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Can Constitutional Rules, Even if 'Golden', Tame Greek Public Debt?

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I. SETTING THE SCENE

GREECE HAS STOOD at the epicentre of the ongoing public debt crisis since its outburst. The country's attempts during the last three years to rein in the deficit in its public accounts reflect a belated recognition for its huge debt being an issue, born out of concern in the face of state default. The pernicious effects of repeated borrowing are only now becoming obvious, prompting the population to undergo a process of self-knowledge.[2] The following quotation effectively captures the issue at hand: '[T]he agony of a pensioner who cannot live with 350 Euros per month is opposed to the agony of Greece who cannot live with 350 billion of debt.'[3]

The crisis is constantly evolving, not only creating new financial, political and social challenges but also fostering transformations in the constitutional architecture both at national and European level. New European institutions and legal measures emerge and significantly alter the substance of economic governance, as well as the political systems of both the EU and its Member States. Constitutions are called upon to regulate the economic and fiscal behaviour of the respective states in several ways, predominantly through the incorporation of budgetary constraints. Greece has needed to adapt radically, almost violently, to the new facts; and a hurricane of parliamentary acts and case law confirm this radical change. Although the Greek written constitution has not undergone any formal revision due to political and technical reasons that will be explained below, the Greek living constitution has already experienced a profound transformation.

This chapter intends to contribute to the ongoing discussion concerning

[1] Many thanks to Federico Fabbrini for revising this paper, as well as to Xenofon Kontargyris, Eva Tsoukalidou and Victoria Brooks for linguistically editing it.

[2] A Doxiades, 'The Real Greek Economy: Owners, Rentiers and Opportunists', www.constitutionalism.gr/html/ent/733/ent.1733.asp (accessed 10 May 2013).

[3] Y Drossos, 'The Memorandum as a Turning Point to the Form of Government' (2011) 6 *The Book's Journal* 42 (in Greek).

the 'Greek case' with respect to the role of the constitution in coping with the economic and fiscal crisis. In particular, it aims to explore the strengths and weaknesses of the constitution as a device to deal with the current situation and also prevent future fiscal crises, with a focus on the Greek experience. The enquiry proceeds in three steps, which are built upon three claims.

Firstly (Section II), before delving into the constitutional discussion and in order to place it in a wider context, the course that brought Greece to today's critical situation shall be traced. This will also provide a brief historical review as to why Greece, a small peripheral member of the EU, has proven to be the weakest link of European Monetary Union (EMU) and how it arrived at the present impasse. The claim, upon which this section is built, is that, 'the Greek case' is partly an exception and partly an inevitable consequence of the incomplete European economic governance. Specifically, although Greece may appear as an exception in some respects, it is but a typical example of the lack of a common European economic policy, as well as the evidence that facing the national debt crisis demands supranational measures and further steps towards a more enhanced political Union. The second claim is that the particularities of Greece's constitutional system render a constitutional balanced budget amendment improbable—at least in short term—and yet rather redundant. In order for this to be proven, the particularities of the Greek constitution will be considered closely, with the aim of explaining why the constitutionalization of a 'golden rule' may be close to impossible in the near future. The fact that this amendment is so unlikely to be implemented does not undermine the rule's normative power (if there is such) since its incorporation into national law has already taken place through the ratification of the Fiscal Compact (Section III). This is supplemented by a third and more general claim concerning the limited strength of every constitution actually to frame and shape economic and fiscal matters in an independently normative way. Hence, the constitutional nature and efficacy of the balanced budget constitutional rule shall be examined (Section IV). Lastly (in Section V), some preliminary conclusions are drawn.

II. GREECE: AN EXCEPTION OR THE RULE?

A. The Greek 'Exception'

For 20 years after World War II and the Greek civil war between left and right (1946–49), Greece presented an impressive economic performance, enjoying rapid growth, high investment and low inflation. The pre-1974 regime, however, was politically illiberal, autocratic and eventually degenerated into a military dictatorship (1967–74). After a relatively smooth transition from dictatorship to democracy, the prevailing ideological climate was such that both governing parties, New Democracy (ND) (1975–81) and then later the Panhellenic Socialist Movement (PASOK) (1981–89) accommodated the popular demand for an

expanded role of the state, and for redistribution. Both would only become possible through borrowing.[4]

Greece applied to join the European Economic Community (EEC) in June 1975 and eventually joined in 1981, based on a political bargain with the nine existing Member States. This was achieved, in part, as a consequence of Europe's collective guilt concerning its passive stance toward the dictatorship, and despite the fact that the country's economic development lagged behind that of other members.[5] Thus, Greece's entry (and the same applies in respect of Spain's and Portugal's entry five years later) was equally justified on political as well as economic grounds. Furthermore, entry to the EEC was intended to act as a safeguard of the country's recently restored democratic institutions.[6]

One of the basic faults was that the country entered the common market without having first addressed its structural economic deficiencies, mainly consisting of a restricted productive base, a rather strong—but dispersed in small properties—agricultural sector, an emerging manufacturing industry which proved unready for an open competition, and an underdeveloped service sector, mostly restricted to the emerging tourist industry. Following the second oil shock and its admission to the EEC, Greece entered a period of persistent stagflation: Greek manufacturing declined,[7] while public sector deficits and debts exploded.[8] Not using debt for domestic public investment which would have encouraged growth, but rather for subsidizing private businesses and income redistribution in favour of the medium and lower strata, pushed both government and private consumption upwards.[9]

During the 1990s, generous financial support from the Community for economic and social cohesion helped to change the climate for the better: it reduced the external imbalance, high rates of growth were sustained, a successful ten-year macroeconomic stabilization programme was executed, and a number of economic distortions began to be corrected. Also, at the time, monetary financing of the fiscal deficit had been reduced in compliance with the provisions

[4] For a brief review, see also R McDonald, 'The Greek Deficit and Debt Crisis: An End or a Beginning?', lecture for the Athens Centre delivered on 23 May 2011, www.economia.gr/index.php?dispatch=pages.view&page_id=1541 (accessed 17 April 2013). He recalls that after World War II and under 'the Truman doctrine Greece received some $300m, under the Marshall Plan $376m and under various Foreign Military Assistance programmes during the 1970s, 1980s and 1990s, a total of some $6bn. These sums may not sound like much in today's prices but they were significant at the time.'

[5] E Oltheten, G Pinteris and Th Sougiannis, 'Greece in the European Union: Policy Lessons from Two Decades of Membership' (2003) 43 *Quarterly Review of Economics and Finance* 774, 780.

[6] Ibid, 775 et seq. According to the authors, at the time of entry Greece's per capita GDP was 68% of the EU average, higher only than Ireland's.

[7] Ibid, 784 et seq.

[8] For a detailed account, see G Alogoskoufis, 'The Two Faces of Janus: Institutions, Policy Regimes and Macroeconomic Performance in Greece' (1995) 10 *Economic Policy* 149, 150 et seq.

