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# Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?

*Afroditi Ioanna Marketou\**

## Abstract

The legal story of the Eurozone crisis is by now well known. Most commentators have focused on the impact of the crisis on the organisation of the European Union. However, the dominant Eurocentric discourse has neglected the important changes brought about by the crisis in the constitutions of ‘weak’ Member States—those who have received financial assistance. Domestic scholars are typically unable to offer a coherent account, let alone justification, of these transformations from a constitutional law point of view. Outside the domestic sphere, constitutional change within ‘crisis-hit’ countries has not attracted enough attention; it is considered not to be the problem, but rather the solution or an inevitable side-effect of the European developments. Still, it is precisely these ‘weak’ states that form exemplary cases for the study of how economic emergency and European integration operate in the domestic sphere of liberal constitutional democracies. The purpose of this paper is to shed some light on this ‘dark side’ of the Eurocrisis, through the study of a particular, albeit exemplary, national case: Greece. How was the Greek Constitution deconstructed by legal means? How do domestic actors justify the significant constitutional-political changes brought about by the Eurocrisis? How can we observe the loss of faith in the Greek Constitution?

## Keywords

Economic Emergency, Eurocrisis, Greek Constitutional Politics, Constitutional Change, Constitutional Faith

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The legal story of the Eurozone crisis (Eurocrisis) is now well known. Most commentators have focused on the impact of the crisis on the organisation of the European Union (EU). In particular, the legal discussion concentrated on the compatibility of the crisis-related

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measures to the general legal framework of the EU and, more recently, on aspects related to European fundamental rights and the rule of law. In recent analyses, the scholarship has focused on institutional or cultural-ideological elements behind the Eurocrisis changes in order to identify possible future developments. It is now widely acknowledged that the changes following the Eurocrisis have fundamentally shifted the EU as an organisation. It is thus more relevant to analyse the potential of these changes, rather than further discuss their legality. Analyses from the viewpoint of national constitutional law have been rare. When scholars turn to the matter, they are mostly interested in the German Basic Law and the position of the *Bundestag* or *Bundesverfassungsgericht* towards the new situation established at the EU institutional and legal levels.<sup>1</sup>

However, the dominant Euro-centred discourse has neglected the impact of the financial crisis on the constitutions of ‘weak’ Member States, namely those that have received financial assistance. Domestic scholars have failed to offer a coherent account, let alone justification, of the developments from a constitutional law point of view. At the same time, changes within ‘crisis-hit’ countries have not attracted enough attention outside the domestic sphere; these are considered not to be the problem, but rather the solution or an inevitable side effect of the general European developments. Still, it is precisely these Member States that form exemplary cases for the study of how economic emergency operates in the domestic sphere of liberal constitutional democracies. Accounts of European institutional and constitutional developments, which have so far mostly focused on the discourse of the EU legal actors, would benefit from an empirical basis in the domestic spheres as well. More generally, the striking constitutional political transformations occurring without constitutional amendment in these Member States are of extreme importance for legal scholars, since they reveal much about the function and meaning of modern constitutions.

The purpose of this paper is to shed some light on this ‘dark side’ of the Eurocrisis through the study of a particular, albeit exemplary, national case. Greece has been at the epicentre of the crisis and was the first Eurozone Member State to receive financial assistance. In domestic public debates, Greece has long been considered the major cause of the Eurocrisis: a weak and corrupt Member State, needing the help of its strong partners in order to regain access to the markets.<sup>2</sup> When the crisis hit Greece, there was no European financial assistance mechanism. The Greek Loan Facility was thus initially agreed on an intergovernmental basis with the participation of the International Monetary

<sup>1</sup> For another perspective, see the contributions in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014). See also the contributions in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013); Emiliios Christodoulidis, ‘Europe’s Donors and Its Supplicants: Reflections on the Greek Crisis’ in Johan Willem Gous Van der Walt and Jeffrey Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos 2014). However, in these analyses the authors only trace the constitutional changes without any effort to offer an account or explanation from the point of view of constitutional law.

<sup>2</sup> See, eg, Minutes of the Greek Parliament (6 May 2010) <[www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100506\\_1.pdf](http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100506_1.pdf)> accessed 6 March 2016.

Fund (IMF).<sup>3</sup> This complicated mechanism was instituted after long negotiations and under strong market pressures. The complexity of the intergovernmental construction of this mechanism and the perception of some kind of collective responsibility by both the creditors and the Greek people made it so that Greek public debates regarding the economic emergency acquired a tempestuous dynamic.

Facing the crisis became *the* stake of domestic political decisions; the advancement of this objective became *the* criterion for evaluating political propositions. Other constitutional values were subjugated to economic emergency; so were the procedures and rules contained in the Greek Constitution which protect these values. Greece is an extreme case of constitutional transformation in the face of the Eurozone crisis. This paper traces the evolution of this phenomenon, seeking to uncover its domestic meaning. How was the Constitution deconstructed by legal means? How do domestic actors justify the significant constitutional-political changes brought about by the Eurocrisis? How can we ‘constitutionally’ observe a loss of faith in the Constitution?

The paper begins by exploring the way economic emergency led to the introduction of legal norms in the domestic sphere with no respect for domestic constitutional forms and procedures (1). Soon it became clear that constitutional deconstruction was not simply an exceptional consequence of a temporary crisis. The possibility for legal norm production outside constitutional conditions and procedures was permanently extended (2). This is connected to the fact that emergency itself was ‘normalised’ by clothing exceptional measures in a formal legal garb (3). After five years of continuous crisis, this evolution has led to a paradox: the Constitution seems to be valid in some respects but not others. Is it possible to offer a coherent account of this phenomenon from a domestic constitutional point of view?

I propose to analyse Greek constitutional politics through the lens of the constitutional faith metaphor, well known to US lawyers (4). Current constitutional-political transformation would thus be understood as a loss of faith in the Greek Constitution, expressed in the argumentation advanced by certain constitutional-political actors. In the rhetoric of these actors, faith in the Constitution, in the sense of a formal legal text, is replaced by faith in a ‘spirit’ transcending and founding the Constitution. Therefore, popular sovereignty and democracy, traditionally ensured by the formality of the Constitution itself, are no longer the ultimate objectives of constitutional politics. Instead, as the study of this argumentation unveils, in this new type of faith another objective is perceived as more imperative: economic independence under the particular economic policy dictated by the state’s creditors (5). In the afterword, the proposed approach is applied in order to account for the policy of the SYRIZA–ANEL government

<sup>3</sup> Loan Facility Agreement (8 May 2010) <<http://www.irishstatutebook.ie/eli/2010/act/7/schedule/2/enacted/en/html>> accessed 5 March 2016 (First Loan Agreement). This text, contained in a schedule annexed to the Irish statute ‘Euro Area Loan Facility Act 2010’, is the only official English version of the Agreement that could be retrieved. On the participation of the IMF, see preamble, para 3.

during the negotiations with Greece's creditors and to assess the new agreement within the framework of the European Stability Mechanism (ESM) (6).

## 1 Deconstructing constitutional forms: The First Economic Adjustment Programme in the domestic legal sphere

The domestic constitutional story of the Eurocrisis starts with Law 3845/2010.<sup>4</sup> This was certainly an atypical piece of legislation. First, its distinctiveness lay in its content. Under the title 'Measures for the implementation of the support mechanism for the Greek economy by the Eurozone Member States and the International Monetary Fund', the statute included in an annex a draft of the first Memorandum of Understanding (MoU), as well as relevant statements by the Euro-area Member States' heads of state and government. It thus introduced into the domestic legal sphere, in a rather unorthodox way, developments that had taken place during the weeks that preceded its voting in parliament. This story has been told elsewhere;<sup>5</sup> I will attempt only to summarise it here.

In early 2010, the Eurostat data on the Greek deficit were revealed. In March 2010, the socialist government, elected shortly before under an anti-austerity platform, decided to adopt an austerity package. Nonetheless, rating agencies further downgraded the country's credit rating, making access to the markets difficult. In April 2010, the Greek government officially requested the financial assistance of the IMF and the EU. An ad hoc mechanism was established in order to provide Greece with a total of €110 billion, coming from individual Euro-area Member States and from the IMF. On 2 May 2010, the Eurogroup decided to activate the support mechanism for the Greek economy. The next day, the Greek authorities signed the MoU with representatives of the state's creditors. The agreement was brought for discussion and voting in the Greek parliament on 4 May 2010 as an annex to Law 3845/2010. The statute was adopted on 6 May and entered into force the following day. The measures described in the MoU were included in subsequent Council Decisions, issued after recommendation by the Commission, under the excessive deficit procedure.<sup>6</sup> The First Loan Agreement was signed on 8 May 2010.<sup>7</sup> The next day, the IMF executive board approved the relevant Stand-by Arrangement.<sup>8</sup>

<sup>4</sup> Law 3845/2010 of 6 May 2010, Government Gazette A 65.

<sup>5</sup> See, eg, Xenophon Contiades and Ioannis Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013).

<sup>6</sup> See Council Decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L145/6, and its amendments.

<sup>7</sup> See the First Loan Agreement (n 3).

<sup>8</sup> See IMF External Relations Department, 'IMF Executive Board Approves €30 Billion Stand-By Arrangement for Greece', Press Release No 10/187 (9 May 2010) <<https://www.imf.org/external/np/sec/pr/2010/pr10187.htm>> accessed 6 February 2016.

