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Afroditi Marketou

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Greece: Constitutional Deconstruction and the Loss of National Sovereignty

AFRODITI MARKETOU

During the last six years Greece has experienced socio-political developments that are unique for a Western state: five national elections, at least ten governments, a referendum, three economic adjustment programmes and unprecedented austerity policies with socio-economic consequences resembling those of a war. These developments, causing a total transformation of Greek constitutional politics, were not accompanied by formal constitutional change. Instead, they have been made possible through an extended deconstruction of constitutional forms, justified through the use of emergency discourse. Is there any place for the Constitution as a valid point of reference in domestic constitutional politics?

1 Deconstructing Constitutional Forms: The Economic Adjustment Programmes in the Domestic Sphere

The Greek constitutional story of the Eurocrisis starts with Law 3845/2010.¹ Under the title 'Measures for the implementation of the support mechanism for the Greek economy by the euro area Member States and the International Monetary Fund', the statute included, as an annex, a draft of the first Memorandum of Understanding (MoU) between Greece and its creditors, as well as relevant statements by the Heads of State and Government of euro area Member States. The policies announced in these texts were partly implemented in the main provisions of Law 3845/2010. Article 3 imposed severe cuts on the revenues of public employees and pensioners. This article also affected employees with a private law contract and declared that it prevailed over any contrary provision, be it

¹ Law 3845/2010, OJ A' 65/11.05.2010.

part of a collective agreement, arbitral award or individual contract. The rest of the articles imposed tax increases and exceptional levies. Due to these substantive changes in socio-economic policy, the discussion of Law 3845/2010 in Parliament was perceived by all parties as an 'historical moment' which would determine the future of the country.²

It is no exaggeration to say that Law 3845/2010 was the legal event that divided the Greek political world and society into pro-MoU and anti-MoU forces. Despite its historical importance, however, emergency left no place for parliamentary discussion on the policies or the specific measures enacted by the statute. The bill was brought to Parliament under the emergency procedure, instituted by Article 76, paragraph 4 of the Constitution: 'A Bill or law proposal designated by the Government as very urgent shall be introduced for voting after a limited debate in one sitting'.³ The Government stated that the voting of the bill was urgent, in order for the relevant Loan Agreement to be concluded before 19 May 2010. On this date, a €10 billion bond loan matured and, if the country was unable to repay its creditors, it would face bankruptcy and isolation from its euro area partners.⁴ Deputies 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 major parties in Parliament. Errors in the Greek translation of the MoU further poisoned the national debate.

However, from a legal scholar's point of view, Law 3845/2010 was even more intriguing in formal terms, that is, as far as legal norm production is concerned. What was Parliament actually doing when voting on the statute? Was it adopting a piece of internal legislation or was it, at the same time, approving an international agreement, namely the MoU? 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

² See 'ιστορική στιγμή' ('historical moment') in Minutes of the Greek Parliament, 6 May 2010, www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100506_1.pdf, pp 6715 and 6742.

³ 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.

⁴ See, for example, Minutes of the Greek Parliament, 6 May 2010, p. 6728.

conventions on trade, taxation, economic cooperation, participation in international organisations or unions, as well as all other conventions containing concessions for which a statute is required by the Constitution, or which may burden the Greeks individually, 'shall not be operative without ratification by a statute voted by the Parliament'.

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? Should it then be voted by a qualified majority, as Article 28 imposes? Or was it simply the political programme of the Government, attached to the statute as part of its explanatory report? These questions raised important academic, political and judicial debates.⁵ In its first article, Law 3845/2010 contained a description of the steps taken for the activation of the support mechanism. In the introductory report to the draft law it was stated that the annexed MoU was an 'integral part of the draft bill'.⁶ Nonetheless, the Council of State, the Supreme Administrative

⁵ See Section X.3 of the 'Report on Greece' prepared by A. Marketou and M. Dekastros (last revised 9 June 2015) for the 'Constitutional Change through Euro Crisis Law' project of the EUI Law Department, available on its website: <http://eurocrisislaw.eui.eu>.

⁶ See 'αναπόσπαστο μέρος του σχεδίου νόμου' ('integral part of the draft bill) in the introductory report to the bill, www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf, p. 3.

Court of the country, in its relevant decision denied legal force to the MoU and found it to be the political programme of the Government, which could not be submitted to judicial scrutiny.⁷ The court decided so, despite the Prime Minister having repeatedly stated in the relevant parliamentary debates that the MoU and the statute were not the Government's political choice but had been imposed by the creditors.⁸ In the public discourse of the Government, the fulfilment of the Loan Agreement conditions was presented as a binding obligation imposed on the country. Was governmental policy in Greece defined according to a non-ratified international agreement? And what did this mean for national sovereignty?

