

The Constitution of Greece: EU Membership Perspectives



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Abstract The Constitution of Greece, adopted in 1975 after the collapse of the military dictatorship, was drafted with provisions providing the constitutional grounds for European integration. Subsequently, two EU related amendments were introduced and, additionally, constitutional interpretation is used to overcome further conflicts. The Constitution is described in the report as detailed and comprehensive, with a legal character and strong normative force. It includes a detailed list of rights, including social rights. The Constitution refers to the concept of ‘welfare state rule of law’. By way of an exception to constitutional systems of this type, Greece does not have a constitutional court, but instead a decentralised system of review of constitutionality. Adhering to the French ‘*État de droit*’ and the German ‘*Rechtsstaat*’ traditions, the rule of law works in conjunction with specific constitutional provisions. In particular, *nulla poena sine lege* is a cornerstone

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principle of constitutionality and the rule of law, and has prompted extensive scholarly concerns in relation to the European Arrest Warrant system. More widely known are the constitutional and fundamental rights issues raised in the context of the EU and IMF austerity and conditionality programmes, marking, according to the report, a darker side of sovereignty loss. The report summarises a broader concern in Greek academic commentary that constitutional rights and values have been given marginal protection, as the national constitution is no longer the guarantor of popular sovereignty rooted in a political decision made by the people, but rather has become a guarantor of the state's compliance with EMU obligations.

Keywords The Constitution of Greece · Constitutional amendments regarding European and international co-operation · Decentralised constitutional review · 'Welfare state rule of law' · The French '*État de droit*' and German '*Rechtsstaat*' traditions · European Arrest Warrant · *nulla poena sine lege* and defence rights in extradition cases · Fundamental rights · EU and IMF austerity and conditionality programmes · Social rights · Trade union rights and the economic emergency regime · Data Retention Directive · Limitation of rights and public interest Change away from popular sovereignty based on the Constitution

1 Constitutional Amendments Regarding EU Membership

1.1 *Constitutional Culture*

1.1.1 The current constitution of Greece was promulgated in 1975 after the collapse of a seven-year military dictatorship. The constituent power exercised by the Parliament elected in 1974 was described as delegated power to convey the image of constitutional continuity. Indeed, the 1975 Constitution, which has been revised three times (1986, 2001, 2008) has its roots in the Constitution of 1864, the most long-lived Constitution in Greek constitutional history, which contributed greatly to the establishment of the rule of law and parliamentarism. The 1864 Constitution had been enacted after a revolution against the monarch and was influenced by the 1831 Constitution of Belgium and the 1849 Constitution of Denmark. The election of a new king by the Constituent Assembly and the enactment of a liberal constitution marked the passage from constitutional monarchy to parliamentary democracy.

The Constitution of Greece is written and difficult to amend.¹ Detailed, analytical and comprehensive, the Constitution has legal character and strong normative force. Due to the existence of a system of diffused constitutional review, all courts have competence to review the constitutionality of laws. In other words, Greece does not have a constitutional court, but instead a tradition of diffused review. The current Constitution thus enshrines a decentralised system of judicial

¹ Spyropoulos and Fortsakis 2009.

review of the constitutionality of laws (Art. 93(4)). However, constitutional review is to a great extent concentrated through jurisdictional mechanisms of appellate review by the three supreme courts, i.e. *Areios Pagos* (Supreme Civil and Criminal Court), the Council of State (Supreme Administrative Court), and the Court of Audit. Article 100(5) of the Constitution regulates constitutional review as follows:

When a section of the Supreme Administrative Court or chamber 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, as specified by law. This regulation shall also apply accordingly to the elaboration of regulatory decrees by the Supreme Administrative Court.

Thus, the Greek Constitution belongs to the type of constitutions that have legal character, contain detailed norms and are enforceable in courts.

1.1.2 The Constitution sets out the form of government, establishes the separation of powers and provides for checks and balances. Furthermore, it includes a detailed list of fundamental rights enshrining civil, political and socio-economic rights. It is noteworthy that all former Greek constitutions have also included catalogues of rights, gradually incorporating the three generations of rights. Since the adoption of the Constitution of 1864, the principle of popular sovereignty has been enshrined in constitutional texts. According to Art. 1 of the current Constitution, '[s]overeignty lies with the people; all powers derive from the people and exist for the people and the Nation'.

The Constitution of Greece sets out the basic rules of the game, organising and allocating powers and providing for the detailed protection of fundamental rights. It has therefore been central to the legal and political life of Greece, generating a strong culture of constitutionalism; constitutional narratives are dominant in the Greek political discourse.

1.2 Amendment of the Constitution in Relation to the European Union

1.2.1, 1.2.3 The application for accession to the EU was submitted on the day the Constitution of 1975 was enacted. Specific provisions were included in the constitutional text in order to provide the constitutional grounds for the accession. Thus, accession to the EU did not take place under an aged constitution, rather the Constitution itself was drafted in such way as to include provisions facilitating this goal. The advice of legal scholars in favour of this choice proved invaluable for a smooth accession procedure.

Articles 28(2) and (3) of the Constitution² set out the substantive and procedural requirements allowing the accession as follows:

Article 28(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(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.

In 2001 an interpretative clause was added, according to which: ‘Article 28 constitutes the foundation for the participation of the Country in the European integration process’. Still, the wording of the above provisions was rather ambiguous and left room for different interpretations. Thus, Greek scholars disagreed on whether the accession of Greece to the EU should be understood as vesting powers in agencies of international organisations, which would require the three-fifths majority of the total number of Members of Parliament (MPs), or it constituted a limitation on the exercise of state sovereignty, which could be made through the enactment of legislation voted by the absolute majority of the total number of MPs. The dominant view was that both paras. (2) and (3) of Art. 28 in combination provided the constitutional grounds for the accession. Thus, a combination of the stricter substantive conditions provided for by para. (3) and the stringent procedural requirements set by para. 2 was applicable. What the Parliament actually did was to vote the law ratifying the accession of Greece to the EU with a three-fifths majority, leaving open the relevant interpretative issues. The same procedure was followed for the ratification of the treaties of Maastricht, Amsterdam, Nice and Lisbon, leaving the interpretational ambiguity unresolved. However, all ratifications took place smoothly since the two major political parties of the pre-financial crisis period were pro-European.³

1.2.2, 1.2.4 So far, constitutional amendment procedures have not been used to address the application of EU law. Although the relationship between EU law and the Greek Constitution from the aspect of the hierarchy of legal rules has been the subject of debate, with the doctrine of primacy of EU law having gained ground during recent years, in practice the issue has not yet created serious problems. So far, the incompatibility of constitutional norms with EU law has emerged as a problem with regard to two provisions. The first is Art. 14(9) of the Constitution, which provides that the capacity of owner, partner, major shareholder or managing

² The official translation, which is used here and subsequently in the report, is available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

³ For details and references to further literature, see Contiades and Fotiadou 2014.

director of a media enterprise is incompatible with the capacity of owner, partner, major shareholder or managing director of an enterprise that undertakes to perform works or to supply goods or services to the public sector, with the prohibition extended to all types of intermediary persons. The Greek Council of State⁴ referred questions to the European Court of Justice (CJEU) regarding the compatibility of the ‘major shareholder’ provision with EU law. The CJEU in its judgment of 16 December 2008⁵ concluded that an incompatibility existed. The contested provision has not been enforced since, and its revision is pending because, due to procedural hurdles set by the amending formula, no constitutional revision to allow such amendment has as yet taken place.

The second provision of the Constitution that creates tension with EU law is Art. 16(5), according to which ‘education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons’. Incompatibility with EU rules on the recognition of professional rights with regard to graduates of private colleges, as well as with EU rules on freedom to offer and receive services, has often triggered discussion about amending this constitutional provision. Nonetheless, agreement among the political parties to do so has been hard to achieve.

As mentioned, such tensions with EU law are difficult to promptly address through formal amendment, since the amending formula is very stringent, rendering the Greek Constitution difficult to change. In particular, formal amendment rules consist of a combination of procedural and material limits. Procedural limits set out in Arts. 110(2)–(6) are very strict, providing for a two-phase process, with intervening general elections. In the first phase, the need for a constitutional revision is ascertained by a resolution of Parliament, adopted on the proposal of at least fifty Members of Parliament either by a three-fifths majority or by an absolute majority of the total number of its members in two ballots, held at least one month apart. This resolution specifically determines the provisions that are to be revised. In the second phase, the next Parliament proceeds with the amendment of the provisions that are to be revised. It is noteworthy that the timing of the intervening elections is not influenced by the initiation of the amending process. If a proposal for amendment of the Constitution receives an absolute majority of the votes of the total number of members but not the three-fifths majority, the next Parliament shall proceed with the revision of the proposed provisions by a three-fifths majority of the total number of its members, and vice versa. Constitutional revision is concluded with the publication of the revised provisions in the government gazette within ten days after their adoption by order of the Speaker of Parliament. Rigidity is enhanced by a mandatory time lapse between revisions: revision of the Constitution is not permitted before a lapse of five years from the completion of a previous revision.⁶ Material limits are provided for by Art. 110(1), which

⁴ Decision 3760/2006 of the Greek Council of State.

⁵ Case C-213/07 *Michaniki* [2008] ECR I-09999.

⁶ Contiades and Fotiadou 2014, p. 712.

entrenches the provisions defining the form of government and also Art. 2(1) (respect of human dignity), Arts. 4(1), (4) and (7) (equality before the law, eligibility of Greek citizens for public service, and prohibition of titles of nobility or distinction), Arts. 5(1) (right to free development of personality) and (3) (personal liberty), Art. 13(1) (freedom of religious conscience) and Art. 26 (separation of powers).

The stringency of the amending formula works within a predominant culture of political distrust between the political parties. Thus, the constitutional culture enhances the rigidity level.⁷ Within this context, the sort of constitutional maintenance culture required to ‘fix’ incompatibilities of specific constitutional provisions with EU law does not exist. Consequently, in the course of the three revisions of the 1975 Constitution, EU law exerted implicit influence in shaping the content of specific provisions. For example, EU law influenced the design of constitutional provisions such as Art. 116(2), according to which the adoption of positive measures for promoting equality between men and women does not constitute discrimination on grounds of sex. According to this provision, the state shall take measures for the elimination of actual inequality, in particular to the detriment of women. Another provision shaped in light of EU law is Art. 4(4), providing that only Greek citizens shall be eligible for public service. This provision was subject to interpretation imposed by EU law, opening the Greek public service to EU citizens, while Art. 102(2), according to which the authorities of local government agencies which enjoy administrative and financial independence are elected by universal and secret ballot, was influenced by EU law introducing interpretations that allow EU citizens to vote in municipal elections.⁸ Thus, these examples show that informal amendment was the route chosen and that formal amendment is neither a necessary nor suitable tool to address incompatibilities between the Constitution and EU law.

Consequently, the strictly and directly EU-related formal amendments are two interrelated interpretative clauses. The first is the above-mentioned clause added to address the debate regarding the foundation for participation in the European integration process. The clause adopts the view, which prevailed during the discussions in Parliament as part of the revision process, that different possibilities exist, which may accordingly trigger the application of different paragraphs of Art. 28. This interpretative clause was complemented in 2001 by the interpretative clause of Art. 80 of the Constitution, providing in para. 2 that the minting or issuing of currency shall be regulated by law. According to this interpretative clause, ‘[p]aragraph 2 does not impede the participation of Greece in the process of the Economic and Monetary Union, in the wider framework of European integration, according to the provisions of article 2’.

⁷ Contiades and Fotiadou 2012, p. 450.

⁸ Contiades and Tassopoulos 2012, p. 166.