Financial assistance was provided to Greece on the condition that the state would respect the agreed MoU, containing measures of unprecedented austerity.<sup>9</sup> The 80 pages of the MoU declared general objectives for the Greek economy, such as a balanced budget and competitiveness targets, and defined the specific economic policies that the Greek government should implement in various domains (taxation, public employees' salaries, social security and pension, and others). Administrative and legislative measures were concretely defined on a three-month basis and their expected financial impact was calculated. The MoU was accompanied by letters of intent by the Greek Minister of Finance and the President of the Bank of Greece, expressing their commitment to complying fully with the programme.<sup>10</sup>

The policies contained in the First Economic Adjustment Programme, as this complex body of measures and instruments was called, were partly inserted into the main part of Law 3845/2010. Article 3 imposed severe cuts on the revenues of public employees and pensioners. This article also affected privately employed workers and declared that it prevailed over any contrary provision, be it part of a collective agreement, arbitral award or individual contract. The remaining articles imposed tax increases and exceptional levies. It is no exaggeration to say that Law 3845/2010 was the legal event that divided the Greek polity into two camps: pro-MoU and anti-MoU forces. Due to the substantive changes introduced at the level of socio-economic policy, the discussion of Law 3845/2010 in parliament was perceived by all parties as a 'historical moment', which would determine the future of the state.<sup>11</sup>

Despite its historical importance, the economic emergency left no place for parliamentary discussion on the policies or specific measures enacted by Law 3845/2010. The law was brought to parliament under an emergency procedure. The government stated that voting on the law was urgent because the relevant loan agreement had to be concluded before 19 May 2010. On this date, a €10 billion bond loan matured and, if the state had been unable to repay its creditors, it would have faced bankruptcy and isolation from its Eurozone partners.<sup>12</sup> The members of parliament had less than three days to read the statute and its annexes, and only one day to discuss it in parliament. Even members of the government later admitted that they had not had time to read the MoU. The support mechanism and the measures it implied were approved as a whole in one single article, rendering any amendments to specific austerity provisions impossible. Strict party discipline was imposed on the members of the two biggest parties in parliament. Errors in the Greek translation of the MoU further stymied the national debate.

<sup>9</sup> See First Loan Agreement (n 3), preamble, para 7, art 1.

<sup>10</sup> See 'Greece—Memorandum of Economic and Financial Policies' in International Monetary Fund 'Greece: Staff Report on Request For Stand-By Arrangement' (3 May 2010) 47 <[www.imf.org/external/pubs/ft/scr/2010/cr10110.pdf](http://www.imf.org/external/pubs/ft/scr/2010/cr10110.pdf)> accessed 12 September 2015 (MoU). The MoU is composed of three texts: the Memorandum of Economic and Financial Policies, the Technical Memorandum of Understanding and the Memorandum of Understanding on Specific Economic Policy Conditionality.

<sup>11</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6714.

<sup>12</sup> See *ibid* 6728.

However, from a legal scholar's point of view, Law 3845/2010 was even more impressive in formal terms, that is, as far as the production of legal norms is concerned. What was the parliament actually *doing* when voting on the statute? This matter, concerning the status of international agreements in the domestic sphere, has raised important academic debates in Greece.<sup>13</sup> Article 36 of the Constitution regulates the conclusion of international treaties and attributes the relevant constitutional competence to the President of the Republic. Paragraph 2 of the same article declares that conventions on trade, taxation, economic cooperation and participation in international organisations or unions, as well as other conventions containing concessions for which a statute is required or which may burden Greeks individually, 'shall not be operative without ratification by a statute voted by the Parliament'.<sup>14</sup>

Once operative according to article 36, article 28 of the Constitution defines the status of international law in the domestic legal order. Paragraph 1 states that ratified international conventions 'shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law'. Paragraphs 2 and 3 set particular procedural and substantive conditions for the ratification of certain conventions. They declare:

2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.

3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

Article 28 of the Constitution is followed by an interpretative clause stating that it 'constitutes the foundation for the participation of the Country in the European integration process'.

Was the MoU an international agreement requiring ratification? This was the argument of the left in parliament, which raised a procedural objection when voting on Law 3845/2010. According to the members of parliament in this camp, the MoU implied the concession of constitutional competences and essential parts of national sovereignty to international organisations. It would determine governmental and social policy for many years and would constitute a precedent which would apply for decades. Should the MoU have been voted by a qualified majority as article 28 of the Constitution requires?

<sup>13</sup> See Afroditi Marketou and Michail Dekastros, 'Report on Greece' (*Constitutional Change Through Eurocrisis Law*, 16 January 2014, last updated 9 June 2015) para X.3 <[eurocrisislaw.eui.eu/greece/](http://eurocrisislaw.eui.eu/greece/)> accessed 12 September 2015.

<sup>14</sup> An official parliamentary translation of the Constitution of Greece (last revised 27 May 2008) is available at <[www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf](http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf)> accessed 12 September 2015.



The socialist government at the time did not take any position during parliamentary discussions. Parties from the right, on the other hand, contended that the agreements had no legal character. However, in the introductory report to the draft bill it was stated that the annexed MoU was an ‘integral part of the draft bill.’<sup>15</sup>

If the MoU was not legal in nature, was it simply the political programme of the government, attached to the statute as part of its explanatory report, or as a solemn declaration of the meaning of the statute? This was the line of argument applied by the Council of State in the decision concerning the constitutionality of Law 3845/2010.<sup>16</sup> According to the judges, the MoU could not be submitted to judicial scrutiny since it had no direct legal consequences.<sup>17</sup> The law’s non-legal character was evident in the fact that the constitutionally competent domestic authorities needed to enact implementing measures.<sup>18</sup> However, this solution would not resolve all constitutional quandaries. Article 82 of the Constitution attributes the responsibility for defining and directing the general policy of the state to the government. Eventually, parliamentary confidence or censure as regards this policy should be declared under a special motion, in accordance with article 84 of the Constitution. Otherwise, the Constitution does not provide for the possibility to vote on the government’s political programme.

According to the majority opinion of the Council of State, eventual legal obligations of the state to implement the economic policy defined in the MoU may result only from the subsequent Loan Agreement.<sup>19</sup> Until the crisis, however, loan agreements were not deemed to be international conventions creating public law obligations for the state and did not require ratification in order to be operative in the domestic legal sphere. This seemed to be the case for the Greek Loan Facility as well, which was drafted as an economic agreement governed by English law.<sup>20</sup> Did things change because Greek debt was bought by public organisations, outside the context and rules of the market? The issue has been contested in the Greek academic literature.<sup>21</sup> The First Loan Agreement, providing for high interest rates and austerity conditionality, seemed to be a convention that needed ratification according to article 36(2) of the Constitution. In

<sup>15</sup> See the introductory report to the bill, ‘Eisigitiki Ekthesi sto schedio nomou “Metra gia tin efarmogi tou michanismou stixixis tis ellinikis oikonomias apo ta krati meli tis zonis tou evro kai to Diethnes Nomismatiko Tameio” [Introductory report to the draft bill, “Measures for the implementation of the support mechanism of the Greek economy by the Member States of the euro zone and the International Monetary Fund”]’ (4 May 2010) 3 <[www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf](http://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf)> accessed 12 September 2015.

<sup>16</sup> See Greek Council of State (Plenary Session) Decision 668/2012 of 20 February 2012, 60 *Nomiko Vima* 384.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> First Loan Agreement (n 3) art 14.

<sup>21</sup> See, eg, Antonis Manitakis, ‘Ta syntagmatika zitimata tou Mnimoniou enopsei kratikis kyriarchies kai epitroumenis dimosionomikis politikis [The Constitutional Issues of the Memorandum in View of the Divided National Sovereignty and the Monitored Fiscal Policy]’ (2011) 51 *DtA* 689. For further analysis of the domestic discussion on the matter, see Marketou and Dekastros (n 13) para X.3.



this case, a qualified majority, according to article 28 of the Constitution, might have been required: imposing the definition of governmental policy, at least partially, by supra- and international organisations, it ceded to them important competences that constitutionally belong to the government.

The procedure followed for its implementation, however, indicates that the Loan Agreement was purported to have only a private economic legal nature. Law 3845/2010 was voted on before the signing of the agreement, and thus did not ratify it. Nor did a draft ratification bill that was brought to parliament on 4 June 2010.<sup>22</sup> Indeed, this bill was never discussed or subject to a vote in the Plenum because the competent parliamentary commission considered the ratification of the Loan Agreement not necessary.<sup>23</sup> From the point of view of transparency, moreover, official versions of the Loan Agreement were difficult to find at the time even in English, let alone in Greek.

Nonetheless, in the public discourse of the government, the fulfilment of the loan agreement conditions was perceived as a binding obligation imposed on the state. In the relevant parliamentary debates, the Prime Minister repeatedly stated that the MoU and the statute had not been the government's political choice but had been imposed by creditors.<sup>24</sup> Even more, Law 3845/2010 contained provisions that conferred on the Agreement a nebulous public law status. In its first article, it contained a description of the steps taken for the institution and activation of the support mechanism.<sup>25</sup> Further, annexed to the statute was the request by the Greek authorities for the activation of the support mechanism and the relevant statements of the Euro-area leaders.

Was thus governmental policy in Greece defined according to a non-ratified international agreement? And what does this mean for national sovereignty? It might be that the obligatory nature of the Economic Adjustment Programme resulted from the state's EU and Eurozone membership, which was a choice of Greece as a sovereign state. This hypothesis, expressed by the Council of State majority, is reinforced by the adoption of the MoU provisions in subsequent Council Decisions.<sup>26</sup> However, it is generally accepted that Member States have not conferred the competence to decide broad domains of governmental policy, such as the ones regulated by the MoU, on the EU institutions.

<sup>22</sup> See the draft bill entitled 'Ratification of the 8 May 2010 Loan Facility Agreement between the Hellenic Republic as debtor and the Member States of the Eurozone and of the KfW as creditors, as well as of the 10 May 2010 IMF Stand-by arrangement. Participation of Greece to the European Support Mechanism' <<http://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/ADANEIO.pdf>> accessed 3 November 2015. The title and the explanatory report of the draft bill explicitly refer to *ratification* of the First Loan Agreement.

<sup>23</sup> See Christos Staikouras (member of parliament in the right wing group Nea Dimokratia), 'Dilosi gia ti syzitisi kai enimerosi epi mnimonion, symfonion kai symvaseon [Declaration on the discussion and information on memoranda, agreements and conventions]' (23 June 2010) <<http://www.cstaikouras.gr/2010/06/dilosi-gia-ti-sizitisi-ke-enimerosi-epi-mnimonion-simfonion-ke-simvaseon/>> accessed 5 March 2016.

<sup>24</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6766.

<sup>25</sup> Law 3845/2010, art 1(1)–(2).

<sup>26</sup> See Council Decision 2010/320/EU and its amendments.