[9] According to Alogoskoufis (ibid, 173) 'the deterioration in Greece's balance of payments, despite the drop in investment spending, is attributable to lower national saving after the rise in public deficits and debts, rather than to a deterioration in Greece's competitiveness following the rise in relative unit labour costs or EC entry'.

of the Maastricht Treaty, in order to fulfil the fiscal and monetary 'Convergence Criteria'.[10] In this way, EC transfers contributed to Greece's welfare. However, as a result of being largely unconditional, they did not create incentives to counteract the relaxation of the external constraints, but rather masked the underlying structural problems,[11] making necessary adjustments less pressing to the political elites and almost invisible to the public. So, when it entered the EMU in 2001, Greece still lagged behind in terms of infrastructure as well as technological and institutional development in relation to most of its monetary partners. In addition, the country had not adjusted the competitiveness of its economy, in order to face the challenges. This would have minimized the pressure which resulted from the introduction of the common currency.[12] Moreover, tax authorities lost their credibility and tax evasion was taking place on an immense scale.[13]

Until recently, Greek politics used to be heavily majoritarian, dominated by one governing party, with the phenomenon of partitocracy affecting the whole state apparatus. Partitocracy, together with political short-terminism and the weakness of civil society, were the main particularities of Greece compared with its fellow partners in the EU. During the last 35 years, budget deficits and debt accumulation have served to redistribute income in favour of the lower and middle classes, to finance private enterprises, and to ensure the alternation of the two governing parties in power. The stronger presence (compared to other European democracies) of political polarization might have also contributed to the government's tendency to over-issue public debt.[14]

In 2004, Greece was placed under surveillance by the European Commission under the excessive deficit procedure, but sanctions were never applied. As a result, imprudent government spending continued, raising the budget deficit in 2009 to 15.4 per cent[15] and general government debt to 127.1 per cent of GDP.[16] The European Commission rightly reacted and in March 2009, the Economic

[10] From 1994 to 2001 the budget was in surplus. The criteria for the EMU included basic rules that deficits should be no more than 3% of GDP and debt should be equivalent to, or headed towards, 60% of GDP. See also Oltheten, Pinteris and Sougiannis (n 5) 776.

[11] Alogoskoufis (n 8) 161, 177. The same (181) also notes that '[persistently] Greece failed to make the necessary adjustments to allow its participation in the Exchange Rate Mechanism of the EMS'.

[12] In 1998 Greece wanted to join but with a deficit at 4.6% of GDP and a debt at 108.5% of GDP did not qualify. Through the use of accounting practices then sanctioned by Eurostat but later heavily criticized by the conservative party Nea Dimokratia when it came to government, the Pasok government of the day reduced the government budget deficit and debt squeezed the inflation through a series of administrative measures. So, in March 2000 Greece was declared to have met the membership targets and on 1 January 2001 it became the 12th member of the EMU. According to later calculations, however, it is purported that Greece had never met the criteria for EMU membership. See McDonald (n 4).

[13] See M Mitsopoulos and T Pelagidis 'The Real Cause of Greek Debt: Taxation and Labour Market Distortions in Greece' (2011) 46 *Intereconomics* 112; G Kaplanoglou and V Rapanos 'Tax and Trust: The Fiscal Crisis in Greece' (2012) 17 *South European Society and Politics* 1.

[14] *Cf* A Alesina and G Tabellini, 'A Positive Theory of Fiscal Deficits and Government Debt' (1990) 57 *Review of Economic Studies* 403, 412.

[15] Euroindicators, Eurostat, 60/2011, 26 April 2011. The average in the EU27 was 6.8% and in the eurozone (of 17 Member States) 6.3%.

[16] Nearly 70% above the EU average, which in the EU27 was 74.4% and in the eurozone 79.3%.

and Finance Minister's Council (Ecofin) placed Greece under the excessive deficit procedure again. No further measures were taken, given that the governing party and the then Prime Minister cared more about the results of the approaching elections rather than the medium- or long-term effects of their policy.

After the elections in October 2009, when Greece was no longer able to meet its debt obligations at a sustainable market price, and thus faced bankruptcy, it asked for financial assistance.[17] As a result, the first rescue plan, in the form of an 'Economic Adjustment Programme for Greece'[18] was signed in May 2010, containing, inter alia, a Memorandum of Understanding (MoU). The agreement launched an economic recovery programme, consisting of both fiscal and structural reforms, in order to render Greece eligible to receive a uniquely large loan facility from the EU and the International Monetary Fund (IMF).[19] 'Greece is assisted, because the Euro had to be assisted.'[20] Internal devaluation was supposed to be the most economically sensible solution; instead what has resulted is unprecedented economic recession, comparable to that of a war, and a dramatic increase in unemployment.

The loan was to be paid in 13 tranches under the IMF's model of 'strong conditionality': the payment of each one depended (and still depends) on an evaluation of the progress made in relation to the reform programme, made by a team comprising the European Commission, the European Central Bank and the IMF—known as the 'Troika'—with the final decision to be taken by the board of the IMF and the Ecofin. Should the Government's performance be evaluated as not fulfilling its obligations, instalments would be withheld. The loan is definitely cheaper than any form of financing Greece could have obtained from the markets but also lucrative for the creditor states,[21] which allowed the anti-memorandum side to accuse the EU borrowing partners, especially Germany, of taking advantage of the situation. This accusation—combined with stereotypical prejudices across the continent—ignited anti-EU as well as anti-German feelings and inspired massive popular protests, especially in summer 2011, when a mass of people occupied Syntagma Square just opposite the parliament building.

However, because the first rescue plan turned out to be insufficient to tackle the Greek fiscal challenges, a new joint rescue package from the ***E***uropean Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility (EFSF) and the IMF was negotiated with Greece and decided in June 2011 by the European Council. The second rescue plan included 'voluntary private sector

[17] See also A Antoniadis, 'Debt Crisis as a Global Emergency: The European Economic Constitution and Other Greek Fables', in A Antoniadis, R Schütze, E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Oxford, Hart Publishing, 2011), available at SSRN: http://ssrn.com/abstract=1699082.

[18] Available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/op61_en.htm.

[19] Total worth of the loan was €110 billion out of which €80 billion was to be provided by the EU and €30 billion by the IMF.

[20] Y Drossos, 'Greece—The Sovereignty of the Debt, the Sovereigns over the Debts and Some Reflections on Law', www.constitutionalism.gr, 4.

[21] Ibid, 9.

involvement (PSI)[22] in the form of informal and voluntary roll-overs of existing Greek debt at maturity'.[23] On 14 March 2012, the Ecofin approved the Second Economic Adjustment Programme for Greece,[24] which is financed by the EFSF, as opposed to the first, which was based on bilateral loans.

The government of Georgios Papandreou surrendered power to a coalition government; after his proposal for a referendum on the measures following the decision on restructuring the Greek debt was not backed up by the Deputies of the governing party, Papandreou resigned. A multiparty parliament emerged from the double elections in May and June 2012.[25] Besides the near political extinction of the once powerful PASOK, the most impressive and alarming outcome of the election is the rise of an ultra-right, nationalist party with neo-nazi features and a mode of behaviour that threatens anyone in disagreement with it, and ultimately, democracy itself.

B. Greece as a Rule

Notwithstanding the above, Greece's unbearable public debt is not only due to imprudent domestic economic and fiscal policy but also to the notorious asymmetries in the design of EMU. Since Maastricht, EMU has favoured monetary integration at the expense of economic integration and has failed to take into account the imbalance between developed and peripheral economies. Thus, it comes as no surprise that the so-called 'PIIGCS'[26] are increasing in number and there is a growing fear that France may soon join the Mediterranean camp.

As already implied, deficient fiscal surveillance in the context of the EMU, as well as the continuing lack of institutional mechanisms on its behalf to restrain the choices of Greek policymakers are also equally to blame. Not only have sanctions never been applied under the excessive deficit procedure, but the relevant surveillance of Greece was lifted in June 2007.[27] Although the Greek economy had not recovered, the rules of the Stability and Growth Pact had meanwhile changed in 2005, in order to accommodate France's and Germany's

[22] The voluntary private sector involvement (PSI) was initially set at a level of 21% restructuring and resulted in a 50% 'haircut' at the Euro Summit on 26 October 2012.

[23] *Cf* Statement by the Eurogroup of 20 June 2011, available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/122908.pdf (accessed 04 May 2013), followed by European Council of 23/24 June 2011, Conclusions, Doc EUCO 23/11, para 15. See also M Ruffert, 'The European Debt Crisis and European Union law' (2011) 48 *Common Market Law Review* 1777, 1781–82.

[24] It included the undisbursed amounts of the first programme (Greek loan facility) plus an additional €130 billion for the years 2012–14.

[25] The second election took place as the first did not result in a governing majority.

