Constitution and the Eurozone Crisis: A Critique of European Constitutional Pluralism, *Acta Universitatis Lapponiensis* 364, 2017, pp. 48 *et seq*., 61 *et seq*. (From Constitutional Hierarchy to Constitutional Heterarch), 102 *et seq*. NEIL WALKER, The Idea of Constitutional Plural-

the supremacy or priority between legal orders, with each of them asserting its own supreme position on the basis of self-reference, cannot be resolved *in abstracto*. The rule that is ultimately supreme and is implemented is one, and its pronouncement and application is not only the outcome of co-existing legal orders, but also of jurisdictions, namely of courts engaging in a dialogue through procedures, such as that of preliminary reference to the CJEU[91].

Another interesting issue in the Greek case is the activation of the institution of referendum over a crucial national matter [Art. 44 par. 2 indent (a) of the Greek Constitution, Art. 44 par. 2 intent (b)][92]. This type of referendum contrasts with the legislative referendum over a bill passed by the Parliament regarding a crucial social issue. No legislative referendum is allowed to be conducted for fiscal issues, though. In Art. 44 par. 2 of the Greek Constitution, fiscal issues are distinguished not only from "social", but also from "national" issues, concerning foreign affairs and security policy, the country's European orientation, etc. The legislative referendum is made part of the statute's voting procedure and brings about evident legal consequences; thus, it is decisive.

A referendum over crucial national matters is not part of the legislative procedure, yet it is not "consultative". Its outcome is not

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ism, *Modern Law Review* 65 (3), 2002, pp. 317-359, NEIL WALKER, Multilevel Constitutionalism: Looking Beyond the German Debate *in:* KAARLO TUORI / SUVI SANKARI (eds.), *The Many Constitutions of Europe*, Ashgate, 2010, pp. 143 *et. seq*., NEIL WALKER, Constitutionalism and Pluralism in a Global Context, *in:* MATEJ AVBELJ / JAN KOMÁREK (eds.), *op. cit.*, pp. 17 *et seq*., NEIL WALKER, Constitutional Pluralism Revisited, *European Law Journal*, 22 (3), 2016, pp. 333 *et seq*., LINA PAPADOPOULOU, Die implizite Änderung der griechischen Verfassung durch das EU-Recht, *ZaöRV* 2014 p.141 *et seq*. For a summary of the constitutional choices of EU Member States see L.F.M. BESSELINK / M. CLAES / S. IMAMOVIC / J. REESTMAN, *National Constitutional Avenues for Further EU Integration*, European Parliament, 2014 *et seq*.

91 See fn. 69. Certainly the CJEU has dealt with other procedural avenues on the issues of haircut of Greek government debt, see fn. 70.

92 See EVANGELOS VENIZELOS, *op. cit.* (fn. 3).

simply taken into account by the Government exercising the country's general policy or by the Parliament, when it approves of acts of the Government, by voting relevant statutes for which increased majority is often required (Articles 27 and 28 of the Greek Constitution). A referendum is not an official poll. Therefore, this type of referendum is binding, in principle[93].

The Constitution was violated by the referendum of 5 July 2015, since that referendum's question obviously related to fiscal issues. Furthermore, the Constitution was evidently infringed on account of the technical complexity of the texts put to the electorate (texts of multiple pages in English) and given the short period of five business days that intervened between the referendum's proclamation and its conduct. Evidently, the good practices that have been codified by the Venice Commission of the Council of Europe regarding referenda (clarity of the question and a period of at least fifteen days between proclamation and conduct) were not complied with[94]. The aforementioned infringements constitute neither a "constitutional incident", formulating a constitutional practice, nor an interpretational precedence, due to the strong reaction that was expressed by the Opposition, as well as by the academic community. Much less do they amount to some sort of informal constitutional amendment of the normative content of Art. 44 par. 2 of the Constitution.

The aforementioned academic reactions did not carry on because, in spite of the large majority in favor of "No" - which, politically speaking, was, at minimum, a mandate for very tough negotiations at the European Council and the Eurogroup -, the Government rushed to agree to texts similar, or even harsher than those rejected.

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[93] See EVANGELOS VENIZELOS, *op. cit.*

[94] See European Commission "For Democracy Through Law" (Venice Commission) Code of Good Practice on Referendum Study 371/2006, 20.1.2009. And now the (Greek) National Commission for Human Rights, Good Referendum Principles. Best Practices, Report, May, 2018, identifies similar problems (in particular concerning the minimum length of the call-in period and the clarity of the query).

Apparently, it became fearful of the markets' reactions and of the referendum's repercussions on the Greek economy.

