Ordoliberalism Out of Order? The Fragile Constitutionality of Greek Austerity

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This is the second part of a two-part post. The first part, available here, considered the historical background of the concept of constitutional order and its relation to the ordoliberal project. Judicial independence was examined in parallel with central bank independence, with each understood as a means of insulating policy from social and democratic pressures and also as a means of enacting and maintaining fiscal discipline and market-conforming order. It also included some preliminary observations on the relation between constitutional order and the European Union / European Monetary Union, as well as a brief overview of the background and outbreak of the Eurozone crisis. This second part examines the specifically legal aspects of structural reforms in Greece from 2010 onwards, critically assessing different challenges to their constitutional legitimacy, as well as responses to these challenges. The ultimate aim is to assess the relationship between the ordoliberal concept of constitutional order and the constitutionality (or lack thereof) of Greek economic restructuring.

Crisis Legislation

The Greek government's official request for financial assistance, triggered by the excessive deficit (12.8% of GDP) submitted to Eurostat in October 2009, initiated a process of economic restructuring. This took the form of three memoranda of understanding (MoU), concluded between successive Greek governments and the Troika [1] in 2010 and 2012 and the European Stability Mechanism (ESM) in 2015. From a legal perspective, and in part reflecting the hastiness with which the financial assistance program was conjured, the exact legal status of the financial assistance program and its relation to EU law was unclear. [2] Initially portrayed as "simple guidelines" proposed by the Troika, their concretization and implementation was "left" to the Greek government, whose proposals would have to be assessed and approved by the Troika (and later the ESM).

In this unusual context, austerity in Greece would begin with a simple draft law (3845/2010), brought to parliament in early May 2010, to which the MoU was annexed. Law 3845/2010 included a clear breakdown and implementation plan for the guidelines "proposed" by the MoU, mostly centred around significant wage and allowances' cuts for public employees and pensioners, wage reductions for private employees that prevailed over all existing contracts (collective or individual), tax increases, and benefit reductions. Weaponizing the approaching maturity of a €10 billion bond on 19 May 2010, the Troika and Greek government would insist on the absolute urgency of the situation, thereby introducing Law 3845/2010 under Article 76, paragraph 4 of the Greek Constitution, which stipulates that "a Bill or law proposal designated by the Government as very urgent shall be introduced for voting after a limited debate in one sitting".

The choice to present the MoU as a set of "guidelines", leaving the Greek government to "decide" on the exact measures, was by no means accidental. Among other things, it reflected the IMF's accumulated experience in structural adjustment programs, a key reason why the Fund was invited to participate in the first place. Aware of its negative reputation and in an attempt to "reduce the stigma associated with Fund lending" [3], the IMF's own conditionality guidelines suggest avoiding "language having a contractual connotation" [4], while also refraining from "subjecting a country member to contractual obligations to implement their programs and putting the country member in the unenviable position of being in breach of a legal obligation if it failed to meet a condition. To provide incentives to members, IMF seeks to minimize the legal consequences attached to failure." [5]

To the extent that the financial assistance program had all the characteristics of an international agreement, a strategic *rewording* of the kind suggested by the IMF could also serve to circumvent the fact that the Greek Constitution requires all international agreements to be subject to two crucial constitutional clauses: Article 36, which demands parliamentary ratification [6]; and, once operative on this basis, Article 28, which demands a three fifths qualified majority (i.e. 180 out of 300 MPs) for this ratification. [7] During parliamentary debates, Syriza and the Communist Party of Greece (KKE) pointed to this requirement to raise their initial constitutional objections. In their view, the MoU constituted an international agreement by definition, drawn up as it was by the Troika and meant to be implemented by the Greek government. Led by Evangelos Venizelos, the core of the government's response to these objections was to proclaim that "this is not the time to stick to procedures and technicalities". [8] Besides conveying an embarrassing disregard for

constitutional law for a well-respected constitutional lawyer like Venizelos, this approach was essentially an early and indicative sign that principles enshrined in the Greek Constitution would not stand in the way of the overwhelming forces lining up to implement austerity.

