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I. The Context: The Greek economy and structural reforms

By the end of 2009, the Greek economy had faced the highest budget deficit and government debt-to-GDP ratio in the EU. In 2018 Greece's a government debt was equivalent to 181.10 percent of the country's Gross Domestic Product. Government Debt to GDP in Greece averaged 101.46 percent from 1980 until 2018, reaching an all time high of 181.10 percent in 2018 and a record low of 22.60 percent in 1980.[1] To sum up, Greece's government debt level as a share of GDP at 180 percent of GDP is still among the highest in the world and expected to decline to about 125 percent of GDP by the mid-2030s as the economy builts-up. A sustained effort to regain fiscal credibility away from the public deficit trend of the past ultimately began to pay off: between 2009 and 2017, the primary fiscal balance improved by more than 14 per cent of GDP, despite the depression. The primary fiscal surplus (that is, before interest) was 3.8 per cent of gross domestic product in 2016 (up from 0.8 percent in 2015), and around 4 percent in 2017 and 2018. These surpluses are far larger than those of other crisis-hit Eurozone countries.

[1] https://tradingeconomics.com/greece/government-debt-to-gdp

When the crisis erupted Greece entered an eight-year EU-IMF supervision. Three bailouts followed the first IMF involvement. In 2009, the IMF involvement appeared as the only alternative. The Eurozone lacked the expertise and mechanisms to face the problem: Article 125 of the EU's Treaties explicitly ruled out bailouts for Eurozone members. This changed eventually, as Eurozone leaders worked hard to establish such mechanisms, eventually leading to the creation of the European Stability Mechanism (ESM) in September 2012.[2]

The impact of these developments at the national level was the birth of a new form of "fiscal constitutionalism", that is, the imposition of supranational or constitutional constraints on the exercise of fiscal policy.[3] In Greece fiscal constitutionalism developed through the channels of informal constitutional change. During the years of acute crisis no revision process was initiated and the Constitution of Greece was formally revised in 2019. It is noteworthy that the constitutionalization of the balanced budget rule triggered debate was never enshrined throughout the crisis.[4] The consensus required for amending the Greek Constitution is high, which renders the adoption of such a rule difficult. The enshrinement of the balanced-budget clause in other jurisdictions shows how the immense symbolic power of the constitution can be used to respond to the financial crisis. Setting aside the discussion on the content and practicability of the enshrinement of such clauses, their very adoption is an example of constitutional adaptation at the face of the crisis.[5]

A clear symptom of the phenomenon of fiscal constitutionalism, with a push from the European Commission, the IMF and the OCD,[6] was the establishment of the Parliament's State Budget

[2] See http://www.ekathimerini.com/231899/opinion/ekathimerini/comment/the-limitations-of-imf-involvement.

[3] A. Vlahogiannis, "The end of fiscal innocence" (in Greek), (forthcoming, in file with author) and A. Vlachogiannis, "From submission to reaction: The Greek Courts stand on the financial crisis" in Zoltán Szente, Fruzsina Gárdos-Orosz, *New Challenges to Constitutional Adjudication in Europe. A Comparative Perspective* (Routledge 2018), 72-83. See also Kaarlo Tuori, "The European Financial Crisis – Constitutional Aspects and Implications", *EUI Working Papers*, LAW 2012/28, http://cadmus.eui.eu/bitstream/handle/ 1814/24301/LAW_2012_28_Tuori.pdf.

[4] See T. Ginsburg, "Balanced Budget Provisions in Constitutions" in T. Ginsburg, M. Rosen, and G. Vanberg (eds.) *Liberal Constitutionalism in Times of Crisis* (Cambridge University Press 2019), M. Gulati and G. Vanberg, "Financial Crises and Constitutional Compromise" in T. Ginsburg, M. Rosen, and G. Vanberg, *Liberal Constitutionalism in Times of Crisis* (CUP 2019).

[5] R. Robledo, "The Spanish Constitution in the Turmoil of the Global financial Crisis" in X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013) 131.

[6] https://www.oecd.org/gov/budgeting/48141323.pdf.

