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# **Financial Constitutions in the EU: From the Political to the Legal Constitution?**

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## **Abstract**

This study aims to analyse a recent, wide-ranging trend towards the constitutional entrenchment of balanced-budget clauses in national constitutions in the European Union. The article tries to answer this question: is this trend just pointing out the rise and triumph of a substantial approach to public-finance issues in constitutional law? Or is it also announcing a *legalisation* of financial constitutional law, an area of constitutional law which has traditionally been analysed in the framework of the relationship between the executive and the legislature?

This paper considers recent debt-constraining constitutional reforms in the four most important Member States in the Eurozone and in Hungary. Furthermore, it deals more specifically with the enforceability of those clauses before constitutional courts and the possibility of derogations to the new constitutional schemes. In the end, these transformations will be assessed in the light of the debate about the features (and respective virtues) of a political and a legal understanding of constitutionalism.

## **Key-words**

Crisis in the Eurozone, Constitutional reform, Balanced-budget clauses, Judicial review, Political constitutionalism

# Financial Constitutions in the EU: From the Political to the Legal Constitution?

Giacomo Delledonne\*

SUMMARY: 1. Introductory Remarks. – 2. Financial Constitutional Arrangements as Part of the Law of the Constitution. – 3. Major Aspects of the Recent Reforms (a. Germany: Stability as a Guiding Principle; b. Spain; c. Italy: The Weight of Interpretation; d. France: Searching for a Golden Rule; e. Hungary). – 4. Questionable Features of National Constitutional Reforms in the Eurozone (a. Enforcing Balanced-Budget Clauses; b. *Exception française*: A Plausible One?; c. Derogations: Majoritarian Parliamentary Politics Taking Its Revenge?). – 5. Lessons from the US. – 6. Assessing Transformations (a. The Procedural vs. the Substantial; b. The Political vs. the Legal). – 7. Concluding Remarks.

## 1. Introductory Remarks

This paper tries to cast light on recent constitutional transformations which have led to wide-ranging reform in the financial sections of constitutions throughout many Member States of the European Union (e.g. in Germany<sup>1</sup>, Spain<sup>2</sup>, Italy<sup>3</sup>, France<sup>4</sup>, and Hungary<sup>5</sup>) and to the elaboration of

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<sup>1</sup> *Gesetz zur Änderung des Grundgesetzes (Artikel 91c, 91d, 104b, 109, 109a, 115, 143d)* of 29 July 2009. See Ulrich Häde, "Die Ergebnisse der zweiten Stufe der Föderalismusreform", 135 *Archiv des öffentlichen Rechts* (2010), 541; Dominic Heinz, "Federal Reform II in Germany", 2 *Perspectives on Federalism* (2010), issue 2, N.1; Christian Mayer, "Greift die neue Schuldenbremse?", 136 *Archiv des öffentlichen Rechts* (2011), 266.

<sup>2</sup> *Reforma del artículo 135 de la Constitución Española, de 27 de septiembre de 2011*. See "La reforma del artículo 135 CE", 31 *Revista Española de Derecho Constitucional* (2011), no. 93, 159; Jorge García-Andrade Gómez, "La reforma del artículo 135 de la Constitución española", 63 *Revista de Administración Pública* (2012), no. 187, 31; Violeta Ruiz Almendral, "Estabilidad Presupuestaria y Reforma Constitucional", 11 *Revista Española de Derecho Europeo* (2012), no. 41, 33.

<sup>3</sup> *Legge costituzionale 20 aprile 2012, n. 1 (Introduzione del principio del pareggio di bilancio nella Carta costituzionale)*. See Massimo Luciani, "Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana", 39 *Diritto e società* (2011), 635; Antonio Brancasi, "Il principio del pareggio di bilancio in Costituzione", 5 *Osservatorio sulle fonti* (2012), no. 2, at [http://www.osservatoriosullefonti.it/saggi/cat\\_view/45-saggi/219-saggi-22012-entra-e-scarica-gli-allegati](http://www.osservatoriosullefonti.it/saggi/cat_view/45-saggi/219-saggi-22012-entra-e-scarica-gli-allegati); Rita Perez, "Dal bilancio in pareggio all'equilibrio tra entrate e spese", 18 *Giornale di diritto amministrativo* (2012), 929; Nicola Lupo, "La revisione costituzionale della disciplina di bilancio e il sistema delle fonti" in Vincenzo Lippolis, Nicola Lupo, Giulio M. Salerno and Gino Scaccia (eds), *Costituzione e pareggio di bilancio* (Napoli, Jovene, 2012), 89.