The Economic Adjustment Programme was thus introduced into the domestic legal order with no respect for constitutional procedures and forms. Incoherent justifications of the measures, opportunistically advanced by the government according to the forum to which they were addressed, excluded every kind of accountability. Legal accountability was excluded since the text was presented as a political programme that could not be submitted to judicial scrutiny.<sup>27</sup> Furthermore, political accountability was considerably limited, since the government argued that the programme had resulted from binding supra- or international obligations and its specific provisions were barely discussed in parliamentary debates. These features have seemed to acquire a permanent character in following developments.

## 2 Crisis management or permanent transformation?

Scheuerman observes that 'executive-dominated emergency economic regulation now represents a more or less *permanent* feature of political life in many liberal democracies.'<sup>28</sup> This is true at least for Greece. Many different persons and political parties have participated in the political branches of the Greek government since 2010, but the major policy guideline has remained unique: to respond to the economic emergency faced by the state. Law 3845/2010 thus marks the starting point of a serious degradation of Greek constitutional democracy.

Deconstruction of constitutional forms and procedures became permanent in the main body of Law 3845/2010. The government exploited the ambiguity as to the nature of the instruments employed, in order to limit the role of parliament in the implementation of the relevant agreements. Article 1(4) of Law 3845/2010 delegated to the Minister of Finance the power to bind the state to future agreements regarding the application of the Economic Adjustment Programme. The original version of the provision required that relevant agreements be brought to parliament for ratification. However, it was amended two days later, by a last minute 'legal-technical' correction, voted on again through the emergency procedure: the term 'ratification' was replaced by the terms 'discussion and briefing', rendering agreements operative from the moment of their signature.<sup>29</sup> According to the representative of the government, the amendment was necessary in order for the First Loan Agreement, signed some days later, to come into immediate effect, and thus before 19 May 2010, the date on which the bond loans matured.<sup>30</sup> Less than a month later, article 93 of Law 3862/2010 reiterated that agreements and MoUs relevant to the participation of the state in the European Financial Stability Facility (EFSF) would

<sup>27</sup> See Council of State (Plenary Session) Decision 668/2012 (n 16).

<sup>28</sup> William Scheuerman, 'The Economic State of Emergency' (2000) 21 *Cardozo L Rev* 1869, 1870 (emphasis in original).

<sup>29</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2).

<sup>30</sup> *ibid* 6742.

be brought before parliament only for discussion and briefing.<sup>31</sup> Nevertheless, such instruments, creating economic burdens for the Greek people and imposing austerity policies, might need ratification according to article 36 of the Constitution.

Constitutional deconstruction does not only concern the openness of the domestic system to international legal instruments; it also takes place in the internal distribution of constitutional competences between the legislature and the executive. Article 2 of Law 3845/2010 conferred on the executive a broad range of powers to take the necessary measures for the application of the Economic Adjustment Programme. This broad delegation met objections even by parties that voted in favour of the MoU.<sup>32</sup> Article 43 of the Constitution concerns the delegation of powers to the executive. It declares:

2. The issuance of general regulatory decrees, by virtue of special delegation granted by statute and within the limits of such delegation, shall be permitted on the proposal of the competent Minister. Delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature.

(...)

4. By virtue of statutes passed by the Plenum of the Parliament, delegation may be given for the issuance of general regulatory decrees for the regulation of matters specified by such statutes in a broad framework. These statutes shall set out the general principles and directives of the regulation to be followed and shall set time-limits within which the delegation must be used.

The MoU, affecting virtually all domains of governmental policy, could not be considered as addressing ‘more specific matters or matters of local interest or of a technical and detailed nature’, as paragraph 2 imposes. Nor was Law 3845/2010 valid as a framework statute, as defined in paragraph 4; constitutional law scholars agree that the formal conditions for such a statute were not fulfilled.<sup>33</sup> Therefore, the relevant statutory provisions, far too broad to meet the commonly accepted constitutional limits to the delegation of legislative power, made emergency norm production a permanent possibility.<sup>34</sup>

But the government was not alone in this reign of the executive. The Loan Agreement provided that the disbursement of each tranche would take place through a unanimous Eurogroup decision. This decision would be based on the evaluations of

<sup>31</sup> See Law 3862/2010 of 8 July 2010, Government Gazette A 113.

<sup>32</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6788.

<sup>33</sup> See, eg, Prokopis Pavlopoulos, ‘Paratiriseis os pros ti nomiki fysi kai tis ennomes synepeies tou “Mnimoniou” [Comments on the legal nature and the legal consequences of the “Memorandum”]’ (22 October 2010) <[http://prokopispavlopoulos.gr/index.php?option=com\\_content&view=article&id=197:-qq-&catid=48:2010-10-22-17-50-50&Itemid=71](http://prokopispavlopoulos.gr/index.php?option=com_content&view=article&id=197:-qq-&catid=48:2010-10-22-17-50-50&Itemid=71)> accessed 5 March 2016. For further analysis and literature on the matter, see Marketou and Dekastros (n 13) para X.7.

<sup>34</sup> It is generally accepted that a framework-statute must concern a homogeneous subject matter and must determine the general legislative guidelines for the regulation of the matter. See Marketou and Dekastros (n 13) para X.7.

the domestic reforms by a technocratic body composed of a representative of each of the European Central Bank (ECB), the IMF and the European Commission (EC), on behalf of the Euro-area Member States.<sup>35</sup> In public debates, this body was referred to as the troika. The broad powers of the troika in the determination of governmental policy were not mirrored in legislation. Instead, these powers operated *de facto*, and were accommodated through their ‘coating’ with a domestic political garb. In other words, whenever the legality of the troika’s requirements was contested, the creditors claimed that the particular measures adopted were the choice and exclusive competence of the Greek government.<sup>36</sup> On the contrary, in public debates recommendations by the troika were claimed to determine every aspect of governmental policy.<sup>37</sup> They were repeatedly invoked by the Greek government to justify the use of emergency procedures and instruments.

The economic crisis was not overcome and the situation of legal emergency was extended as well. On 14 March 2012, a second rescue package was agreed upon between Greece and its creditors.<sup>38</sup> The troika preserved its broad powers and became subtly institutionalised; it was expressly mentioned in many official documents of the Second Economic Adjustment Programme.<sup>39</sup> Thus, it seems that under the force of economic adjustment the Greek political regime shifted to a system whereby parliament became impotent in the face of an ‘executive unbound’;<sup>40</sup> or, put more bluntly, with an executive solely bound by the precepts of international institutions or formations, claiming technocratic legitimacy. The loss of national sovereignty and of legislative autonomy caused by the troika review missions, combined with the lack of political accountability of the troika members, provoked constant argument in public and parliamentary debates.<sup>41</sup> Despite this state of exception, law and legality have played an important role in emergency argumentation.

<sup>35</sup> See First Loan Agreement, preamble, para 8.

<sup>36</sup> Regarding the questions raised in the European Parliament on the closure of ERT (Greece’s National Radio and Television Foundation), see ‘Joint answer given by Mr Rehn on behalf of the Commission’ (European Parliament, 2 August 2013) <[www.europarl.europa.eu/RegData/questions/reponses\\_qe/2013/006815/P7\\_RE\(2013\)006815\\_EN.pdf](http://www.europarl.europa.eu/RegData/questions/reponses_qe/2013/006815/P7_RE(2013)006815_EN.pdf)> accessed 12 September 2015.

<sup>37</sup> See, eg, ‘Tin epomeni evdomada sti Vouli to nomoschedio me ta proapaitoumena [The bill containing the preconditions is introduced to Parliament next week]’ (25 July 2014) <<http://news.in.gr/economy/article/?aid=1231337007>> accessed 5 March 2016.

<sup>38</sup> See European Commission, ‘The Second Economic Adjustment Programme for Greece’ (Occasional Paper on the European Economy No 94, March 2012) <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp94\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf)> accessed 6 March 2016.

<sup>39</sup> See, eg, European Commission, ‘The Second Economic Adjustment Programme for Greece—Second Review’ (Occasional Paper on the European Economy No 148, May 2013) <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/pdf/ocp148\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp148_en.pdf)> accessed 12 September 2015.

<sup>40</sup> Lina Papadopoulou, ‘Can Constitutional Rules, Even if “Golden”, Tame Greek Public Debt?’ in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 236.

<sup>41</sup> See, eg, Minutes of the Greek Parliament (28 March 2012) 8032ff <<http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20120328.pdf>> accessed 5 March 2016.

### 3 Exception 'normalised' through law

While constitutional forms and procedures were deconstructed, a web of international legality was being fashioned around the Loan Facility that Greece had agreed with its creditors. As we saw, article 93 of Law 3862/2010, enacted by parliament on 5 July 2010, declared that agreements and MoUs relevant to the participation of the state in the EFSF were to be brought before parliament only for discussion and briefing. However, the same article explicitly provided for the legal status of loan agreements as *international conventions* which, contrary to other agreements, would be brought to parliament for *ratification*, and would be valid only after the publication of the relevant statute in the Official Gazette.<sup>42</sup> Following this provision, the EFSF Framework Agreement, together with its amendments, was brought to parliament for ratification, more than a year after its initial signature.<sup>43</sup> If we take into account that such ratification did not take place in other EFSF countries, why was it needed in Greece?

The answer is that the 'legalisation' of international agreements in the domestic sphere was deemed to protect creditors from the consequences of an abrupt political change, already predictable at the time.<sup>44</sup> Indeed, article 28(1) of the Constitution confers supra-legal status on ratified international agreements. Therefore, generally, promoters of austerity have always presented the measures in public debates as resulting from a *legal* obligation of the Greek government. Possessing an ambiguous status (European norms, international norms or economic agreements concluded by the state as *fiscus*), Eurocrisis legal instruments have acquired a *de facto* validity and binding nature in the domestic sphere.

Sometimes this apparent validity was obtained by invoking Greece's EU commitments. Austerity measures included in Law 3845/2010 did not have a temporary character. Since economic emergency was invoked for their justification, the measures were contested before the Council of State as disproportionate to their aim. However, the Court specified that the legislative purpose was 'not only to face, according to the assessments of the legislature, the sharp fiscal crisis but also [to consolidate] public finances in a way that will be sustainable in the future.'<sup>45</sup> This purpose was characterised as a 'compelling public interest' and 'an aim of common interest for Eurozone Member States, in view of the obligation of fiscal discipline and guarantee of the stability of the Eurozone as a whole, established by EU legislation.'<sup>46</sup> Was it an economic emergency, or

<sup>42</sup> Yet, according to art 94 of Law 3862/2010, this provision is retroactively valid only from 1 June 2010; it thus does not concern the First Loan Agreement. See Marketou and Dekastros (n 13) para IV.2. It is interesting to note that the same provision had been included in the draft law ratifying the First Loan Agreement, which was never discussed or voted on in Parliament.