The ambiguity of the status of the MoU and the Loan Agreement was deliberately preserved in the second economic adjustment programme. Drafts of the relevant texts were annexed to Law 4046/2012, before their signature.⁹ The Government was asking for the *approval* of the annexed drafts, together with the adoption of the statute. It was also requesting an authorisation for the Minister of Finance and the President of the Bank of Greece to represent the country in the negotiations and to sign the agreements, which would then become immediately operative.¹⁰ However, prospective approval is not foreseen by the Constitution, which only provides for *ratification* of international agreements. In the competent Parliamentary Committee, the Minister of Finance at the time argued that the MoUs were staff-level agreements, not necessitating such ratification.¹¹ However, Article 1, paragraph 6 of Law 4046/2012 declared that certain provisions of the MoU on the Specific Conditions of Economic Policy were 'perfect legal rules of direct application' and thus, in a sense, ratified them.¹²

For subsequent versions of the second economic adjustment programme documents, the Government chose another road: the use, or rather abuse, of constitutional emergency procedures. Indeed, the

⁷ See CoS Pl., Decision 668/2012, 20 February 2012, www.dsnet.gr/Epikairothta/Nomologia/668.htm, para. 28.

⁸ See Minutes of the Greek Parliament, 6 May 2010, p. 6766.

⁹ Law 4046/2012, OJ A' 28/14.02.2012.

¹⁰ *Ibid.*, Art. 1 Para. 3 and f. The statute in its title itself explicitly stated that the Government was asking for the approval of the annexed texts.

¹¹ See the speech by Evangelos Venizelos in the permanent committee of financial affairs, 11 February 2012. Indeed, the video is not uploaded anymore and, unfortunately, I cannot find any other reference to this speech.

¹² In the words of the statute, 'συνιστούν πλήρεις κανόνες δικαίου άμεσης εφαρμογής'.

practice used to circumvent the ratification requirement would confuse even the most cunning 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. Subsequently, when agreements were already valid and operative in the international economic sphere, the relevant decree-laws were introduced into Parliament for ratification, which validated the approval of the draft Loan Agreements retroactively in the domestic legal order.¹³

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 extensive use of the emergency decree-laws, in Greek called 'acts of legislative content' (*πράξεις νομοθετικού περιεχομένου*). According to Article 44, paragraph 1 of the 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,¹⁴ crisis governments have used this *sui generis* instrument to enact complex and contentious provisions, either directly connected to the crisis or not. This practice is even more degrading for the role of Parliament, if one considers that often many such administrative acts have been subsequently ratified en masse, annexed to legal statutes that were brought for voting under the emergency procedure.¹⁵ What is more, the relevant acts have been usually ratified in one single article, thus limiting any

¹³ See 'Report on Greece' prepared by Marketou and Dekastros (n.5). See Act of Legislative Content, OJ A' 55/14.03.2012, Art. 1 and 2 and Law 4060/2012, OJ A' 65/22.03.2012, retroactively validating it.

¹⁴ 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, for example, the acts ratified by Law 4111/2013 (OJ 98 A'/25-01-2013).

¹⁵ See, for example, 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.

possibility of amendment of particular provisions included therein. It is not difficult to see that this practice effectively deprives parliamentary discussion from its content.

The excessive use of emergency procedures and instruments bears a strong symbolic meaning as well: a similar practice by Ioannis Metaxas in the 1930s completely degraded the role of 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 freedom of speech and have always been attacked by oppressive regimes. The public media were abruptly shut down on 11 June 2013 through a joint ministerial decision.¹⁶ Having in mind that the closure of the public broadcaster did not enter within the powers of the Ministers who signed the relevant decision, the Government issued an act of legislative content that extended these Ministers' powers.¹⁷ The urgent closure of the public media was presented by the Government as satisfying a requirement set by the creditors for reducing the number of public employees.¹⁸ This allegation was denied by the creditors.¹⁹ Whatever its source and the reasons for the emergency, the relevant act of legislative content was never ratified by Parliament and therefore ceased to be valid. However, it succeeded in fully producing its de facto consequences: effectively, the public broadcaster was closed down for a period of two years. This left Greece without state-owned public television for a month and without state-owned public radio for more than two months.