<sup>4</sup> *Projet de loi constitutionnelle relatif à l'équilibre des finances publiques*, approved by the National Assembly on 10 May 2011. See Alain Pariente, "L'équilibre budgétaire: un principe juridique insaisissable?", 28 *Revue française de finances publiques* (2010), no. 112, 163; Carine Soulay, "La 'règle d'or' des finances publiques en France et en Allemagne: convergence au-delà des différences?", 28 *Revue française de finances publiques* (2010) no. 112, 187;

the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter the TSCG)<sup>6</sup>. Those reforms have prompted the constitutional (or, more ambiguously, supralegislativ) entrenchment of some kind of balanced-budget clause or “golden rule” in most Member States within the EU, approximately in the last three years. More in detail, balanced-budget clauses have been constitutionally entrenched in Germany, Spain and Italy. In France, after a lengthy discussion, the Parliament is going to approve an organic law (*loi organique*) providing for a more flexible approach to the same objective of balancing public budgets. In Hungary, the new constitutional charter contains far-reaching debt-constraining clauses. In March 2012, all the Member States of the EU – with the important exceptions of the United Kingdom and the Czech Republic – signed the TSCG, which requires them to entrench balanced-budget clauses in their constitutions<sup>7</sup>. To different extents, all these clauses account for uncommon limitations of the political process.

Very interesting examples of budget-constraining clauses are also traceable in other national European constitutions, e.g. in Poland<sup>8</sup> or in Switzerland<sup>9</sup>. However, their relevance to an analysis of the current developments in the EU is not as immediately evident as for the other cases mentioned: Switzerland is not part of the EU while Poland drafted its own constitutional charter in order to comply with the Stability and Growth Pact before being admitted to the Union.

This article aims to read this reform pattern as a possible shift from a (prevalingly) *political* to a (would-be) *legal* notion of financial constitutions. Thus, it will partially depart from the view of current developments in this area of constitutional law, that are mainly concerned with the debate

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Bertrand Mathieu, “Faut-il constitutionnaliser la règle d’équilibre budgétaire?” 30 *Revue française de finances publiques* (2012), no. 117, 165. See also the *Projet de loi organique relatif à la programmation et à la gouvernance des finances publiques*, approved by the National Assembly on 10 October 2012.

<sup>5</sup> Articles 36 and 37 of the Magyar Constitution of 2011. See Attila Vincze and Marton Varju, “Hungary: The New Fundamental Law”, 18 *European Public Law* (2012), 437; András Jakab and Pál Sonnevend, “Kontinuität mit Mangeln: Das neue ungarische Grundgesetz”, 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2012), 79.

<sup>6</sup> Full text of the Treaty, which was signed on 2 March 2012, is available at [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf).

<sup>7</sup> See Giuseppe Martinico and Carlo Maria Cantore, “The New ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’: Asymmetry or Dis-integration?”, Real Instituto Elcano Working Paper no. 10/2012, available at [http://www.realinstitutoelcano.org/wps/portal/rielcano\\_eng/Content?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_in/zonas\\_in/dt10-2012\\_martinico-cantore\\_emu](http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/dt10-2012_martinico-cantore_emu).

<sup>8</sup> Article 216(5) of the Polish Constitution of 1997, forbidding government to contract loans or to provide guarantees and financial sureties “which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product”, was drafted with an eye to the Protocol on the Excessive Deficit Procedure (cf. the national report presented by Mirosław Granat at the 28th International Roundtable on Constitutional Justice, Aix-en-Provence, September 2012).

<sup>9</sup> Article 126 of the Swiss Federal Constitution, as modified in 2009. A “debt brake” (*Schuldenbremse*) was introduced into the constitutional text by means of referendum after a period of steady increase in public deficits and debt: see Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel suisse* (2nd edn, Berne, Stämpfli, 2006) 414 f.; Andreas Glaser, “Begrenzung der Staatsverschuldung durch die Verfassung – ein Vergleich deutscher und schweizerischer Regelungen”, 60 *Die Öffentliche Verwaltung* (2007), 98.

about whether (and how) to embrace the principles of *fiscal constitutionalism*, which implies some kind of *substantial* (and not just *procedural*) constitutional limitations on the budgetary process, as well as the determination of the balance between public revenues and expenditures<sup>10</sup>.

In fact, according to the literal formulation of Article 3(1) and (2) TSCG (the so-called Fiscal Compact), the latter debate might seem to have come to an end<sup>11</sup>. The “long march” which started in the late 1960s – when the first Grand Coalition in Germany entrenched an earlier version of the Golden Rule in the German Basic Law<sup>12</sup> and passed the Law on Stability<sup>13</sup> – appears to have ended after some intermediate, compromise-like steps at both the European and national levels. The signatory parties to the TSCG are now required to enact substantial supralegisative (constitutional, but not necessarily so) limitations to the public budgetary process.