Nevertheless, the disdain accorded both to the procedure, as well as to the outcome of the referendum, consists in an additional rule for the interpretation of the relevant constitutional provision (Art. 44 par. 2). Having recourse to a referendum and transferring the responsibility directly to the electorate does not mean that the Government or the parliamentary majority which decides to proclaim a referendum is released of its political and historical responsibility about the national, financial, social, or even merely political repercussions of the referendum's outcome. A referendum does not provide immunity to political, national or fiscal populism.

VII. The Financial Crisis as Reason for Amending the Constitution and as a Limitation to Constitutional Amendment

The financial crisis not only caused a wave of informal constitutional changes but also paved the way for formal constitutional changes. Such modifications have already taken place in those national legal orders where ratifying amendments of EU primary law presupposes or entails an amendment of the national Constitution, or is the equivalent of such an amendment[95].

Ireland is the most striking example of a targeted amendment of the national Constitution, during the crisis, through a referendum. This amendment explicitly provides for cuts in the remuneration of certain categories of judges in the framework of the austerity meas-

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[95] See L.F.M. Besselink and others, *supra*, fn. 90. For the first use of the concept of "Multilevel constitutionalism" in the EU see Ingolf Pernice, Constitutional Law Implications for a State Participating in a Process of Regional Integration - German Constitution and "Multilevel Constitutionalism", *in:* Eibe Riedel (ed.), *German Reports on Public Law. Presented to the XV. International Congress on Comparative Law, Bristol 26 July to 1 August 1998*, NOMOS, 1998, pp. 40-66.

ures that accompanied the country's rescue program[96]. In Greece, as we have seen[97], the same issue was regulated legislatively, but the legislation was found unconstitutional by the competent special court (which includes as members professional judges, law professors and lawyers) as well as by the Court of Auditors. The review process is also slower and more complex in Greece than in Ireland[98]. In addition, an amendment of this kind to the Constitution could itself be regarded as unconstitutional by the courts, because it violates, for example, the principle of the separation of powers, which belongs to the "core" of unamendable principles and provisions under Article 110 (1) of the Greek Constitution[99].

Now the Treaty on Stability, Coordination and Governance binds the states parties in this multilateral treaty (contracting parties) into incorporating the golden fiscal rule in their national legal order, preferably by amending their formal Constitution or by enacting it as national legislation which regulates the voting and implementation of the budget (a subject normally regulated by the national

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[96] DAVID GWYNN MORGAN, The Constitution and the Financial Crisis in Ireland *in:* XENOPHON CONTIADES, *op. cit.* (fn 1), pp. 63-88, JOHN O'DOWD, Judges in whose cause? The Irish Bench after the Judges pay Referendum, *The Irish Jurist*, New Series, Vol. 48 (2012), pp. 102-131. PATRICK O'BRIEN, Never let a Crisis go to waste: Politics, Personality and Judicial self-Government in Ireland, *German Law Journal*, Vol. 19 No 07, 2018, pp. 1871-1900.

[97] See *supra*, *IV*.

[98] See XENOPHON CONTIADES / IOANNIS TASSOPOULOS, Constitutional Change in Greece. FIONA DE LONDRAS / DAVID GWYNN MORGAN, Constitutional Amendment in Ireland *in:* XENOPHON CONTIADES (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, Routledge, 2013, pp. 151-178, 179-202.

[99] See XENOPHON CONTIADES / IOANNIS TASSOPOULOS, *op. cit.* (fn. 98) and from a comparative perspective, GÁBOR HALMAI, Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective. *Wake Forest Law Review*, Vol. 13, No. 38, 2016.

Constitutions, with the supplementary rules constituting part of the so-called small (material) constitution[100]).

Since in most national Constitutions of the Member States (including Greece), an international agreement which has been ratified by law, like the Treaty on Stability, Coordination and Governance, prevails over national laws which cannot amend it even if newer (Art. 28 par. 1 of the Greek Constitution), the golden fiscal rule has been, in one way or another, incorporated in the Greek national legal order, even if the Greek Constitution has not been amended on this point[101].

Interestingly, this provision of the Treaty on Stability, Coordination and Governance for the amendment of a national Constitution amounts to an indirect recognition of the Treaty's supremacy or great legal significance; it further connotes an indirect acceptance of the dualistic perception of the relationship between national and international law[102].

The new, more complete edifice of the EU's and EMU's economic governance, as well as the extension of the normative content of the so-called economic Constitution of the EU, indicates, indirectly though clearly, the limitations of any initiative to amend a

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100 See MARIO DOGLIANI, Constitution in a Formal, Material, Structural and Functional Sense: With Regard to an Observation by Gunther Teubner on the Self-Destructive Trends of Social Systems, *Diritto pubblico*, 2/2009, pp. 295 *et seq*. See ALESSANDRO CATELANI, Costantino Mortati e le Moderne Costituzioni, 2010, (studylibit.com), ALESSANDRO CATELANI / SILVANO LABRIOLA (eds.), La Costituzione materiale - percorsi culturali e attualità di un'idea, Giuffrè, 2001, RENZO DICKMANN, Material Costs or Cost Materiality? (http://www.forumcostituzionale.it/).