<sup>43</sup> Art 48 of Law 4021/2011 of 3 October 2011, Government Gazette A 218.

<sup>44</sup> The representatives of the socialist government actually admitted that ratification was required by the creditors in some cases. See Minutes of the Greek Parliament (5 July 2010) 9581 <[www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100705.pdf](http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100705.pdf)> accessed 12 September 2015.

<sup>45</sup> See Decision 668/2012 (n 16) para 35.

<sup>46</sup> *ibid.*

was it rather a *requirement by EU legislation* to follow a certain economic policy, that necessitated the measures?

The ambiguity surrounding the status of the MoU and the Loan Agreement was deliberately preserved in the Second Economic Adjustment Programme. The drafts of the relevant texts were annexed to Law 4046/2012,<sup>47</sup> before their signature. Through the vote on the statute, the government was asking for the approval of the annexed drafts. They were also asking the parliament to authorise the Minister of Finance and the President of the Bank of Greece to represent the state in the negotiations of the texts and to sign the relevant agreements, which would be immediately operative.<sup>48</sup> However, such approval is not a procedure envisaged by the Greek Constitution, which only provides for *ratification* of international agreements.<sup>49</sup> In the competent parliamentary committee, the Minister of Finance at the time argued that the MoUs were staff level agreements, not needing ratification.<sup>50</sup> Still, article 1(6) of Law 4046/2012 declared that certain provisions of the Memorandum of Understanding on the Specific Conditions of Economic Policy were ‘perfect legal rules of direct application’ and thus, in a sense, ratified them.

Ambiguity continued to exist at a supranational level as well. The First Review of the Second Economic Adjustment Programme declared that ‘[t]he EU Council decision (...) adopted upon a recommendation of the European Commission, sets the steps and deadlines to be respected to correct the situation of excessive deficit.’<sup>51</sup> In other words, it seems that the programme acquired a European legal mantle. However, the Review went on to state that the MoU documents were drafted jointly by the troika and the Greek authorities, and were implemented according to a pre-agreed timetable.<sup>52</sup> In other words, though the ‘steps and deadlines’ were European legal obligations, the specific provisions in the MoU—which ‘comprehensively identified the specific measures to be taken, going into a high degree of detail’—were not.<sup>53</sup>

The ambiguous nature of the MoU commitments did not reassure the state’s creditors, who sometimes required personal written confirmations by Greek political leaders that

<sup>47</sup> Law 4046/2012 of 29 February 2012, Government Gazette A 40.

<sup>48</sup> Arts 1(3)–(6) of Law 4046/2012. The statute in its title itself explicitly stated that what the Government was requesting was the *approval* of the annexed texts.

<sup>49</sup> See arts 28 and 36 of the Constitution.

<sup>50</sup> See the speech by Evangelos Venizelos, Minister of Finance, in the competent parliamentary committee (11 February 2012) <[www.hellenicparliament.gr/Vouli-ton-Ellinon/ToKtirio/Fotografiko-Archeio/#a9f345a6-5cad-40e9-b36a-0a416f376a8c](http://www.hellenicparliament.gr/Vouli-ton-Ellinon/ToKtirio/Fotografiko-Archeio/#a9f345a6-5cad-40e9-b36a-0a416f376a8c)> accessed 12 September 2015.

<sup>51</sup> European Commission, ‘The Second Economic Adjustment Programme for Greece—First Review’ (Occasional Paper on the European Economy No 123, December 2012) 7 <[ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp123\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf)> accessed 12 September 2015.

<sup>52</sup> See European Commission, ‘The Second Economic Adjustment Programme for Greece—Fourth Review’ (Occasional Paper on the European Economy No 192, April 2014) 9 <[ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2014/pdf/ocp192\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp192_en.pdf)> accessed 12 September 2015.

<sup>53</sup> European Commission, ‘Second Economic Adjustment Programme for Greece—First Review’ (n 51) 7.

they would follow the policies defined in them.<sup>54</sup> Even though such confirmations would only have a political nature, their international and constitutional legality is doubtful, especially insofar as they were required as a condition for the application of the Loan Agreement by the creditors. Even more, in the First Review of the Second Economic Adjustment Programme it was stated that the MoU documents would be ‘subsequently transformed into a *cogent* law through a vote in Parliament.’<sup>55</sup> Still, when a normal voting procedure is employed, a law can be ‘cogent’ in Greece only if it is ratifying international legal agreements. In other words, it seems that, whilst a web of international legality was being constructed, it was only operating in the domestic legal sphere, binding parliament and future governments. On the contrary, the troika’s missions and the MoUs did not need to be founded on any international or European legal text, and did not engage the accountability of the European institutions involved before the Court of Justice of the EU.

What is more, the MoU progressively ceased to be perceived as an exceptional instrument to face the economic emergency; it was ‘normalised’. For the first time, the First Review of the Second Adjustment Programme stated that the MoU texts

are living documents and are modified at every quarterly review mission, based on implementation of previous commitments and identification of new ones. The first programme documents were established in May 2010. The set of documents included in this publication constitutes the seventh version since then.<sup>56</sup>

This declaration, repeated in following reviews, established continuity and coherence between the First and the Second Economic Adjustment Programme. Most importantly, omitting any reference to exceptional circumstances and characterising the MoUs as ‘living documents’, the declaration overturned their ad hoc nature.

‘Normalisation’ of the emergency further took place in the domestic sphere, through the use, or rather abuse, of constitutional procedures. Even though loan agreements are legally defined as international agreements needing ratification, no loan agreement was ever ratified by parliament. For the Second Loan Agreement and its Amendments, the procedure used to circumvent the ratification requirement would confuse the most cunning of constitutional lawyers: the government issued an emergency decree-law, approving the draft of the relevant loan agreement and authorising the competent authorities to sign it. Then, when agreements were already valid and operative in the international economic sphere, the relevant decree-laws were introduced into parliament for ratification, which validated them retroactively in the domestic legal order.<sup>57</sup>

<sup>54</sup> See Jan Strupczewski, ‘Eurogroup Set to Release Greek Tranche, Fix EFSF Leveraging Rules’ *Reuters US* (25 November 2011) <[www.reuters.com/article/2011/11/25/eurogroup-idUSL5E7MO3NZ20111125](http://www.reuters.com/article/2011/11/25/eurogroup-idUSL5E7MO3NZ20111125)> accessed 12 September 2015.

<sup>55</sup> See European Commission, ‘Second Economic Adjustment Programme for Greece—First Review’ (n 51) 7 (emphasis added).

<sup>56</sup> *ibid.*

<sup>57</sup> See Marketou and Dekastros (n 13) 94.



This is not the only example of parliament having been called upon to ratify *de facto* established situations. Indeed, during the crisis governments have made increasingly extensive use of the emergency decree-laws, in Greek called ‘acts of legislative content’. According to article 44(1) of the Greek Constitution:

Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of Article 72 paragraph 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session. 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.

Usually putting forward a formal, self-serving justification,<sup>58</sup> governments have used this *sui generis* instrument to implement complex and contentious provisions. This practice is even more degrading for the role of the parliament, if one considers that often many such administrative acts were subsequently ratified en masse, annexed to legal statutes that were brought to vote under the emergency procedure.<sup>59</sup>

Five years of prolonged economic emergency have produced thus an unusual constitutional situation. Constitutional politics and norm production in Greece are not anymore based on democratic parliamentary deliberation, as the Constitution requires, but on international agreements concluded by the executive, and having ambiguous nature and changing content. Constitutional rules are continuously circumvented or abused. Still, the Constitution is broadly recognised as a valid legal text. Though a state of emergency has sometimes corroded its forms, the institutions for which it provides are operating according to its procedures and in its name. In the end, emergency is being ‘normalised’ *through the Constitution itself*. How can we account for this contradiction from an internal constitutional law point of view?

#### 4 Constitutional transformation as loss of faith in the domestic Constitution

What local constitutional transformation means depends to a large extent on the local form and meaning of the Constitution before the crisis. National constitutions can be very different in this respect. In the United Kingdom, even though famously there is no written constitution, there is a long-standing belief in certain political conventions so firm that nobody would dare contest them. Greece is a very different case. Since the

<sup>58</sup> Typically, these acts start with a statement that the government took into account the ‘extraordinary circumstances of an urgent and unforeseeable need’ to take the measures each time contained in the act. See, eg, the acts ratified by Law 4111/2013 of 25 January 2013, Government Gazette A 18.

<sup>59</sup> See, eg, Law 4111/2013. This statute ratified under the emergency procedure six decree-laws containing various complex and totally irrelevant provisions. Among them, there were certain austerity measures, as well as an amendment of the Second Loan Agreement.

beginnings of the Greek state almost two hundred years ago, its Constitution has always been written. Always, except for periods of oppression and turmoil—such as control by military juntas, the occurrence of coups d'état and wars, including a civil war—that the country has experienced in its short history.<sup>60</sup> The Constitution, in its formal incorporation into a written and entrenched document, symbolises the existence of the state itself and a strong commitment to liberty and equality against the arbitrary powers of the Ottoman local authorities. Unsurprisingly, the Constitution is dear to the Greek people as a symbol of national independence and guarantee against oppression. For instance, the central square of Athens is called *Syntagma*, ie Constitution Square.

The English constitution is said to have its source in long-lived social practices and to be itself a result of the liberty of the English people. On the contrary, constitutional texts adopted over time in Greece have always been ambitious and have illusorily represented social reality. More than a functional document, the Constitution in Greece has had a strong symbolic value; it has rather expressed an ideal, a level of 'civilisation' that the Greek people want to achieve. Often following the model of more 'advanced' European countries, the drafters of Greek constitutions have always expressed the popular image of a desired polity with European orientation. This popular image, whenever it existed, has been founded on a consensus on certain fundamental political moral values. Mazower relates the words of an inhabitant of Ottoman Salonika in 1908: 'Constitution is such a wonderful thing that he who does not know what it is is a donkey.'<sup>61</sup> Still, the strong commitment to the Constitution has not impeded the existence of authoritarian regimes, with the military regime of 1967 still lively social memory.