[26] Portugal, Italy, Ireland, Greece, Cyprus and Spain.

[27] The deficit was reported in 2006 to be equal to 2.6% of GDP, a figure that was also revised later by Eurostat—when it finally finished checking Greek accounts (in 2009)—to 5.7%! Some political analysts have suggested that Greece's exit from surveillance in 2007 was based on political grounds, ie the political affinity between the conservative Prime Minister Kostas Karamanlis and the Commission's President Manuel Barroso, in order for the former to win the preterm elections in 2007.

failure to comply with the original rule of the Pact. As a result, Greece exited the surveillance status and even during the 2008 global financial crisis[28] the (then) conservative government insisted that the country was insulated from its worst effects and hence continued spending and raising the debt.

As noted above, EMU was born with a genetic flaw: monetary union was achieved, yet economic union was far from real; fiscal policies remained completely uncoordinated.[29] By prohibiting the new European Central Bank from bailing out a country with an excessive deficit by lending money directly to governments and yet not foreseeing a euro-exit process, the EU Treaties completed the chronicle of a fiscal crisis foretold. Some economists[30] had long ago foreseen the adverse economic consequences of a common currency for a highly heterogeneous group of countries, including the sovereign debt crises and large trade deficits that now plague most eurozone countries, the fragile condition of major European banks and high levels of unemployment across the eurozone. It is worth noting that the measures taken ex nihilo, firstly exclusively for Greece and under the fear that the 'patient' might infect other vulnerable states and lead to the demise of the euro,[31] paved the way for the design of new institutional mechanisms at European level (such as the emergency and temporary mechanisms of the EFSM and EFSF and the permanent European Stability Mechanism (ESM)[32]) and further national rescue plans that then served for more vulnerable eurozone economies (eg Portugal, Ireland, Spain and Cyprus).[33]

Although Greece has indeed proven to be the weakest link, this is definitely not merely a Greek crisis; it is rather a severe EU crisis with many facets such as the rise of Euroscepticism, tendencies to renationalize competences even in breach of EU law,[34] and uncertainty about the future of the euro. The debris of the economic, political and constitutional earthquake that has shaken Greece may only be recovered via a combined strategy to be followed by Greece, the EU and all the Member States. Neither the economic nor the constitutional architecture can be exclusively national in character. Renationalization will prove to be disastrous. The only way is to proceed with the Europeanization of the constitution, including the economic constitution, and the constitutionalization of Europe.

[28] *Cf* G Pagoulatos and Chr Triantopoulos, 'The Return of the Greek Patient: Greece and the 2008 Global Financial Crisis' (2009) 14 *South European Society and Politics* 35, 43 et seq.

[29] Critically J. Habermas, 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts –Ein Essay zur Verfassung Europas' (2012) 72 *ZaöRV* 1, 2–3.

[30] See eg M Feldstein, 'EMU and International Conflict' (1997) 76 *Foreign Affairs* 60 et seq, available at: www.nber.org/feldstein/fa1197.html.

[31] *Cf* N Ferguson, 'The End of the Euro', *Newsweek*, 6 May 2010, www.thedailybeast.com/newsweek/2010/05/07/the-end-of-the-euro.html.

[32] See P Craig in this volume (Chapter 2).

[33] For the entire series of measures taken, see European Commission, Economic and Financial Affairs, EU Response to the Economic and Financial Crisis, at: http://ec.europa.eu/economy_finance/focuson/crisis (accessed 20 May 2013). See also AG Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance' (2012) 49(5) *Common Market Law Review* 1613 et seq.

[34] Ruffert (n 23) 1777.

C. Economic Policy Constraints and Memoranda of Understanding

As mentioned above, the legal framework currently in place in Greece to deal with the fiscal emergency is based on the MoUs. The MoUs contain measures concerning fiscal, tax, social and social security policies, such as reform of the pension schemes including pension and salary cuts, bold tax increases, including housing taxes, loosening of labour law protections, as well as deep structural reforms towards a more competitive economy and fiscal sustainability with the aim of regaining the confidence of the markets. The parliamentary acts adopted to materialise the latter have been based on a legal framework of a multiple and overlapping nature, including international, European, national and also private laws. The content of instruments of international law was repeatedly copied verbatim in EU or national acts. Specifically, the MoU,[35] signed on 3 March 2010 between Greece and the Commission, has been accorded a distinctive status, owing to its linkage with different legal measures of the international, EU and Greek legal order.[36] Firstly, it has been incorporated into Greek law, since it has been attached as an annex to Law 3845/2010, containing measures for the application of the support mechanism.[37] Secondly, the Loan Facility Agreement,[38] technically a contract under international law between Greece and its foreign lenders, refers to the MoU as a condition for the release of the loan tranches. Thirdly, the main commitments laid down in the MoU were copied in the Council Decision 320/2010/EU.[39]

For the last three years, the MoU has been the main keyword in public discourse. Not only has it caused a civil division and a new kind of political cleavage between camps, consisting of parties from both the right and the left, but it has also become the object of legal controversy. To be more precise, the political debate was eventually legalized and a vast number of cases concerning the compatibility of the MoU with Greek, EU and international law were brought

[35] The MoU consists of three parts: (a) The Memorandum of Economic and Financial Policies (MEFP), (b) the Memorandum of Understanding on Specific Economic policy conditionality (SEPC) and (c) the Technical Memorandum of Understanding (TMU).

[36] I Vlachou, *Memoranda sunt servanda?—The Legal Status of the Memorandum of Understanding of the Greek Bailout in the Hellenic, European and International Legal Order*, LLM master's thesis, University of Leiden Faculty of Law (October 2012) available at: http://studentthinktank.eu/wp-content/uploads/2012/11/THESIS_I.Vlachou-11.pdf, 14.

[37] Law 3845/2010, 'Measures for the application of the support mechanism for the Greek economy by euro area Member States and the International Monetary Fund', Official Gazette A΄ 65/ 06.05.2010. The MoU has also been connected to the standby arrangement, constituting a condition for IMF financing.

[38] The Agreement was signed on 8 May 2010 by Greece on the one hand and the rest of the Member States on the other, except from Germany, on behalf of which the German Kreditanstalt für Wiederaufbau signed it. Art 1(1) of the Loan Agreement provides that: 'The Lenders make available to the borrower a loan facility … subject to the terms and conditions of the MoU and this Agreement.'

[39] Council Decision 320/2010/EU, EE L 145, 11 June 2010, 6–11, 'addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit' (based on Arts 126(9) and 136 TFEU), later revised by Council Decision 2011/57/EU of 20 December 2010.

before the competent courts. Human dignity, the right to property, protection of labour, and social rights in combination with the principles of proportionality, legal certainty, the rule of law, and national sovereignty itself have been invoked in these legal challenges.[40]

Austerity measures imposed through the first MoU and its related laws (especially Law 3845/6.5.2010, A΄ 65) have been challenged before the courts, especially the highest administrative court, the Council of the State (Symvoulio tis Epikratias) triggering a debate on the constitutionality of the MoU.[41] It is worth noting that that Greece does not have a constitutional court. Review of constitutionality is diffuse, being exercised by all courts.[42] However, the highest administrative court, the Council of the State, effectively concentrates on constitutional review.[43] With its Decision 668/2012, the Council of State dismissed the case of the alleged unconstitutionality of the measures. The Strasburg Court also denied their unconventionality, coming to the conclusion that salary cuts do not violate Article 1 of the 1st Additional Protocol to the European Convention on Human Rights (ECHR)[44] and it thus rejected the relevant application as 'manifestly ill-founded' (Article 35(3) and (4) ECHR).