It seems thus that under the force of economic adjustment the Greek political regime has deviated into a system whereby Parliament is impotent and faced with an 'executive unbound'.²⁰ Yet, Government has not been alone in this reign of the executive. Policy has in fact been defined in meetings with the Troika, a technocrat tripartite body composed of the

¹⁶ Joint Ministerial Decision OIK 02/11.6.2013, 'Suppression of the public enterprise Greek Radio-Television, A.E. (ERT-A.E.)', OJ B' 1414/11.6.2013.

¹⁷ See Act of Legislative Content, OJ A' 139/11.6.2013. This act was the legal basis of the administrative decision that closed the public broadcaster.

¹⁸ Ibid., Introduction.

¹⁹ See the 'Joint answer given by Mr. Rehn on behalf of the Commission' to the questions raised in the European Parliament on the closure of ERT [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), p. 5.

²⁰ L. Papadopoulou, 'Can Constitutional Rules, Even if 'Golden', Tame Greek Public Debt?', in M. Adams, F. Fabbrini and P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, (Oxford: Hart Publishing, 2014), p. 236.

representatives of the European Central Bank (ECB), the International Monetary Fund (IMF) and the European Commission.²¹ The broad powers acquired by the Troika in the determination of governmental policy have not been mirrored in legislation. They have operated de facto instead, 'coated' with a domestic political garb by the Constitution. In other words, whenever the international or constitutional legality of the Troika's requirements was contested, the creditors have claimed that the particular measures were the Greek Government's political choice under its exclusive competence for the implementation of obligations resulting from the economic adjustment programmes.²² However, in public debates the recommendations of the Troika have been claimed to determine every aspect of governmental policy. They have been repeatedly invoked by the Government as the justification of the use of emergency procedures and instruments. Yannis Drossos described this situation as the Polity's new way of functioning.²³

The loss of national sovereignty and legislative autonomy caused by the Troika review missions, combined with the lack of political accountability of the Troika members, provoked constant contention in public and parliamentary debates. Still, under the second 'rescue package', not only did the Troika preserve its broad powers, but it also became subtly institutionalised. Indeed, it was mentioned with its own name in official documents of the second economic adjustment programme.²⁴

It was only in 2015 that the SYRIZA-ANEL government officially rejected the de facto powers that the tripartite body of technocrats had

²¹ Paragraph 8 of the Preamble of the First Loan Facility Agreement defines that: 'The release of Loans subsequent to the first one shall be conditional upon the Euro Area Member States (except Greece) deciding favourably after consultation with the European Central Bank (hereinafter the "ECB") on the basis of the findings of verification by the Commission that the implementation of the economic policy of the Borrower accords with the adjustment programme or any other conditions laid down in the Council decision on the basis of Art. 126(9) and 136 TFEU and the MoU.' This provision constituted the basis for the Troika's intervention in domestic policy-making. The Agreement is available at www.irishstatutebook.ie/eli/2010/act/7/schedule/2/enacted/en/html.

²² See the 'Joint Answer given by Mr. Rehn on behalf of the Commission'.

²³ G. Drossos, 'Το 'Μνημόνιο' ως σημείο στροφής του πολιτεύματος' ('The 'Memorandum' as a Turning Point of the Polity'), www.constitutionalism.gr. Also published in *The Book's Journal*, 6, April 2011, p. 42

²⁴ See, for example, European Commission, *The Second Economic Adjustment Programme for Greece – Second Review* (Occasional Paper on the European Economy No. 148, May 2013), ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp148_en.pdf.

acquired to the detriment of constitutional democracy and national sovereignty. This changed the situation for some months. The Troika missions to Athens were suspended and the Greek government, after five years, was able again to implement governmental policy without consulting the creditors and sometimes even against their explicit disagreement.²⁵

However, the situation could not last long. In the end, the Government had to pay a high price for its defiance of the Troika's technocratic 'advice'. Following the striking results of the July referendum and two weeks of capital controls and bank holidays in Greece, a Euro Summit took place on 12 and 13 July 2015. The result of what has been described by all witnesses as a very hard meeting was a common Statement, according to which the Greek Government agreed to implement 'without delay' a set of priority actions, in order for the negotiations with its European partners to restart.²⁶ For some major reforms, the words 'without delay' meant in three days' time.²⁷ Determination of governmental policy went so far as to require changes in the core of the Greek legal system such as, most notably, an extensive reform of the code of civil procedure.²⁸ What is more, the Greek authorities committed to 'reexamine with a view to amending legislations that were introduced counter to the February 20 agreement by backtracking on previous programme commitments or identify clear compensatory equivalents for the vested rights that were subsequently created.'²⁹ The prior actions required by the creditors were included in an emergency omnibus bill and were voted in one article. To justify the circumvention of constitutional procedures the Government invoked the Euro Summit Statement and the 'particularly exceptional circumstances' triggered by it.³⁰

²⁵ See, for example, Law 4320/2015, 'Provisions for adopting immediate measures to face the humanitarian crisis, for the organisation of Government and of Government organs and other provisions', OJ A' 29/19.03.2015.