Office and the Hellenic Fiscal Council.[7] The Parliament's State Budget Office (hereinafter called "Office") was established by the Hellenic Parliament's article 36A of the Parliament's Standing Orders. The Office works according to its own Special Regulation for its internal organization and operation. The Office is Parliament's internal unit in the level of Directorate, situated in the premises of the Parliament and affiliated directly to the Speaker of the Parliament.

The Office is responsible for the collection of information and the monitoring of the implementation of the State Budget, the support of the work of the Special Standing Committee on the Financial Statement and the General Balance Sheet and the implementation of the State Budget, as well as of the Standing Committee of Economic Affairs, by providing all necessary information and data. The Office prepares and submits to these Committees reports on the compliance with the budget targets set out in medium-term fiscal strategy, on the assumptions underlying the macroeconomic estimations and budgetary forecasts, according to the principles and procedures of the law 3871/2010 on the "Financial management and responsibility", as well as other reports requested by the Speaker of the Parliament or the Chairmen of the aforementioned committees.[8]

The Hellenic Fiscal Council replaced the Parliamentary Budget Office as the official IFC in 2015. The Council is an Independent Administrative Authority established by Law 4270/2014. It commenced its workings following the appointment of the first Board of Directors in November 2015. All entities in the public sector are obliged to provide information as requested and to assist the Hellenic Fiscal Council and its employees in the execution of their duties. The Hellenic Fiscal Council reports to the Greek Parliament when requested or when required before a Parliamentary Committee, and submits to Parliament within six months after the end of each financial year an annual report of activities along with the Council's audited financial statements.[9] The establishment of the Hellenic Fiscal Council through new legislation, following the European institutional framework, is a fundamental structural reform.[10]

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[7] On the impact of the crisis on national parliaments see C. Fasone, "Taking Budgetary Powers Away from National Parliaments? On Parliamentary Prerogatives in the Eurozone Crisis" (2015) EUI Department of Law Research Paper No. 2015/37.

[8] The legal Framework of the Office is delineated in the Government Gazette, Law 3871/ 2010.

[9] https://www.hfisc.gr/en/legislation.

[10] See Ch. Triantopoulos and A. Chymis "Fiscal Council and Pre-election Platforms Evaluation: A Scenario for Greece" (2017), 5(3) *Management Studies* 153-169 available at https://www.davidpublisher.org/Public/uploads/Contribute/58df1088721af.pdf, visited on 26 Jan 2020.

II. The constitutional jurisprudence: the judge, budgetary constraints and financial laws

By doing their jobs, that is, exercising constitutional review in domestic courts as part of the checks and balances system in liberal democracies, judges witnessed themselves becoming international players in a multi-player game. The classic image of judicialization of mega-politics, that is, "matters of outright and utmost political significance that often define and divide whole polities",[11] transformed into the judicialization of transnational economic governance. This went beyond the pattern of dialogical exchange between domestic and international Courts, as judicial decisions had the potentiality of impacting indirectly international agreements between lenders and deptors.[12] Self-restraint acquired new meaning in the financial crisis jurisprudence. In the Greek context, constitutionality review is diffused and fiscal measures where challenged both as part of strategic litigation and by individuals claiming their rights.[13]

The crisis jurisprudence in Greece can be roughly divided into three phases: entering the role, normalization (coming to terms with the task), and maturity.

To understand the Greek paradigm it is important to know that the Constitution provides for a decentralized system of judicial review of the constitutionality of laws (Art 93 para 4 Gr Const) concentrated in practice to a great extent through jurisdictional mechanisms to the three supreme courts (Court of Cassation, Supreme Administrative Court, Chamber of Accounts). The "financial crisis case law", triggered by challenges against austerity measures, was thus channeled through ex post review in the context of specific cases.

In the context of the new forms of economic governance the dilemma's faced by the judge became more complex.[14] Part of the phenomenon is a new form of transjudicial communication: during the crisis constitutional courts and supreme courts were faced with identical problems. Judgements had to be delivered under the spotlight of vast media coverage and the potential

[11] See R. Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 *Annual Review of Political Science* 93.