III. BALANCED-BUDGET AMENDMENT IN THE GREEK CONSTITUTION

The tendency within the course of constitutionalism is to enhance the 'economic'[45] and/or 'fiscal' constitutionalism both at national, supranational[46] and

[40] *Cf* A Pottakis, 'Greece—In Search of a Modern Deus ex Machina: Towards an Orderly Bankruptcy of European Legal Orders' (2011) 17 *European Public Law* 187; Y Kouzis, 'The Impact of the Crisis on Labour Relations and Collective Agreements in Greece—Towards a Sustainable Recovery: The Case for Wage-Led Policies', (2011) 3 *International Journal of Labour Research* 245, as well as abundant Greek literature.

[41] *Cf* X Contiades and I Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' in X Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Surrey, Ashgate 2013) 195, 201 et seq.

[42] See Art 93(4) GrC: '4. The courts shall be bound not to apply a statute whose content is contrary to the Constitution.' In such a diffuse system, any court exercises a specific review, ie of the application of the law in the very specific case before it. When a court finds that the legal provision as applied in the specific case is unconstitutional, it misapplies it, but id may not annul it (with the exception of the Highest Special Court, called to judge in specific cases).

[43] This is mainly due to hierarchical structure of the judicial system, which allows for repeal of the decisions taken at first instance. Lower courts tend to adjust to the higher courts' decisions, even though they are not legally obliged to do so. See also Art 100(5) GrC: 'When a chamber of the Council of State or of the Supreme Civil and Criminal Court or of the Court of Audit judges a provision of a statute to be contrary to the Constitution, it is bound to refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court of this article. The plenum shall be assembled into judicial formation and shall decide definitively.'

[44] See judgements 57665/12 and 57657/12, Ioanna Koufaki c la Grèce and ADEDY c la Grèce, 7 May 2013, available at: http://hudoc.echr.coe.int/.

[45] G Beaucamp, 'Grundzüge der Finanzverfassung' (1998) 30 Juristische Arbeitsblätter 774; R Zippelius and M Wurtenberger, *Deutsches Staatsrecht* (Munich, Beck, 2005) 467 et seq.

[46] A look at the agenda of European Council Meetings during these last three years reveals that most of the topics focus on the reformation of the economic constitution of the EU.

international level.[47] The global financial crisis and the subsequent European sovereign debt crisis mark—although not exclusively—the peak of this tendency. One could reasonably argue that the strengthening of global markets is the environment to which legal regulations need to adapt. This creates the need for the adoption of common economic policies, the efficacy of which is ensured through their entrenchment in national, European and international law. A question then arises as to the relationship between this new type of economic and fiscal constitutionalism and the classic, liberal and democratic constitutionalism as we used to know it.

Returning to the case of Greece—and combining the international with the national arena—one could arguably reach the conclusion that, if the flaw in the design of Greek economic policy is structural, then changing the basic law, the Constitution, could help the state face the current fiscal crisis or prevent the next one from hitting shortly afterwards. In other words, should the necessary structural correction start from the fundamental law of the state? Will imposed constitutional constraints effectively change the basic rules of the fiscal game? The constitutional agenda on this point has been set Europe-wide by the Fiscal Compact, which demands the incorporation of the 'golden rule' in the national legal apparatus, preferably at constitutional level. This section will focus on the legal merits and flaws of introducing the 'balanced-budget rule' into constitution, and especially into the Greek Constitution.

A. The 'Golden Rule' Amendment

(i) The Requirements of the Fiscal Compact

The Treaty of Maastricht has already set the goal of maintaining price stability and preventing high inflation.[48] Article 126(1) TFEU (in its post-Lisbon version) states that 'Member States shall avoid excessive government deficits' while monitoring by the Commission based on specified criteria is foreseen in the second paragraph. This monitoring possibly counterbalances the fact that economic policy remains a national competence.[49] In the same vein, the Treaty on Stability, Coordination and Governance (TSCG) was signed with the aspiration, according to its Preamble, 'to promote conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area'. In the same Preamble the contracting parties explicitly recognize that

> the need for governments to maintain sound and sustainable public finances and to prevent a general government deficit becoming excessive is of essential importance

[47] The number of G8 and G20 meetings has substantially increased over time.
[48] See also Art 119(2) and Art 127(1) TFEU as well as Art 3(3) TEU.
[49] See C Hillgruber, 'Disziplinlosigkeit oder Vertragsbruch?' [2004] *Juristenzeitung (JZ)* s 166–72.

> to safeguard the stability of the euro area as a whole, and accordingly, requires the introduction of specific rules, including a 'balanced budget rule' and an automatic mechanism to take corrective action.

The main commitment that Member States undertake with regards to the new Treaty is to introduce—within one year of the Treaty coming into force (1 January 2013)—into their national legal system the so-called 'golden rule', or 'balanced-budget rule', ie a legal prohibition of deficit government spending.[50] More specifically, Article 3(2) TSCG imposes on Member States the duty to incorporate the 'golden rule' at national level by means of 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. This is the first time that an EU treaty has imposed on Member States an explicit constitutional amendment, rather than just causing implicit changes, as most such treaties have done until now. Moreover, Article 8(1) TSCG[51] allows the CJEU to be called upon to judge if a Member State has failed adequately to incorporate the 'golden rule' in its national legal apparatus.

(ii) Why in the Constitution?

Inserting budgetary constraints into Member State constitutions is intended to guarantee legal certainty and effectiveness. If the effectiveness of legal provisions is closely linked with enforceability, then in order for the 'golden rule' normatively to command any disobedient budget legislator, it needs to be justiciable. Thus, courts are invited into the game. In this light, one could easily understand the regulation on competence of the CJEU, which may be called upon by any Member State in order to adjudicate whether another Member State has not been applying the fiscal rules. It then becomes unclear why it is necessary for the balanced-budget amendment to be introduced into national law. Besides, by remaining a provision of EU law, the 'golden rule' acquires the same force by being adjudicated upon in the CJEU.

One answer to the question why the constraints should be transposed into national legal order is the fear that national constitutional courts might develop a stance of 'judicial disobedience' towards the Fiscal Compact and probably CJEU

[50] For the 'golden rule' in the Fiscal Compact, see F Fabbrini, 'The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism' (2013) 36 *Boston College International & Comparative Law Review* 1, 4.

[51] 'The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.'

rulings.[52] That they would, in other words, declare a European 'golden rule' inapplicable in national fiscal matters either as unconstitutional vis-à-vis their own national constitution or outside of EU competence (ultra vires). The inadequacy of available legal bases might have after all compelled the European political elite to design the Fiscal Compact as an international treaty and not as an EU law instrument. The fact that an international treaty needs to be transformed into national law—independent of the self-executing nature of international law (or the lack thereof)—helps overcome the impediment of economic policy remaining at national level.

The alternative to constitutional incorporation, namely a regulation based on Article 136 TFEU,[53] would run the risk of being declared by a national court as violating a national constitution or even being ultra vires. Thus, such an alternative would not necessarily guarantee the higher legal value that the drafters of the Fiscal Compact had wished to safeguard.[54] Their discomfort reflects the uncertainty of EU law when it faces national constitutional law, as well as their fear that the principle of supremacy might be undermined in its full application by national constitutional courts.

B. The Greek Particularities

(i) The Balanced-Budget Amendment Is Improbable

Greece's fiscal constitution[55] does not contain any provisions concerning public borrowing. Hence, if the 'golden rule' were to be inserted into the Greek Constitution (GrC), then the latter would have to be formally amended. The revision procedure of the relatively rigid Constitution is foreseen in Article 110.[56] A

[52] *Cf* Czech Constitutional Court, judgment of 31 January 2012, Pl ÚS 5/12, R Zbíral, 'Case Note: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*' (2012) *Common Market Law Review* 49, 1475.

[53] According to a convincing opinion, Art 136 TFEU is not a substantive legal basis as such but rather the basis for enhanced co-operation between eurozone members, and thus it requires an international compact—eg it has been utilized to adopt the 'two-pack' of regulations. For this view see Ruffert (n 23) 1777.

[54] See A Dimopoulos in this book (Chapter 3).