One of the key ways the IMF tries to avoid the perpetual stigma of enforcing harsh austerity is to insist on grounding "local ownership" of the program, making the national government responsible for laying out and applying the restructuring process. [9] From the European perspective, however, avoiding this stigma was not a primary concern. More important than this was the strategy of utilizing Greece's market exclusion to realign its economic policies with the EMU's core macroeconomic principles, spelled out in the economic order constitutionalized in the Maastricht and Lisbon treaties. For this purpose, the European side of the Troika found it imperative to work out the essential elements of the reforms, closely monitor and evaluate their implementation, and attach strict consequences to any potential failure.

From a legal perspective, this represented a gridlock. To overcome it, the MoU would have (a) to be stripped of its "international agreement" status, thus avoiding parliamentary ratification by a qualified majority and/or judicial review [10]; (b) to be "locally owned"; (c) to be produced and monitored by the Troika; and (d) to create a clear obligation of the Greek government, whose failure to comply would result in the termination of the external financial assistance. As constitutional lawyer Botopoulos would comment at the time, the MoU was a "special, unprecedented type of 'international agreement', that created both a national obligation *and* a commitment to an international organ". [11]

Initiating the restructuring process through Law 3845/2010 was a means of satisfying the local ownership aspect crucial to the IMF, while annexing the MoU and proclaiming it "an integral part of the draft law" [12], appeased European demands. In any case, and in formal terms, Law 3845/2010 transformed the MoU from a European-led project into "the *governmental program* for the confrontation of the economic problems of the country, a compelling public interest and a common interest of Greece's Eurozone partners". [13]

Naturally, the legal transformation of the MoU into the "political program" of the Greek government was quite dubious, given that the entire process was strictly monitored and evaluated by the Troika. The further implication that this transformation meant that there was nothing legally binding between the Greek government and international authorities was even

more peculiar, since strict implementation of the MoU guidelines was a precondition for the disbursement of the tranches of the loans. Nonetheless, as already noted in the first part of this post, this arrangement also carried something strangely realistic: the Greek government *did* in fact agree with the implementation of austerity measures, openly arguing that the MoU contained policy objectives endorsed– and, in many cases, already adopted–by the government.

From this moment on the key concern of both Troika and government was to ensure that this program's implementation proceed with no parliamentary hiccups that could "politicize" what was presented as a technocratic issue, thereby exacerbating the anticipated explosion of class antagonism. In this direction, an additional law (3847/2010) introduced a few days later replaced any mention of parliamentary "ratification" with the mere requirement to "discuss and inform" parliament, while Pasok (and later New Democracy) imposed strict party discipline to secure a swift process. [14]

Such side-stepping of parliamentary procedures to ensure austerity continued during the years that followed. Among the most striking examples were the proliferation of fast-track procedures, the multiplication of multi-bills, and the procedure of passing hundreds of acts under a single article. Under such a practice, seven to eight hundred pages worth of acts were at times introduced in parliament under a single article, meant to be "discussed" and voted in one day. Further, in a move reminiscent of Chancellor Brüning's use of Article 48 of the Weimar Constitution to bypass parliamentary supervision of deflationary economic policies, "emergency decrees" were repeatedly utilized, the importance of which lay in their constitutionally entrenched ability to circumvent parliamentary ratification and to "confuse even the most cunning constitutional lawyers". [15] In an attempt to pre-emptively neutralize constitutional objections, the executive also made frequent use of so-called "administrative acts of legislative content": on the basis of Article 44 paragraph 1 of the Constitution, the legal statute of such administrative acts renders them "part of the *interna corporis* of Parliament and [as such] not subject to judicial review". [16]

Challenges

This continuous process of impeding established procedures was not, of course, left unanswered. Starting with a scientific committee set up by parliament, doubts were expressed concerning the constitutionality of the measures. But the committee's report went beyond deviations of parliamentary procedure. It argued that economic restructuring directly contradicted

constitutionally protected social rights, such as the right to a welfare state (Art. 25. para. 1), the right to work (Art. 22, para. 1), and the right to collective bargaining (Art. 22, paras. 2 and 3). In addition, the report challenged the reforms' compatibility with the principle of proportionality and equality, while also hinting at the infringement of the right to property (Art. 17, para. 1, and Art. 1 of the Additional Protocol 1 of the ECHR). While acknowledging that the Greek Constitution allows some room for such violations when justified by "reasons of public interest", it ruled that such "infringement of the rights should be accompanied by compensation measures". [17]