²⁶ See the Euro Summit Statement 12 July 2015 (SN 4070/15), www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/20150712-eurosummit-statement-greece/, p. 1.

²⁷ *Ibid.*, pp. 1ff.

²⁸ *Ibid.*, p. 2. Note that the deadline for the implementation of this reform was 11 days.

²⁹ *Ibid.*, p. 5.

³⁰ See Law 4334/2015, OJ A' 80/16.07.2015 and the relevant explanatory report at www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-ems-eis.pdf, p. 1.

Under the subsequent European Stability Mechanism (ESM) programme,³¹ which is still operative, contempt of the Constitution and national sovereignty persists, with the exception of some purely aesthetic changes. For the application of the economic adjustment programme, the Troika, now elegantly renamed as the 'Institutions', continues its review missions to Athens.³² 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.'³³

The economic adjustment programmes have thus operated in the domestic legal order with no respect for constitutional procedures and forms. Incoherent justifications of the measures, opportunistically advanced by Government according to the forum to which they were submitted, have excluded any kind of accountability. Legal accountability has been excluded, as the MoU has been argued to be a political programme. Political accountability has also been considerably limited, since the programmes have been argued to result from binding supranational or international obligations and their specific provisions have been hardly discussed in parliamentary debates. Economic emergency has left no place for democracy and has progressively led to a major limitation of national sovereignty. As their lengthy duration indicates, these features have acquired a permanent character and have now become a typical trait of everyday constitutional politics in Greece.

2 Economic 'Emergency'?

The constant use of abbreviated procedures and the de facto operation of euro-crisis instruments in the domestic sphere seem to indicate the existence of an economic emergency. Though Article 48 of the Constitution, which provides for a constitutional state of siege, was never invoked,³⁴ governments have often used a rhetoric reminiscent of a state

³¹ See the Financial Assistance Facility Agreement, 19 August 2015, www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf and the relevant MoU, 19 August 2015, http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf.

³² See Euro Summit Statement (SN 4070/15), p. 5. ³³ Ibid.

³⁴ Besides, the very strict conditions of this article would not be met. It can only be invoked 'in case of war or mobilization owing to external dangers or an imminent threat against

of war or exception.³⁵ In the explanatory report accompanying Law 3845/2010, 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.’³⁶ Moreover, in the introductory report annexed to the statute, it was mentioned that the only alternative to these measures would be ‘collapse and destruction’.³⁷ This perception of an imminent emergency persisted under the second economic adjustment programme, as well as during the 12 months of the SYRIZA-ANEL government.³⁸

In its decision on the constitutionality of Law 3845/2010 the Council of State translated the emergency rhetoric used by the Government into legal terms. To this purpose, the Court invoked a situation of ‘fiscal emergency’. This situation was to be identified exclusively by the legislator; the judiciary would have no say in legislative evaluations in this respect.³⁹ Further, in the decision, the Court referred very extensively to the economic and political situation that the country was facing, before concluding that the impugned measures were justified by the ‘compelling public interest’ of the consolidation of public finances. Until recently, the Supreme Administrative Court had constantly rejected the nature of a ‘fiscal interest of the State’ as a legitimate reason justifying fundamental rights’ restrictions. However, since the beginning of the crisis, the path to Decision 668/2012 had been paved in previous cases: the financial public interest had been progressively qualified as a ‘compelling national interest’.⁴⁰ Thus, in Decision 668/2012, deferring to governmental policy choices, the administrative judges stated that no examination of less-

national security, as well as in case of an armed coup aiming to overthrow the democratic regime’.

³⁵ See Minutes of the Greek Parliament, 6 May 2010, p. 6714.

³⁶ See ‘πράξη ευθύνης και ιστορική υποχρέωση απέναντι στον κίνδυνο κατάρρευσης της οικονομίας’ in the explanatory report, www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/M-DNTAMEIO-eis1.qxp.pdf, p. 1.

³⁷ See ‘η εναλλακτική πορεία θα ήταν η κατάρρευση και η καταστροφή’ in the introductory report, www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf, p. 2.

³⁸ ‘Acts of legislative content’ and emergency procedures were used to transfer public sector funds to a special Bank of Greece account, to amend pre-existing legislation on the referendum procedure and on other matters.