[55] Section III: Parliament, Chapter Six: Taxation and fiscal administration, Arts78–80 GrC, or Art 75 'Bills resulting in burdening the State budget'.

[56] Art 110 GrC:

> 1. The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7 , 5 paragraphs 1 and 3, 13 paragraph 1, and 26.
>
> 2. The need for revision of the Constitution shall be ascertained by a resolution of Parliament adopted, on the proposal of not less than fifty Members of Parliament, by a three-fifths majority of the total number of its members in two ballots, held at least one month apart. This resolution shall define specifically the provisions to be revised.
>
> 3. Upon a resolution by Parliament on the revision of the Constitution, the next Parliament shall, in the course of its opening session, decide on the provisions to be revised by an absolute majority of the total number of its members.

balanced-budget amendment is in principle not excluded by the 'eternity clause' of Article 110(1) GrC. The argument that such a rule poses too wide a restriction on a government's framework to design and execute its policy and hence runs counter to the principle of democracy is not very convincing here, since it ignores the constitutional character of Greek democracy, which allows for a binding frame within which decisions are allowed. Furthermore, it has been proposed that fiscal irresponsibility cannot be laid at the feet of particular politicians or parties, since the expectation that, 'with electoral rotation, those who stand for fiscal integrity might eventually replace those who are fiscally profligate' is utopian since there is a fault not 'in ourselves, as participants in the ordinary politics of modern majoritarian democracy, but in the structural rules within which this politics takes place'.[57]

In any case, in order formally to revise the Constitution, the Parliament must approve with qualified majorities the amendment in two subsequent periods. Given the requirement for a qualified majority (ie three-fifths of the total number of MPs, see Article 110(4) GrC), inserting a 'golden rule' into the Constitution presupposes that different political parties have to agree on the basics of future economic policies and on a set of contingencies that would only provide them with little room to deviate from a balanced budget when in office. Given the current political situation, a balanced-budget amendment is unlikely to be supported by the necessary three-fifths majority (180/300 MPs). Moreover, for the amendment procedure to be properly completed, an absolute majority of MPs in the next parliamentary period after the elections is required.[58] Not only does this result in a delay, but it also risks annulment of the forthcoming amendment, in the event of a possible radicalization of voters and/or a change in government in favour of opposition parties. Thus, amending the Constitution of Greece in order to incorporate the 'golden rule' is not only technically difficult and time consuming but politically complex as well. Furthermore, such a change would face the accusation that it was causing a further loss of sovereignty.[59]

4. Should a proposal for revision of the Constitution receive the majority of the votes of the total number of members but not the three-fifths majority specified in paragraph 2, the next Parliament may, in its opening session, decide on the provisions to be revised by a three-fifths majority of the total number of its members.

5. Every duly voted revision of provisions of the Constitution shall be published in the Government Gazette within ten days of its adoption by Parliament and shall come into force through a special parliamentary resolution.

6. Revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision.

[57] J Buchanan, 'The Balanced Budget Amendment: Clarifying the Arguments' (1997) 90 *Public Choice* 117, 120-21.

[58] For a similar revision procedure see M Diamant and M van Emmerik in this volume (Chapter 12).

[59] Contiades and Tassopoulos (n 41) 214.

(ii) The Balanced-Budget Amendment Is Legally Unnecessary

If Greece does not succeed in completing a constitutional amendment due to the technical and political reasons explained above, the question arises whether it should expect to be brought before the CJEU accused of not implementing Article 3(2) TSCG, pursuant to Article 8(1) TSCG. A possible line of defence in such a case—which at the same time provides a profound and solid ground for proving that a balanced-budget amendment is not necessary for the rule to be eventually enforced—lies with the legal status of international treaties in the Greek legal order.

Within the context of a mixed model (monist and dualist[60]), international law—such as the TSCG—after its incorporation into national law, acquires a legal position higher than formal laws, ie laws voted upon by the Parliament, including the law on state budget. The TSCG has already been ratified and incorporated into Greek legal system through Law 4063/2012.[61] In this way, the Fiscal Compact (Article 3 TSCG) has become part of the Greek legal order (due to the monist effect of the incorporation of international law according to Article 28(1) GrC) and has acquired higher legal validity than any contrary provision of law.

Consequently, Greece's obligation resulting from Article 3(2) TSCG to give effect to the rules of Article 3(1) TSCG 'in the national law through provisions of binding force and permanent character … guaranteed to be fully respected and adhered to throughout the national budgetary process', although not on a constitutional level (something not necessarily demanded by the TSCG), has already been formally fulfilled.

The legal status of the Fiscal Compact as an international treaty is higher than that of formal laws, but below the Constitution. Theoretically speaking, this allows a court to undertake a constitutionality review of the 'golden rule' based on the assumption that it contravenes both fundamental principles, such as democracy (Article 1 GrC) and the social state (Article 25(1) GrC), as well as specific social rights. Such a development, however, leading to Greek courts restricting the executive as regards the execution of its budgetary obligations ,is highly improbable in light of the judicial experience to date.

(iii) Executive Unbound?

Since the signing of the MoU, Greek legislative and executive institutions have functioned under the auspices of the Troika, which has taken charge to fix not

[60] The dualist element is the requirement of incorporation whether the monist elements consists in the incorporation of the international law into the Greek legal order. *Cf* Art 28(1) GrC: 'The generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.'

[61] Art 3 of Law 4063/2012, Official Journal of the Government (FEK) A΄ 71/30.03.2012. The same law ratified the amendment of Art 136 TFEU (Art 1) and the ESM Treaty (Art 2).

only the nation's finances but the entire Greek administration. Although the members of the Troika are simply high-ranking officials of the organizations in which they work, they negotiate with ministers—though the word 'negotiation' might be considered a euphemism for predetermined decisions imposed on the Greek government.[62] It is actually the Troika that sets the political agenda, since it delivers the report on which the release (or not) of the next loan instalment depends.

As a result, the constitutional regime during the crisis is mainly marked by an intensification of the tendency for an 'unbound executive' along with a diminishing capacity for supervision both by Parliament and by the courts when it comes to economic issues. Executive power itself is dichotomized between politically accountable ministers and the heads of the parties supporting the government, and the Troika, who are politically unaccountable, supported by a large number of publicly unknown but powerful 'ephorate', 'a new branch of government comprising office-holders who possess the type of expertise and specialised knowledge that has become the basis of effective governmental decision-making'.[63] Such an evolution with regards to the Troika's role and the transfer of a substantial amount of political power to this kind of transnational 'ephorate' exemplifies a new phase in the development of government.[64] However, this is also the government's fault to the extent that no plan for national reforms was being prepared to maintain and promote the country's comparative advantages within the EU and/or at a global level. Two coinciding trends of depoliticization may be observed and financial issues are a domain par excellence in which to observe these trends: first, the transfer of economic decision-making to the EU, only partially legitimized by the citizens, since power is exercised mainly by the Council (on which representatives of the executive sit); and second, the strong role played by professional executives—a new 'ephorate', represented par excellence by the Troika. In this context, the commitment imposed by Article 3(2) TSCG to 'fully respect the prerogatives of national Parliaments' sounds like a euphemism. Where financial issues are concerned, not only courts but even parliaments seem to lose their say and executive power, old and new, appears more unbound in all respects.

A further trend of depoliticization is reflected in the 'judicialization of mega-politics'.[65] In this vein, an unprecedented recourse to the Greek courts has harboured hollow hopes that the MoU's austerity policies will be defeated in courtrooms. Moving between technocratic decisions taken by the executive (and merely endorsed by the Parliament) and judicial judgments proves to be a 'no-win situation' for politics. Nevertheless, Greek judicial practice from previous

[62] *Cf* Drossos (n 20) 11.

[63] M Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press, 2010) 450.

[64] Ibid.