The fall of the junta, in 1974, inaugurated a new era in Greek political history, the so-called *Metapolitefsi* (change of regime). The Constitution of 1975, to a large extent still formally valid today, was the fruit of the rejection of the nationalist authoritarian regime and the tool for the re-establishment of democracy. It 'reconnected Greece with the European constitutional tradition.'<sup>62</sup> Furthermore, the 1975 Constitution was deemed to be one of the most progressive ones at a European and international level at the time it was enacted.<sup>63</sup> Until recently, it was generally considered a 'constitutional success,'<sup>64</sup> as for long it had, more effectively than any text preceding it, organised the domestic political life. Indeed, the 1975 Constitution consolidated democracy, the rule of law and human rights protection in Greece. Until recently, domestic constitutional scholarship was still proud of the regime established in 1975. In the words of Alivizatos, 'for the

<sup>60</sup> For an interesting essay on Greek constitutional history, see Giannis Drosos, *Dokimio Ellinikis Syntagmatikis Theorias* [An Essay on Greek Constitutional Theory] (Sakkoula 1996).

<sup>61</sup> Mark Mazower, *Dark Continent: Europe's Twentieth Century* (1st edn, Vintage Books 2000) 4.

<sup>62</sup> Nicos Alivizatos, *O Avevaios Eksygychronismos kai i Tholi Syntagmatiki Anatheorisi* [The Uncertain Modernization and the Vague Constitutional Reform] (Polis 2001) 174.

<sup>63</sup> Aristovoulos Manessis, 'Oi Kyries Synistoses tou Systimatos Themeliodon Dikaiomaton tou Syntagmatos tou 1975 [The Main Composants of the Fundamental Rights System in the Constitution of 1975]' in Aristovoulos Manessis, *Syntagmatiki Theoria kai Praxi* [Constitutional Theory and Practice], vol II (Sakkoula 2007).

<sup>64</sup> Alivizatos (n 62) 185.

Greek constitutional law scholars, 1974 was what 1945 had been for their European colleagues.<sup>65</sup> In their minds, Greek society had for once reached close to the ideal polity depicted in its Constitution.<sup>66</sup>

The metaphor of constitutionalism as a civil religion is well known to US lawyers. I propose that it is a useful metaphor in order to account for the ongoing constitutional-political transformation in Greece. In the Greek context, at least since 1975, there has traditionally been a 'reverence' for the Constitution, as emanating from the 'democratic deity The People'.<sup>67</sup> Indeed, the dominance of the 'will of the people' was the major stake in the first years of the *Metapolitefsi*. The 1975 Constitution formally expresses and institutionalises this: article 1, which has not yet been subject to constitutional amendment, defines the principle of popular sovereignty as the foundation of the polity. It concretises the principle with the following statement: 'All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution.' Faith in 'the People' has thus been closely connected to the existence of a written formal constitution which regulates political life and constrains public power. The formal qualities of the Constitution as an entrenched text have determined to a large extent the rites of Greek constitutionalism. Exegesis and formalism are traditionally essential features of Greek legal and constitutional scholarship.

Other elements seem to enforce the religious analogy. Kennedy observes that in a world of believers, people understand their constitutional history in the modes of patriotism and morality.<sup>68</sup> Indeed, the Greek constitutionalist narrative, widely shared in Greek society, expresses both these visions. Greek constitutions have expressed the particularities of the Greek people and have represented a particularly Greek way of national self-determination. The 1975 Constitution, for example, begins with an admittedly strange phrase, fruit of a particularly Greek understanding of political morality: 'In the name of the Holy and Consubstantial and Indivisible Trinity'. Constitutionalism as patriotism is expressed in the last provision of the Constitution: 'Observance of the constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution.'<sup>69</sup>

Moreover, Greek constitutions have embodied the moral values of the most idealistic image of the Greek people. Interestingly, despite their historic particularities and their devotion to the Orthodox Church, constitutional texts have always depicted the Greek people as a European-oriented liberal democratic society. They have comprised long catalogues of constitutional rights and have been open to European integration. This

<sup>65</sup> *ibid* 23.

<sup>66</sup> See Dimitrios G Sioufas (member of parliament), 'Foreword', in the official parliamentary translation of the Constitution of Greece (n 14) 7.

<sup>67</sup> Duncan Kennedy, 'American Constitutionalism as Civil Religion: Notes of an Atheist' (1995) 19 *Nova L Rev* 908, 909.

<sup>68</sup> *ibid*, especially 919ff.

<sup>69</sup> Constitution of Greece, art 120(4).

European orientation is combined with the belief in the power of the Constitution as a vehicle to achieve the more 'advanced' level of 'civilisation' and sometimes even the economic prosperity of Greece's European partners.<sup>70</sup> The foreword of the 1975 Constitution, for example, states that its text 'fully expressed the *acquis* of post-war European constitutionalism, and, indeed, considering the institutional backwardness of the Country at the political level during the first decades following World War II, signalled a real advance in that direction.'<sup>71</sup>

Of course, there is always a shift between how a constitution works in the popular imagination and how it actually works in practice. For example, while in the dominant political morality, expressed in the constitutionalist religion, parliament might be the primary legislator, in practice, legislative initiative has its source in the government; parliament is usually confined to approving draft bills. Even more, popular constitutionalist imagination might be consciously wrong or even hypocritical. In this sense, believing in popular sovereignty should not be considered a 'mistake'; it might be a custom, nostalgically preserved, even if it is naïvely or in bad faith used by people exercising public power. This does not reverse the fact that constitutionalism as faith has always played a role in political argumentation. Even if it found poor correspondence in practice, since its enactment, the 1975 Constitution, in the sense of a formal text guaranteeing popular sovereignty and liberal values, has had a strong symbolic value. It has been a criterion for the legitimacy of political arguments and propositions.<sup>72</sup> Constraining the argumentation of political actors, it has constrained political practice as well.

In contrast, the abuse of constitutional procedures in Eurocrisis legislative practice shows that this symbolic value of the Greek Constitution has been lost, even though the constitutional text is still formally valid.<sup>73</sup> The excessive use of emergency procedures and 'acts of legislative content', for example, bears a strong symbolic meaning: a similar practice by Ioannis Metaxas in the 1930s completely degraded the role of the parliament and led to the dictatorship of August 1936. Symbolism is important, especially when it concerns what is generally accepted as fundamental in a constitutional democracy. The public television and radio have long functioned as national symbols of free speech and have always been attacked by oppressive regimes. In 2013, the public media were shut down after the issuing of an act of legislative content that expanded an existing

<sup>70</sup> See more generally Drosos (n 60) 39ff.

<sup>71</sup> See Sioufas (n 66) 7.

<sup>72</sup> Indeed, the conformity or non-conformity of a certain political proposition to the Constitution has been often used as a moral-political argument itself. This is usually the case in constitutional democracies.

<sup>73</sup> Observing the deconstruction of constitutional forms and symbols does not necessarily presuppose faith in the Constitution. Even more, it does not presuppose faith in the existence—or the accessibility of knowledge—of a *correct* constitutional solution for each case. Finally, it does not imply any normative evaluation of constitutional deconstruction. Even taking a point of view totally external to the Greek system of constitutional law, one can observe that constitutional precepts and values are not anymore constraining local constitutional actors.

legislative delegation to the administration on the matter.<sup>74</sup> Their closing was presented by the government as satisfying a requirement set by the troika for reducing the number of public employees, an allegation denied by the creditors.<sup>75</sup> Whatever its source and the reasons for the emergency, the act of legislative content was never ratified by parliament, and therefore ceased to be valid. However, it succeeded in fully producing *de facto* consequences.

‘Continuity’ and ‘change’ in the English constitution are criteria for accepting or criticising political propositions in the English political sphere.<sup>76</sup> In this sense, the English constitution, dynamic and unwritten, still channels the evolution of domestic politics. On the contrary, what is observed in Greece under the Economic Adjustment Programmes is *rupture*. Since the outburst of the Eurocrisis, Greece has experienced a rather inverse phenomenon from what is happening in the UK. Though the country possesses a written constitution, no one seems to believe anymore in the political conventions that it formalises. The crisis abruptly unveiled the deficiencies of the Greek polity. Suddenly, the ‘constitutional success’ of 1975 was reinterpreted as a failure, as the grounding for the establishment of a rotten political system, which the Constitution sustained and even nourished for more than 30 years. Everyone started talking about replacing the 1975 Constitution; propositions for constitutional amendments were included in the political programmes of the major parties in the 2012 elections. Venizelos even referred to a ‘constituent’ power of parliament, thus making rupture with the 1975 Constitution explicit.<sup>77</sup>

However, very soon it became clear that the Greek people could no longer agree on what their desired polity would be. So, while constitutional amendment discussions have been temporarily silenced, the loss of faith in the Constitution remains. The Constitution has lost its capacity to shape constitutional politics in Greece and its importance as a criterion for the legitimacy of political propositions. Its forms, categories and instruments—when they are respected at all—are rather mobilised by legal-constitutional experts in the Scientific Service of Parliament,<sup>78</sup> in the ministerial cabinets and in public debates, in order to *circumvent* parliamentary deliberation.

<sup>74</sup> See Act of Legislative Content, ‘Amendment of the provisions of article 14(B) Law 3429/2005’ (10 June 2013) Government Gazette 139 A. This act was the legal basis of Decision OIK.2/2013 of the Minister of Finance, ‘Suppression of the public enterprise Greek Radio-Television, AE (ERT-AE)’ (11 June 2013) Government Gazette B 1414, issued the next day.

<sup>75</sup> See, eg, ‘Joint answer given by Mr Rehn on behalf of the Commission’ (n 36).

<sup>76</sup> For a survey of various examples of constitutional evolution in the United Kingdom, see John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007).

<sup>77</sup> Xenophon Contiades and Ioannis Tassopoulos (n 5).

<sup>78</sup> The Scientific Service of Parliament is a body composed of experts in various domains, including public law, constitutional and institutional history, environmental issues, European law and international relations. The mission of this service is to provide technical advice to parliament on the various bills that are introduced for discussion.