[12] See S. Saurugger and C. Fontan, "Courts as political actors: Resistance to the EU's new economic governance mechanisms at the domestic level", https://halshs.archives-ouvertes.fr/halshs-01628964/document.

[13] On the Greek system of constitutional review, see X. Contiades and A. Fotiadou, "The Hellenic Republic" in L. F.M. Besselink, P.P.T. Bovend'Eert, H. Broeksteeg, R. de Lange and W. Voermans (eds), *Constitutional Law of the EU Member States* (Kluwer Law International 2014) 703-72.

[14] On the task of the judiciary from the judge's perspective see see P. Pikrammenos, "Public law in extraordinary circumstances within the context of the action for annulment process" (in Greek) (2012) 2 *Theory and Practice of Administrative Law* 97-100, S. Rizos, "The Council of State between the constitutional model of Welfare State and the political objection 'you cannot take from the one that does not have'" (in Greek) (2015) 4 *Theory and Practice of Administrative Law* 289- 293.

backlash of their rulings.[15] News about seminal decisions, either upholding austerity measures or invalidating them, travel fast from one legal order to the other covered by the media and by academic commentary. These channels of communication allow the transjudicial exchange of ideas on the basis of a sui generis comparability created by the crisis itself. This dialogical communication allows the judiciary to understand the stakes of being a player in economic and fiscal governance.[16]

1. Phase I: the judiciary enters the role (2010-2013)

During the first phase, following the outbreak of the financial crisis, the constitutionality of international loan agreements was challenged and judges were also asked to rule on the constitutionality of austerity measures. At this point, the judiciary – being reluctant to interfere in major political and economic decision-making – demonstrated considerable self-restraint. Decisions were carefully written to ensure that loan agreements were not put at risk. Judges made clear that it was the job of elected representatives to take fundamental decisions on how to respond to the crisis. Decision 668/2012 of the Council of the State (i.e. the Supreme Administrative Court), which upheld the constitutionality of the first Memorandum of Understanding (2010), epitomises that tendency.[17] The Private Sector Involvement (PSI) decisions are also a good example of the first judicial responses to the hybrid fiscal-constitutional questions posed by the crisis.

a. The "Memoradum Decision" (668/2012 Council of the State)

The Council of State ruled that the first Memorandum was not an international treaty, but a political program that resulted from the co-operation between the Greek government and the Troika, setting targets to be achieved and policies to be implemented.[18] The Court ruled that

[15] On the character of the judge see N. Garupa and T. Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

[16] See X. Contiades and A. Fotiadou "The Crisis Jurisprudence. A transjudicial Dialogue" (2017) IX *Annuaire International Des Droits De L'Homme* 359-367.

[17] To explore whether judicial self-restraint during crises is the expression of strong rather than weak courts see M. Gulati and G. Vanberg, "Financial Crises and Constitutional Compromise" (n 4).

[18] X. Contiades and I. Tassopoulos, "The Impact of the Financial Crisis on the Greek Constitution" in Contiades (ed), *Constitutions in the Global Financial Crisis* (n 1) 195. See also A.I. Marketou and M. Dekastros Report on Greece in *Constitutional Change through Euro Crisis Law* (Eurocrisislaw.eui.eu, 16 January 2014) http://eurocrisislaw.eui.eu/greece/.

Article 28 of the Constitution, which regulates the transfer of sovereignty and competences following an international Treaty, was therefore not applicable. The Court indicated that it would decide on the constitutionality of specific measures taken toward implementation of the Memorandum upon enactment and reviewed the specific measures brought before it, that is the cut of salaries and allowances for employees in the public sector and the wider public sector and retirement benefits.

According to the Court, measures taken in implementation of the first MoU were not disproportional, and did not violate the core content of the right to social security, legal certainty and Art.1 of the First Protocol to the ECHR. The Court held that the unexpected emergency, during which the measures were enacted, absolved the lawmaker from the obligation to conduct economic studies of their overall consequences and stressed that cuts were part of a broader program of fiscal adjustment and promotion of structural reforms of the Greek economy.