1.3 Conceptualizing Sovereignty and the Limits to the Transfer of Powers

1.3.1, 1.3.4 For many years the supremacy of EU law appeared to puzzle constitutional scholars and judges alike.⁹ Reluctant to clearly recognise the supremacy of legal norms over the Constitution, theory and jurisprudence found refuge in the concept that such rules have a different scope and cannot be in conflict. In extreme cases of tension, interpretative choices that harmonise the crucial constitutional provision with EU law should prevail.¹⁰ This hesitation to address the issue gradually gave way. In Decision 161/2010, the Grand Chamber of the Council of State stated that when reviewing a law, the courts must first consider whether the law is contrary to the Constitution. Only if the answer to that question is negative should the courts consider whether the law is contrary to EU law. If the contested provision is found to be in violation of the Constitution, it is rendered inapplicable, and thus there is no reason to review it further. The Court stressed that this way of reviewing national laws is not contrary to the principle of the primacy and direct effect of EU law, but appropriate, since in order to assess the compatibility of a national law with EU law (and perhaps ask the European Court of Justice for a preliminary ruling), the exclusively competent national judge should firstly adjudicate on all the issues of interpretation and applicability of national law. It is noteworthy that 13 members of the Court dissented, stating that the Court in the specific case should first have adjudicated on the compatibility of the specific law with EU legislation, since the specific piece of legislation was enacted in order to comply with rulings of the European Court of Justice. The dissenting opinion also stressed that in accordance with the principles of primacy and direct effect of EU law, the Court should interpret the relevant constitutional provisions in line with EU law, so as to minimise the possibility of conflict between the Constitution and EU legislation.¹¹

As a whole, although sovereignty narratives have not changed, in practice the Constitution operates in harmony with EU law, the supreme courts refer questions to the Court of Justice of the EU, and EU-friendly interpretation of legislation is common practice.

It is noteworthy that the crisis-related EU treaties were ratified via the normal law-making procedure provided for in Arts. 70–77 of the Constitution. In other words, Art. 28(1) of the Constitution, which dictates that international conventions are ratified by law, was applied instead of the special procedures set up by Art. 28(2) for vesting constitutional powers in agencies or international organisations. Statute 4063/2012 contained, among other rules, the ratification of the Treaty

⁹ Chrysogonos 2003, pp. 210–213.

¹⁰ See Decision 247/1997 of the Council of State recognising the supremacy of EU law, and contrarily Decision 2809/1997 not recognising supremacy of EU law over the national Constitution.

¹¹ See Association of European Administrative Judges, Greek Report, 2013.

Establishing the European Stability Mechanism (ESM Treaty), the amendment of Art. 136 TFEU and the ratification of the Fiscal Compact. The balance of political powers in Parliament allowed for this to happen quite smoothly, although concerns about the informal amendment of the Constitution effected by these treaties were expressed by parties of the opposition. So far, the dilemma about the constitutionalisation of the balanced budget rule implementing the Fiscal Compact has not been addressed due to the stringency of the amending formula. Nonetheless, when a constitutional revision process is initiated, the issue will inevitably emerge.

For more recent discussion on sovereignty in the context of the judicial adjudication of the financial crisis, see Sect. 1.5.

1.4 Democratic Control

1.4.1 The Standing Orders of Parliament¹² (Standing Orders) provide for the rules governing the relation of the Greek Parliament with the EU decision-making process. According to Art. 70(8) of the Constitution, ‘the Standing Orders of Parliament shall specify the manner in which the Parliament is informed by the Government on issues being the object of regulation in the framework of the European Union, and debates on these’. This amendment, explicitly mentioning the EU, was added in the 2001 constitutional revision.

Article 32 of the Standing Orders sets out the rules on the Committee of European Affairs, providing that the Speaker of the Parliament shall, at the onset of every parliamentary term, establish by his/her decision a special standing Committee of European Affairs. The Committee is composed by 30 MPs and one of the Parliament’s Deputy Speakers, acting as the Committee’s president. In the sittings of the Committee, Greek members of the European Parliament can participate with a right to speak. The Speaker of the Parliament may refer to the Committee any issue that he/she deems as relevant or any issue submitted to him/her by the standing or special committees of the Parliament or by MPs and Members of the European Parliament. The competences of the Committee mainly include the following: (a) institutional issues of the EU, (b) issues of co-operation between the Hellenic Parliament and other national Parliaments of the EU, of the European Parliament and of the Conference of Community and European Affairs Committees of Parliaments of the EU (COSAC), (c) issues of European policy and (d) acts of EU bodies with a regulative content. The Committee can express its consultative opinion on the aforementioned issues through the submission of a respective report to the Parliament and the Government.

With regard to opinions on the regulatory acts of the European Parliament, Art. 41B of the Standing Orders provides that the Government shall forward the draft legislative acts of the EU to the Speaker of the Parliament immediately after they

¹² <http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/Kanonismos-tis-Voulis/>.

are communicated to the Council of Ministers. The Speaker of Parliament refers the documents to the competent standing committee or/and to the Committee on European Affairs. The Speaker of Parliament or the Committee by its own decision may invite the competent Minister to provide information to the Committee if it is so requested by one third of its members. The competent committee delivers its opinion, which is forwarded to the competent Minister and, if this is provided by EU legislation, to the Union's competent bodies. By a decision of the Speaker of Parliament or if this is requested by the competent Committee, the issue on which an opinion is delivered is entered in the Plenum's parliamentary control order of the day. In recent years, the Hellenic Parliament Committee on European Affairs has adopted several opinions on EU legislative acts, which it has then submitted to the European Commission, and has taken part in consultation procedures with regard to green papers.

1.4.2 Since constitutional referendums are not provided for and referendums have not been employed in practice during the last 40 years, democratic control is exercised by the Parliament.

However, it is noteworthy that in the midst of the financial crisis that struck Greece in 2010, the idea of holding a referendum was brought forth by the then Prime Minister George Papandreou. His Government was constantly under stress caused by general strikes and violent clashes between police and protestors, and narrowly won a vote of confidence in June 2011 while Parliament approved a five-year austerity package. On 26–27 October, a second bailout loan, which reduced Greece's debt by 50%, was agreed by EU leaders, the IMF and banks. As the adoption of new harsh measures was due, Papandreou decided to hold a referendum to request the opinion of the people on the conditions of the new agreement. Under immense pressure exerted by both the French and German leaders, by his own party, and by the opposition parties as well, Papandreou called off the referendum on 3 November. As a vote of confidence was pending in Parliament and Papandreou was faced with the imminent danger of losing it, a constitutional absurdum occurred: the Prime Minister won the vote of confidence under the unprecedented condition that he would subsequently resign so that a coalition Government would be formed. One week later, on 11 November, an interim coalition Government was indeed formed with the participation of PASOK, New Democracy and a far right wing party, the Popular Orthodox Rally (LAOS). The new Prime Minister, Loukas Papademos, was a highly regarded technocrat, a former Vice-President of the European Central Bank, while the Government's main task was to lead the country up to new elections. Thus, the referendum proposal actually led to the collapse of the Papandreou Government.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 The limited scope of EU-related formal amendments is explicable by a combination of factors. The Constitution of Greece is recent and modern, its very

drafting was done with the aim of EU membership and thus it included the appropriate accession mechanisms. The detailed and extensive protection of fundamental rights is in line with the EU culture of rights protection, which is also reflected in the addition of modern aspects of rights protection, such as the protection of genetic identity and the protection against biomedical interventions (Art. 5(5)), the right to information (Art. 5A(1)), the right to participate in the information society (Art. 5A(2)) and the protection of the person against the electronic processing of personal data (Art. 9A). Although the amending formula and the constitutional culture create a context of augmented constitutional rigidity, alternative routes for relieving possible tensions exist. Issues such as the ban of non-state university-level education, even if the political context fails to produce the level of consent required for a formal revision, can be resolved by way of judicial interpretation.

Furthermore, there has always been strong support for EU membership among the public in Greece, with Euroscepticism being expressed mostly by smaller political parties.

1.5.3 Sovereignty issues with regard to the EU integration process had been merely the subject of discussion among scholars, at least until the financial crisis broke out. The bailout agreements, however, marked a darker side of sovereignty loss. Delayed dismay at this loss apparent in the political discourse and in constitutional challenges against the bailout agreements suggest that an abrupt realisation of waning sovereignty in the age of globalisation occurred as a result of the financial crisis.¹³ Its concrete expression was the challenge against Law 3845/2010 incorporating the Memorandum of Understanding (MoU) between Greece and its international lenders brought before the Greek Council of State, in which it was argued that this law, despite the fact that it made concessions of sovereignty and transferred state competences to international organisations (i.e. the Troika), was not adopted with the necessary enhanced majority of three-fifths of votes, as provided by Art. 28 of the Constitution. It is clear that despite the participation of the International Monetary Fund (IMF), which did however complicate matters legally, the bailout scheme was important if Greece was to remain in the eurozone. The Court resolved the issue by rejecting the very applicability of Art. 28 of the Constitution, characterising the Memorandum not as an international treaty but a political programme.¹⁴ Although the Court thus did not invoke sovereignty issues to resolve the case, narratives of lost sovereignty are part of the influence of the financial crisis on the Constitution. Constitutional normativity has often been challenged because of the impact of austerity measures on the application of fundamental rights and because of deviations from normal law-making processes and the enhanced role of the executive in law-making.

Nonetheless, the Constitution is far from becoming obsolete. As regards the EU, it creates no problems with regard to the integration process, while it has an

¹³ Contiades and Fotiadou 2013, pp. 9–59.

¹⁴ Contiades and Tassopoulos 2013, pp. 195–218.

immense role in adjudication and politics. Still, the financial crisis has put a severe strain on the Constitution and exerted a continuous influence on it, as it has on most constitutions in the legal orders that have been struck by the financial crisis. It is arguable that the amending formula itself could be considered as an area in demand of reconsideration. Over-stringency has proved to be an obstacle to constitutional updating as well as to allowing the people to be more involved in the amending process.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1–2.1.2 Part II of the Greek Constitution protects individual and social rights, while political rights are also enshrined in other constitutional provisions. Ever since the creation of the Greek state, fundamental rights have been constitutionally protected. All Greek Constitutions have included catalogues of rights that have gradually acquired their present status. This gradual evolution has been marked by the continuous enhancement of rights protection. The current Constitution of 1975 has a comprehensive and very detailed list of rights, which was further enhanced in the 2001 constitutional revision that was also marked by the constitutionalisation of interpretative principles.

As part of the 2001 revision, the proportionality doctrine and the horizontal application of rights were explicitly included in the Constitution (Art. 25(1)), which also guarantees the rule of law and the welfare state. The provision also provides that restrictions to rights may be imposed by the Constitution or by statute. In accordance with the wording of Art. 25(1):

[t]he rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.

It is noteworthy that proportionality had already been extensively elaborated in the case law as a normative principle delineating the permissibility of restrictions imposed on constitutional rights. Interpretatively derived from the rule of law principle in a landmark case of the Council of State in 1984,¹⁵ the proportionality doctrine is constantly employed by the Greek courts. The constitutionalisation of the principle encourages the judge to employ all tiers of the test rigorously. Under

¹⁵ Decision 2112/1984 of the Council of State.

the rule of law umbrella, the principles of legal certainty and legitimate expectation have been judicially elaborated.

Greek courts in exercising judicial review of the constitutionality of laws often address constitutional rights protection issues. The absence of a constitutional court often works against a unified, coherent jurisprudence. Nonetheless, a large part of Greek constitutional jurisprudence deals with the delineation of the protective scope of rights and the permissibility of restrictions.

2.1.3 The rule of law principle was explicitly enshrined in 2001, although it had been part of the Greek constitutional culture ever since the birth of the Greek state, with a landmark point in its evolution being the Constitution of 1864. The above-mentioned concept of the ‘welfare state rule of law’¹⁶ is considered to be one of the fundamental principles of the state, along with the principle of democracy and the separation of powers doctrine. The Greek constitutional literature had interpretatively derived the principle from a combination of a long list of constitutional provisions. Jurisprudential references to the doctrine had also found multiple constitutional grounds for its elaboration. The welfare state dimension operates under the rule of law rationale, while welfare state redistribution complements the constitutional protection of social rights. Adhering to the French ‘*État de droit*’ and the German ‘*Rechtsstaat*’ traditions, the Greek conceptualisation of the rule of law works in conjunction with other specific constitutional provisions.