[65] R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Boston, MA, Harvard University Press 2004) 169–70; R Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93, available at ssrn.com/abstract=1138008.

years asserts the general observation that, with a few exceptions, '[i]n matters of broad economic and social policies, the courts have generally been less active' since such issues 'require wider state intervention and changing public expenditure priorities'.[66] As mentioned above, Greek courts (with the exception of few decisions mainly taken by lower courts) have been hesitant to intervene in this field since they are inadequately equipped to convincingly overturn economic decisions taken by the executive power and endorsed by the Parliament. The most they could possibly ask for from the latter—in practice from governmental officials—is a detailed cost–benefit analysis report justifying the necessity of the measures.[67]

However, there is a caveat to the above evaluation concerning the courts' reduced capacity to administer the economy through the rule of law: given the fact that a constitutionally embedded 'golden rule' sets a procedural limit,[68] a prohibition, the enforcement of a 'golden rule' merely presupposes that the courts exercise their function of ideal type, which is negative legislating. This is more apt to their nature, as opposed to the implementation of social rights that implies the exercise of positive legislation.[69] Thus, courts might be expected to be less reluctant to reinforce the 'golden rule' than they are to reinforce social rights and distributive justice. This argument, however, ignores the fact that the very nature of constitutionalization and the corresponding expansion of judicial adjudication is a political, rather than a juridical, phenomenon.[70] In this context, judicial decisions are hardly likely to resist governmental decisions, especially given the fact that the 'golden rule' foresees a wide range of exceptions, making it susceptible to breaches masked as normatively prescribed for 'exceptional circumstances'. If the hypothesis that courts, especially in economic matters, are inclined to withhold decisions of the executive, then by legalizing and constitutionalizing budgetary constraints the real power is rather being transferred to the new 'ephorate'—bureaucrats and economists, executives and lobbyists. On the other hand, if the political community through a constitution-amending majority decides to impose such a rule as an exercise in self-command,[71] meaning an effort to 'overrule one's own preferences',[72] they will already have shown the second-order political will to obey to such a rule. The latter could provide a legitimate excuse

[66] R Hirschl, 'Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming', (2005) 84 *Texas Law Review* 471, 475.

[67] See Council of State judge's Karamanof dissenting opinion in three judgements of the Court: (a) 668/2012 (Plenum), para 33.Γ, (b) 1972/2012 (Plenum), para 17.B and (c) 38/2013 (Plenum), para 7.

[68] Buchanan (n 57) 126.

[69] *Cf* H Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution' (1942) 4 *Journal of Politics* 183.

[70] Hirschl, *Towards Juristocracy* (n 65) 12.

[71] W Keech, 'A Theoretical Analysis of the Case for a Balanced Budget Amendment' (1985) 18 *Policy Sciences* 157, 158.

[72] TC Schelling, 'Self-command in Practice, in Policy and in a Theory of Rational Choice' (1984) 74 *American Economic Review* 1. Schelling develops this concept in the context of theories of rational choice on the individual level, such as consumer behaviour.

for the government to avoid spending, as long as it decides to do so and not rely on the exceptions foreseen by the rule itself.

A further argument used by some proponents[73] of a balanced-budget amendment builds on the analogy that the government is like an alcoholic, drunk on deficits and unable to achieve the sobriety of balanced budgets without a constitutional constraint. This argument does not hold for Greece nowadays either, since the country has ran out of alcohol anyway! Having already signed MoUs with its creditors, Greece does not even need to proceed formally to a constitutional amendment in order to respect budgetary constraints. The MoUs—although they are not legal texts, according to decision 668/2012 of the Council of State discussed above, but merely political agreements—are enough to guarantee Greece's obedience to the substance of the 'golden rule'. Tight fiscal surveillance under the EU deficit procedure and the Troika guarantee this result better and more effectively than a constitutional provision in a country without a constitutional court. Thus, the normative power of the facts themselves—'die normative Kraft des Faktischen'—in harmony with the 'state of emergency' largely evoked by the courts, seem to overrule the normative Constitution and render a balanced-budget amendment redundant—at least for the time being.

IV. DOES THE 'GOLDEN RULE' BELONG TO THE CONSTITUTION?

The previous comment opens a Pandora's box. Apart from the practical difficulties of a political nature that amending the Greek Constitution would nowadays involve, a more general, theoretical question arises: even if agreement is reached on the substance of the 'golden rule', should this politico-economic policy be dressed in a constitutional cloak, and thus frozen, thereby binding future parliamentary majorities? In this respect, considerations of constitutional theory and politics come to the fore. The question is whether the constitution is the suitable legal topos for a balanced-budget rule.

A. About the Constitutional Fabric

At this juncture, it is worth posing three distinct questions that might undermine the first-order belief that a balanced-budget rule should be inserted into the Constitution. Firstly, does economic policy belong in the content of a constitution? Secondly, to go a step further, who is to decide the eligible content of constitutions? Here, the grammar of constitutionalism is called upon. The demand for constitutionally setting the budget framework raises questions concerning the very existence and function of a constitution. These are ques-

[73] J Buchanan and RE Wagner, *Democracy in Deficit* (New York, Academic Press, 1977) 159.

tions with difficult, uncertain, debatable and labile answers. Thirdly, if the constitution 'is there everlastingly to depend upon, and to relieve us from the necessity of facing and settling matters of principle',[74] one would ask whether the balanced budget is such a matter of principle or it should rather be inserted as 'a check upon the experimental spirit which is the natural corollary of democratic theory'.[75]

Constitutions were conceived as written declarations aiming to restrain political power over the citizenry and originally the bourgeoisie, concerning primarily taxation, private ownership and religious tolerance. In terms of taxation, one can already distinguish the seeds of a fiscal and financial constitutionalism in this early constitutional setting. This kind of financial constitutionalism, however, was confined to procedural guarantees protecting the emerging bourgeois class from the monarch's omnipotence. Parliament, as a representative organ of the bourgeois citizens, had a veto over the monarch's prerogative to impose new taxes upon them and is still maintains competence to decide upon the budget. Today, however, democratically elected representatives tend to approve the executive's proposals for higher spending even at the expense of the public debt, since they are also concerned about their functional legitimacy—to term it benevolently—or, they tend to resort to clientelism (which is more the case in the Greek context) in order to be re-elected.

Opponents of constitutional budgetary constraints say that economic policy has to be decided upon by each legislative majority and government, according to the results of elections. Political parties must be free to propose their programmes and design their prospective policies, even if these are based on borrowing. This is why a balanced-budget constitutional rule would violate democracy and its indispensable ingredient, political pluralism, as the guiding principle of a constitutional state, and would excessively narrow 'political manoeuvring in matters of public finance and fiscal policy, inscribing into the Constitution neo-liberal economic policies'.[76] However, setting a constitutional boundary to governmental power is always a boundary to democracy if the latter is conceived only in procedural terms. The balanced-budget amendment governs the process and 'lays out a new rule for making fiscal choices; it does not lay down guidelines for what these choices might be'.[77] Fundamental rights do nothing less than that, namely setting boundaries. Yet according to the more convincing perception with regards to their nature, fundamental rights should not be conceived as principles contradicting popular sovereignty, but rather as mutually interdependent and unbreakable corollaries.[78] Constitutional democracy, as a mixed

[74] AK Rogers, 'Constitutionalism' (1930) 40 *International Journal of Ethics* 289, 289.
[75] Ibid.
[76] Contiades and Tassopoulos (n 41) 214.
[77] Buchanan (n 57) 126.
[78] J Habermas, 'Human Rights and Popular Sovereignty: The Liberal and Republican Versions' (1994) 7 *Ratio Juris* 1, 13.

regime, is based on multiple modes of legitimacy, namely popular election of political representatives and the rule of law.