## 5 Loss of faith in the domestic constitutional discourse

Loss of faith is demonstrated at the level of the domestic constitutional discourse. Indeed, domestic political and legal actors often justify the changes brought about by the Eurocrisis from the point of view of the Constitution. This justification discourse appears in parliamentary debates, in statutes' explanatory and introductory reports, in public and academic debates and in judicial decisions and opinions. The various arguments express different versions of constitutional faith. In some cases, they even express a total loss of faith in the Greek Constitution. Here, I will only refer to some examples of constitutionally relevant arguments.

At a first level, domestic actors have sometimes attempted to accommodate the socio-political situation within pre-existing constitutional categories, rules and concepts. In their reasoning, constitutional forms operate differently due to the influence of exceptional circumstances. For example, called to rule upon the constitutionality of Law 3845/2010, the Council of State dedicated half of its reasoning to the description of the exceptional situation that the state was facing.<sup>79</sup> Then, as we saw, it went on to declare that the impugned measures were justified by the 'fiscal emergency' or the 'compelling public interest' of the consolidation of public finances, which also constituted the 'aim of common interest for Eurozone Member States'.<sup>80</sup> Admittedly, it is not usual for a domestic court to justify restrictions to fundamental rights by referring to the common interest of the members of a supranational organisation. But, as noted above, this is related to the ambiguous foundation of the Economic Adjustment Programme. Besides, it is not the only originality in the Council of State's qualification: until recently, the same Court had constantly rejected the nature of a 'fiscal interest of the State' as a legitimate reason justifying fundamental rights' restrictions.<sup>81</sup> However, since the beginning of the crisis, the financial public interest had been progressively qualified as a 'compelling national interest' in previous cases.<sup>82</sup> Thus, the path to decision 668/2012 had been paved.<sup>83</sup>

Exceptional circumstances affect not only the definition of constitutional concepts; they also have an impact on the intensity of judicial scrutiny, and unavoidably affect the scope of constitutional protection of fundamental rights.<sup>84</sup> This is usually justified through the principle of proportionality. In the decision 668/2012, the majority of the Council of State, citing Strasbourg case law on the right to property, deferred to governmental policy choices. The judges stated that assessments by the legislature concerning the

<sup>79</sup> See Decision 668/2012 (n 16) paras 9–14.

<sup>80</sup> *ibid* para 35.

<sup>81</sup> See Council of State (Plenary Session) Decision 1663/2009 of 13 May 2009 [2009] EEvrd 435.

<sup>82</sup> See Council of State (6th Section) Decision 1620/2011 of 30 May 2011 [2011] EDKA 350.

<sup>83</sup> Iakovos Mathioudakis, 'Metaschimatismoi tou Tameiakou Symferontos tou Dimosiou se Periodo Entonis Oikonomikis Krisis [Transformations of the Cash Interest of the State in a Period of Intense Economic Crisis]' [2011] EfDD 478.

<sup>84</sup> See, eg, in the domestic literature, Panagiotis Pikrammenos, 'Dimosio dikaio se ektaktes synthikes apo tin optiki tis akrotikis dioikitikis diadikasias [Public law under exceptional circumstances from the point of view of the administrative procedure of annulment]' [2012] ThPDD 97.

importance of the public interest that the austerity measures were advancing, as well as the suitability and the necessity of those measures, were political or factual evaluations subject only to marginal judicial scrutiny.<sup>85</sup> Therefore, the Court applied only a kind of rational basis test: it stated that the impugned measures were part of a 'broader programme of economic adjustment and structural reforms' that, 'comprehensively and coordinately applied', would purportedly respond to the fiscal crisis and lead to economic sustainability.<sup>86</sup> The measures, directly contributing to the reduction of public spending, were thus not 'manifestly unsuitable', and could not be deemed unnecessary for the pursuit of the compelling public interest of the consolidation of public finances.<sup>87</sup>

The incidental and fragmented way in which cases arrive before the Council of State does not allow for a holistic account of the matter. In contrast, academic scholarship confronts the new constitutional situation at a more abstract level. When they do not object to the incompatibility of the new state of affairs with constitutional precepts, domestic authors often try to justify the constitutional-political changes by 'dressing them in familiar clothes.' According to Drosos, for example, the MoU and the central role that the troika acquired in the determination of governmental policy mark a 'turning point' in the Greek polity, which took place *de facto*, without the need for constitutional amendment.<sup>88</sup> The author suggests that similar fundamental shifts have occurred in the past and do not contest the validity of the Constitution.<sup>89</sup>

This type of argumentation is often combined with an attempt to 'force' the Constitution in order to make it fit reality. An article written by Contiades and Fotiadou is illustrative of this.<sup>90</sup> The authors propose the principle of proportionality as a method for the definition of the content of fundamental social rights.<sup>91</sup> Crisis-related case law and legislation is used as a support for their arguments. According to their line of reasoning, it is constitutional theory that should fit reality and not the other way around. Similarly, Manitakis offers a constitutional account of the situation which is influenced by the 'existential dimensions' that the financial crisis has acquired.<sup>92</sup> Thus, the author re-invents constitutional concepts, such as national sovereignty and public interest, in order to accommodate the MoU. Mobilising highly complex technical arguments and distinctions, he attempts to justify constitutional political changes.

What is common in the above justifications is that emergency is accommodated by the Constitution. Though exceptional, the situation remains within the constitutional realm. The constitutional text remains a central part of constitutional-political

<sup>85</sup> See Decision 668/2012 (n 16) para 35.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> See Giannis Drosos, 'To "Mnimonio" os Simeio Strofis tou Politevmatos [The "Memorandum" as a Turning Point of the Regime]' (2011) 6 *The Book's J* 41.

<sup>89</sup> *ibid.*

<sup>90</sup> Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 *Intl J Con L* 660.

<sup>91</sup> *ibid.*

<sup>92</sup> See Manitakis (n 21) 707.



argumentation, even though the scope of its provisions is fluid and adapted to the circumstances. This is not surprising, since the Council of State, like constitutional law scholars, derive their authority as constitutional-political actors from the existence of a valid Constitution. Therefore, in these actors' argumentation, constitutionalist faith is not lost; we are rather in what Balkin has called a 'middle game relationship', where one can still hope for improvement after the economic and constitutional crisis ends.<sup>93</sup> Thus, unless the Constitution is not turned into something totally elastic, in this type of reasoning constitutional theory preserves a minimal critical function. In other words, courts preserve for themselves the possibility of declaring legislative or administrative choices unconstitutional in the future. In subsequent cases, Greek courts have indeed scrutinised more stringently legislative interferences with fundamental rights, and have declared measures implementing the Economic Adjustment Programme to be unconstitutional.<sup>94</sup>

A subtle but fundamental change occurs when it is claimed that the measures actually *implement* the Constitution. This argument, existing already in an embryonic form in decision 668/2012, is more explicit in the public discourse of the supporters of austerity policies. Thus, it has been generally advanced by the government that the statutes related to Eurocrisis law were applying, and not violating, national constitutional law. The main legal-technical argument is that article 28 of the Constitution explicitly provides for European integration and that implementation of the Economic Adjustment Programme is a necessary step in this direction. More broadly, budgetary discipline is argued to contribute to the modernisation of the Public Administration and to the elimination of Greek pathologies, deemed to be culturally specific.<sup>95</sup> Austerity is argued to be necessary in order for the state to regain its sovereignty, lost as a consequence of the debt crisis.<sup>96</sup>

In this kind of rhetoric, the Constitution no longer represents a text composed of written rules, procedures and substantive provisions. Instead, those supporting this argumentation refer to the 'spirit', 'orientation' or 'foundation' of the Constitution as a whole.<sup>97</sup> Article 28 of the Constitution, regulating the openness of the constitutional order to European integration becomes the Trojan horse for transforming the polity and deconstructing the Constitution. In this way, national sovereignty is re-interpreted as implying *economic* independence within the EU and Eurozone, pursued at the cost of political independence. Indeed, economic independence is argued to be achievable only through a particular economic policy, imposed by the EU. The foundation of the State is no longer popular sovereignty, as one routinely hears in the halls of Greek law schools;

<sup>93</sup> Jack M Balkin, 'Sanford Levinson's Second Thoughts About Constitutional Faith' (2012) 48 *Tulsa L Rev* 101, 107.

<sup>94</sup> See the case law summarised in Marketou and Dekastros (n 13) para X.9.

<sup>95</sup> See, eg, Minutes of the Greek Parliament (28 March 2012) (n 41) 8004ff.

<sup>96</sup> *ibid.*

<sup>97</sup> See, eg, the argumentation by the members of the governing party in the parliamentary debates of the 28 March 2012, *ibid.*

it has been replaced by economic sovereignty of the state as a public organisation with a European orientation. The 'people' is lost from the political background; economic rationality, as dictated by the state's creditors, has taken its place. In other words, this type of reasoning expresses a very different version of faith, though it still claims to be constitutional. No longer attached to a text that constrains political actors, this new type of faith upsets fundamental features of Greek constitutionalism.

Responding to the accusations by the left that, by ratifying Eurocrisis legal instruments, the government was 'acting in absentia of the Greek people', a member of the parliamentary majority contended on the contrary that '[they were] supporting the fundamental choice of the Greek people, namely that the country remains in the Eurozone.'<sup>98</sup> However, no referendum on Eurocrisis policies had taken place in Greece at the time; nor was the issue at stake in any elections preceding the statement of that member of parliament. Messianic parliamentary majorities become the sovereign interpreters of the will of the people, and the interpretation is now reduced to a fundamental choice: European integration, or isolation and destruction. It is not difficult to notice that this rhetoric is equivalent to an overall contestation of the formal Constitution as a valid criterion for the legitimacy of political propositions. In the discussions of Law 3845/2010, Venizelos, Minister of Finance at the time and a prominent constitutional law scholar, argued:

The Constitution (...) is not a text, is not a code of civil or criminal procedure. It is a great, historic, national pact. Substantively, it is the framework of the consensus that governs our nation in the long historic time. Thus, when [procedural constitutionality] matters are raised, in reality it is the legitimacy of Parliament and Government, the legitimacy of the political and State system of the country itself that is contested. We cannot respond technically to this matter. (...) We must convince citizens that we know what we are doing, not hidden behind the provisions of the Constitution and of the Standing Orders of Parliament, but before our historic responsibilities.<sup>99</sup>

A similar way to justify the incompatibility of a certain situation to the Constitution is to appeal to a kind of legitimacy or responsibility *transcending* the formal Constitution. During the same parliamentary debates, left wing parties blamed the unconstitutional violation of social rights and social *acquis*. In support of their arguments, they cited a report by the Scientific Service of the parliament.<sup>100</sup> The government in response compared the situation of the country to a state of war.<sup>101</sup> In the explanatory report accompanying

<sup>98</sup> *ibid* 8043.