Article 42 of the Constitution dictates that statutes passed by the Parliament shall be promulgated and published by the President of the Republic. Statutes obtain formal legal effect with their publication in the government gazette, and substantive legal effect ten days after publication; i.e. legal validity begins with publication and legal enforceability ten days later. Statutes may also contain provisions that set a different starting point for legal bindingness. Retroactivity is possible if explicitly provided for under the condition that this is not prohibited by the Constitution. Retroactive force is not constitutionally permissible in the following provisions: Art. 7(1), according to which no crime exists and no punishment can be inflicted unless specified by law in force prior to the perpetration of the act, while criminal liability also cannot be retroactively increased; Art. 77(2), according to which pseudo-interpretative statutes may not be used to produce retroactivity;¹⁷ and Art. 78(2), according to which taxes or other financial charges may not be imposed by a retroactive statute effective prior to the fiscal year preceding their imposition.¹⁸ In other words, the rule of law is substantiated through specific constitutional provisions that pre-existed the explicit enshrinement of this principle, providing the grounds for its interpretative conceptualisation, while these provisions are currently read in conjunction with the doctrine.

¹⁶ The terminology used in the official translation of the Constitution, see *supra* n. 2.

¹⁷ ‘A statute which is not truly interpretative shall enter into force only as of its publication.’

¹⁸ Contiades and Fotiadou 2014, p. 714.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 According to the CJEU's jurisprudence, conflicts that may arise between fundamental rights and fundamental freedoms enshrined in the Treaties are resolved when the Court, following a balancing procedure, rules whether or not a fundamental right can prevail over fundamental freedoms. In the light of the CJEU's jurisprudence, fundamental freedoms can justify a restriction of rights, which are not considered as absolute.¹⁹ The evaluation of whether a right is considered absolute or not is based, among other criteria, on the European Convention on Human Rights (ECHR). Consequently, in relation to all the rights which, according to the ECHR, can be subject to limitations justified by objectives of public interest, fundamental freedoms are considered by the jurisprudence of the CJEU as a 'form' of public interest, the protection of which potentially requires the restriction of rights.²⁰ The CJEU's jurisprudence is not clear about whether rights generally prevail over freedoms. In every case the balancing procedure is based on the principle of proportionality. Consequently, the limitation of a freedom is considered legitimate if it takes place within the framework of the exercise of a fundamental right, and is considered to be appropriate, necessary and proportional *stricto sensu* for the achievement of the objectives of the right at issue. On the other hand, the limitation of a right is appropriate, necessary and proportional *stricto sensu*, if it serves the achievement of a given end which is protected by the freedom at issue. Nevertheless, the most crucial issue is that according to the CJEU's jurisprudence, fundamental freedoms must be balanced against fundamental rights even in those circumstances in which the exercise of rights concerns activities that fall outside the scope of the EU's competence, given that the CJEU has ruled that the exercise of rights cannot jeopardise the achievement of goals protected by fundamental freedoms.²¹ Within the balancing context, fundamental rights do not prevail over economic freedoms. As a commentator on case C-112/00²² has observed, 'the language of *prima facie* breach of economic rights, suggests that it remains something, which is at the heart wrong, but tolerated'.²³

With regard to the question of constitutional issues in Greece due to the jurisprudence of the CJEU on the balancing of fundamental rights with economic freedoms, we can observe that the jurisprudence of the Council of State has been influenced by the CJEU's approach concerning the primacy of fundamental

¹⁹ See Case C-112/00 *Schmidberger* (2003) ECR I-05659.

²⁰ *Ibid.*, para. 79. The CJEU makes a direct reference to the text of Arts. 10 and 11 of the ECHR and their limitations due to objectives in the public interest.

²¹ Case C-438/05 *International Transport Workers Federation (Viking)* [2008] ECR I-10779, para. 40 and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, para. 87. On this issue see Amtenbrink 2012, pp. 35–64, especially pp. 60–62.

²² Case C-112/00 *Schmidberger* [2003] ECR I-05659.

²³ Brown 2003, p. 1508.

freedoms of EU law over national constitutions, which may act as trumps over the enforcement of certain constitutional provisions. However, the Council of State has not developed a sound constitutional policy regarding the relation between the Greek Constitution and EU law (see below Sects. 2.7–2.8).

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1–2.3.1.2 This presumption applies in Greece; Greece has incorporated the ECHR as well the International Covenant on Civil and Political Rights (ICCPR), among other conventions, into its legal order. Both academic commentary and the courts hold that the presumption is not violated through the execution of a European Arrest Warrant (EAW).

According to the national provisions concerning arrest, an arrest warrant is in conformity with the law if there is probable cause indicating guilt, and the proceedings are controlled by the judiciary (Arts. 5(3) and 6(1) of the Constitution; Art. 276 et seq. of the Code of Criminal Procedure (CCP)). Although these are provisions of domestic law, they apply to the EAW along the same lines, since it is considered as a procedural means in the common EU space, where mutual trust and especially the principle of mutual recognition have to prevail. Therefore, the Supreme Court (*Areios Pagos*, hereinafter AP) has no competence to control the substance of the case; it can only control the legality of the EAW.²⁴ However, part of the academic commentary holds that control must always be carried out in cases where procedural requirements for the execution of the EAW are not met. This is the case especially when the issuing state has no jurisdiction over the alleged deed.²⁵

One aspect of the presumption of innocence that could be regarded as having been violated is the ‘*pro mitiore*’ principle, which means that if several reasoned scientific views exist, the one that best safeguards the rights of the accused ought to be preferred. Such a violation occurs when national ‘indictment’ (i.e. charging the person sought, which in Greece is a ground not to execute an EAW according to the law (Arts. 12(1a’) and (b’) of Law No. 3251/2004), is interpreted narrowly by the courts and thus its scope is not exhausted to allow the person to be treated in more favourable terms. This narrow interpretation runs contrary to the very meaning of the legislative ground for non-execution, as long as the latter aims at avoiding

²⁴ Kedikoglou 2014, pp. 29–30, 71; Mouzakis 2009, pp. 572 et seq.; Mouzakis 2012, p. 67. From the case law see e.g. AP 1836/2007, Poiniki Dikaiosini 2008, p. 535 (summary); 1811/2009, Poiniki Dikaiosini 2010, pp. 37 et seq.

²⁵ Kedikoglou 2014, pp. 71–72.

double jeopardy and thus should be interpreted generously to benefit the person sought. Since, according to the commentary, a preliminary investigation, possible henceforth in Greece for almost all crimes and obligatory now for felonies (Laws Nos. 3904/2010 and 4055/2012, accordingly amending Art. 43 CCP,) blocks the execution of an EAW as an indictment does, the execution of an EAW should be denied also in the case of such an investigation. Contrary, however, to the viewpoint in the above commentary, the Supreme Court considers preliminary investigation as separate from indictment (which as such may or may not follow, according to the evidence obtained after the investigation has ended). Here one could consider the Court's approach to identifying indictment in the wider sense of the EAW Framework Decision²⁶ (EAWFD) with the formal and narrow meaning that this term has in domestic law to be erroneous. The case seems ripe for a request for a preliminary ruling from the CJEU.²⁷ However, the Supreme Court has recently held that indictment, even if thus narrowly conceived, may exclude the execution of an EAW even when it temporally follows the issuing of the latter; the only condition is that indictment take place during the hearings on the EAW at the Appeals Judicial Council or the Supreme Court and not later.²⁸ However, pending indictments may adversely impact the proper application of the EAWFD, given that the optional refusal of execution has been reshaped as obligatory with regard to nationals under Arts. 11(h') and 12(a') of Law No. 3251/2004, which provides for a possibility of abuse since consciously unfounded complaints may be submitted with the aim of paralysing the execution of an EAW through a subsequent indictment. This reshaping into an obligatory ground deprives the judge of the discretionary power that he/she otherwise had to declare such submissions abusive and allow execution. The Greek legislator has thus distorted the EAWFD in a 'nationalist' manner.²⁹

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle of *nullum crimen, nulla poena sine lege* is recognised in Greece as a cornerstone of criminal law and, as discussed in Sect. 2.1.3 above, as part of the rule of law (Arts. 2(1), 6(1) and especially Art. 7(1) of the Constitution

²⁶ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

²⁷ Kedikoglou 2014, pp. 129–134. As to commentary, see also Anagnostopoulos 2005, pp. 855–856; Fytrakis 2006, pp. 219; Kalfelis 2006, pp. 203; Mouzakis 2012, pp. 59–60. Cf. the opposite stance of the judiciary in AP 591/2005, Poinika Chronika 2005, pp. 840 et seq.; AP 2149/2005, Poiniki Dikaiosini 2006, pp. 169 et seq.; AP 1773/2007, Poinika Chronika 2008, pp. 556 et seq., as well as of Karaflos 2013, p. 98.

²⁸ Kedikoglou 2014, pp. 136–137. Cf. AP 678/2012, Poinika Chronika 2013, pp. 440–441; AP 558/2007, Poinika Chronika 2007, pp. 597 et seq.; AP 2135/2005, Poinika Chronika 2006, pp. 597 et seq.

²⁹ Toghias 2013, pp. 1156–1157.

and Arts. 1 and 2 of the Criminal Code (CC)). Article 2(1) of the Constitution provides that '[t]he primary obligation of the State is to respect and protect human dignity'. Art. 6(1) provides that '[w]ith the exemption of *in flagranti* crimes, nobody shall be arrested or imprisoned without a reasoned warrant, which must be presented at the time of arrest or detention'. Article 7(1) provides:

No crime is constituted and no criminal sanction shall be imposed without a law valid before the commission of the deed and defining its component elements. A criminal sanction that is harsher than the one provided for at the time of commission of the deed, shall never be imposed.

Therefore, the legal commentary has strongly contested the EAW from the point of view of respect of the principle of *nulla poena sine lege*, especially as regards the erosion of the dual criminality principle. The points stressed in the theory are the following: it is absurd for the executing state to extradite a person for an act which the state itself does not consider as punishable; the very fundamentals of extradition are thus dismantled; the guarantees of the person sought and laid down in the above-mentioned constitutional provisions are undermined; sovereignty is negated; without dual criminality, criminalisation overwhelms the EU legal space.³⁰ It seems clear that despite the symbolic maintenance of the principle of dual criminality, it has in fact been totally eroded, especially if the 32 'crime types' in Art. 2(2) of the EAWFD (Art. 10(2) of Law No. 3251/2004) are taken into consideration, whereby dual criminality is already *ex lege* excluded. The principle functions only marginally, e.g. when an execution is refused due to defects in the legality principle traced *in concreto* when, for instance, the crime for which a person is sought is not provided for as such in Greece and simultaneously is not included in the 32 'crime types'.³¹ The removal of double criminality has been considered problematic in Greece in particular with regard to the following crimes and offences in the list, which are not considered as crimes or offences in Greece. First, Greece may face problems as to the forms of certain crimes: e.g. in Greece, 'homicide' does not include participation in suicide or acts of euthanasia, both specifically provided for

³⁰ Kedikoglou 2014, pp. 56–57, 68; Kaiafa-Gbandi 2004, pp. 1297–1301, noting '... for the person sought the offering of procedural guarantees for the materialization of extradition cannot counter the eventual dismantlement of basic obstacles blocking it, since, as it is obvious, there is no comparison between the possibility of non-extradition and the extradition under procedural safeguards' (at p. 1297); Fytrakis 2006, pp. 214–215, noting: '... narrowing the requirement of dual criminality constitutes a dangerous diversion from the fundamental principles of criminal law, as they are laid down in our Constitution' (at 215)'; Kalfelis 2006, p. 201; Vasilakakis 2006, p. 207, noting: '... the deletion of dual criminality produces an over-incrimination at a European level, since the probability of being confronted with a EAW grows ... under conditions of intense international mobility like nowadays the possibility grows that somebody may behave legally according to the law of his/her nationality or usual residence, in conformity with which he/she coordinates his/her behavior, but illegally according to another country's law, which he/she may ignore'.