Alongside such opposition, political parties mounted their own challenges on the purported constitutionality of austerity. In some cases, these remained within the context of constitutional law, focusing on the status of the MoU as an international agreement requiring parliamentary ratification. Interesting in this respect was the intervention of constitutional lawyer (and future Syriza member) George Katrougalos, who advanced the somewhat peculiar argument that since the (infamous) Article 125 of the Treaty of the European Union forbids bailouts [18], the MoU did not follow EU law but was instead a "new, unprecedented international agreement between member states and Greece" [19], thereby challenging the narrative that the austerity measures reflected a consequence and *legal continuum* of Greek membership in the EMU.

However, soon after, and as the implementation of austerity continued, challenges to MoU constitutionality on behalf of political parties were politicized to such an extent that their legal content began to wither away. [20] For instance, pretending that Greek territory was being sold to repay foreign creditors [21] or that Greek law resembled that of an "occupied country" [22] may have appeased the patriotic sensitivities of those who interpreted the MoU as a "national humiliation", but it lacked any substantive constitutional backing, while also relativizing the concept to such a degree that it became insulting towards *actual* occupations. Moreover, comparing Greece's legal situation in 2010 to its legal situation in the 1950s [23], when Cold War politics and a right-wing authoritarian government in the country oversaw the marginalisation, imprisonment, exile, and often execution of left-wing sympathizers and their families moved beyond hyperbole towards hubris. At a political level, such exaggerated historical analogies and repeated references to "the loss of sovereignty" were politically revealing of Syriza's national focus, standing in stark contrast to the approach that saw the austerity apparatus as a class offensive and not a national disgrace. From a legal perspective, however their content bore the marks of what one commentator shrewdly called the "unbearable lightness of constitutional verbalism". [24]

Judicial Review

Published a few days after the voting of the second MoU in February 2012, decision 668/2012 of the Council of State (Symvoulio tis Epikrateias, or "StE") sought to respond to the various legal challenges concerning the constitutionality of the reforms. As expected, the StE ruling put forward the argument that the MoU "did not constitute an international treaty binding the Greek Government, but only the political programme of the Government for the confrontation of the economic problems of the country through the European rescue mechanism". By adopting this approach, the StE could also declare that "the Memorandum did not result in the transfer of competences to international authorities, it did not create legal rules and it did not possess a direct effect in the domestic legal order". [25] Ruling that there was no transfer of competences to a foreign entity, the StE was also addressing the charge that austerity constituted a significant loss of national sovereignty. While taking the opportunity to remind plaintiffs that Article 28, paragraph 3 of the Constitution allows for limitations of national sovereignty under specific conditions [26], the final decision was that this was not the case, as no de jure national sovereignty had been handed over. [27]

In the context of the constitutional protection of social rights, the StE reiterated that constitutional law does not forbid wage, pension, or benefit cuts, but only their reduction below a level that *threatens the survival* of recipients. Absent an objectively defined and accepted level, a percentage cut remains well within constitutional law. A similar approach was taken toward violations of "human dignity"; the StE rejected "the claims of the plaintiffs because they did not invoke or prove any risk for their decent way of living caused by the questioned measures, which would constitute an offense to human dignity". [28]

Beyond its willingness to hide behind the vagueness of wage calculations and definitions of dignity, the StE decision was based on three points: accepting the assertion of urgency; framing economic reforms and any potential infringements on constitutional principles as mandated by a "general public interest"; and opting for judicial deference, a doctrine that effectively subordinates judicial to executive power by conceding that the designated constitutional organ lacks the expertise to evaluate economic policy.