³⁹ See CoS Pl. Decision 668/2012, para. 35. The Court did not explicitly refer to the concept of exceptional circumstances. See, on the contrary, the concurring opinion, para. 38.

⁴⁰ Decision 1620/2011, para. 8; see I. Mathioudakis, ‘Μετασηματισμοί του ταμειακού συμφέροντος του Δημοσίου σε περίοδο έντονης οικονομικής κρίσης’

restrictive alternatives was required, since the impugned measures were part of a general programme for facing the economic crisis.

Emergency, in turn, indicates that the situation of constitutional deconstruction should be exceptional or temporary. The Socialist government itself had promised in 2010 that ‘the national effort [would have] a beginning, a middle and an end’.⁴¹ However, this has not been the case; in fact, constitutional deconstruction has become a permanent feature of Greek constitutional politics. This is due both to the practice of domestic actors and to that of the creditors.

Let’s start again with Law 3845/2010. In its main body, the government exploited the ambiguity as to the nature of euro-crisis instruments and limited the role of parliament in their implementation. Article 1, paragraph 4 delegated to the Minister of Finance the signature of future agreements for 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 again through the emergency procedure of Article 76, paragraph 4 of the Constitution: the term ‘ratification’ was replaced by the terms ‘discussion and briefing’, rendering agreements operative from their signature. According to the representative of the government, the amendment was necessary for the First Loan Agreement, signed some days later, to come into immediate effect, and thus before 19 May 2010, the date that the bond loans matured.⁴² Less than a month later Article 93 of Law 3862/2010 repeated that agreements and MoUs relevant to the participation of the country in the European Financial Stability Facility (EFSF), as well as to loans agreed with this organisation, should be brought before parliament only for discussion and briefing.⁴³ Circumvention of constitutional procedures for the ratification of international agreements became thus a permanent possibility, at least as far as participation to the EFSF is concerned.⁴⁴

(‘Transformations of the cash interest of the State in a period of intense economic crisis’), www.constitutionalism.gr.

⁴¹ See the introductory report to the bill, cited above (n. 37) p. 2: ‘Όλη αυτή η εθνική προσπάθεια έχει αρχή, μέση και τέλος’.

⁴² See Minutes of the Greek Parliament, 6 May 2010, p. 6742.

⁴³ See Law 3862/2010, OJ A’ 113/13.07.2010.

⁴⁴ Indeed, such instruments, creating economic burdens for the Greek people and imposing austerity policies, are arguably subject ratification according to Art. 36, para. 2 of the Constitution.

Constitutional deconstruction did not only concern the openness of the domestic system to international or supranational legal agreements; it also concerned the internal distribution of constitutional competences between the legislature and the executive. Article 2 of Law 3845/2010 conferred a broad range of powers on the executive 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.⁴⁵ 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 ‘more specific matters or matters of local interest or of a technical and detailed nature’ as Article 44, paragraph 2 stipulates. Nor was Law 3845/2010 valid as a framework statute, according to paragraph 4 of the same article: constitutional law scholars agree that the formal conditions for such a statute were not fulfilled.⁴⁶ 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 possibility which became permanent and normal, like economic adjustment itself.

Indeed, while constitutional forms were deconstructed, a web of international legality was being fashioned around the Loan Facility and the programmes agreed between Greece and its creditors. As we saw, Article 93 of Law 3862/2010, voted on 5 July 2010, declared that agreements and

⁴⁵ See Minutes of the Greek Parliament, 6 May 2010, p. 6788.

⁴⁶ It is generally accepted that a framework-statement must concern a homogeneous subject matter and must determine the general legislative guidelines for the regulation of the matter. See the Report on Greece prepared by Marketou and Dekastros (n. 5).

MoUs relevant to the participation of the country in the EFSF are 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, are brought to Parliament for *ratification* and are valid only after the publication of the relevant statute in the Official Gazette.⁴⁷ 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.⁴⁸ 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.⁴⁹ Indeed, Article 28, paragraph 1 of the Constitution confers supra-legislative status to ratified international agreements. Therefore, promoters of austerity have always, in public debates, presented the measures as resulting from a *legal* obligation of the government. Possessing an ambiguous status (European norms, international norms or economic agreements concluded by the State as a private person), euro-crisis legal instruments have acquired a *de facto* validity and binding character in the domestic sphere.

Sometimes this was obtained by invoking the European commitments of the country. 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.’⁵⁰ This purpose was characterised as a ‘compelling public interest’ and ‘a common

⁴⁷ Yet according to Art. 94 of the same law, this provision is retroactively valid only from 1 June 2010; it thus does not concern the First Loan Agreement. See *ibid.* It is interesting to note that the same provisions had been included in the draft law ratifying the First Loan Agreement, which was never discussed or voted in Parliament.