³¹ See in this regard Togias 2013, pp. 1154–1156, referring in this regard e.g. to AP 116/2011, as well as Decision 8/2011 of the Piraeus Appeals Judicial Council and Decisions 38/2012 and 89/2012 of the Athens Appeals Judicial Council.

in Greece separately from the former; however these may be part of ‘homicide’ in some other Member States. Problems may also arise with regard to the question whether crimes procedurally related to those in the EAW are to be considered as included in the list. Secondly, issues around dual criminality may arise with regard to crimes concerning tax evasion, customs fees or currency (Art. 10(1a’), last sentence of Law No. 3251/2004, incorporating Art. 4 of the EAWFD), whereby Greece is obliged to extradite persons even to countries that do not accept this EAWFD clause, like some Scandinavian and Baltic countries or the Netherlands. Furthermore, Greece in its domestic law has also widened the list of offences provided for in the EAWFD by providing also for ‘violations of sexual freedom’ in general, ‘corruption’ and preparatory acts of currency-related crimes.³² Finally, the case law of the Supreme Court does not consider it to be a violation of the *nulla poena* principle if the EAW provisions also apply to alleged deeds committed before the entry into force of Law No. 3251/2004, provided that the EAW request has been received after this temporal point; the reasoning is that in procedural law matters, unlike in substantive law, the *nulla poena* principle is not binding, allowing thus for retroactivity.³³

Counterarguments to the above critical points could be that the above-mentioned constitutional provisions concern only indictments made by the Greek state, whereas in the case of the EAW, Greece is only assisting another EU Member State legally and, moreover, the crimes included in the 32 ‘crime types’ will mainly be committed abroad (however, in this case the problem remains with regard to crimes that are not punishable in Greece and have been allegedly committed by nationals).³⁴ There is thus a clear setback for the constitutional guarantees for arrested persons, which has been considered as a necessary ‘sacrifice’ for the good functioning of co-operation inside the EU legal space.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 According to Greek law (Art. 13(1) of Law No. 3251/2004, incorporating Art. 5 EAWFD), the execution of an EAW for the execution of a penal sanction based on a court judgment issued *in absentia* is not automatic; it may be made dependent on a declaration from the part of the issuing state, satisfying the executing state, that procedural possibilities exist for a new trial in the issuing state in the presence of the person sought. This declaration should originate only from a court, not from any other, administrative authority. A practical difficulty as to the handling of such cases is the multiplicity of the Member States’ legislation on

³² Kedikoglou 2014, pp. 59–67, and pp. 72–75.

³³ See Art. 39 of Law No 3251/2004 and Mouzakis 2012, p. 65, respectively. In favour of the judiciary’s stance also Karaflos 2013, p. 99. For a comprehensive critique of the viewpoint that favours retroactivity in criminal procedure, see passim Fytrakis 1998.

³⁴ Kedikoglou 2014, p. 69.

summonses and subpoenas, which makes the respective control of whether the foreign law has been respected rather complicated for the executing state.³⁵ When the person sought for extradition is a national, Art. 11(f) of Law No. 3251/2004 also applies: the Greek state may insist on execution in Greece as a condition for execution of the EAW. It may then also refuse execution due to the fact that the *in absentia* judgment, if issued without compliance with the proper procedure on summonses and subpoenas, violates the principle of fair trial (scil. Art. 6(1) ECHR) and therefore execution of the sanction cannot be allowed by the Greek state (this rule applies both to nationals as well as non-nationals).³⁶ The ‘collateral damage’ of such potential refusals is of course the loss of a new trial of the person sought, i.e. the loss of the chance of an acquittal or a diminution of the sanction, and the risk of the judgment becoming final, if Greece, instead of taking refuge in Art. 6(1) ECHR, chooses to execute the sanction.³⁷ A solution in such cases could be that the Greek courts would adjudicate in conformity with the *I.B.* judgment of the CJEU. In that case, the CJEU would approach EAW requests for extradition for the execution of sanctions as requests for initiating criminal proceedings, provided that there exists in the issuing state an exceptional appeal for a new trial (in the form of a ‘*revisio propter nova*’ or something analogous to it); meanwhile the execution of the existing judgment would be left pending.³⁸

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The absence of the protection guaranteed by domestic legislation is a real challenge for the person sought, as well as for the family. In Greek legislation there are no special measures provided for assisting these persons in such cases. The Ombudsman cannot be involved, since this institution mediates between public administration services and citizens; cases having to do with the judiciary, like EAW cases, are excluded. As to legal aid, Law No. 3226/2004 provides that every EU resident of low income may become a beneficiary. Low income means an income less than two-thirds of the annual family income as stipulated by the conditions of the General National Collective Labour Agreement. Such aid must be applied for. The aid also covers appeals, provided that they are not blatantly unfounded (Arts. 1, 2 and 7(4) of Law No. 3226/2004).

One can consider perhaps the provisions of the Law incorporating the EAWFD in Greece concerning residents and inhabitants (Arts. 12(1e’), 13(3) of Law No. 3251/2004) as a kind of pre-emption and thus ‘circumvention’ of the challenges mentioned above. According to these provisions, Greece may refuse to execute an

³⁵ Kedikoglou 2014, p. 162.

³⁶ Kedikoglou 2014, pp. 162–163.

³⁷ Mouzakis 2012, p. 60.

³⁸ See Case C-306/09 *I.B.* [2010] I-10341, paras. 56–57; cf. on this also Mouzakis 2012, pp. 60–61.

EAW if execution of the sanction in Greece (provided that such execution is possible according to domestic law) is guaranteed, if the person sought is resident in Greece, which is judged depending on the ad hoc personal, economic and social relations the person has to the country, indicating a link or connection of a more or less stable character. A certain period of stay is not a prerequisite, nor is it required that the person originate from an EU country, nor that he/she have no criminal record. Provided that the same conditions are fulfilled, custody of the arrested person may be replaced by non-custodial restrictive terms (Arts. 16(1)–(3) of Law No. 3251/2004). Exceptionally, when the person sought is a citizen of the issuing state, the link to the latter will probably prevail as to the execution of the EAW, but there is still a margin of appreciation for the Greek courts when the rights and freedoms of the person sought might be put at risk.³⁹

The aim of the provisions is the successful rehabilitation of the person sought into the social circumstances with which he/she is familiar. This aim is also in harmony with Art. 8 ECHR, a provision the EAWFD also aims at enhancing.⁴⁰ Despite the conformity of the statute and the case law with the ruling in the *Szymon Kozłowski* case,⁴¹ the differentiation of the treatment of nationals where refusal is obligatory (cf. Art. 11(f') of Law No. 3251/200⁴²), is not in full compliance with the EU scope of protection for aliens, in so far as e.g. the court judgment may depend on administrative prerequisites like the possession of a valid residence permit. The CJEU preliminary ruling which was expected after the French request submitted in *Joao Pedro Lopes Da Silva Jorge* concluded that a Member State's legislation restricting the power not to execute an EAW to cases where the requested persons are its nationals runs contrary to the principle of non-discrimination.⁴³ A final complication that negatively impacts the situation of the sought person is the incorrect stance of the prevailing opinion in the Supreme Court's jurisprudence concerning the costs of the proceedings. Such costs, according to the Supreme Court's opinion, shall be borne by the person sought according to the respective domestic legislation, when he/she is extradited after his/her appeal has been rejected; however, Art. 37 of Law No. 3251/2004 provides otherwise, putting such charges at the expense of the executing state. This provision, especially as regards dealing with the costs of EAW proceedings on the basis of the territory on which they have arisen, has to apply in lieu of the general

³⁹ Kedikoglou 2014, pp. 91–94. See from the respective case law AP 854/2012, Poinika Chronika 2013, p. 116; AP 437/2012, Poinika Chronika 2013, pp. 113–115.

⁴⁰ See e.g. AP 1676/2010, Poinika Chronika 2011: 670–672.

⁴¹ Case C-66/08 *Kozłowski* [2008] ECR I-06041.

⁴² Whereby it remains contentious whether the court judgment of the issuing state should be 'irrevocable' (and not merely 'final' without suspension of the sanction's execution); fair trial considerations promote the affirmative answer, whereas the letter of the law allows for a negative one: cf. Karaflos 2013, p. 95.

⁴³ See Case C-66/08 *Kozłowski* [2008] ECR I-06041 and Case C-42/11 *Joao Pedro Lopes Da Silva Jorge* [2012] ECLI:EU:C:2012:517. See also: Mouzakis 2012, pp. 57–59.

provisions of the Greek CCP.⁴⁴ It would seem recommendable to establish institutions and procedures aimed at appropriate assistance for persons extradited and for their relatives, and it is obvious that Greece is far behind in doing so. One possible solution could be an NGO-based model of assistance.

2.3.4.2 As to statistics regarding extraditions, throughout the years 2005 to 2009, Greece executed 82 EAWs. Between 38–49% of persons sought did not consent to their extradition; the average time needed for the extradition of persons not having consented to extradition was 48 days.⁴⁵ To date, 10 Greek citizens have been extradited to be indicted abroad and serve the sentence in Greece; in four cases concerning alien residents, no return has been decided due to the fact that they were citizens of the issuing state; in one case return was impossible because the Greek authorities did not apply for it; in five cases the aliens were deemed non-residents and the EAW was executed unconditionally.⁴⁶

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.4 Given the strong adherence in the EAW system to the institution of mutual recognition, judicial review tends admittedly to become rather weak (and more so if the issuing state's authority is a non-judicial one). Since, however, fundamental liberties and rights are at stake in criminal law matters, the standpoint that seeks legitimacy for such weakness through the argument that criminal court decisions have to be assimilated to freely circulating consumer goods, cannot be regarded as acceptable. This is so because orders pertaining to deprivation of freedom, as inherently resistant to any kind of commodification, cannot be normatively equated with rules applicable to consumer goods. In this regard even the exequatur in civil and commercial matters is of dubious legitimacy, especially when the sanctions are so severe that they must be equated to quasi criminal sanctions; the same holds even more true when genuine criminal sanctions are to be imposed. Therefore, we will subsequently highlight six points which provide some additional safeguards in the Greek legal order.

First, one substitute for the lacking judicial review may be found in refusal of execution when the alleged deed does not fall under the jurisdiction of the issuing state, and Greece has no such jurisdiction either. However, this would run contrary to the interpretation of the EAWFD by the Greek courts; according to the judicial interpretation, the courts may not control the substance of the case underlying an EAW which Greece has been requested to execute.⁴⁷

⁴⁴ Mouzakis 2012, p. 64.

⁴⁵ Toghias 2013, p. 1154.

⁴⁶ Kedikoglou 2014, pp. 101–102.

⁴⁷ Kedikoglou 2014, pp. 71–72 and 150–152. See also under Sects. 2.3.1.1–2.3.1.2 above.