101 See LINA TRIANTAFYLLIA PAPADOPOULOU, Can Constitutional Rules, Even If 'Golden', Tame Greek Public Debt?, *in:* MAURICE ADAMS / FEDERICO FABBRINI / PIERRE LAROUCHE (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, pp. 223-247.

102 From recent bibliography, see JORDAN J. PAUST, Basic Forms of International Law and Monist, Dualist, and Realist Perspectives, *in:* MARKO NOVAKOVIC (ed.), *Basic Concepts of Public International Law*, 2013, pp. 244-265.

national Constitution in an opposite or different direction. In practice, new substantive limitations are added, beyond those provided by the "eternity clauses" which exist in many national Constitutions of Member States, as it happens with Art. 110 of the Greek Constitution[103].

These limitations to the discretion of the constitutional Legislator mainly have to do with possible manifestations of constitutional populism[104], inherent to the versions of authoritarian democracy which show up in many EU countries. The constitutional nationalistic populism is the twin phenomenon of the authoritarian illiberal democracy; it asks for the autonomy of the national constitutional identity and in this way provokes violations of EU principles which

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[103] From recent bibliography, see YANIV ROZNAI, Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions, *Michigan State Law Review*, 2017, pp. 253-331. Also the world view as presented by MICHAEL HEIN, Never say never! On Entrenchment and Eternity Clause in Modern Constitution, *Katapult Cartography and Social Science Magazine* (2015) and *academia.edu*.

[104] See, for example, from the recent literature NEIL WALKER, Populism and Constitutional Tension, *International Journal of Constitutional Law*, 2019 (Volume 17, Issue 2, April 2019, pp. 515-535), Edinburgh School of Law Research Paper No. 2018/18 (available at SSRN). Also, SUJIT CHOUDHRY, Constitutional Resilience to Populism: Four Theses, *VerfBlog*, 2018/12/11, BOJAN BUGARIĆ, *Populists at the Gates: Constitutional Democracy Under Siege?* New York University School of Law / Jean Monnet Center for International and Regional Economic Law & Justice, September 15-17, 2017. On the American approach to Populist Constitutionalism see LUCIA CORSO, What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions, *Rivista di filosofia del Diritto*, III, 2/2014, pp. 443-470, PAUL BLOKKER, Populism as a Constitutional Project, *International Journal of Constitutional Law*, 2018/11/08. It goes beyond the scope of this study to refer to the distinction between Political Constitution, Popular Constitution, Populist Constitutionalism, Constitutional Populism, Political Populism and the Constitution.

are identical to the common constitutional principles and traditions of the Member States[105].

The paradox is that in Greece, proposals for amending the Constitution were submitted in November 2018, on the one hand, by members of the parliamentary majority (the "SYRIZA" party) and, on the other hand, by members of the major opposition (the "New Democracy" party). A proposal relating to the golden fiscal rule, in compliance with the Treaty on Stability, Coordination and Governance, is not included among the majority's proposals. Although Greece has signed and ratified the Treaty, it does not amend its Constitution accordingly, in spite of being able to do so in the context of an amendment process that is under way. A relevant proposal by the major opposition to introduce the fiscal balance rule in Article 79 of the Constitution, which regulates issues related to the Budget, has been dismissed already since the first phase of the amendment process and will not be introduced in the Parliament elected July 2019 which concluded the Revision. A contradictory phenomenon is therefore noted, with the golden fiscal rule not being incorporated in the Constitution, but applying in the Greek legal order on the basis of the Treaty on Stability, Coordination and Governance and, in fact, with a force higher than that of other ordinary statutes (Article 28 par. 1 Const.). Meanwhile, Greece has undertaken commitments not only about the level of the fiscal deficit, but also about the level of the primary surplus which it is required to achieve on an annual basis until full payment of the loans it has received from the European institutions (EFSF/ESM), or other countries-members of the Eurozone - *i.e.*, until 2060.

We therefore see that on the critical issue of the golden fiscal rule and of fiscal awareness, the experience of the crisis does not halt the tendency for constitutional populism in the form of a dual normative language: a language which, at the level of international, European, as well as of national law (by which an international

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[105] See for example JOSÉ A. GUTIÉRREZ-FONS / KOEN LENAERTS, The constitutional allocation of powers and general principles of EU law, (2010) 47 *Common Market Law Review*, issue 1629-1669.

treaty is ratified), expressly provides for the golden fiscal rule; nonetheless, at the level of the national constitutional text, it does not add expressly an undertaken obligation of the country, with full force. This is a constitutional rhetoric by omission, which attempts to maintain the illusion that there are fiscal margins that do not exist. Unfortunately, such a choice contributes to the deconstruction of the Constitution's normative content and devalues the principle of fiscal awareness that should be having a very clear position in the constitutional text[106].