<sup>99</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6750.

<sup>100</sup> The report on Law 3845/2010 raised issues of constitutionality or compatibility to the ECHR of many of the statute's provisions. The report expressed clear doubts concerning the respect by the legislature of labour and social rights guaranteed by the Greek Constitution. See 'Report on the bill "Measures for the implementation of the support mechanism of the Greek economy from the Member States of the Eurozone and the International Monetary Fund"' (5 May 2010) 4ff <[www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/m-dnt-epistimoniki.qxp.pdf](http://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/m-dnt-epistimoniki.qxp.pdf)> accessed 12 September 2015.

<sup>101</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6714.

the statute, the government argued that the activation of the support mechanism and the onerous measures agreed in the MoU were an ‘action of responsibility and an historical obligation to face the danger of collapse of the Greek economy’.<sup>102</sup> Moreover, in the introductory report annexed to the statute, it is mentioned that the only alternative to these measures would be ‘collapse and destruction’.<sup>103</sup> Against procedural objections raised by left wing parties during the voting on the first MoU, the Prime Minister at the time argued that the major concern should not be the qualified majority eventually required by constitutional provisions, but the national and political responsibility of the parliament and of its members personally towards the state and its creditors.<sup>104</sup> Similar arguments were mobilised by the government during the voting of the second rescue package, against accusations for ‘constitutional deviance’, ‘colonisation’ of the country and ‘dictatorship of the markets’ launched by the parties of the opposition.<sup>105</sup>

In the above discussions, representatives of the government have drawn upon the image of a state of exception, where constitutional norms do not apply. However, they have not referred to article 48 of the Constitution which provides for a constitutional state of siege. Besides, the very strict conditions of this article would not be met.<sup>106</sup> Courts are incompetent when faced with such a situation, since the *interna corporis* of the parliament are traditionally immune from judicial scrutiny. It is clear that the above argumentation is not anymore characteristic of what Balkin has called a ‘middle game relationship’.<sup>107</sup>

The paradox, emphasised by Venizelos himself, a little further in his speech on Law 3845/2010, is striking: the last remaining defenders of the Constitution are left wing parties.<sup>108</sup> Ironically, it is those parties that, until recently, were contesting the political *status quo*, precisely the one institutionalised in the same Constitution.<sup>109</sup> In contrast, for the traditional ‘priests’ of constitutional faith, the Government and constitutional law scholars, the Constitution has become something purely formal, almost pagan.<sup>110</sup> In their discourse, international legality, coupled by technical economic standards, has

<sup>102</sup> See the explanatory report to Law 3845/2010, 1 <[www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/M-DNTAMEIO-eis1.qxp.pdf](http://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/M-DNTAMEIO-eis1.qxp.pdf)> accessed 12 September 2015.

<sup>103</sup> *ibid* 2.

<sup>104</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6762.

<sup>105</sup> See Marketou and Dekastros (n 13) para X.2.

<sup>106</sup> This article can only be invoked ‘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’.

<sup>107</sup> See Balkin (n 93).

<sup>108</sup> See Evangelos Venizelos, Minutes of the Greek Parliament (6 May 2010) (n 2) 6750.

<sup>109</sup> *ibid*.

<sup>110</sup> See Xenophon Contiades, *To Anorthologiko mas Syntagma: Giati Apetychan oi Politikoi Thesmoi? [Our Irrational Constitution: Why Did Political Institutions Fail?]* (Papazisis 2015). See also Evangelos Venizelos, ‘Ethniko Syntagma kai ethniki kyriarchia ypo synthikes diethnous oikonomikis krisis: to provlima itan kai paramenei politiko kai ochi syntagmatiko [National Constitution and National Sovereignty in Circumstances of International Economic Crisis: The Problem was and Remains Political and not Constitutional]’ [2011] EfDD 2.

substituted the constitutional text in its legitimising function. The Constitution has progressively surrendered to the much more concrete and technical precepts of market rationality and Eurocrisis legal instruments.

Under this view, since politics has lost its sense, popular sovereignty has lost its sense as well. Deprived of its foundation, of its symbolic value, the Constitution is turned into a tool, consciously and even explicitly manipulated by governments. Its value becomes only a functional one. Those who invoke it in order to *constrain* executive economic regulation are deemed at best to appeal to some kind of ‘bourgeois formalism’ in the present existential crisis of the Greek state.<sup>111</sup> At worst, they are deemed to be pursuing the destruction of the Greek polity in its present form, the destruction of what is most valuable in the new faith expressed by the promoters of austerity: the European orientation of the state and its economic independence according to a certain economic model. Paraphrasing Levi-Strauss, we can say ‘The Constitution, a symbol of irreligion, what a paradox!’<sup>112</sup> In this rhetoric, objections to the constitutionality of political propositions are easily rebutted with the aphorism ‘the Constitution is not eatable’, as I once heard a Greek constitutional law professor say during a conference. However, since no constitution is or will ever be ‘eatable’, does this discourse, far from a redefinition of Greek constitutionalism, express a more general loss of faith in constitutional democracy? And, if Weiler is right in saying that “legitimacy resources” of the [European] Union (...) are depleted, and that is why the Union has had to turn to its Member States for salvation,<sup>113</sup> what does the loss of faith in national constitutions mean for European integration?

## 6 Afterword: Latest developments

The constitutional faith metaphor proves useful in the account of the latest developments in Greek constitutional politics. In the January 2015 elections, the self-proclaimed radical left party of SYRIZA won, obtaining an impressive vote. From a legal point of view, the party’s political programme can be read as a campaign of restoration of constitutional faith, even if this adds a patriotic tenor to its discourse and ideology. SYRIZA’s members had fiercely denounced the rule of law crisis provoked by the Economic Adjustment Programmes, claiming even their right to resist the violent abolition of the Constitution according to article 120. The invocation of this article provoked heated political debates; this provision had been famously mobilised by the left during the period of political turmoil that had preceded the military junta.

After the elections, SYRIZA formed a government with the far right Independent Greeks. The focus on the Constitution became characteristic of governmental policy

<sup>111</sup> Mazower (n 61) 23.

<sup>112</sup> Claude Lévi-Strauss, ‘Le Père Noël Supplicié’ (1952) 77 *Les Temps Modernes* 1572, 1754.

<sup>113</sup> Joseph Weiler, ‘Europe in Crisis: On “Political Messianism”, “Legitimacy” and the “Rule of Law”’ [2012] *Sing JLS* 248, 249.

during the first months of this extraordinary coalition. Anti-austerity legislation was justified by invoking constitutional articles and European fundamental rights.<sup>114</sup> In this respect, the contrast with previous crisis-related legislation is striking. At a symbolic level, the government restored ERT, the public radio and television which had been violently shut down in June 2013. The explanatory report accompanying the ERT statute resembles a constitutional law handbook analysis of article 15 of the Constitution.<sup>115</sup>

In fact, the rule of law and the Constitution became a weapon in the hands of the left in their effort to give leeway to democratic politics again. Members of the governing parties often used constitutionalist argumentation against the cold economic rationality of the creditors. Their discourse sometimes acquired a specialist, scientific tone. It did not only concern substantive values, like human dignity and social rights. Indeed, the most powerful arguments had a distinctive formal and procedural tone, in harmony with the rites of Greek constitutionalism. In his first press conference, for instance, the Greek Finance Minister refused to negotiate with the troika, which he characterised as a structurally rotten committee; he requested institutional interlocutors instead.<sup>116</sup> One of the most significant achievements of the Greek government was to enhance the visibility and transparency of the Economic Adjustment Programme negotiations, which beforehand were taking place in a technocratic 'black box'. Most importantly, what the government was aiming for was the revival of the *essence* of Greek constitutionalism: the idea of the people, expressing itself through the Constitution, as the source of political power; the idea of the people's will as the main directive of government policy. The government, defying market rules, rejected any possible extension of the Second Economic Adjustment Programme, since the 'people' itself in the January 2015 elections had rejected its rationale.

However, creditors proved hard to convince with this constitutionalist burst. Economic pressures on the state became stronger and stronger, and the Greek government was soon obliged to cede virtually all the crucial points of its political programme. During the final stage of the negotiations, the creditors insisted on an extension of the existing programme under the condition that the Greek government would implement harsh austerity and privatisation policies. Creditors' proposals generally included

<sup>114</sup> See the reports accompanying Law 4325/2015 of 11 May 2015, Government Gazette A 47 <[www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law\\_id=89e03b77-5816-4313-a5ee-a47300035379](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=89e03b77-5816-4313-a5ee-a47300035379)> accessed 12 September 2015. See also the relevant reports for Law 4320/2015 of 19 March 2015, Government Gazette A 29 <[www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law\\_id=65cc459d-46da-48b3-a4d7-a4500148fbae](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=65cc459d-46da-48b3-a4d7-a4500148fbae)> accessed 12 September 2015.

<sup>115</sup> See the explanatory report to Law 4324/2015 of 18 March 2015, Government Gazette B 372 <[www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law\\_id=43568363-af33-4f55-8e17-a46d01455ede](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=43568363-af33-4f55-8e17-a46d01455ede)> accessed 12 September 2015.