Secondly, by way of an analogous substitute, one may consider refusal of execution when a national is sought for execution of a sanction where either the act is not punishable in Greece or simply the sanction is not provided for as such in Greece (e.g. a certain type of internment in a workhouse conceived of as a form of security in the issuing state, but not existing in Greece as such).⁴⁸

Thirdly, along the same lines, one could request a more generous use of the human rights clause and thus the refusal to execute an EAW on the grounds of a potential violation of Art. 6 of the EU Treaty (Art. 1(3) of the EAW FD; Art. 1(2a') of the implementing Law No. 3251/2004). The standpoint of the Greek Supreme Court, which holds that these rights or the fairness of the procedure are not at stake when deciding on the execution of an EAW and that these become relevant only after execution,⁴⁹ is very narrow. In opposition to this, commentary is strongly in favour of taking principles laid down in instruments like the ECHR or the case law of the European Court of Human Rights (ECtHR) like the judgment in the *Soering*⁵⁰ case into consideration. In such a framework, detention conditions that violate Art. 3 ECHR could provide grounds to refuse execution.⁵¹

Fourthly, it was noted that an appeal against a decision to execute an EAW taken by the President of the Appeal Court is not permitted when the person sought has consented to the extradition. Whilst this is in accordance with the speedy nature of the procedure and the freedom of choice of the consenting person and thus complies with Art. 20(1) of the Constitution ('right to be heard'), Art. 6 of the ECHR, Art. 2 (1) of Protocol No. 7 to the ECHR and the ICCPR, the non-permissibility of a refusal to execute such decision, at least in exceptional cases, seems less justified. It is obvious that a decision is not to be executed in the case of invalid consent (e.g. the person sought consents without having a lawyer and without being e.g. informed about the real consequences of consent to waiving the specificity rule (Art. 34 (2) e'-f') of Law No. 3251/2004), despite the fact that this case is not expressly regulated in the law.⁵²

Fifthly, when an appeal is submitted (when the person sought has not consented to the extradition) but the appellant is absent when the court convenes, the Supreme Court will reject the appeal on the formal ground that it is 'unsupported' through the appellant's presence; such presence is indeed required according to Art. 501(1) CCP. This standpoint has, however, been strongly and persuasively contradicted by the minority opinion in Supreme Court Judgment No. 651/2011,⁵³ rejecting the

⁴⁸ Kedikoglou 2014, pp. 87–90. If an alien is sought who is resident in Greece and who is a citizen of the issuing state, the link to the issuing state may lead Greece not to refuse to execute the EAW; see also above Sect. 2.3.4.1.

⁴⁹ See for instance AP 1303/2011, Poinika Chronika 2012: 494. See also Mouzakis 2012, p. 67.

⁵⁰ *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.

⁵¹ Togiak 2013, p. 1161 and footnote 52. As to the impact of international human rights and protective legal means on the EAW, see also Vasilakakis 2006, p. 208. Critically to the conception of the notion of the EAW as an overreacting 'combat norm', see also Papacharalambous 2002.

⁵² Mouzakis 2012, pp. 63–64.

⁵³ AP 651/2011, Poinika Chronika 2012, p. 347.

application of this article. The argument is that the article in question has to do with genuine decisions taken after real trials and not with rulings issued by judicial units acting as mere councils (as in EAW cases), whereby publicity and orality are not followed as in trials. It is further pointed out in the minority opinion that rejection of the appeal significantly deteriorates the procedural status of the person sought also for another reason: it is not permissible to claim that the procedure is invalid, as normally possible for an appellant according to domestic law when the non-appearance of the appellant was due to ‘force majeure’ (Art. 341 CCP), because of the specific and accelerated procedure of the EAW.⁵⁴ Moreover, and according to the same minority opinion, even the appellant’s declaration that he/she ‘will not appear’ before the Supreme Court cannot always be interpreted as a waiver of the initially launched appeal. Such waivers must be made explicitly; tacit waivers are not recognised by the respective provisions of Art. 474(1) and 475(1) CCP. Finally, the presence of the appellant in and of itself adds nothing to the judicial procedure regarding the EAW: it is not matters of evidence but only complex juridical issues that are at stake at this stage. For all these reasons, the rejection of the appeal on formal grounds falls short of the requisite level of due protection of procedural rights.⁵⁵

Finally, a clear case of disproportionate deterioration of the procedural status of the person sought is the formalistic reference in Art. 22(1) of Law No. 3251/2004 to Art. 451(1) CCP as regards the procedure of appealing against the initial decision to execute an EAW. The latter provision requires the person sought to submit an appeal exclusively with the Appeal Court’s secretary within 24 hours after the issuing of the initial decision. Thus, the appeal becomes nearly impossible for a person in custody, since he/she is not permitted to address the director of the penal institution for that purpose, as it is provided for in principle according to Art. 474(1) CCP.⁵⁶ Additionally, this option is misleading: Art. 451 CCP presupposes that the appellant is not in custody. Finally, the disproportionate outcome of this option is evident from the fact that addressing the prison’s director is, according to the jurisprudence of the Supreme Court, allowed if the detainee intends to waive the right to appeal.⁵⁷

⁵⁴ Mouzakis 2012, pp. 62–63; Toghias 2013, pp. 1162–1163.

⁵⁵ Mouzakis 2012, p. 63; Baltas 2014, p. 287. Contra AP 241/2013, *Poinika Chronika* 2014, pp. 286–287.

⁵⁶ Toghias 2013, p. 1162, where, as to the rejection of the appeal as inadmissible, the author refers e.g. to AP 478/2011, *Nomiko Vima* 2011, p. 1005; see also AP 117/2013, *Poinika Chronika* 2014, p. 285. Regarding the narrow time limit of 24 hours for the appeal, see also the critique in Vasilakakis 2006, p. 208.

⁵⁷ Voulgaris 2014, p. 286. See also against the AP jurisprudence on this, *Fytrakis* 2006, pp. 219–220.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

Amongst other challenges to constitutional rights in the context of EU criminal law, six issues will be briefly mentioned here.

First, the territoriality and the notion of the identity of the ‘same act’ (*idem*) present significant problems as to a stable and foreseeable application of the EAW. According to Art. 11(g)i) of Law No. 3251/2004, Greece shall refuse execution if the act has been committed, even partly, on Greek soil; the optional ground of refusal has also here been recast as an obligatory one. This has been relevant to crimes committed through the Internet, trans-border crimes like cigarette smuggling and other forms of smuggling or drug trafficking, and they have been dealt with in a contradictory manner by the Greek courts. In some cases these have been considered as having been committed (partly) on Greek soil (which leads to a refusal of execution), whilst in others as not influencing the jurisdiction of the issuing state (which leads to execution of the EAW). Whereas the former interpretive option is in concordance with the spirit of the CJEU ruling in *Gaetano Mantello*, which also refers to Art. 54 of the Schengen Treaty and promotes the *idem factum* in lieu of the *idem crimen* approach,⁵⁸ the academic commentary has seen in the latter option a risk of enhancing what is already an overly extensive tendency to affirm execution of an EAW.⁵⁹ In the case of concurrence of more than one crime (and the same holds true for so-called ‘continuous crimes’, i.e. repetitious conduct of more or less the same kind, like more acts of theft, robbery or embezzlement), the point of departure remains their autonomy. Therefore, the Greek judicial authority shall require the urgent delivery of information from the issuing state as to whether the person sought had, even partly, committed separate act(s) of the ‘crime chain’ on Greek soil (according to Arts. 5 and 16 CC and Art. 19(2) of Law No. 3251/2004), in which case execution must be denied.⁶⁰ Inherent in all the above constellations is the risk that the ‘wholeness’ of the criminal event is not taken under proper consideration as long as it is ‘chopped’ into pieces, whereby the complexity of the facts, the involvement of more persons and the differences in the procedural laws among the Member States may cause delays and undeserved harm for the accused. A reform at EU level seems unavoidable.⁶¹

⁵⁸ Cf. Case C-261/09 *Mantello* [2010] ECR I-11477, paras. 38–41.

⁵⁹ See also Togiás 2013, pp. 1157–1161; Mouzakis 2012, pp. 65–67; AP 108/2013, Poinika Chronika 2013, pp. 468–469. These authors refer, respectively, to AP 1557/2012, AP 200/2011, AP 2006/2010 and the opposite (refusing the commission on Greek soil) AP 1074/2012, AP 678/2012, AP 994/2010, AP 810/2010. See also on territoriality AP 200/2011, Poiniki Dikaiosini 2011, pp. 579–581 and the respective remarks of Vrioni 2011, p. 582. In favour of the ‘*idem factum*’ conception as to the identity of the act, see AP 1/2011, Poinika Chronika 2011, pp. 501–504, with approving remarks of Anagnostopoulos 2011, pp. 504–505; see also Karaflos 2013, pp. 91–92.

⁶⁰ Vrioni 2011, p. 583.

⁶¹ This is correctly pointed out by Karaflos 2013, p. 97.

A second area of concern is whether an initial refusal of execution results in blocking the affirmation of a repeated EAW for the same person and deed. Since a clear provision is lacking in the Law, Art. 454 CCP applies *per analogiam*: in contrast to the final (i.e. irrevocable) judgment as to the substance of the case on which the EAW is based,⁶² there is no *res judicata* in extradition cases, because the substance is never examined at this stage. Thus, the affirmation of a repeated EAW remains possible, provided that it contains new facts.⁶³

The third point to note is that the requirement of specificity, i.e. the prohibition of being prosecuted or sentenced for an offence other than that for which surrender occurs, is dangerously undermined in Greece. Article 34 paras. (2)–(4) of Law No. 3251/2004 provide for exemptions from this principle, among which is the consent of the executing state after an application from the Appeals Court Prosecutor in this regard.⁶⁴

The fourth point concerns the finding in Supreme Court Judgment No. 1/2011 that where a sentence has in fact been served, this is no longer a prerequisite for denying the execution of the EAW; the Supreme Court interprets Art. 50 of the EU Charter of Fundamental Rights (with regard to the *ne bis in idem* principle) as so indicating. However the issue cannot be considered as definitely settled.⁶⁵

Another point that has arisen is that minors under 13 are not criminally responsible in Greece. EAWs regarding such persons cannot be executed in Greece.⁶⁶

Last but not least, it is very important that EAWs are not unconditionally executed when human rights and discrimination issues arise in cases where the person sought may be further extradited via the issuing state to a third state of ambiguous democratic legitimacy. In Decision No. 1303/2011, the Supreme Court approved Germany's EAW request concerning a suspect for supporting DHKP-C (the acronym for '*Devrimci Halk Kurtuluş Partisi-Cephesi*', meaning 'Revolutionary People's Liberation Party/Front') in Turkey under the condition of no further extradition to third countries (according to Art. 36(2) of Law. No 3251/2004). The minority of the judges in this decision proceeded to an interpretation that was more generous and distinctly protective of human rights; the minority judges called for a rejection of the request on the grounds of a lack of clarity of the accusations and because of the fact that they saw the acts ascribed to the suspect as intrinsically legitimate.⁶⁷

⁶² Whether the judgment is final on the substance is determined according to the legislation of the Member State in which the case has been tried and not according to the legislation of the executing state: Karaflos 2013, p. 92.

⁶³ Togias 2013, pp. 1163–1164.

⁶⁴ Karaflos 2013, p. 99.

⁶⁵ Cf. respectively Karaflos 2013, p. 100.

⁶⁶ Karaflos 2013, p. 93.

⁶⁷ See the majority and the courageous minority in this decision in AP 1303/2011, Poinika Chronika 2012, pp. 494–495 and 495–496, accordingly.

2.4 *The EU Data Retention Directive*

2.4.1 According to the Greek Constitution, home, private and family life are inviolable; home searches are subject to law and carried out in the presence of representatives of the judiciary (Art. 9(1)). Violations of this right are punishable as crimes of breaches of peace of home and abuse of power, and the perpetrator shall also pay damages to the victim (Art. 9(2)). Further, every person is protected from the collection, elaboration and use, especially through electronic means, of his/her personal data; an Independent Authority is established for this purpose (Art. 9(a)). Finally, correspondence is inviolable except in cases where national security and the fight against especially serious crime so warrant, and an Independent Authority is also established for this purpose (Arts. 19(1) and (2)). Evidence obtained through violations of all of these three articles is not admissible in court.

EU Directive 2006/24⁶⁸ has been incorporated into the Greek legal order through Law No. 3917/2011. The Law provides for some guarantees for the preservation of the rule of law: a) access to data is dependent upon the rules and restrictions laid down in Law No. 2225/1994 concerning the interception of communications (Art. 4); (b) the procedure is supervised by independent authorities like the one protecting personal data (Art. 9); (c) illegal access, elaboration and dissemination of retained data is punishable as a felony with long-term imprisonment (especially when the constitutional order is endangered) or with imprisonment of 2 to 5 years as a misdemeanour when the crime is committed through negligence (Art. 11); (d) data produced in public places may be retained only when serious crimes (treason; public order offences; violent crimes; drug trafficking, crimes against property) or vehicular circulation are concerned (Art. 14).