However, the StE's uncritical adoption of the notion of "urgency", and of an imminent economic collapse, was already ambiguous, especially when considering that any alternative for dealing with Greece's higher borrowing costs was not merely ignored but pre-emptively excluded by the

MoU. It is also noteworthy that the deterioration of the Greek economy, as a direct result of harsh austerity, would become a future justification for urgency, paving the way for the second and third MoU. But even if one conceded the immediate urgency of the situation (within the framework of an economy dependent on the viability of the banking system and international market access), a temporal discontinuity persisted. As Marketou noted, "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'". [29] In this context, the enacted measures did not simply deal with an immediate emergency; they also set the stage for all future economic policy, creating a framework of embedded rules that forbid any deviation. This situation prompted the inevitable question, "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?" [30]

From the perspective of austerity's designers, there was nothing contradictory about this. Greece had landed into an economic crisis due to a lack of substantial fiscal discipline, and the aim of the restructuring process was to ensure that the country's immediate repayment obligations would be met and that it would not end up in a similar situation in the future. This appeal to creating a long-standing structure (or a rules-based order) that would prevent similar economic distress in the aftermath enjoyed broad support. On the one hand, Greece's economic and political elites could push through changes to facilitate higher rates of profit (by drastically lowering the costs of labour and reproduction costs). On the other hand, this formulation appealed to those who had understood the outbreak of the crisis as the culmination of long-standing pathologies in Greece's social order. It was this semblance of "objectivity" that determined (and continues to determine) the support of a section of the Greek population for the reforms, presenting the restructuring as "harsh but necessary". The StE's ruling sought to legitimize this narrative.

The only problem here, of course, is that this was false. If Greece ended up where it did in 2010, it was not because its pathologies forced it to deviate from the dominant economic model. Rather, it was precisely because *despite* them, Greece followed that model too closely. [31] Relying on cheap credit to fuel "economic growth" was not a divergence from the dominant model of the 2000s; it was its affirmation, and one strongly facilitated by the increased profitability it generated for the banking sectors of core European countries. Greece's structural problems (e.g. low concentration of capital, relentless bureaucracy, clientelism) *adapted* to this situation; they did not generate it. In any case, the economic restructuring that was imposed was neither

concerned with nor designed to overcome these problems. If there was *one* specific "pathogeny" that both the Greek ruling class and the Troika sought to eradicate, it was the historically persistent power of labour and Greee's inability or unwillingness of both state and private capital to drive down the costs of wages, pensions, and benefits *below productivity*. In other words, the pathogeny of class struggle.

On a final note, the StE's constitutional justification of the MoU reforms as serving the "general public interest" represented a specific endorsement of an ideologically charged economic doctrine that presents the supremacy of creditors' interests and fiscal discipline as objective interests, identical with the "public good". As Alasdair Roberts has shown in *Logic of Discipline*, far from any claim to objectivity, this logic represents the dominant framework for implementing reforms since decades, one characterized by scepticism towards "democratic processes and the desire to transfer authority to new groups of technocrat-guardians". [32] In this context, the specific form of economic and social restructuring in Greece after 2010 was never merely a response to an immediate funding crisis. It was an accelerated and ruthlessly enforced attempt to further Greek economic integration into a model geared towards maintaining fiscal discipline despite the social cost. This is the main reason why the interests of the Troika and the Greek state and ruling class were aligned: contrary to those who saw in the economic restructuring a weakening of sovereignty, the process was one of strengthening the Greek state vis-à-vis its labour market. [33]

The Apparent Lack of a Constitutional Order

Identifying the underlying economic dogma that informed the StE ruling does not necessarily render the restructuring process unconstitutional. As already noted, the Greek constitution contains several clauses that allow for austerity measures, especially when a situation of urgency is taken for granted. However, given that constitutions are historical documents open to interpretation by courts and other bodies, the argument remains ambiguous. While the constitution allows its principles to be violated under certain circumstances, such as during a state of urgency or when the "general public interest" is engaged, such violations must be limited. Thus, constitutional overview can demand that these violations are temporary and exceptional, while also ensuring their adherence to principles of equality and proportionality. [34]

From this viewpoint, an examination of the performance of the Portuguese Constitutional Court (PCT), during the same period and under similar conditions of economic restructuring, exposes

the weakness of the legal reasoning in the Greek case. With a national constitution similar to Greece's [35], and after an initial period in 2011 when it held austerity to be constitutional on the basis of the same arguments as the StE [36], the PCT embarked on what has been described as "judicial activism", declaring a series of austerity measures unconstitutional. Among other things, the PCT argued that attacks on public sector workers violated the principles of equality, legitimate expectations, and proportionality, while also challenging their "necessity" by questioning whether the measures were the "only possible" or "least painful" ones. From 2013 onwards, the PCT continued to defy the constitutionality of various (but not all) economic reforms, by presenting their effects as cumulative and therefore as exacerbating the unconstitutional "difference of treatment" they had already observed (but acquiesced in) in 2011–12.