In short, the Court showed deference to elected officials in its decision.[19] Ruling differently would have signalled a remarkable departure from the Court's previous profile: with the exception of vigorous review in environmental cases, the Council of State had never been an activist court.

b. The PSI decisions

Decisions 1116/2014 and 1117/2014 of the Greek Council of State (plenary session) ruled that the legal framework for the implementation of the so-called "PSI" ("Private Sector Involvement"), that is, the participation of private creditors in the writing-down of sovereign debt through the exchange of Greek sovereign bonds with new ones of significantly lower value, does not violate the Greek Constitution nor the European Convention of Human Rights.[20]

The Court ruled, by a majority vote, that the right to the protection of property and, in particular, expropriation under Article 17 of the Greek Constitution was not violated. According to the Court, the limitation of the right to property and of the right to enjoyment of possessions was provided for by law, served an overriding public interest and did not go beyond what was necessary. The Court also ruled that the legitimate expectations and legal certainty of the

[19] E. Venizélos, "Crise grecque et zone euro" (2017) 159 *Le Commentaire*, P. Lazaratos, "Budgetary interest and state of emergency law" (in Greek) (2013) 8-9 *Theory and Practice of Administrative Law* 686-692.

[20] See A. Mitsou, "Council of State rules on the legality of the Greek 'PSI' in the writing-down of sovereign debt", http://mitsou.gr/council-of-state-rules-on-the-legality-of-the-greek-psi-in-the-writing-down-of-sovereign-debt/ accessed on 15/9/2019.

applicants were not breached in view of the fiscal situation of the Hellenic Republic, which could lead to a credit event and bankruptcy, on one hand, and to the fluctuation of Greek government bonds in the secondary market at very low levels, on the other.

The Court also ruled that the relevant national legislation safeguarded the applicants' procedural rights.[21] According to the Court, in case serious reasons of public interest exist, the restriction of individual rights is permitted if under the specific circumstances it is found necessary and appropriate for serving of the public interest, and thus does not violate the principle of proportionality. Finally, according to the Court, under these conditions, the reduction of the property value does not constitute a breach of Art.1 of the First Additional Protocol ECHR, which enshrines the principle of a fair balance between the general interest of the whole and the protection of the fundamental rights of the individual.[22]

It must be noted that the issue was brought before ECtHR, which also followed a similar rationale[23]. According to the ECtHR the participation in bond trading was not voluntary for minority bearers, but mandatory. However, it was provided for by law, it served public interest and was not disproportionate, and thus there was no violation of Article 1 of the First Additional Protocol.

2. Phase Two: the judge comes to terms with the task at hand (2013-2016)

The second phase began when it became clear that the financial crisis was not merely an event, but a transition. Austerity measures would be challenged constantly, and the judiciary had to decide on the constitutionality of such measures. The courts began to play an important role in tackling the crisis, and much of this 'crisis' jurisprudence became a distinct feature of the constitutional response to the financial crisis. The fact that the Council of State explored the possibility of a more activist role became apparent in Decision No 1972/2012, which held that cutting of electricity to individuals who did not pay 'Special Property Contribution' constituted a violation of the right to property. In Decision No 3354/2013, the Council of State held that the suspension of civil servants, if not decided in accordance with objective criteria, is an

[21] E. Venizelos, "The influence of the 2012 restructuring of the Greek public debt on the economic governance of the Eurozone and on public debt law" (in file with author).

[22] http://mitsou.gr/council-of-state-rules-on-the-legality-of-the-greek-psi-in-the-writing-down-of-sovereign-debt/.