There have been no judicial challenges with regard to the implementation of the Directive in Greece. However, even with the above safeguards, the Law cannot stand up against the critique already exerted against the Directive itself. The proportionality principle is in particular blatantly violated, in a framework of a general inconsistency of the Directive with Art. 8(2) ECHR: principles like fair warning, foreseeability and the necessity of the measures in a democratic society are not satisfied. The Directive proves unclear, allows retention for disproportionately long periods of time, contains no sufficient procedural safeguards and infringes upon the very meaning of the right to privacy, establishing an Orwellian EU ‘Super-Panopticon’ undermining freedoms and pluralism as fundamental EU values. Thus, the Directive seems totally unconstitutional, empirically unverified as to its necessity and counter-productive. This is evidenced by the annulment or bypassing of the implementing laws of the Directive in Bulgaria, the Czech

⁶⁸ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

Republic, Cyprus, Germany and Romania⁶⁹ and of course by the respective decision of the CJEU in the jointly judged cases *Digital Rights Ireland* and *Seitlinger and Others*.⁷⁰ Nevertheless, Law No. 3917/2011 still remains in force.

2.5 Unpublished or Secret Legislation

2.5.1 This issue has not arisen in Greece. As was noted in Sect. 2.1.3, the requirement of publication of laws is regarded as part of the concept of a rule-of-law-based state. Article 42 of the Constitution provides that statutes passed by the Parliament are promulgated and published by the President of the Republic. Statutes obtain formal legal effect with their publication in the government gazette, and substantive legal effect ten days after publication; i.e. legal validity begins with publication and legal enforceability ten days later.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 The constitutional rules on legal certainty and non-retroactivity are addressed in Sect. 2.1; see also Sect. 2.8 on judicial review.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule of Law Based State

2.7.1–2.7.3 As noted in academic commentary, especially in a recent Policy Paper of the Robert Schuman Centre of the European University Institute, the establishment of the European Stability Mechanism (ESM) transforms the nature of the EU. The EU is no longer considered a community whose members enjoy only benefits; it is also a community that shares risks.⁷¹ Although the ESM is not formally an institution of the EU, scholars have underlined that we cannot overlook that its function concerns managing financial risks relating to EU members; therefore the

⁶⁹ Lachana 2013, pp. 1143–1153 and generally. With regards to Bulgaria, cf. the Decision of the Supreme Administrative Court of 11.12.2008, <http://secile.eu/wp-content/uploads/2013/11/Data-Retention-Directive-in-Europe-A-Case-Study.pdf>, under Sect. 5.2.

⁷⁰ Joined cases C–293/12 and C–594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

⁷¹ Poiaras Maduro et al. 2012, p. 8.

ESM must not function in a way that is incompatible with the principles of transparency and accountability, which are fundamental for the operation of the EU.⁷² However, in the decision-making process within the context of the ESM, the dominant role belongs to a body composed by the Ministers of Finance of the countries participating in the ESM. The choice of means for a country's rescue belongs exclusively to this body, and their decisions do not require any justification in the form of presenting the ground on which they are based, a requirement that exists for all EU institutions, in accordance with Art. 296 TFEU. This absence of justification is even more significant if we consider that the operation of the ESM is not accompanied by the usual accountability mechanisms for EU bodies, i.e. access to documents and the obligation to report to the European Parliament.⁷³

Scholars have additionally identified two other changes brought by the ESM to the institutional architecture of the EU: (a) it alters the balance in favour of transnational over supranational elements of governance and (b) it breaks the unity of the EU legal order, as the legal regime of the ESM is in the form of an international treaty ratified by some members of the eurozone.⁷⁴ The first change is particularly important, if we consider that within the ESM, some countries play the role of the lender and others the role of the debtor, and therefore the power relations between them are unbalanced. This development weakens the economic sovereignty of some members, since the loss of their ability to make decisions on specific issues is not accompanied by the creation of decision-making mechanisms at the EU level that would enjoy democratic legitimacy.⁷⁵ Regarding the second change, it should be mentioned that this undermines the institutional unity of the EU, as the ESM introduces mechanisms that are not governed exclusively by EU law, allowing deviations in the decision-making process from the guarantees given by the institutional architecture of the EU.⁷⁶

As Chiti and Teixeira have observed, whereas the establishment of the ESM and the amendment of certain provisions of the TFEU lead to constraints of national sovereignty over budgetary matters, this does not involve the reinforcement of all EU institutions, especially those which contribute to the transparency and accountability of the decision making process.⁷⁷ Thus, the current structure of the decision-making process of the ESM may contribute to the widening of the EU's democratic deficit and, consequently, also to the democratic deficit in the Members States. Furthermore, scholars have identified that the Memoranda of Understanding

⁷² *Ibid.*, pp. 8–10.

⁷³ *Ibid.*, p. 10.

⁷⁴ Chiti and Teixeira 2013, pp. 673–708, especially p. 685.

⁷⁵ *Ibid.*, pp. 705–706.

⁷⁶ A side effect of the non-inclusion of these mechanisms in the EU legal order is that national courts invoking such specificity may refuse to refer cases to the CJEU for a preliminary ruling, as did the Council of State in Decision 1117/2014 (para. 29), arguing that measures taken in the implementation of these mechanisms are not taken under EU law and therefore there is no need to refer a case for a preliminary ruling.

⁷⁷ Chiti and Teixeira 2013, p. 689.

(MoUs) signed by Greece and other countries make it clear that such instruments constitute a binding framework that Member States which receive financial assistance must respect in order to continue obtaining financial assistance.⁷⁸ As Kenneth Armstrong has observed:

The degree and manner of the constraint on the policy autonomy of the states is significant. The regular mechanisms of accountability and governance are formally not suspended, yet they are in reality restricted for the states which are subject to the discipline imposed via MoU and controls exercised in the context of the adjustment programmes.⁷⁹

Moreover, no legal evaluation of the international bailout agreements can escape considerations about state sovereignty. However, the Greek Council of State evaded the question as to whether the MoU implied a transfer of sovereignty by characterising the MoU as a political programme and not a legally binding document, since the MoU, unlike in other countries, had the support of the Parliament. In all of the relevant cases,⁸⁰ the Council of State has held that the measures taken by the Greek Government (salary cuts and cuts to bonds issued by the State of Greece) in order to comply with the loan agreements are compatible with the Greek Constitution (see below Sect. 2.8).

It is evident from the above-mentioned analysis that only issues within the field of Question 2.7.3 have arisen in Greece, since the Questions in Sects. 2.7.1 and 2.7.2 concern creditors and not debtors, such as Greece.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

It should be noted that Greek courts, from 1984 onwards, recognise the principle of proportionality as a general principle of law, which should rule limitations of rights. Since the 2001 constitutional revision, this principle is enshrined in the Greek Constitution (Art. 25(1d)). However, as has been pointed out, during the financial crisis, the Council of State has significantly eased or relaxed its control as to the second stage of this principle, in which the necessity of the measure is examined, and has tended to accept the legislature's choices as to the necessity of the measures. At the same time, invoking the principle allows the judge to place some limits on the legislator as to the interference with rights that will be deemed to be compatible with the Constitution.⁸¹

As regards the principle of legal certainty, it should be noted that recognition of this principle in the jurisprudence of the Greek courts has not led the Greek courts,

⁷⁸ See Fabrini 2014, p. 73.

⁷⁹ Armstrong 2013, as cited by Fabrini 2014, p. 15.

⁸⁰ Judgment 668/2012 considering the implementation of the First MoU and Judgments 1117/2014 and 2307/2014 considering the implementation of the Second MoU.

⁸¹ See Contiades and Fotiadou 2013, p. 33.

in the past, to recognise a form of social *acquis* as regards the level of benefits associated with social rights.⁸² The settled case law of the Greek courts is that the legislature has wide discretion in determining the amount of benefits of this type, and thus the level of benefits cannot be taken for granted. Therefore, the recent case law on the cuts in social benefits does not constitute a change of paradigm within the context of Greek jurisprudence. According to the principle of legal certainty as conceived in the Greek legal order, this principle does not guarantee a specific amount of benefits. Moreover, in accordance with the case law of the Greek courts, this principle does not apply to the expectations of bondholders. According to a recent decision of the Council of State, the application of the principle of legal certainty in relations between bondholders and the issuer of the bonds presupposes that the solvency of the state remains unchanged over time, which, according to the Court, is contrary to reality. Therefore, a ‘haircut’ of bonds is not contrary to the principle *pacta sunt servanda*, since in cases of changed circumstances, the guiding principle is *rebus sic stantibus*.⁸³

As for the rule of law, it should be noted that even if we consider that the review of constitutionality of laws is one of the key aspects of this concept, the Greek courts have traditionally been very discreet in relation to the economic choices of the legislature, recognising the primacy of the latter on these issues over time.⁸⁴ We should note that the underlying reasoning of the jurisprudence of the ECtHR concerning the review of financial measures is similar, since it recognises a wide margin of appreciation in favour of the legislator.⁸⁵ Thus, the recent case law of the Greek courts in relation to the countermeasures of the economic crisis is not a deviation from the established case law.⁸⁶ The maximum that the judge can review is whether the legislature has provided sufficient evidence to support its choices.

The judicial review of the measures undertaken by Greece in the implementation of the MoUs does not exceed the limits of the judicial review exercised by the Greek courts in cases in which the crucial legal issue is the compatibility of a rule of EU law with the Greek Constitution. The Greek courts systematically avoid examining the cases at issue from the viewpoint of the protection of the constitutional identity of a Member State or a breach of competence by an EU institution, unlike is the case with the jurisprudence of other supreme courts. In the cases concerning the MoUs, the Council of State has followed this strategy and limited its judicial review of the measures only from the viewpoint of their compatibility with the Greek Constitution and the ECHR, ruling that they are compatible. Furthermore, the Council of State has avoided making a preliminary reference to the CJEU on the issue of whether EU law applied at that time (before the reform of the Treaties), conferred competence on the EU to adopt Council Decision

⁸² See Contiades 1999, p. 199.

⁸³ Judgment 1117/2014, para. 16.

⁸⁴ See Kaithatzis 2010.

⁸⁵ See *Koufaki Ioanna and AEDDY v. Greece*, no. 57665 & 57657/2012, 7 May 2013.

⁸⁶ Judgments 668/2012, 1972/2012, 38/2013.

2010/320/EU, which constitutes the legal basis of the MoUs. This was despite the fact that a relevant preliminary reference question should have been raised, according to the criteria applied by the CJEU concerning the submission of preliminary references. At the same time, the Council of State has avoided making a preliminary reference with regard to the compatibility of specific measures laid down by the above-mentioned Council Decision, (e.g. wage cuts in the public sector) with specific provisions of the EU Charter of Fundamental Rights, for instance Arts. 20, 21(1) and 31(1). In general, as has been pointed out in Greek public law theory, the jurisprudence of the supreme courts tends to play down the importance of EU rules, which could contribute to the interpretation of the rules of the internal legal order, and has not yet developed a consistent constitutional policy regarding the relationship between the national constitution and EU law.⁸⁷

We should also note that there has been a clear shift in the jurisprudence of the Council of State, which is based on an extension of the concept of public interest that now includes financial and service targets in order to avoid fiscal ‘derailment’ of the country. However, this is a choice made by the judges which is limited to the formative dimension of interpretation of legal provisions, without reaching the point of creating new rules of law by the court, in order to deal with situations that have not been foreseen by the legislator. It is significant that in a Council of State Decision⁸⁸ only a minority of three judges held that in cases involving the relationship of rights and the financial crisis, the constitutional provision (Art. 48 of the Constitution) which provides for the partial and temporary suspension of the Constitution due to national security reasons should be applied proportionately, even if the Constitution does not explicitly provide for the implementation of this provision in such a case. As far as the specific questions in Sect. 2.8 are concerned, we can make the observations below.