The example of Portugal could be (and has been thought to be) an indication that a constitutional order may be used as a shield against the devastating austerity that fiscal disciplinary measures bring about [37], and also as an illustration of how social rights may be prioritized as against creditor protection. Compared to its Greek, Spanish, and Italian counterparts, the PCT's "judicial activism" appears to diverge sharply, and has been analyzed by different commentators by reference to social movements [38], the composition of the court and its appointments procedure [39], and even the simple fact that PCT judges are not exempt from wage cutbacks. [40]

But a closer look at the actual effects of the PCT's actions shows that this differentiation is also exaggerated. Framed within (and not outside) the overall state mechanism and its objectives, the PCT's declarations of unconstitutionality were often suspended by the Court itself, in view of the consequences they might have for public finance and Portugal's position in the EU. [41] In parallel, the unconstitutionality of certain reforms was declared *ex nunc*, i.e. with no retroactive power, thereby legitimizing previous reductions. Even when the PCT's rulings successfully blocked cuts in wages and allowances, the subsequent fiscal gap vis-à-vis the MoU program was "closed by additional measures" [42] in other sectors. [43] For this reason, the efficacy in mitigating the implementation of austerity through constitutional means remains highly questionable. [44]

Out of Order?

Constitutional law, like all other forms of law, reflects social conflict and class struggle. As the examples of Greece and Portugal show, constitutions emulate the social pressures of the

historical period during which they are drawn up, engraving their demands and compromises within a legal order. Insofar as law freezes historical time, traces of past struggles are reified in its structures. But this process of reification makes past gains appear as things–as legal rights provided by an alien structure, the state. This process not only lends constitutional law a "phantom objectivity" and an "autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature". [45] It also indicates that the very framework within which those past achievements exist is no longer a conflictual site of direct negotiation and compromise. It becomes, instead, an internal element of the state.

In cases such as Greece, these residual elements continued to inform social and legal practice and were a reflection (but not a cause) of the slower integration within the macroeconomic layer of the EMU's constitutional order. In other countries, where social conflicts had disappeared from view and capital had been able to reassert its dynamic, an attempt to push back compromises coded in law prevailed. Italy presents a characteristic example: whereas the radical explosion of the 1960s and 1970s had forced the Italian Constitutional Court to defend social and economic rights at the expense of fiscal discipline, the reversal of this dynamic from the late 1980s onwards was also reflected in a reorientation of judicial overview. The result was the "landmark judgement no. 455/1990 [in which] the Court developed a 'balancing test' to accommodate social rights protection with the shortage and distribution of fiscal resources". [46]

The process of EMU integration was focused primarily on transferring monetary policy to a central bank tasked with controlling and stabilizing the currency, while encasing strict fiscal rules within a constitutional order of treaties and agreements. The eventual outbreak of the Eurozone crisis in 2010 indicated that the specific setup for subordinating fiscal policy to a rules-based order and ECB monetary control did not deliver the results that were hoped. But it did not alter the foundational structure or purpose of the EMU. Instead, it led to its forceful reaffirmation, using the opportunity afforded by the crisis to impose fiscal discipline on countries excluded from international markets. But what emerged alongside was equally crucial: understanding constitutionalization as a *process*, the goal remained one of establishing a uniform constitutional order reflective of the underlying macroeconomic targets of the EMU, a continuous "dialogue" between law and economic policy. In this context, "de-politicizing" economic policy and embedding fiscal discipline also meant a process of overcoming the historically contingent balance of forces reflected in each national legal order. EMU integration means affording market freedoms supremacy over social rights, even in their reified form.