The question then arises as to what extent, if at all, is the prohibition of excessive sovereign debt different to a fundamental right, eg the prohibition of compulsory work (Article 22(4) GrC).[79] The need for exceptions and for flexibility and change in economic policy apply to both cases. Compelling people to work would probably help the economy to flourish. Yet, nowadays in Europe this is seen (rightly so) as totally excluded and beyond any notion of constitutionalism. Unlike human rights, balanced budgets are not first principles or ends in their own right; rather deficits are opposed for instrumental reasons relating inversely to other implicitly higher goals such as price stability, capital formation, and, by extension, long-term growth.[80] Thus, from a constitutional theory point of view, the legitimacy and acceptance of a constitutionally based balanced-budget rule depends on the elaboration of a theoretical account combining the diminution of debt with constitutional principles which the 'golden rule' serves, beyond pure economic necessity. Such a theoretical account will be explored below.

B. Balanced Budget as a Prerequisite for a Democratic Government

Only if it can be proven that the cutting of fiscal deficits is a prerequisite for democratic governance and/or the rights of the individuals can its insertion be accepted under the principles of constitutionalism. Such an account may be elaborated around three axes.

(i) Sovereign debt vs popular sovereignty

The first axon is the emergence of a bipolarity composed of the states as public spaces, and international private interests that supersede states in economic strength. The functioning of rating agencies and the catalytic repercussions that their credit ratings may have on national economies[81] are pieces of a puzzle that in its totality may prove that the states' relative independence from the 'markets' is the indispensable background for any level of self-government. This argument implies that there is an inverse relationship between sovereignty, either national

[79] Art 22(4) GrC: 'Any form of compulsory work is prohibited. Special laws shall determine the requisition of personal services in case of war or mobilization or to face defence needs of the country or urgent social emergencies resulting from disasters or liable to endanger public health, as well as the contribution of personal work to local government agencies to satisfy local needs.'

[80] Keech (n 71) 159.

[81] *Cf US v McGraw-Hill Companies Inc, and Standard & Poor's Financial Services LLC* (available at www.justice.gov/iso/opa/resources/849201325104924250796.pdf). In this civil lawsuit against Standard & Poor's the US government is seeking $5 billion, accusing the ratings service of defrauding investors.

or popular, and sovereign debt. Thus if a constitution legitimately guarantees the former, it should necessarily prevent the latter.

This analysis is framed by the suggestion that a sustainable notion of democracy presupposes its relative restriction in the present. This argument may be found in a judgment of the German Federal Constitutional Court.[82] Responding to the criticism that a constitutional debt-brake violates the principle of democracy, the Court underlined that such a constraint 'may be necessary precisely in order to preserve the democratic power to shape affairs for the body politic in the long term'.[83] Just as liberty, to be sustainable, may demand some restrictions (eg prohibition of hate speech), democracy needs to be protected against its own excesses too. One can also draw a comparison with rules governing free economic competition. Leaving competition totally free and unregulated will definitely result in a concentration of economic power. Thus, the sustainability of the free competition principle depends upon its procedural limitations. At this juncture, attention may also be drawn to the openness of the democratic process. The same logic that allows for budgetary restrictions in order to preserve the sustainability of popular sovereignty, would also dictate the outlaw of political parties that jeopardized democracy. Hence, the German way of seeing things in budgetary matters is consistent with the notion of *streitbare/wehrhafte Demokratie* that the Republic adopts in order to face its enemies. Although this sounds convincing, it does not correspond with the Greek constitutional philosophy and political culture.[84] By not embracing the philosophy of 'militant democracy', the Greek constitution is thought not to be able to confront by normative means either the debt crisis through the insertion of a 'golden rule' or the democratic crisis posed by an anti-democratic party, such as the Golden Dawn.

[82] Judgment of the German Federal Constitutional Court, BVerfGE 129, 124—EFS of 12 September2012,

[83] Ibid, para 224:

> [I]t is not anti-democratic from the outset for the budget legislature to be bound by a particular budget and fiscal policy' (see BVerfGE 79, 311, 331 et seq; 119, 96, 137 et seq). By putting into specific terms and objectively tightening the rules for borrowing by Federal and *Länder* governments (in particular Article 109 (3) and (5), Article 109a, Article 115 of the Basic Law new, Article 143d (1) of the Basic Law), the constitution-amending legislature made it clear that a constitutional commitment on the part of the parliaments and thus a palpable restriction of their budgetary power to act may be necessary precisely in order to preserve the democratic power to shape affairs for the body politic in the long term (BVerfGE 129, 124, 170). Even if such a commitment restricts democratic legislative discretion in the present, it serves at the same time to guarantee it for the future. Admittedly, even a long-term worrying development of the level of indebtedness is not a constitutionally relevant impairment of the legislature's competence for a situation-dependent discretionary fiscal policy. Nevertheless, it results in a de facto constriction of discretion (see BVerfGE 119, 96, 147). Keeping discretion as broad as possible is a legitimate goal of the (constitutional) legislature.

[84] The whole discussion touches upon the way the Greek political system should face the danger posed by the emergence of the neo-nazi political party called Golden Dawn. It is worth noting here that in Greece there is no legislation for prohibiting political parties.

(ii) Intergenerational Justice

The second axon around which the quality of the 'golden rule' as constitutional fabric may be twined is intergenerational justice. Borrowing today in order to enjoy goods or services results in austerity measures tomorrow, for the next generation.[85] There is an inherent injustice to this scheme, a radical break in the equality and solidarity principle. If this holds, then a constitution as the supreme law, aiming at reversing the unequal way things are naturally and socially structured, may exercise its normative power to try to prevent such an economic and ethical injustice. This thought serves also as a counterargument to the assertion that the 'golden rule' necessarily violates the principle of the social state and the protection of specific social rights. This objection is countered by reference to fact that the obligation of a balanced budget does not prevent a state from redistributing and offering social protection to the poor and weak; it only prohibits deficit spending in excess of revenue, ie funds raised by borrowing, rather than by taxation. Thus it only obliges the government to make the necessary arrangements and save resources for social public expenses through revenues. No governmental outlay, but only high levels of debt-financed public expenses are excluded. The latter seems to enforce solidarity and redistribution more than excessive borrowing and imposes the need for enhanced governance capacity.

(iii) Excessive Borrowing as Unfair Political Competition

The third quality that connects a debt brake with democracy is the need to liberate the political process and party competition from unfair elements. Such an unfair element is the promise to deliver goods to the electorate not based on politics, fostering production, modernizing the administration and redistributing the outcome or through hierarchizing human needs, but rather based on 'cheating'. In this context, suspending the political agents' authority to spend without taxing,[86] and also limiting their borrowing power, prevents them from bribing voters, and corrupting consciences. In this respect, free and fair competition is a principle applying to both the economy and politics. Legal regulation is necessary and applicable to guarantee both, even by limiting the procedural liberty (of governments, political parties and enterprises) in order to safeguard their substance.

The counterargument to the above would be that borrowing in order to invest would be a smart way of reasserting the lost (national and popular) sovereignty.[87]

[85] *Cf* Constitutional Court of North Rhine-Westphalia, Germany, VerfGH 20/10, 15 March 2011, available at www.vgh.nrw.de/pressemitteilungen/2011/05_110315/110315_vgh_Urteil.pdf. The Court states (C.I.1) that the aim is the protection of future generations; more specifically future citizens and parliaments need to be protected from the fact that they will not have the necessary financial framework to face the problems of their time, according to their own criteria. That is why income that burdens future budgets needs to be compensated with spending which benefits the future.

[86] Buchanan (n 57) 121.

[87] Thus the old debt brake in the German Constitution looks more justified than the new one.

Moreover, considerations of economic relevance would come to the fore, which go beyond the subject matter of this discussion. The open-ended character of the discussion, the polarization it provokes and the ambiguity of the whole issue may be a good reason not to adopt such an amendment after all.