2.8.1 There is no statistical data concerning preliminary rulings addressed to the CJEU by the Greek Courts. It is commonly accepted that the Greek supreme courts were for a long time reluctant to submit preliminary rulings, which has changed over the last ten years, but is still not a well-established practice, as the recent case law concerning the loan agreements shows.

2.8.2–2.8.5 There is also no statistical data concerning the annulment of domestic acts on the grounds of their incompatibility with the Greek Constitution. In general, we can claim that the Council of State, at least after 1975, has been very active on rights protection, especially the protection of rights concerning individual autonomy, human dignity and the environment. The previous analysis also proves that the review of measures that implement EU law by the Greek courts does not demonstrate a sound doctrinal approach similar to that of the German Constitutional Court or the ECtHR. It is also obvious that such a lack of constitutional policy with regard to the relation between EU law and the Greek Constitution results in a gap in

⁸⁷ See Yiannakopoulos 2013, pp. 374–375.

⁸⁸ See Dissenting Opinion of three judges of the Council of State to Judgment 693/2011.

judicial review. The range of strategies followed by the Council of State, according to scholarly commentary,⁸⁹ varies from setting aside the Constitution in favour of EU law to setting aside EU law in favour of the Constitution. Both strategies lack consistency, since they do not provide us with sound criteria that are used constantly. Yet we should not come to the conclusion that setting aside EU law in favour of the Greek Constitution results in a more protective approach for the rights' holders, as the recent case law on austerity measures indicates.

2.8.6 As far as the question of reverse discrimination due to the implementation of EU law is concerned, the answer is that we can distinguish two distinct periods in the jurisprudence of the Greek courts. Since 2009, the relevant jurisprudence has changed and reverse discrimination due to the implementation of EU law is considered to be unacceptable. The main doctrinal arguments which have led to this shift are founded on the equality principle provided by the Greek Constitution (Art. 4). However, this shift in the jurisprudence does not imply an automatic implementation of EU law with regard to Greek citizens. It only implies that the judge is obliged to examine whether or not the differential treatment between EU and Greek citizens can be justified according to the equality principle.⁹⁰

2.9 *Other Constitutional Rights and Principles*

2.9.1 One of the consequences of the economic crisis is the further retreat of the justiciability of social rights, since their operation is completely dependent on available funding sources. Moreover, the case law of the Greek courts does not deny the normative content of social rights, but merely disputes the possibility to found claims for steady and fixed benefits on them.⁹¹ Economic crisis further weakens this dimension of rights, so that they alone cannot provide sufficient basis for reviewing the constitutionality of measures taken, without recourse to constitutional provisions which can give rise to justiciable claims, such as the right to property.⁹²

Another development in the protection of rights during the financial crisis concerns the transformation of the concept of public interest in the case law. According to recent jurisprudence, the measures taken are not merely intended to satisfy a simple public interest but a serious financial interest, which has two sides. On the one hand, its satisfaction is considered as a prerequisite for the state's ability to serve its basic functions under the Constitution. On the other hand, it is connected to the satisfaction of a fundamental interest of the EU, of which Greece is a member.

⁸⁹ Yiannakopoulos 2013, pp. 424–464.

⁹⁰ *Ibid.*, pp. 342–348.

⁹¹ See Ntouchanis 2007.

⁹² Contiades and Fotiadou 2013, p. 31.

The Council of State and the Higher Special Court (*Anotato Eidiko Dikastirio*), in a series of judgments after 2012 that were not related to cuts in salaries, pensions or other measures taken to comply with the MoUs, have held that any measure which can help to prevent fiscal risk may provide an acceptable foundation for limitation of rights. These cases relate to the so-called ‘privileges of the state’, i.e. the short limitation periods for claims of citizens against the state and the lower rate of interest charged on such claims compared with the rate charged on claims of the state against individuals. Whereas until 2012, the case law of the Council of State, under the influence of the jurisprudence of the ECtHR, considered that these privileges were not compatible with the principle of equality (Art. 4 Constitution), the provisions of Art. 6 ECHR and Art. 1(1) of the First Additional Protocol to the ECHR, the case law changed after a decision by the Higher Special Court.⁹³ According to the rationale of the decision, the shorter limitation period for private claims against the government serves fiscal purposes, in particular the rapid resolution of cases with budgetary costs, which helps the state revenue-expenses balance. A similar shift was observed in the case law of the ECtHR in *Giavi v. Greece*.⁹⁴ The ECtHR, making a shift from earlier decisions,⁹⁵ held that the severe economic crisis can be an imperative reason of public interest, which imposes the restriction of rights arising from Art. 6 ECHR and Art. 1(1) of the Protocol. Therefore, with regard to Greece, we can claim that the economic crisis also affected a number of rights that do not belong to the category of social rights, but fall into the category of individual rights and rights of due process.

Apart from the above rights, another category affected by the economic crisis is rights regarding labour relations. The MoUs impose measures affecting the constitutionally guaranteed collective autonomy (Art. 22), reducing the role of trade unions in collective bargaining as well as the substance thereof, to the benefit of rules imposed unilaterally by the Greek legislature.⁹⁶ It is a choice that moves in the opposite trajectory from the ECtHR’s jurisprudence on collective autonomy.⁹⁷ Moreover, the two MoUs tend to restrict or even eliminate the role of arbitration, by prohibiting increases in salaries and fees granted through arbitration.⁹⁸

⁹³ Judgment 25/2012.

⁹⁴ *Giavi v. Greece*, no. 25816/2009, 3 October 2013.

⁹⁵ *Meidanis v. Greece*, no. 33977/06, 22 May 2008; *Zoumpoulidis v. Greece*, no. 36963/06, 25 June 2009.

⁹⁶ See Achtsioglou and Doherty 2014, pp. 219–240.

⁹⁷ See *Demir and Baykara v. Turkey*, no. 34503/97, 12 November 2008. For this reason, the strategic litigation followed by the applicants before the ECtHR in the case *Koufaki and ADEDY v. Greece* was criticised, on the grounds that the applications to the ECHR were limited only to salary cuts, without further developing the issues related to the changes in working relations, see Gavalas 2014.

⁹⁸ However, the Council of State in a recent Judgment (2307/2014) ruled that the relevant prohibition is contrary to Art. 22(2) of the Greek Constitution.

2.10 *Common Constitutional Traditions*

2.10.1 The question concerning whether the common constitutional traditions of the Member States can be an autonomous source of rights within the context of EU law cannot be answered definitively, since a convincing doctrine of sources from which fundamental rights are derived still remains elusive. However, the jurisprudence of the CJEU offers some guidelines which help us to determine the proper place of the constitutional traditions of the Member States within the context of EU law. On this issue, the jurisprudence of the CJEU on Art. 53 of the Charter is crucial (see Sect. 2.11 below). When the level of rights protection afforded by national constitutions is equivalent to that of the Charter, then common constitutional traditions can be a source of fundamental rights protection. In any other case, the CJEU focuses on whether or not the application of national standards touches upon the unity, primacy and effectiveness of EU law. The solution adopted by the CJEU is that rights protection under the Charter operates as a ‘ceiling’ for the afforded protection. Yet I consider the approach of the Advocate General in the *Melloni* case⁹⁹ to be more persuasive. Common standards of protection require common definitions. We should then ‘differentiate between situations in which there is a definition at European Union level of the degree of protection afforded to a fundamental right ... and those in which that level of protection has not been subject to a common definition’.¹⁰⁰

2.11 *Article 53 of the Charter and the Issue of Stricter Constitutional Standards*

2.11.1 We cannot examine the issue of stricter constitutional standards and the application of Art. 53 of the Charter without taking into account the CJEU’s case law on the issue. According to the interpretation of Art. 53 given by the CJEU in the *Melloni* case, ‘national authorities and courts remain free to apply national standards of protection of fundamental rights provided that ... the primacy, unity and effectiveness of EU law are not thereby compromised’.¹⁰¹ Thus, national courts should apply national standards of protection of fundamental rights under the condition that they do not undermine the primacy, unity and effectiveness of EU law. The courts may only enforce more protective constitutional rights when the basic elements of EU law are not undermined. In other cases, the Charter displaces the national constitution and, as a consequence, the level of constitutional protection is lowered. Yet we have to take into account that there are still situations that

⁹⁹ Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

¹⁰⁰ Opinion of AG Bot in Case C-399/11 *Melloni* [2013] ECLI:EU:C:2012:600, para. 124. On this issue see also Torres Pérez 2014, pp. 308–331, especially p. 326.

¹⁰¹ Case C-399/11 *Melloni*, supra n. 99, para. 60.

are not entirely determined by EU law, situations where EU law leaves discretion to the Member States for the implementation of EU law. Arguably therefore, we might conclude that when a situation is entirely determined by EU law, the Charter displaces the level of protection afforded by national constitutions, whereas in cases that are not determined entirely by EU law a more flexible approach should be applied. For instance, there are cases in which the interpretation given to a constitutional right is considered, even by the CJEU, to be part of the national constitutional identity, which is being protected according to Art. 4(2) TFEU. In this regard, the possibility of applying a higher standard of protection provided by a national constitution should not be automatically excluded when the primacy, effectiveness and unity of EU law are involved. The wording of Art. 53 as such does not preclude an interpretation that incorporates a mandate for the CJEU to allow for higher levels of constitutional protection in specific cases, when there are no other rights or interests that should prevail.¹⁰²

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 According to the above-mentioned analysis, we can claim that the main obstacle in Greece concerning the debate on constitutional rights and values within the EU legal order touches upon the restricted judicial review exercised by the Greek courts in cases in which the crucial legal issue is the compatibility of a rule of EU law with the Greek Constitution. The Greek courts systematically avoid examining the cases at issue from the viewpoint of the protection of the constitutional identity of a Member State or the breach of competence of the EU institutions, as is the case with the jurisprudence of other supreme courts. In the recent cases concerning the MoUs, the Greek courts have refrained from making preliminary references to the CJEU, and thus they have refrained from starting a dialogue between a national court and the CJEU that would be crucial for the development of common standards for rights protection.

Considering the restricted standing of private parties to request a review of EU legislation, such omission restricts the level of rights protection in combination with the national courts' lack of jurisdiction to examine the compatibility of EU law with the national constitution. Therefore, it would be necessary to develop mechanisms which would overcome such lacunae in rights protection. Thus, I fully agree that the suspension of the application of, and the carrying out of a review of EU measures, where an important constitutional issue has been identified by a number of constitutional courts, would be a measure to the right direction. This could strengthen

¹⁰² Torres Pérez 2014, p. 327.

the federalist aspects of EU governance, while at the same time respecting a basic precondition for democracy, namely the constant re-evaluation of previous decisions.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.3 Concerns about the reduction in the standard of protection and the rule of law in the context of the EU are fairly sound, but the whole issue is not a zero-sum game. As the Greek case indicates, the role of institutions that are entitled to protect rights is crucial. Greek courts have reviewed the measures taken under the bailout agreements only in respect of their compatibility with the Greek Constitution and the ECHR. Such omission is important if we consider that, since the inclusion of the Charter of Fundamental Rights in primary EU law, the whole constitutional structure of the EU has shifted from a constitutional order oriented towards the fulfilment of economic goals to a constitutional order in which a list of fundamental rights has an equal footing. Thus, it would be crucial for the whole system of rights protection in the EU to push the CJEU to rule on the normative content of the rights included in the Charter.