This task of reaffirming the legal and constitutional framework within which economic activity can take place did not fully belong to the “rescue packages”, which acted mostly as impromptu vehicles of austerity with ambiguous legal and institutional status. Rather, it should be traced to a development that took place amid the radical uncertainty of the time: the conclusion of the Fiscal Compact in March 2012. Heralded as a step towards a “true fiscal stability union”, this instrument underscored “the need for governments to maintain sound and sustainable public finances and the prevent a general governmental deficit becoming excessive is of essential importance 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”. As Article 3(2) of this instrument explained, member states had the duty to incorporate the “balanced budget rule” at a national level by means of “provisions of binding force and permanent character, *preferably constitutional*“. [47]

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Endnotes

[1] Composed of the European Commission, the European Central Bank, and the International Monetary Fund.

[2] As Antoniou correctly observes, "the 'web of texts' constituting the first rescue mechanism were part of an on-going transformation in the process of European integration and of the creation of a European rescue mechanism". Theodora Antoniou, "Η απόφαση της Ολομέλειας του Συμβουλίου της Επικρατείας για το Μνημόνιο–Μια ευρωπαϊκή υπόθεση χωρίς ευρωπαϊκή προσέγγιση" [The Decision of the Plenary Session of the Council of State on the Memorandum–A European Affair Lacking a European Approach], 1 (2012) *Το Σύνταγμα* 197.

[3] IMF, "GRA Lending Toolkit and Conditionality: Reform Proposals" (2009), s. II, 4.

[4] IMF, "Guidelines of Conditionality", s. B(10).

[5] Maria Meng-Papantoni "Legal Aspects of the Memoranda of Understanding in the Greek Debt Crisis", 18 (2015) *Zeitschrift für Europarechtliche Studien* 3.

[6] "Article 36 of the Constitution regulates the conclusion of international treaties and attributes the relevant constitutional competence to the President of the Republic. Paragraph 2 of the same article declares that conventions on trade, taxation, economic cooperation, 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." Marketou Afroditi, "Greece: Constitutional Deconstruction and the Loss of National Sovereignty", in *Constitutional Change through Euro-Crisis Law,* ed. Thomas Beukers, Bruno de Witte, and Claire Kilpatrick (Cambridge: Cambridge University Press, 2017), 180–81 (emphasis mine).

[7] "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.' … 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'." Marketou, "Constitutional Deconstruction", 181 (emphasis mine).

[8] "We will not answer these questions from a technical standpoint. The questions posed are fundamental, political, questions that concern the fate of our country, that concern our relation to citizens, citizens who are angry, anxious and who are entitled to hope … We have to convince our citizens that we, in here, know what we are doing, not hiding behind constitutional clauses and parliamentary procedures, but facing our historical responsibilities." See Minutes of the Greek Parliament on the 6th of May 2010, 6750 (translation mine). During the 12 February 2012 session on the second MoU, Venizelos reiterated his contempt for constitutional procedure: "It is hypocritical to hide a substantial conflict about the future of this nation behind a procedural problem, behind a procedure-based objection." Quoted in Georgios Karavokyris, Το Σύνταγμα και η κρίση: Από το δίκαιο της ανάγκης στην αναγκαιότητα του δικαίου [The Constitution and the Crisis: From the Law of Necessity to the Necessity of Law] (Athens: Κριτική, 2014), 147 (translation mine).

[9] "In responding to members' requests to use Fund resources and in setting program-related conditions, the Fund will be guided by the principle that the member has *primary responsibility for the selection, design, and implementation of its economic and financial policies*". IMF, "Guidelines of Conditionality", s. A(3) (emphasis mine).

[10] Exactly the same format was utilized in the Portuguese MoU. See Cristina Fasone, "Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective", European University Institute MWP Working Paper (2014), 26.

[11] Kostas Botopoulos, "Κοινός νους και κενά σημεία στην «απόφαση του Μνημονίου»" [Common Sense and Logical Gaps in the "Memorandum Decision"], *constitutionalism.gr* (2010).

[12] Introductory report in the Hellenic Parliament, available here, 3.

[13] Afroditi-Ioanna Marketou and Michail Dekastros, "Constitutional Change Through Euro-Crisis Law: Greece", EUI Department of Law (2015), 35.