⁴⁸ Art. 48, Law 4021/2011, OJ A’ 218/03.10.2011.

⁴⁹ The representatives of the socialist government actually admitted that ratification was required by creditors in some cases. See Minutes of the Greek Parliament, 5 July 2010, www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100705.pdf, p. 9581.

⁵⁰ See CoS Pl. Decision 668/2012, para. 35.

interest for Eurozone Member States, in view of the obligation of fiscal discipline and of ensuring the stability of the Eurozone as a whole, established by EU legislation.’ Was it thus an economic *emergency* that the country was facing or was it rather an *EU legal requirement* to follow a certain economic policy?

As far as the second economic adjustment programme is concerned, ambiguity as to its nature was preserved at a supranational level as well. The First Review of the second economic adjustment programme declared that ‘The 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.’⁵¹ In other words, it seems that the programme acquired an official European legal mantle. However, the Fourth Review went on to state that the MoU documents were drafted jointly by the Troika and the competent Greek authorities and were implemented according to a pre-agreed timetable.⁵² In other words, though the ‘steps and deadlines’ were defined as European legal obligations, the specific provisions in the MoU – ‘comprehensively identif[ying] the specific measures to be taken, going into a high degree of detail’ – were not.⁵³

The ambiguous nature of the MoU commitments did not reassure the country’s creditors, who sometimes required *personal written confirmations* by Greek political leaders that they would follow the policies defined in them.⁵⁴ 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 creditors to abide by the Loan Agreement. Even more, in the First Review of the second economic adjustment programmes it was stated that the MoU documents would be ‘subsequently transformed into a *cogent* law through a vote in Parliament.’⁵⁵ Still, when a normal voting procedure

⁵¹ European Commission, *The Second Economic Adjustment Programme for Greece – First Review* (Occasional Paper on the European Economy No. 123, December 2012), ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf, p. 7.

⁵² See European Commission, *The Second Economic Adjustment Programme for Greece – Fourth Review* (Occasional Paper on the European Economy No. 192, April 2014), ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp192_en.pdf, p. 9.

⁵³ See the First Review of the Second economic adjustment programme, p. 7.

⁵⁴ See J. Strupczewski, ‘Eurogroup Set to Release Greek Tranche, Fix EFSF Leveraging Rules’, in *Reuters US*, 25 November 2011, www.reuters.com/article/2011/11/25/eurogroup-idUSL5E7MO3NZ20111125.

⁵⁵ See the Fourth Review of the Second AEP, p. 7 (emphasis added).

is employed, a law can be 'cogent' (i.e. it will prevail over contrary legislation) in Greece only if it is ratifying international legal agreements. In other words, it seems that, although 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 European institutions involved before the ECJ.

What is more, progressively the MoUs ceased to be perceived as exceptional instruments to face the economic emergency; in a way, they were normalised and institutionalised. For the first time, the First Review of the second economic 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.⁵⁶

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 establishing a procedure and timeline, albeit in an embryonic form, for the modification of the MoUs, the declaration undermined their exceptional nature.

Ironically, the calls of the SYRIZA-ANEL government for a political solution to the situation only led to more institutionalisation and normalisation of the economic adjustment programmes. The third programme and its technocratic rationale were not anymore dictated by the Troika specialists, but were explicitly endorsed by the euro area heads of state and government.⁵⁷ Subsequently their concrete terms were politically approved by the Eurogroup Ministers⁵⁸ and were even voted upon by the parliaments of the euro area Member States.⁵⁹ The Loan Agreement now operates under the ESM framework, which was accommodated by the EU treaties through an amendment of Article 136 and thus

⁵⁶ Ibid. ⁵⁷ See Euro Summit Statement (SN 4070/15).

⁵⁸ See 'Eurogroup statement on the ESM programme for Greece', 14 August 2015, www.consilium.europa.eu/en/press/press-releases/2015/08/14-eurogroup-statement/.