On the other hand, scholars such as De Witte have pointed out that the centralised and unitary form of review exercised by the CJEU in respect of EU law does not fit into the multilevel system of EU governance, since some cases may fall within the scope of application of the Charter and domestic law.¹⁰³ Thus, it would be helpful if there were some changes concerning the primacy of the review by the CJEU. A more proactive role for the national courts and other national institutions and a more relaxed approach by the CJEU concerning national standards of rights protection than currently taken would considerably contribute to moving in the right direction.¹⁰⁴

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The Constitution of Greece sets the cornerstone of the relationship between Greece and international law in Art. 2(2), according to which, 'Greece adhering to the generally recognised rules of international law, pursues the strengthening of

¹⁰³ De Witte 2013, pp. 1523–1538, especially p. 1527.

¹⁰⁴ *Ibid.*, pp. 1527–1533.

peace and of justice, and the fostering of friendly relations between peoples and States'. Thus, general objectives for Greek foreign policy and international co-operation are set.

The way in which rules of international law are integrated in domestic law either automatically or following ratification is regulated by Arts. 28 and 36 of the Constitution. Article 28(1) distinguishes between 'generally recognised rules of international law' and 'international conventions', a distinction which corresponds to the distinction between unwritten and written international law. Customary international law and general principles of international law are considered rules with general international recognition, which are automatically integrated in domestic law without any further need for ratification. International conventions become operative according to their respective conditions as of the time they are sanctioned by statute and become an integral part of domestic law.¹⁰⁵

The legislature has the competence to ratify international treaties, placing them accordingly above statutes. The judiciary is responsible for classifying an international rule as a generally recognised rule, thus integrating it into domestic law. 'Controversies related to the designation of rules of international law as generally acknowledged' are settled by the Special Highest Court in accordance with Art. 100(1)(f) of the Constitution. The President of the Republic has competence to conclude certain categories of treaties in accordance with Art. 36(1) of the Constitution. Treaties of peace, alliance, economic cooperation and participation in international organisations or unions are ratified by the President of the Republic and published in the government gazette. However, it is the Government that bears responsibility for the political choices reflected in such treaties. Article 36(1) provides that the President of the Republic shall announce them to the Parliament with the necessary clarifications, whenever the interest and the security of the state thus allow.¹⁰⁶

Furthermore, the Constitution explicitly provides in Art. 36(2) for certain categories of treaties that require ratification by statute voted by Parliament. These include conventions on trade, taxation, economic cooperation and participation in international organisations or unions and all others containing concessions for which, according to other provisions of the Constitution, no provision can be made without a statute or which may burden Greeks individually. *A contrario*, international treaties that do not fall into these categories may be concluded by the Government or by authorised diplomats. However, unless they are ratified by a statute, according to the aforementioned Art. 28(1) of the Constitution, they do not become part of domestic law.

Hence the Constitution explicitly addresses monist and dualist approaches. The Constitution primarily adopts dualism, however the influence of monist theory is detectable in the automatic integration of generally recognised international rules. International law is integrated into the internal hierarchy of legal norms, retaining

¹⁰⁵ Contiades and Fotiadou 2014, p. 720.

¹⁰⁶ Ibid.

its unique character. Generally recognised international rules and international conventions sanctioned by statute are placed beneath the Constitution and above statutes in the hierarchy of sources of law.¹⁰⁷

3.1.2–3.1.3 Not applicable.

3.1.4 The Constitution provides an efficient legal framework for the participation of Greece in international organisations and the ratification of treaties. The above-mentioned recent, financial crisis-triggered discussion regarding concessions of sovereignty and the transfer of state competences to international organisations by the law incorporating the Memorandum, under Art. 28 of the Constitution, confirms that the Constitution provides the framework for dealing with concessions of sovereignty. Although Art. 28 was not employed by the Greek Parliament and the Council of State confirmed this choice, what was not questioned was the existence of constitutional paths to allow such concessions.

3.2 *The Position of International Law in National Law*

See Sects. 3.1 and 3.3.

3.3 *Democratic Control*

3.3.1–3.3.2 In Greece, international treaties and agreements relating to the areas noted in Sect. 3.1. of this report should be ratified by the Parliament. When such agreements make a concession of sovereignty and transfer state competences to international organisations (like the Troika), according to the Greek Constitution (Art. 28), a three-fifths, enhanced majority of the total number of Members of Parliament is required for ratification. An international agreement or treaty can be subject to referendum under to the Greek Constitution (Art. 44(2)); to be more precise, the relevant provision does not clearly provide for such option but also does not exclude it.¹⁰⁸ The Former Prime Minister proposed that a referendum could be used to ratify the loan agreements (see Sect. 1.4.2.). Yet even members of the Cabinet did not agree, and the referendum never took place.

¹⁰⁷ *Ibid.*, p. 721.

¹⁰⁸ Article 44(2) ‘The President of the Republic shall by decree proclaim a referendum on crucial national matters following a resolution voted by an absolute majority of the total number of members of the Parliament, taken upon the proposal of the Cabinet. A referendum on bills passed by Parliament, regulating important social matters with the exception of fiscal ones, shall be proclaimed by decree by the President of Republic, if this is decided by three-fifths of the total number of its members following a proposal of two-fifths of the total number of its members ...’.

The constitutionality of the loan agreement was challenged before the Council of State. One of the arguments in support of the unconstitutionality of the loan agreement was that the agreement was integrated in the Greek legal order as a piece of legislation by a simple majority and not the qualified majority required for international treaties and agreements. In fact, the ratification of the loan agreement and its compatibility with the relevant constitutional provisions has been the subject of a vivid public deliberation which took place within the community of Greek public law lawyers. No other treaty ratification in the past has been discussed so widely.¹⁰⁹ However, the Greek Council of State rejected the argument of unconstitutionality, ruling that the MoU is merely a political programme, without any legally binding effects on its own.¹¹⁰ Consequently, the existing constitutional provisions provide only for the formal ratification by Parliament of treaties and international agreements. Yet, the observance of the relevant provisions by Parliament is not under an intense review by the courts, since judicial review by Greek courts does not exceed the so-called *interna corporis* of the Parliament. Thus, considering the Greek judicial practice of the past years, which asserts the observation that the courts have been less active when issues concerning the ratification of a treaty are under review for constitutionality, it might prove helpful if the Greek Parliament were to obtain the means to exercise an intense control over the implementation of treaties and international agreements.

3.4 *Judicial Review*

3.4.1 The judicial review of the MoUs in terms of their compatibility with the Greek Constitution, EU law and the ECHR are discussed above in Sect. 2.8. The following further issues are worth mentioning here.

In Greece, the relevant rules concerning the review of international treaties are set out in Art. 28 of the Greek Constitution (see Sect. 3.1).

Article 28(3) of the Greek Constitution allows for the delegation of state powers to supranational organisations if this does not conflict with the democratic foundations of the Constitution and human rights. This procedure, according to Greek constitutional theory, serves as a quasi-constitutional revision process outside of the strict standard provided for in Art. 110, since the ratification of a treaty may result in an informal revision of the Constitution. Up until the loan agreements, all international treaties had been ratified by the vast majority of the MPs on the basis of Art. 28. Thus, there are two standards on which judicial review concerning the ratification of a treaty or an agreement can rely, i.e. the ratification process (see

¹⁰⁹ See for example Karavokyris 2014, Mantzoufas 2014 and DSA (Athens Bar Association) Essays on the MOU 2013.

¹¹⁰ On the legal Status of the MoU, see Vlachou 2012.

above Sect. 3.3) and the content of the treaty, or the agreement in respect of the democratic foundations of the Constitution and human rights protection.

Thus, the critical question is whether the transfer of sovereignty inherent in the loan agreements and in being part of the European Monetary Union (EMU) affect the democratic system of government. The answer is based on an assessment made by the Parliament during the ratification of the relevant Treaty. As far as review by the courts of these matters is concerned, an assessment of the compatibility or otherwise of the Treaty on the Functioning of the EU or the loan agreements with the Greek Constitution would be a review with dubious legal consequences. If it were ruled that the TFEU was not compatible with certain articles of the Greek Constitution, the state would still be bound by the treaty and have legally binding obligations under the treaty. Such decision would not increase the credibility of the court, and would simultaneously reduce its legitimacy. So by the time the Greek judge ruled that the measures adopted in order to activate the European support mechanism are measures ‘deriving from the status of Greece as a member of the EU and of its participation in the EMU’,¹¹¹ the next step was to conclude that ‘the measures are justified by invoking serious grounds of public interest which are objectives of common interest of the Member States of the EU’,¹¹² (i.e. budgetary discipline and the stability of the euro area). The public interest has increasingly obtained an EU dimension and must be served by the policies of the countries participating in the EU. Further on, the question of whether participation in the EU raises issues of potential conflict between national constitutions and the provisions of EU law is only marginally considered by the Greek courts. Thus the national constitution is no longer the guarantor of popular sovereignty rooted in a political decision made by the people (popular sovereignty), but becomes a guarantor of a state’s compliance with the obligations arising from participation in the EMU, regardless of a possible conflict between such obligations and policy decisions based on popular sovereignty.¹¹³

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 In Greece, the loan agreements have taken the form of MoUs and bilateral loans, in which the IMF is part of the Troika and thus one of the two ‘signatories’ parties. Consequently, the related public debate does not refer to the IMF as such or to the implication of its policies upon social rights. Instead, the discussion among public law theorists, the public debate in the press (including the

¹¹¹ See Judgment 668/2012, para. 35; see also the recommendation delivered by Judge E. Sarp on Judgment 668/2012, (in Greek) available at www.constitutionalism.gr. A recommendation is the proposal of one member of the judiciary on which the Court bases the judgment. Translation by the author.

¹¹² Ibid.

¹¹³ See Drosos 2011, pp. 764–779, especially pp. 768–769.

Internet) and mass media, as well as the litigation in courts concerns the impact of the MoUs on social rights and the quality of democracy. However, we cannot ignore the fact that the austerity programme in Greece has a strong EU dimension, since it is related to the obligations undertaken by Greece due to participation in the EMU. Monetary integration is not the same as the general process of globalisation through trade liberalisation. The main difference is that it involves a deliberate institutional decision to give up national prerogatives over the exchange rate and interest levels for the sake of establishing a common currency. Within this context, democracy is affected only if we conflate democracy and state autonomy. If we escape such conflation, we should focus on the EU level and on the possible changes which should take place in order to make the EMU more compatible with democracy. In Greece, such a shift in the agenda is being proposed by political theorists dealing with European integration and less often by public law theorists. As far as the social rights agenda is concerned, a dimension often ignored in Greece is that the judicialisation of so-called mega-politics has had poor results.¹¹⁴ The unprecedented recourse to the Greek courts has created hopes that austerity measures will be defeated in the courts. Yet, as mentioned above, the Greek supreme courts have been hesitant to intervene in the field of technocratic decision-making by the executive that is merely endorsed by the Parliament, since they feel that they are inadequately equipped to overturn such economic decisions. The most they could possibly ask from the governmental officials is a detailed cost-benefit analysis report justifying the necessity of adopted measures.¹¹⁵

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 In all areas included in this section of the Questionnaire, there have been scholarly commentary and parliamentary debates. Yet, according to the analysis above, we can conclude that a prominent characteristic of the Greek case is that debates in the Parliament and scholarly commentary do not affect the practice of the courts, which seem to be very reluctant to review any measure that constitutes an obligation undertaken by Greece in the context of the EU with regard to its compatibility with the Greek Constitution or with EU law. Another observation we can make is that the jurisprudence of Greek courts during the crisis has put the boundaries of constitutional pluralism, as a main characteristic of European Public Law, to the test. Greek courts seem to be reluctant to engage in a dialogue with the CJEU; the dialogue between the Council of State and the European Court of Human Rights, which in the past has produced some fruitful results concerning rights

¹¹⁴ Kaithatzis 2011.

¹¹⁵ See dissenting opinion of Judge Karamanof to three judgments of the Council of State, 668/2012, 1972/2012, 38/2013.

protection, has turned into a monologue under the ‘shadow’ of the financial crisis. What the financial crisis has dredged up are the functional aspects of constitutional pluralism, namely the evasion of conflicts, and not the more substantial elements like the displacement of authority by arguments within the context of constitutional discourse.

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