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

unconstitutional infringement on the principle of equality. In a judgement issued in May 2014[24], the Council of State ruled that privatization of water in Athens was a violation of the constitutional right to health.[25]

A crucial bulk of jurisprudence dealt with pension and salary cuts. Such cases were particularly sensitive, triggering on one hand backlash, while also being subjected to severe scholarly criticism as overly activist. In its case law with regard to public servants subject to 'special wage regimes', including judges, diplomats, army and police personnel, university professors and teaching personnel of universities the Court argued that the legislator should take into consideration the circumstances that justify categorization into a special payroll, and should not treat all categories alike without considering the special features of each. In Decision 2192/2014 the Court stressed that the discretion of the legislator to cut wages is limited by the principles of proportionality, equality in contributing to public expenditures, and respect for human dignity. In such decisions, the judiciary was faced with the question of who shall bear the burden of the austerity measures induced by the crisis.[26]

The issue of distributing the burden of the crisis is an important element for understanding the new challenges faced by the judiciary due to the financial crisis. This new type of distributional issues, that is, decision making with regard to wages and cuts that affect different professions and part of the population was part of the crisis being normalized. The judiciary undertaking this distributional role became a key player in economic matters with overreaching influence. In that context the notion of the common good and its relation with the pecuniary interest of the State had to be succinctly defined.

[24] Decision 1906/2014

[25] The Council reversed the transfer of a controlling stake in the company from the State to the Hellenic Republic Asset Development Fund. According to the ruling, transferring water utilities from a state company to a private one, which does not operate on a non-profit basis, renders the continuation of accessible, high quality water service too uncertain. See X. Contiades and A. Fotiadou, "On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?" (2015) 9 *Vienna Journal on International Constitutional Law*.

[26] X. Contiades and A. Fotiadou, "Constitutional resilience and constitutional failure in the face of crisis: the Greek case" in T. Ginsburg, M. Rosen and G. Vanberg (eds.), *Liberal Constitutionalism in Times of Crisis*, (Cambridge University Press 2019), X. Contiades and A. Fotiadou, "Socio-economic rights, economic crisis and legal doctrine: A reply" (2014) 3 *International Journal of Constitutional Law* 740-746.

In Decisions No 2287-2290/2015 the Council of State ruled that pension cuts introduced through laws implementing the second Memorandum[27] (2012) violated the fundamental right to social security. The Court decided that the Constitution requires systematic analysis of the economic and social impact of cuts in supplementary pensions. As a result, the measures were found unconstitutional because such analysis had not been conducted in advance. These decisions are characteristic of the turn toward judicial activism. The Court ruled that in the absence of imminent threat of financial collapse, the pecuniary interest of the State is not the same as the general interest, that is the common good. This distinction, which appears often in the Court's crisis jurisprudence, holds that while the financial sustainability of the State can coincide with the common good during moments of acute crisis, the two concepts are distinct.

The Council of State also had to find a way to abide by the rationale of the European Court of Human Rights (ECtHR) in *Meidanis v. Greece* (2008), a Judgement where the ECtHR had ruled that the different default interest rate applicable to public law legal entities and to individuals infringed on the applicant's right to the peaceful enjoyment of his possessions, enshrined in Article 1 of the First Protocol ECHR. According to the Court, 'the mere financial interest of a public corporation could not be considered as a public or general interest and could not justify the violation of a creditor's right to the peaceful enjoyment of his possessions caused by the impugned legislation'. The Council of State had to put forth a rationale that would convince why financial interests could under specific circumstances fall within the notion of the general interest. It thus ruled that although mere financial interests do not qualify as the 'general interest', in extreme circumstances, where the danger of the state defaulting is imminent, financial interests may be considered as the general interest. In that sense the limitation of constitutional rights to serve financial interest can be justifiable.[28]

At this phase the Court's developed the principles of proportionality and equality in novel directions. A particular characteristic of this trend is the elaboration of necessity as part of the dialogue between lawmaker and judge. The necessity tier of proportionality acquired a life of its

[27] Available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf accessed on 10/9/2019.

[28] It must be noted that the ECtHR in "Koufaki and ADEDY (Supreme Administration of Greek Civil Servants Trade Unions) v. Greece" ruled that the reductions in salaries and pensions (made according to the first Memorandum) are not in violation of the ECHR and are not disproportionate to the objective of handling acute fiscal crisis and the public financial reform in a way that will ensure the future. Koufaki Ioanna and ADEDY v Greece [2013] No. 57665 & 57657/2012.

own, becoming one of the most basic tools for evaluating impugned measures. This new development links proportionality with the "time factor", that is, (a) the urgency of most measures, which left the lawmaker with limited time to consider their impact and even less time for deliberation in Parliament and (b) the duration of acute emergency: determining how long can a fiscal emergency last becomes an important factor.