⁵⁹ B. Sills, 'Greece Countdown: How Europe Votes on the New Bailout' in *Bloomberg*, 18 August 2015, www.bloomberg.com/news/articles/2015-08-18/greece-bailout-euro-pean-lawmakers-vote-on-new-deal.

does not have an ad hoc or exceptional nature. The MoUs are also no longer ad hoc exceptional instruments, but enjoy the legitimacy of an international treaty. The euro-crisis agreements are perceived as binding international obligations by the Greek government and are ratified as such (though without application of Article 28 of the Constitution).⁶⁰ Besides, refusal to reconsider the Greek debt leads to an indefinite prolongation of the loss of national sovereignty. In the last elections that took place in Greece in September 2015, the political programme that the new Government would apply was pre-defined. The only stake of the elections was *who* would apply it.⁶¹

3 Afterword: The Judiciary as the Last Hope for the Constitution

More than six years of prolonged economic crisis have thus produced in Greece an unusual constitutional-political situation for a Western democracy. Constitutional politics and norm production are no longer based on democratic deliberation, as the Constitution imposes, but on international agreements, of ambiguous nature and changing content, concluded by the executive. Constitutional rules are constantly circumvented or abused. Constitutional deconstruction even seems to have acquired a permanent nature independent of any state of exception or emergency. Besides, the economic adjustment programme instruments and procedures are institutionalised and normalised both in the domestic and the supranational sphere. Still, the Constitution is broadly recognised as a valid legal text. Though emergency has sometimes corroded its forms, the institutions that it provides for are operating according to its procedures and in its name. Is there any hope for constitutional democracy in Greece? Is there any place for the Constitution as a valid point of reference in constitutional-political decision-making?

In this context of constitutional chaos, the last hope for the Constitution is the judiciary. Due to its position and function, the judiciary is

⁶⁰ See Law 4336/2015, OJ A' 94/14.08.2015. Note that this statute ratified the *draft* agreement and MoU (the creditors would not sign it before it was approved by all European parliaments). Interestingly, the Euro Summit statement (SN 4010/15) of 12 July 2015 was also ratified by Law 4334/2015.

⁶¹ See the announcement of the early elections of September 2015 by Alexis Tsipras, www.youtube.com/watch?v=OGVoWlhVBJE.

among the last institutions expressing a faith in the formal Constitution.⁶² Judicial activism has been quite rare in Greek constitutional politics. Besides, possibilities for such activism during the crisis are limited to the scrutiny of the substantive evaluations of public authorities. Indeed, Greek courts traditionally do not check for eventual violation or abuse of the procedures set by the Constitution for legal norm production; this is because, according to the Greek conception of the separation of powers, the *interna corporis* of Parliament are not subject to judicial review. Further, the Council of State usually refrains from contesting public authorities' determinations as to the existence of emergency situations. This considerably limits the possibility for the Supreme Administrative Court to sanction the abusive use of emergency decree-laws.

Still, after a period of inaction, the Greek supreme courts finally assumed a more active role.⁶³ In the beginning they mobilised clear constitutional provisions such as those ensuring collective labour rights, to disapply legislation that implemented MoU requirements.⁶⁴ Subsequently, the Supreme Administrative Court and the Court of Audit required the preserving of a minimum normative content to other constitutional rights as well, through the principle of proportionality. Thus, in recent decisions, the courts have assessed in detail the cumulative effect of austerity policies on certain groups of individuals.⁶⁵ Further, they have sometimes set important justification requirements on austerity legislation. In this way, they have thoroughly scrutinised the substantive evaluations of the legislature when imposing onerous measures, requiring the examination of less restrictive alternatives and the respect of the principles of equality, solidarity and human dignity.⁶⁶

What is more, the Supreme Administrative Court and the Court of Audit have started abandoning their deferent stance concerning

⁶² On the loss of faith in the Constitution as a way to approach constitutional-political change in Greece during the crisis, see A. Marketou, 'Economic Emergency and the Loss of Faith in the Greek Constitution, How Does a Constitution Function when It Is Dying?', in *Cambridge Journal of International and Comparative Law* 4(2), pp. 289–318.

⁶³ See CoS Pl. Decision 668/2012; Decisions 1283, 1284 and 1285/2012, 2 April 2012.

⁶⁴ See CoS Pl. Decision 2307/2014, 27 June 2014.

⁶⁵ See Court of Audit, Fourth Special Sitting of the Plenum, 31 October 2012; Second Special Sitting of the Plenum, 27 February 2013; Court of Audit, Decision 4327/2014, 23 June 2014; CoS Pl., Decision 2192-2196/2014, 13 June 2014.