VIII. Concluding Remarks: The Financial Crisis and the National Constitution's Resilience

The conclusion that can be drawn is that the financial crisis put national Constitutions through an "ordeal". Nonetheless, the latter have demonstrated a considerable degree of resilience[107]. They have been adjusted through interpretation, they have adopted informal changes, and they retain the possibility of formal amendment, as well as a claim for playing an important role within the single European constitutional space. Such is the case of the Greek Constitution, even if, in respect of fiscal awareness, it is not shown the way it should in the process for the Constitution's revision, which was opened after formal conclusion of the third rescue program, in November 2018.

Admittedly these are not Constitutions of the type of a sovereign Westphalian state, but rather Constitutions of "Member States", *i.e.* of a novel type of states, that partake in the European integration on their own accord. Even so: even as Constitutions of shared or lim-

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106 See *supra*, fn. 97.

107 Antonios Manitakis, The impressive resilience of the Greek Constitution in the current financial crisis in Europe, *in:* Lina Papadopoulou / Ingolf Pernice / J. HH Weiler (eds.), *Legitimacy Issues of the European Union in the Face of Crisis: Dimitris Tsatsos in memoriam*, Nomos 2017, pp. 217-230.

ited sovereignty, the national Constitutions of the EU Member States have incorporated the normative and interpretative experience of the financial crisis. They have a part in the European political and constitutional settlements resulting from the continuous intergovernmental negotiations, which promote European integration, in spite of its contradictions and regressions. Whenever reaction is required in order for the fundamental elements of the European constitutional civilization to be protected, such reaction is expressed either by Member States sensitive over derogations from the EU or by the EU itself, in case of Member States violating common European constitutional values.

What is truly needed is historical awareness and institutional vigilance.

ABSTRACTS / RÉSUMÉS

The financial crisis in the Eurozone and the entry of some Member States to rescue programs have brought about major changes in the institutional structure of the EU economic governance. They have also been the subject of a quite interesting case law in the CJEU and the ECtHR. However, this experience primarily affected the national legal order and national Constitutions. Experiencing three consecutive programs (2008-2018), Greece is the laboratory in which the resilience of the national Constitution and the European constitutional theory were tested. A number of rather serious issues were raised concerning the interpretation of the Constitution, the relationship between national Constitution, EU legal order and international law and the limits of the judicial review of austerity legislation. Moreover, questions arose concerning the regulatory content of the Constitution itself, either through informal constitutional changes or through the formal amendment process. The main finding of the study is that the national Constitution demonstrated resilience and adaptability. During the crisis, heated public debate arose concerning the internal and external sovereignty of a Member State in crisis, without violating the constitutional framework. The financial crisis did not function as a state of emergency in the legal sense of the term but as a real situation that affected the interpretation of the Constitution mainly through the concept of general interest and the principle of proportionality. The crisis has highlighted the importance of fiscal awareness as a parameter in the interpretation of the Constitution.

La crise financière dans la zone euro et l'entrée de certains Etats membres dans des programmes de sauvetage ont entraîné des changements majeurs dans la structure institutionnelle de la gouvernance économique de l'UE. Elles ont également fait l'objet d'une jurisprudence assez intéressante de la CJUE et de la Cour européenne des droits de l'homme. Cependant, cette expérience a surtout affecté l'ordre juridique national et les Constitutions nationales. La Grèce, qui a vécu l'expérience de trois programmes consécutifs (2008-2018), a été le laboratoire où ont été testées la résilience de la Constitution nationale et la théorie constitutionnelle européenne. Un certain nombre de problèmes assez graves ont été soulevés concernant l'interprétation de la Constitution, la relation entre la Constitution nationale, l'ordre juridique européen et le droit international ainsi que les limites du contrôle juridictionnel des lois d'austérité. En outre, des questions ont été soulevées concernant le contenu réglementaire de la Constitution elle-même, soit à travers des modifications constitutionnelles informelles, soit par le processus d'amendement formel. La principale conclusion de l'étude est que la Constitution nationale a fait preuve de résilience et d'adaptabilité. Pendant la crise, un débat public animé a eu lieu concernant la souveraineté interne et externe d'un Etat membre en crise, sans pour autant violer le cadre constitutionnel. La crise financière n'a pas fonctionné comme un état d'urgence au sens juridique du terme mais comme une situation réelle qui a affecté l'interprétation de la Constitution principalement à travers le concept d'intérêt général et le principe de proportionnalité. La crise a mis en évidence l'importance de la conscience fiscale comme paramètre d'interprétation de la Constitution.

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