<sup>116</sup> See 'Greece's Varoufakis: "No Debt Talks with EU-IMF Troika"' *BBC News* (30 January 2015) <[www.bbc.com/news/world-europe-31055069](http://www.bbc.com/news/world-europe-31055069)> accessed 27 October 2015. See also 'Greece Warned against Reversing Austerity as it Rejects Bailout Administrators' *Euronews* (30 January 2015) <[www.euronews.com/2015/01/30/greece-warned-against-reversing-austerity-as-it-rejects-bailout-administrators/](http://www.euronews.com/2015/01/30/greece-warned-against-reversing-austerity-as-it-rejects-bailout-administrators/)> accessed 2 November 2015.

detailed measures on a broad range of governmental policies, with a calculated financial impact and a precise and pressing timeline for their implementation. The state's partners left little flexibility to the Greek authorities and rejected alternative solutions proposed by them. Draft proposals sometimes contained a declaration of faith in the Economic Adjustment Programme and in its policies, contrary to the clearly stated government ideology.<sup>117</sup> These requirements were totally opposed to the political platform on which both governing parties had been elected some months earlier. In line with the constitutionalist tack followed until then, the government used the last resort option that the Constitution enshrines the expression of the popular will: it submitted the creditors' proposals to a referendum on 5 July 2015.<sup>118</sup>

Interestingly, constitutional argumentation found itself again at the heart of political debates. Many constitutional law scholars and political personalities criticised the referendum as unconstitutional. Some of them even called the Council of State or the President of the Republic to impede its realisation.<sup>119</sup> The unconstitutionality argumentation was neatly presented by Venizelos in parliament in the relevant voting session:<sup>120</sup> the only argument actually invoking an *existent* constitutional provision relevant to the case was an argument from article 28 and the spirit of the Constitution.<sup>121</sup> Indeed, there was a general fear, supported by ambiguous statements by European officials, that an eventual rejection of the creditors' proposal would lead to an exit of Greece from the common currency (the so-called 'Grexit') and, contrary to article 28, would threaten the European orientation of the state. In other words, it was not the Constitution in the form of a written and entrenched document that was opposed to a referendum; rather, it was the creditors' will and the agreements signed by previous governments. Once again, constitutional procedures were being used as an obstacle to the executive economic regulation dictated by the creditors. Once again, the Constitution became a symbol of irreligion in the new 'constitutional' faith.

<sup>117</sup> See, eg, an English translation of the text published to accompany the referendum, 'Reforms for the completion of the current programme and beyond' 1 <[www.referendum2015.gov.gr/wp-content/uploads/2015/06/REFORMS-FOR-COMPLETION-OF-CURRENT-PROGRAM-1.pdf](http://www.referendum2015.gov.gr/wp-content/uploads/2015/06/REFORMS-FOR-COMPLETION-OF-CURRENT-PROGRAM-1.pdf)> accessed 6 February 2016 ('The Greek Government remains fully committed to the program supported by the lending arrangement. It believes that its policies are adequate to achieve the objectives under the program and stand (sic) ready to take any measures that may become appropriate for this purpose as circumstances change').

<sup>118</sup> See Helena Smith, 'Greek PM Alexis Tsipras Calls Referendum on Bailout Terms' *The Guardian* (26 June 2015) <<http://www.theguardian.com/world/2015/jun/26/greece-calls-referendum-on-bailout-terms-offered-by-creditors>> accessed 3 November 2015.

<sup>119</sup> The Council of State avoided answering a relevant question of constitutionality, reviving the theory of governmental acts. See Council of State (Plenary Session) Decision 2787/2015 (3 July 2015) available at the official website of the Council of State <[www.ste.gr/portal/page/portal/Ste/ProsفاتesApofaseis#a376](http://www.ste.gr/portal/page/portal/Ste/ProsفاتesApofaseis#a376)> accessed 12 September 2015.

<sup>120</sup> Minutes of the Greek Parliament (27 June 2015) 3825 <<http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20150627.pdf>> accessed 6 February 2016.

<sup>121</sup> For more information see Afroditi Marketou, 'The Greek Referendum: Is it Unconstitutional?' (*Constitutional Change Through Eurocrisis Law*, 3 July 2015) <[eurocrisislaw.eui.eu/news/the-greek-referendum-is-it-unconstitutional/](http://eurocrisislaw.eui.eu/news/the-greek-referendum-is-it-unconstitutional/)> accessed 12 September 2015.



The result of the referendum was striking. Despite prolonged bank holidays and capital controls imposed during the campaign, the creditors' proposal was rejected by 61.3 per cent of the voters. However, in substance nothing changed. In the meantime, the extension period of the Second Economic Adjustment Programme had expired, and the Greek government sent a request to the ESM for support. After hard negotiations, the Euro Summit issued a statement on the matter on 13 July 2015. Invoking 'the need to rebuild trust with Greece', the state's European partners forced the Greek government to request the support of the IMF and to legislate a set of prior actions.<sup>122</sup> According to the Statement, these actions should be implemented 'without delay', which for some major reforms meant in three days' time.<sup>123</sup> Determination of governmental policy went so far as to require changes to the core of the Greek legal system such as, most notably, an extensive reform of the Code of Civil Procedure.<sup>124</sup> What is more, the Greek authorities committed to change to reexamine with a view to amending 'legislations (...) backtracking on previous programme commitments or identify clear compensatory equivalents for the vested rights that were subsequently created'.<sup>125</sup>

The prior actions required by the creditors were included in an emergency omnibus bill and were voted in one single article, a procedure that left no possibility for any party to amend or reject specific provisions of the programme. To justify the circumvention of constitutional procedures, the government invoked the Euro Summit Statement and the 'particularly exceptional circumstances' triggered by it.<sup>126</sup> The implementation of the measures, verified by the European institutions, opened the way for the negotiation of a new programme under the ESM framework. The European leaders, however, had specified that this programme would necessarily contain harsh austerity, privatisations and labour market deregulation.<sup>127</sup> Further, Greece assumed the obligation to create an independent fund responsible for the privatisation of valuable Greek assets. Following its political endorsement by the Eurogroup and its approval by national parliaments, on 19 August 2015, a detailed MoU was finally signed by the EC and the Greek authorities.<sup>128</sup> The Financial Assistance Facility Agreement between Greece and the ESM was concluded the same day.<sup>129</sup>

<sup>122</sup> See Euro Summit, 'Statement' SN 4070/2015 (12 July 2015) 1 <[www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/20150712-eurosummit-statement-greece/](http://www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/20150712-eurosummit-statement-greece/)> accessed 2 November 2015.

<sup>123</sup> *ibid* 1ff.

<sup>124</sup> *ibid* 2. Note that the deadline for the implementation of this reform was 11 days.

<sup>125</sup> *ibid* 5.

<sup>126</sup> See Law 4334/2015 of 16 July 2015, Government Gazette A 80, and the relevant explanatory report at <[www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-ems-eis.pdf](http://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-ems-eis.pdf)> accessed 12 September 2015.

<sup>127</sup> See Euro Summit, 'Statement' (n 122).

<sup>128</sup> See Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece (19 August 2015) <[ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/01\\_mou\\_20150811\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf)> accessed 12 September 2015.

<sup>129</sup> See Financial Assistance Facility Agreement (19 August 2015) <[www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf](http://www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf)> accessed 5 March 2016.



Though certain constitutionalist symbols have been endorsed by the drafters of the new Economic Adjustment Programme, technocracy remains dominant. Important policy measures are mentioned in the form of bullet points and their implementation is monitored in a checklist manner.<sup>130</sup> For the application of the programme, the troika, elegantly renamed ‘Institutions’, will continue sending review missions to Athens.<sup>131</sup> The Greek government has committed ‘to consult and agree with the Institutions on all draft legislation in relevant areas with adequate time before submitting it for public consultation or to Parliament.’<sup>132</sup> Though the new MoU does not contain the declaration of faith found in previous creditors’ proposals, ownership of the programme by the Greek authorities is required.<sup>133</sup> And, although the need for social justice and fairness is stressed in the document, in no place do we find a contestation of the austerity rationale; such contestation would be destructive for the technocratic legitimacy to which the ‘Institutions’ are appealing. As Camus already observed with irony in the 1950s: ‘[O]ur old Europe at last philosophizes in the right way. We no longer say as in simple times: “This is the way I think. What are your objections?” We have become lucid. For the dialogue we have substituted the communique.’<sup>134</sup>

Seeking a fresh democratic legitimation in order to apply the MoU, the Prime Minister called early elections. However, this time the political programme that the new government would follow was predefined. What the result of the election would determine was *who* would apply it. Indeed, since September 2015, harsh austerity measures have been justified by a constant invocation of economic emergency, of the obligation of the government to apply the MoU and of the need for domestic legislation to be approved by the ‘Institutions.’<sup>135</sup> Faith in politics is totally lost and constitutional symbolism is turned into some kind of aestheticism; democratic decision-making applies only as to superficial matters. The MoU, now adopted by all Euro-area parliaments just like an international convention, is much more difficult to contest. The Loan Agreement itself is normalised within the EU law framework. The state of economic emergency persists; but European institutions cannot anymore remain unaccountable.

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<sup>130</sup> See European Commission, ‘Report on Greece’s compliance with the draft MOU commitments and the commitments in the Euro Summit statement of 12 July 2015’ (14 August 2015) <[ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/report\\_on\\_compliance\\_with\\_prior\\_actions\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/report_on_compliance_with_prior_actions_en.pdf)> accessed 12 September 2015.

<sup>131</sup> See the Euro Summit, ‘Statement’ (n 122) 5.

<sup>132</sup> *ibid.*

<sup>133</sup> Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece (n 128) 4.

<sup>134</sup> Albert Camus, *The Fall* (Justin O’Brien tr, 1st edn, Vintage International 1991) 45.

<sup>135</sup> See, eg, on the ongoing discussion on the reform of the pensions system: Sotiris Nikas and Eleni Varvitsiotti, ‘Epimenoun oi daneistes gia metra 1,8 dis. fetos kai 5,5 dis. eos to 2018 [The creditors insist on measures of 1.8 billion for this year and 5.5 billion until 2018]’ (*Kathimerini*, 12 January 2016) <<http://www.kathimerini.gr/845234/article/oikonomia/ellhnikh-oikonomia/epimenoun-oi-daneistes-gia-metra-18-dis-fetos-kai-55-dis-ews-to-2018>> accessed 7 March 2016.

The above analysis is incomplete; its subject is difficult to grasp, due to the continuing political and constitutional instability in Greece. The purpose of this article has been to show that domestic constitutional politics is a neglected but important field in Eurocrisis legal literature and to propose a grid of analysis for the current transformations in one of the countries most affected by the crisis. Other interpretations of the situation are of course possible. Further analyses of national cases and comparative studies on the matter could substantially enrich our understanding of constitutional law and constitutional change.