During the second phase of the crisis jurisprudence the Council of the State started to demand that the legislator pays due attention to the proportionality dictate of looking for alternatives that burden rights less. Courts demanded proof that the lawmaker had carefully considered alternative measures and their potential impact. This rendered the second tier of proportionality a much more rigorous test, which created a specific obligation for the lawmaker to justify the choice of measures.

Nonetheless, there may be pitfalls in decisions that repeatedly use the lack of detailed studies accompanying every piece of legislation. This potentiality of the necessity test could transform into the rule that austerity legislation could be constitutionally permissible, provided such legislation included a detailed study of its impact, including actuarial calculations. Becoming rule-like, this prerequisite could develop into a disguise for closet judicial activism. It became apparent that it is important for rulings to include detailed and particularized use of proportionality, leading to narrow judgements. This introduced the third phase of the crisis jurisprudence.

3. Phase III: maturity (2016-today)

Ad hoc judgements, in the context of the financial crisis, can function as constraining rather than enhancing judicial discretion. This is the case because proportionality allowed the judiciary to exercise self-restraint by avoiding adoption of a predetermined stance in favour or against austerity measures. It became apparent that this can be achieved through narrow, ad hoc holdings. This narrowness constitutes self-restraint, since the creation of rules in the context of a crisis would tie the hands of the lawmaker. Through the use of proportionality to deliver narrow judgements, judges choose to partner with the lawmaker in a dialogue, but refuse to be the ultimate decision-maker.[29]

[29] X. Contiades and A. Fotiadou, "Constitutional resilience and constitutional failure in the face of crisis: the Greek case" (n 26).

The stakes at this phase have to do with decisions pending before the Council of State and other Courts with regard to salary and pension cuts, as well as to the issue of retroactivity. Underlying is an important question with regard to the extent to which the judiciary should intervene in the state budgetary policy. As Greece is still facing the financial crisis, such decisions have a potentially immense impact on the State budget. On the other hand, in case the State does not abide by court decisions rule of law issues are raised. Such constitutional dilemmas are interrelated with the role of the judiciary. Having entered a more "mature" era of the crisis litigation the courts show less self-restraint, yet the degree in which they should interfere with budgetary issues, striking down law as unconstitutional, is contested.

A decision halting retroactive tax-audits hindering taxation policy is characteristic of the issues that mark the phase of maturity of the crisis jurisprudence. Decision 1738/2017 of the Council of State, on the indefinite extension of the limitation of tax statutes, ended it considering it a severe violation of legal certainty. This put an end to the ability of tax authorities to impose taxes for fiscal years with limitation periods that would otherwise have lapsed. The Court reviewed legislation, which provided that the statute of limitations for the State to assess taxes is extended successively shortly before the expiry of either the original limitation period or the previous extension. According to the Court this rendered the rule put forth by the Income Tax Code as a five-year statute of limitation no longer applicable to tax liabilities arising in the years to which the above-mentioned accounts relate. Adversely, it was impossible to predict when they will expire, which undermines the credibility of the State in general, and the conscientiousness of the people with regard to fulfilling their tax obligations. In accordance to the ruling the limitation period was extended on several occasions and, since the extension of the limitation period depended on whether various authorities took action, the limitation period for tax claims of the same year might differ from taxpayer to taxpayer, while it may not have even been possible to even foresee when the limitation period is completed.