[14] Nonetheless, and according to research published by the Greek Parliament, in the period 2010 to 2018 Pasok saw 26.5% of its MPs resign, while it expelled 38.8%. New Democracy expelled 31.2%, while another 37.5% resigned. Interestingly, although Syriza accelerated the implementation of austerity, there were zero expulsions and only 18.4% resigned, of which only two reflected disagreement with government policy.

[15] "The Government issued an emergency decree-law, approving the draft of the relevant Loan Agreement and authorizing 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." Marketou, "Constitutional Deconstruction", 182–83. This practice would be accelerated with the second MoU.

[16] Apostolis Gerontas, "Το Μνημόνιο και η δικαιοπαραγωγική διαδικασία" [The Memorandum and the Norm-Creating Procedure], 3 (2010) *ΕφημΔΔ* 712, as quoted in Marketou and Dekastros "Constitutional Change", 149.
[17] Marketou and Dekastros, "Constitutional Change", 118.
[18] Art. 125(1): "The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project."
[19] George Katrougalos, "Το «παρασύνταγμα» του μνημονίου και ο άλλος δρόμος" [The "Para-Constitution" of the MoU and the Other Path], *constitutionalism.gr* (2011). It is interesting to note that this approach implied that the MoU did in fact represent a *bailout* in violation of Art. 125, an argument more often used by German Eurosceptics to denounce the EMU crisis management, rather than a set of punitive loans accompanied by harsh conditionalities.
[20] Taking cue from alarmist (and, frankly, ridiculous) proclamations by Alexis Tsipras, then Syriza's president, that the MoU included provisions about "selling Greek islands", Syriza's opposition in particular resembled an attempt at "national awakening" more than a substantive legal challenge. Within this framework, Katrougalos openly supported the claim that the rule of law in Greece was that of an "occupied country", while also comparing the prevailing irregularities with those of the "Para-Constitution" of 1952. Katrougalos, "'Para-Constitution'". In January 2013 Syriza went as far as to proclaim that Greek citizens were obliged to make use of Art. 120, para. 4 of the Constitution, which accords them the "right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution". In their reasoning, since Pasok had not been elected with a mandate of austerity, the government had lost all legitimacy. One month later, Syriza's "Work Committee for Changes in the State, the Political System, and the Constitution" called for a constitutional convention tasked with drawing up a new constitution.
[21] Tsipras, Parliamentary Session of 25 June 2010.
[22] "The width and intensity of the intervention that accompanies the, under crisis, violent restructuring of the Greek economic system, in conjunction with its imposition from the outside, entirely justifies the assertion by Koukiadis that what is being attempted is to impose the rule of law of an occupied country." Katrougalos, "'The Para-Constitution'" (translation mine).
[23] The "Para-Constitution" of 1952 refers to the post-Greek Civil War legislative acts and measures put in place to justify the relentless prosecution, imprisonment, exile, and even execution of those described as "communists", a characterization that was identified (de facto and de jure) as synonymous with high treason. Although these acts were formally contrary to the constitution in force at the time, they were widely implemented.
[24] Christopoulos, "Στο ρίσκο της κρίσης–Στρατηγικές της Αριστεράς των Δικαιωμάτων" [In the Risk of the Crisis: Strategies of the Human Rights Left] (Athens: Αλεξάνδρεια, 2013), 61.
[25] Marketou and Dekastros, "Constitutional Change", 141.
[26] Art. 28, para 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."
[27] The StE also stated that when Greece joined the Eurozone, and signed the Maastricht and Lisbon treaties, it did so voluntarily and through democratic procedures. The MoUs were closely related to these treaties and further synchronized, coordinated, and continued the supervision of a common currency and European integration. Implementing them was therefore a valid exercise of sovereignty. Karavokyris would reiterate this argument: "The will of the state to become a member of the Eurozone, with all the commitments that this entails, and its jurisdiction to decide or consent to the adoption of the MoU's, confirm its choice as an autonomous state, as a self-governed subject, which confesses, in exactly the same way as between individuals and the state in the social contract, its dependence on the EU and its institutions, as the latter ensure, through this obligation, its self-preservation." What we had in the case of the MoUs was nothing but a "reproduction, at a European level, of the form of voluntary submission that exists within each state". Karavokyris, "The Constitution", 78–79.
[28] Decision 668/2012, point 35, available here.
[29] Marketou, "Constitutional Deconstruction", 191.
[30] Marketou, "Constitutional Deconstruction", 192.
[31] The trajectory of Greece's capital accumulation model (involving, inter alia, the decline of an already small manufacturing sector after EU membership exposed its lack of competitiveness, focus on service and public sector with low productivity increases, and consistent current account deficits) is an oft-neglected historical aspect of the structural imbalances between EMU members that no amount of rules and treaties could overcome.
[32] Alaisdair Roberts, *The Logic of Discipline: Global Capitalism and the Architecture of Government* (New York: Oxford University Press, 2010), 6. As Roberts explains, "the logic has two components. The first component makes the case for reform. This argument usually begins with an expression of deep scepticism about the merits