C. The Strengths and Weaknesses of a Constitution

Even if the answer to the previous question concerning the constitutional quality of the 'golden rule' is positive, a further question arises as to whether and how effective a national constitutional amendment may prove. In other words, whether incorporation into national law and thus possible enforcement by national courts would enhance the balanced budgetary rule's effectiveness and intensify its normative strength, if compared with its mere embeddedness in the European legal order. The question concerns the real normative ability of a constitution to regulate the economy, beyond the basics (ie basic freedom of economic transactions as a part of personal autonomy). In classical terms, if there is a bipolarity between 'rules and coordination based modes of governance',[88] the former is the more intensive and pressing mode of proceeding, often equated with sanctions, while the latter is looser and may be less efficient. One may convincingly think that Article 3(2) TSCG aims exactly at enhancing this kind of normativity and efficiency.

However, this is not necessarily the case with a state such as Greece, where existing law is not always enforced. As the example of 'Greek statistics', namely the attempt to use creative accounting strategies to hide debts, shows, a single constitutional provision has not the force to guarantee that such creative means will not be used in the future to hide overruns. It is only practices and policies that could prevent this from happening—not a legal norm, no matter how high its placement in the legal hierarchy. Moreover, as already noted above, there is no constitutional court in Greece and the highest administrative court (that may be thought of as quasi-constitutional court, since most cases concerning constitutional review are concentrated in its plenum) hesitates (for reasons explained above) to intervene in economic matters. Therefore, a balanced-budget amendment may be responsible for undermining the authority of state constitutions.

Moreover, and needless to say, the relevant set of contingencies to be included in the escape clauses can be very hard to identify and serious problems of enforcement and monitoring may arise. In this respect, these normative prescriptions lead once again to the well-known policy dilemma of choosing between 'simple rules and discretion'.[89] The existence of wide-ranging derogations[90] proves

[88] *Cf* KA Armstrong in this volume (Chapter 4).

[89] Alesina and Tabellini (n 14) 413.

[90] See: Art 115(2) of the German Basic Law, as modified in 2009; Art 135(4) of the Spanish Constitution, as modified in 2011; Art 81(2) of the Italian Constitution, as modified in 2012.

that drafters are fully aware of this fact. If one excludes natural catastrophes, an unprecedented fiscal crisis such as the current one clearly falls under the terms 'unusual emergency situations' and 'economic recession or extraordinary emergency situations that are either beyond the control of the State or significantly impair the financial situation or the economic or social sustainability of the State' and 'exceptional circumstances' that are foreseen as eligible bases for derogation in the German, Spanish and Italian constitutions. The Fiscal Compact itself foresees in Article 3(1)(c) 'exceptional circumstances'[91] as a legitimate ground for the Contracting Parties to 'temporarily deviate from their respective medium-term objective or the adjustment path towards it'. This clause may counterbalance '[t]he chief drawback of constitutionalisation', which is that it severely limits the ability of governments 'to respond to changes in economic circumstances',[92] but it definitely undermines legal certainty and the normativity of legal texts. It is not unusual that courts, feeling obliged to obey economic necessities, surpass a strict legalistic reading of the normative texts. The famous *Pringle*[93] decision of the CJEU is a typical example of a deviation from the normative content of the constitutional rule.

After all, both constitutionalization and legalization of fiscal discipline reveal a bold distrust of the people's representatives;[94] the same applies for the institutionalization of an independent Fiscal Council. However, the possibility of a deviation being allowed can result in the repoliticization[95] of the otherwise depoliticized fiscal policy.

V. CONCLUSIONS: THE GREEK DEBT BETWEEN RULES AND POLICIES

This chapter leads to the conclusion that the influence exerted on domestic policy by a constitutional provision is limited. A 'thick' constitution is more sensitive to violations and misunderstandings. It would thus be preferable rather to abstain from constitutional ambitions and opt for a 'thinner' constitutional economic framework, limiting government in sectors germane to normative regulation.

[91] See Art 3(3)(b): '"[E]xceptional circumstances" refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.'

[92] RC Schragger, 'Democracy and Debt' (2012) 121 *Yale Law Journal* 860, 869.

[93] Case C-370/2012 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, 27 November 2012. *Cf* B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle' (2013) 50 *Common Market Law Review* 805, 834 and 848, who conclude that 'the Court has given, in Pringle, a well- reasoned judgment expressing a good mixture of legal principle and political pragmatism'.

[94] See also Schragger, 'Democracy and Debt' (n 92) 883.

[95] As G DelleDonne in this volume (Chapter 9), notes: '[I]t is far from self-evident that constitutional courts decide to engage in a difficult, controversial scrutiny of the degree of "extraordinariness" of the economic situation after a parliamentary vote.'

Economic issues can be regulated less by the normative strength of the normative ('die normative Kraft des Normativen'), which means enforceability of rules, and more under the 'normative strength of the factual' ('normative Kraft des Faktischen').[96] The first two attempts to legalize budgetary amendments in the Maastricht Treaty and the Stability and Growth Pact have already shown the boundaries of the normative when not supported by the necessary political will and effective surveillance policies. A constitutional balanced-budget amendment might be defensible in some cases, such as the Greek case, when the political process systematically undervalues a desirable relationship between revenues and expenditures.[97] Yet, even in these cases, or maybe especially in these cases, it is highly debatable as to what extent such a constitutional rule would be effective. Thus it would rather be wiser to 'save' the Constitution from the burden of entanglement within the fiscal crisis, which it cannot carry.

European policies and surveillance, as well as constitutional changes at EU level rather than constitutional changes at national level, can facilitate structural reforms in Greece's economy and administration and the modernization of the system. These policies coming from 'outside' must be continuously evaluated and improved, so that their effectiveness is maximized. At the same time, political circumstances need also to be taken into account in order for the financial crisis not to turn into a political and democratic crisis.[98] This is often the case since austerity measures largely feed populist policies that inhibit any efforts to restore macroeconomic stability and reform the state. In this context, the worst phenomenon is the emergence and strengthening of a neo-nazi party, the Golden Dawn, which is today represented in the Greek Parliament, and, as indicated by the polls, is rising in popularity.

According to the mainstream constitutional ethos in Greece, neither the 'golden rule' in the Constitution nor a prohibition of the Golden Dawn would prove particularly effective. At the same time, social rights were not safeguarded when the hurricane of the fiscal crisis hit the country because they were traditionally enshrined in the Constitution. To develop a theory of social rights in the courts, or to insert a rigid rule such as the one calling for a balanced budget, or to outlaw a popular party as counterdemocratic—all such moves are destined to fail in practice. Moreover, all these three examples are expressions of the limitations to the Constitution's normative strength. Hence, overestimating the normative strength of the latter would rather degenerate and undermine it. The general idea that 'law, in the form of its supreme appearance, is apt to be the warrant to all good things that can be achieved' is a rather 'metaphysical approach'. After all, the Constitution is not sufficient to overcome a crisis it did not cause.[99]

The blurring of distinctions between institutional praxis and legal regulation within the course of EU, international and national law has been so far, and

[96] G Jellinek, *Allgemeine Staatslehre* [1905], 4th edn (Bad Homburg vdH, Berlin, Zürich 1966) 338.
[97] Keech (n 71) 166
[98] Oltheten, Pinteris and Sougiannis (n 5) 774.
[99] Drossos (n 20) 42.

will remain, the main feature of efforts by the EU to address the crisis. These combinations imply and presuppose equilibrium between rule-based governance and policy co-ordination and surveillance. Under the conditions of fiscal and political uncertainty surrounding Greece, Greek citizens and elites maintain a vital role: 'representative democracy—citizens' power to elect fiscally prudent agents and decline to elect fiscally imprudent ones— … [remains] the chief way to control local fiscal behaviour'.[100] Furthermore, reforming the state and the political system is a Sisyphean task and belongs to the Greek people themselves, if we want it to be both effective and democratic. Otherwise no real change can be long lasting.

[100] Schragger (n 92) 865–6.