⁶⁶ See CoS Pl. Decision 2192-2196/2014, paras. 19ff.

legislative determinations as to the existence of an economic emergency. Interestingly, the courts have sometimes disappplied austerity legislation, as they found that ‘the financial interest of the State [that justified it] was no longer peremptory’.⁶⁷ Having by now clearly identified the connection between the measures and the EU obligations of the country, the Greek supreme courts insist that domestic constitutional values should be preserved as well.⁶⁸ Therefore, they impugn onerous measures imposed upon certain groups of citizens according to ‘a purely mathematical’ and thus ‘profoundly inappropriate’ criterion.⁶⁹

However, the substantive human rights values that the Greek courts invoke have a content that is not easily observable and agreed upon. Despite their entrenchment in the EU Charter of Fundamental Rights and in other international conventions, court decisions declaring a violation of social rights are translated only into fiscal numbers in the technocratic discourses of the ‘Institutions’, the media and even the other euro area leaders. For example, the Euro Summit stated that the Greek Government must ‘carry out ambitious pension reforms and specify policies to fully compensate for the fiscal impact of the Constitutional Court ruling on the 2012 pension reform’.⁷⁰ No matter that the purely mathematical rationale of austerity was generally criticised in the decision. No matter that Greece does not have a constitutional court at all. All that matters is what the creditors perceive as the ruling’s *fiscal impact*.

Will the Council of State and the Court of Audit continue to resist the quantification of politics and of the Constitution on which technocrats and the media insist? Will the European institutions continue to neglect the constitutions and democratic procedures of (certain of) its member states? And, if Weiler is right in saying that the EU has to turn to its Member States in order to compensate for its legitimacy deficit,⁷¹ what does the shift in Greek constitutional politics mean for the process of European integration?

⁶⁷ See CoS Pl. Decision 2192-2196/2014. Similarly, Court of Audit, Decision 4327/2014.

⁶⁸ See Decision 2192-2196/2014, para. 21.

⁶⁹ See CoS Pl. Decision 4741/2014, 29 December 2014. The official summary of the judgement is available in English at www.ste.gr/images/StE/content/deltia/Judgment%20Summaries.pdf.

⁷⁰ See Euro Summit Statement (SN 4070/15), p. 3.

⁷¹ J. Weiler, ‘Europe in Crisis – On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’’, in *Singapore Journal of Legal Studies*, 2, 2012, 248–69, at 249.

4 Conclusion

This paper has examined the changes brought about by euro-crisis instruments in the domestic sphere from the point of view of constitutional forms and procedures. Focusing on these technical features is a way to escape the criticism of ideological bias that an analysis from the point of view of social rights or other constitutional values would necessarily entail. Indeed, constitutional values have a vague and relative content in situations like the current one, which is perceived as an economic crisis that has often acquired 'existential dimensions' for the Greek state.⁷²

I have shown how the economic adjustment programme instruments, MoUs and Loan Agreements operate in the domestic sphere in the margins of constitutional forms and procedures and bind governmental policy and the exercise of national sovereignty. Having an ambiguous nature, they exclude the Government's accountability as regards their implementation, both before the parliament and the courts. De facto situations resulting from the violation or abuse of constitutional procedures – most prominently, the Troika review missions – are perceived as normative due to their alleged efficiency in the implementation of the transnational technocratic precepts of the economic adjustment programmes. The prevalence of economic rationality, which is claimed to be dictated by the creditors, even on the most valuable constitutional freedoms, like the freedom of speech and information, shows that the current situation has left no leeway to democratic politics. Even though the flagrant disregard for constitutional procedures would indicate the existence of a state of emergency, the fundamental constitutional-political changes brought about by the Eurocrisis do not seem to have a temporary character. On the contrary, the practice of the crisis-stricken governments and their creditors has normalised and institutionalised the circumvention of constitutional forms and procedures, in order to ensure domestic politics' compliance with a transnational technocratic rationale. In this way, the economic adjustment programmes have considerably undermined the fundamental grounds of Greek constitutional democracy, namely the rule of law and parliamentary deliberation.

⁷² A. Manitakis, 'Τα συνταγματικά ζητήματα του Μνημονίου ενόψει κρατικής κυριαρχίας και επιτηρούμενης δημοσιονομικής πολιτικής' ('The Constitutional Issues of the Memorandum in View of the Divided National Sovereignty and the Monitored Fiscal Policy') (2011) 51 DtA 689, 707.

To describe this evolution, I have used the metaphor of constitutional deconstruction. Indeed, the formal Constitution, until recently a coherent whole of forms and procedures ensuring popular sovereignty, now seems void and misplaced compared to the modern, rational and efficient instruments decided in the opaque meetings of technocratic institutions. Because the perception of an economic emergency has left no place for politics and since the will of the creditors has replaced the will of the people, the formal Constitution has lost its fundamental reason for existence. It is valid only when the economic situation allows it; constitutional authorities, procedures and norms are used only when no more efficient option exists. In this way, the Constitution is deprived of its internal coherence and the 'purely mathematical' rationale of the economic adjustment programmes has replaced the polity's democratic foundation.