of conventional methods of democratic governance, which are thought to produce policies that are short-sighted, unstable, or designed to satisfy the selfish concerns of powerful voting blocs, well-organized special interests, and the bureaucracy itself. This argument ends with a call for reforms that will promote policies that are farsighted, consistent over time, and crafted to serve the general interest." Ibid., 3.

[33] This is an aspect of both the EMU and the crisis management consistently mystified by the left-nationalist appeal to national sovereignty. Contrary to the view that it is a shield against globalized capital, the purpose of every nation-state is to discipline its labour market so as to increase its competitiveness in the global economy. As Bonefeld contends, the EMU "integrates the member states as the federated executive states of supranational rules", while remaining "dependent upon the capacity of the constituent member states to govern accordingly". Werner Bonefeld, "Ordoliberalism, European Monetary Union and State Power", 45 (2019) *Critical Sociology* 1003.

[34] The Portuguese, Spanish, and Italian Constitutional Courts also consider the suspension of rights to be constitutionally justifiable when the measures in question are exceptional, transient, non-arbitrary, and directly relevant. See Fasone, "Constitutional Courts".

[35] It is not coincidental that both the Portuguese and Greek constitutions were drawn up immediately after the collapse of their respective dictatorships in the mid-1970s, during a tense historical period characterized by increased class struggle and democratic demands.

[36] The PCT asserted that the constitutional protection of wages did not signify the exact amount of such wages, and that a percentage cut was therefore within its framework. Moreover, the PCT accepted the urgency of the situation, and the duration and admissibility of the cuts, while also practicing judicial deference by declaring its technical inadequacy to evaluate fiscal policy.

[37] In its seventh evaluation of Portugal's "economic adjustment programme", the European Commission warned that "the package faces risks of a political and legal nature, such as the consistency of the measures with the Portuguese Constitution". For this reason, it stated, it was important to "[t]ake a number of steps aiming at mitigating the legal risks from future potential Constitutional Court rulings". European Commission, "The Economic Adjustment Programme for Portugal Seventh Review–Winter 2012/2013" (2013), 20, 72.

[38] Anne Engelhardt, "Judicial Crisis in Portugal: The Constitution in Relation to the State, Social and Labor Movements", 8 (2017) *Revista Direito e Práxis* 670.

[39] Fasone, "Constitutional Courts".

[40] Engelhardt, "Judicial Crisis".

[41] "In *Acórdão* no. 353/2012, while the Court declared the suspension of allowances unconstitutional, it did not go as far as to irremediably impair the governments' duties and commitments vis-à-vis the other Eurozone countries and the Troika …. The Court considered that the consequence of a declaration of unconstitutionality, namely the annulment of the law *ex tunc*, could have put the state's solvency in danger." Fasone, "Constitutional Courts", 27.

[42] European Commission, "Economic Adjustment Programme for Portugal", 3.

[43] For a good overview see Fasone, "Constitutional Courts", 24–30.

[44] As Bonefeld has observed, "[w]hether the liberal rule of law applies is not a matter of law–it is a matter of sovereign decision about the validity of the rule of law in given conditions of social order". Werner Bonefeld, "Economic Constitution and Authoritarian Liberalism: Carl Schmitt and the Idea of a Sound Economy" (2020, forthcoming).

[45] Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, trans. Rodney Livingstone (London: Merlin Press, [1923]), 83.

[46] Fasone, "Constitutional Courts", 17.

[47] The full document is available here (emphasis mine).