The Court ruled that the principle of legal certainty, stemming from the principle of the rule of law, enshrined in the Constitution (art. 25 para 1.a), dictates clarity and foreseeability in the application of legal rules and must be respected with particular rigor in the case of provisions which are likely to have serious economic repercussions on the parties concerned, such as taxes, levies, and sanctions for breaching such provisions. The Court stressed that legal certainty, which serves the general interest, dictates that individuals must be certain with regard to their

compliance with such rules, which cannot thus be called into question indefinitely. Consequently, for the imposition of charges, in the form of taxes, fees, levies and penalties, it is crucial to include a statute of limitation which complies by the principle of proportionality.[30]

Decision 431/2018 of the Council of State ruled that provisions introducing retroactive salary reductions of National Health System doctors were in violation of the Constitution. According to the Court such reductions violate article 21 (3) GrConst, which provides that the State takes care for the health of citizens, the principle of special wage regime for doctors serving in the NHS and the principles of proportionality and equality in public burdens. Doctors who work in the NHS are subject to a special regime and special conditions compared with other civil servants, since they start working at an older age and have exclusive employment. The State has the obligation to provide a special wage regime for NHS Doctors as well as the obligation to provide high standard health care for the citizens, for which NHS doctors are responsible. The extend of wage cuts brings about a reversal of the current wage regime and cannot be effected without prior assessment of the financial benefit in relation to the impact that this reduction will have on the operation of the NHS and in particular without assessing if the reduction is necessary, or could be achieved through other measures that have a similarly effective result burdening less the medical staff. Due to the severe financial crisis and budgetary problems faced by the Greek State, this decision is applicable only to the plaintiffs and to hospital doctors who have already brought their cases before the Courts. The retroactive remuneration and the return to the salary status before August 1st 2012 applies only to them. For all other doctors of the NHS salaries shall be adjusted for the future.[31]

These rulings, bold as they were, seemed to bring the state budget to a dead end imposing a remarkable burden. Most importantly what they suggested in terms of precedent had the potential of immense economic consequences that could endanger abidance by international agreements. Ad hoc decision-making proved to be the key.

The Council of State has ruled in 2018 (by a marginal majority) that the pension cuts scheduled for the following year were not in violation Constitution. The planned reductions will in some cases would amount to 18 percent. The Court decided by 13 votes to 12 that certain significant

[30] A. Fotiadou, "Greece", in R. Albert, D. Landau, P. Faraguna, and S. Drugda, (eds.) *The I·CONnect-Clough Center 2017 Global Review of Constitutional Law* (2018).

[31] A. Fotiadou, Greece, in R. Albert, D. Landau, P. Faraguna, and S. Drugda, (eds.) *The I·CONnect-Clough Center 2018 Global Review of Constitutional Law* (2019).

technical aspects of the law introduced two years ago by former labour and social security minister are constitutional. It must be noted that the Plennary Session of the Court examined, and will revisit, issues such as the recalculation of pensions and the slashing of the so-called personal difference (the difference between pensions issued before and after May 2016), and other the key clauses of the law that pensioner associations impugned before the Court.[32]

The dilemmas faced by the judiciary due to the financial impact of jurisprudence on the state budget became even more obvious during 2019. In Decisions 1880 and 1888/2019 the the Council of State (plenary session) held on one hand that the integration of all existing social security funds into a new one, the Main Insurance Fund (EFKA) is constitutionally permissible despite the heterogeneity of the insured persons and on the other that the application of uniform rules on contributions and benefits to both self-employed persons and salaried employees violates the principle of equality enshrined in Article 4 para 1 of the Constitution. The Court found unconstitutional the decisions of the Deputy Minister of Labour regarding the determination of the basis for calculating the insurance contributions of self-employed persons. According to the Court applying uniform rules with regard to contributions and benefits to categories of insured persons with substantially different conditions of employment and income, violates the constitutional principle of equality. According to the Court, dissimilar situations cannot be treated identically.

In Decision 1891/2019, the Council of State (plenary session) ruled in favor of state funding the Main Insurance Fund stating that the government would continue under the new legislative regime to have the obligation to cover the Fund's deficits. The Court also found constitutional the basis for recalculation of the main pensions, considering that the legislator sufficiently justified their choice. Nonetheless, the Court following the rationale of previous case-law ruled that the recalculation of pensions was insufficiently justified due to the absence of a relevant actuarial study and was thus in violation of the constitutional principles of equality and proportionality. A very crucial point is that according to the Court the effects of this decision will only be binding for the future. The Court thus attempts to contain the financial effect of the judgment since the budgetary cost of its implementation is immense, in view of the system of

[32] http://www.ekathimerini.com/228611/article/ekathimerini/business/cos-upholds-clauses-related-to-pension-cuts

diffuse constitutional review, which means that a great number of pensioners litigate their rights in lower courts, across Greece.

The question whether rulings finding pension cuts unconstitutional can set out time limits, so that they are applicable only in the future, is a complex issue with severe repercussions. What is at stake involves on one hand the very essence of constitutionality control and on the other the impact of judicial decisions on the state budget. The problem becomes more acute in light of the slow administration of justice and the equally slow reflexes of the competent authorities in abiding by the court rulings, which multiply the financial cost of abiding by rulings of unconstitutionality. The diffuse system of judicial review is also relevant, since at the same moment when the Council of the State decides on a constitutionality issue, a great number of cases are pending before lower Courts.

The Council of the State in Decision 21/2019 accepted the Main Insurance Fund's petition for a pilot judgment procedure so that the issues raised by the Council of State decisions that impact a wide circle of persons can be clarified. This judgement will decide the future of litigation in lower courts as a large number of pensioners have sought retroactive payments citing Council of State rulings from 2015 that had found cuts unconstitutional.[33]

III. Concluding remarks

A decade after the outbreak of the global financial crisis we have witnessed a variety of constitutional responses to the crisis.[34] Focusing on the tension between fiscal legislation put in place in response to international agreements and national constitutional provisions, an important side effect of the crisis surfaces: the transformation of the judiciary's role. Two important facets with regard to the role of the judiciary surfaced: (a). judges played a crucial role with regard to constitutional resilience and (b). judges became key players in economic governance.

Constitutions were put under stress during the crisis and their adaptability was tested. The recovery phase for fundamental rights began at the moment when the judiciary exited the first phase of the crisis, during which judges encountered with massive claims of unconstitutionality,

[33] A. Fotiadou, "Greece" in R. Albert, D. Landau, P. Faraguna, and S. Drugda, (eds.) *The I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (forthcoming 2020).

[34] X. Contiades and A. Fotiadou, "How Constitutions reacted to the Financial Crisis" in X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A comparative Analysis* (Ashgate 2013) 9-63.

aiming to even annul international loan agreements. The original puzzlement was followed by acceptance and then came realism.

Coming to terms with the necessity of judicial involvement was a step towards recovery. It then became apparent that it was feasible for constitutional review of the crisis legislation to be performed by way of business as usual. Realism meant striking down measures, but in such narrow judgements that connote that the judiciary firmly rejects the role of the final arbiter of what the fiscal emergency demands. However, the judiciary entered a dialogue with the legislator, trying to keep them in line with the constitutional dictates Through this dialogical process constitutional rights themselves by withstanding the crisis, even scarred, proved resilient.

Domestic courts became involuntary, and possibly unconscious, players at the international field of economic governance. Their traditional role of exercising constitutional review of the legislation posed novel issues of self-restraint. Constitutionality review at the domestic level had the potential to impact international agreements with far-reaching consequences. The novel distributional role of the judge renders them economic actors in the realm of economic governance.

This is a step beyond the judicialization of mega politics, it is about the judicialization of transnational economic and fiscal governance in domestic courts. Judges face questions that not only may divide a polity but also lead to transnational chain reactions. Observing this new phenomenon lead us to an era where Bickel's counter-majoritarian difficulty seems a relatively minor concern.[35]

[35] A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven, CT: Yale University Press 1986)

ABSTRACT

Few months after the abolishment of capital controls introduced on June 2015 due to the snap Grexit referendum, Greece remains a case study of the challenges encountered by a constitutional order faced by an acute financial crisis followed by a prolonged transition to the new era of economic governance.

This paper shall begin with an introduction to the financial crisis context and the structural reforms it triggered and it shall then attempt to address the constitutional aspects of the Greek experience. To do so the paper shall focus on one of the basic repercussions of the crisis: judges have become key players in economic governance through the exercise of constitutional review.