The second part of Article 3(2) TSCG is also of great interest: “the Contracting Parties shall put in place at national level the correction mechanism mentioned in paragraph 1(e) on the basis of common principles to be proposed to the European Commission, concerning in particular the nature, the size and the time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, *and the role and independence of the institutions responsible at national level for monitoring the observance of the rules*” (emphasis added). This provision of the Treaty and Directive 2011/85/EU<sup>14</sup> mainly address the role of *fiscal councils*<sup>15</sup>. They signal the reduced role of

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<sup>10</sup> See e.g. Élise Barthet, “La Constitution n’a pas à définir le contenu des politiques publiques” (interview with Dominique Rousseau), *Le Monde* (Paris, 21 May 2010), at [http://www.lemonde.fr/politique/article/2010/05/20/deficit-il-est-dangereux-d-inscrire-dans-la-constitution-une-obligation-qui-ne-pourra-pas-etre-tenue\\_1360813\\_823448.html](http://www.lemonde.fr/politique/article/2010/05/20/deficit-il-est-dangereux-d-inscrire-dans-la-constitution-une-obligation-qui-ne-pourra-pas-etre-tenue_1360813_823448.html).

<sup>11</sup> According to these provisions, “the budgetary position of the general government of a Contracting Party shall be balanced or in surplus ... The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process”. See also the Euro Plus Pact of March 2011: “Participating Member States commit to translating EU fiscal rules as set out in the Stability and Growth Pact into national legislation. Member States will retain the choice of the specific national legal vehicle to be used, but will make sure that it has a sufficiently strong binding and durable nature (e.g. constitution or framework law)” ([http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/120296.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf)).

<sup>12</sup> In principle, this earlier “golden rule” admitted public debt provided that most of the revenue obtained by means of borrowing be used to finance investments. See Article 115(1) of the German Basic Law, as modified by the *Zweiundzwanzigstes Gesetz zur Änderung des Grundgesetzes* of 12 May 1969: “The borrowing of funds and the assumption of pledges, guarantees or other commitments, as a result of which expenditure may be incurred in future fiscal years, shall require federal legislative authorization indicating, or permitting computation of the maximum amount involved. *Revenue obtained by borrowing shall not exceed the total expenditures for investments provided for in the budget; exceptions shall be permissible only to avert a disturbance of the overall economic equilibrium.* Details shall be regulated by federal legislation”.

<sup>13</sup> Law on the Promotion of Stability and Economic Growth (*Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft* of 8 June 1967).

<sup>14</sup> Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:306:0041:0047:EN:PDF>. It provides (Article 6(1)(b)) for “the effective and timely monitoring of compliance with the rules, based on reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States”.

<sup>15</sup> Fiscal councils are defined as bodies which help reduce the deficit “while leaving full discretion to the political representatives” (Xavier Debrun, David Hauner and Manmohan S. Kumar, “Independent Fiscal Agencies”, 23 *Journal*

political actors in national budgetary procedures: at the same time, they should be construed in accordance with the prerogatives of those independent institutions primarily entrusted with the enforcement of supralegislative legal rules, i.e. the constitutional courts.

Why might it be useful to reflect on the virtues (and limits) of political and legal constitutionalism in financial constitutional matters? In my view, public finance is an area of constitutional law where the dialectic confrontation between political and legal features of constitutionalism has been escalating in the last few months. This is particularly striking if one considers the starting point of financial constitutional law and its difficult relationship with judicial review (paragraph 2).

This article will compare recent constitutional amendments (or projected reforms) in the four most important Member States of the Eurozone, whose constitutional arrangements and present financial situations are generally diverse<sup>16</sup>. Some remarks will be also made on the rather eccentric Hungarian case (paragraphs 3 and 4). The focus will be at once on the constitutional system of the EU and those of its Member States. This is a necessary effect of the “undecided balance” which has marked the European system of public finance since 1992, whereby the establishment of the Economic and Monetary Union was not followed by a decisive coordination of financial policies and budgetary procedures<sup>17</sup>.

It is apposite to embark upon this study bearing in mind the American experience, which offers important evidence concerning the practical operation of constitutional balanced-budget clauses. From this perspective, comparison with the American (federal and state) constitutional experiences may be particularly useful: forty-nine out of fifty states have passed balanced-budget constitutional amendments, and the possible introduction of a balanced-budget clause in the federal Constitution has been the subject of a long-lasting scholarly and political debate. Comparison with the United States is therefore necessary not only because of its relevance to a proper understanding of the dynamics of the European constitution but also because the US is the main stronghold of fiscal constitutionalism and its constitutional practice provides important evidence of the possibility of effective constitutional entrenchment of the principles of fiscal constitutionalism (paragraph 5).

In the end, the results of comparative analysis will be assessed in the light of the current debate about political and legal constitutionalism and their significance to the development of

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of Economic Surveys (2009), 61).

<sup>16</sup> See comprehensive comparative analysis by Federico Fabbrini, “The Fiscal Compact, the ‘Golden Rule’ and the Paradox of European Federalism” (2012), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2096227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2096227).

<sup>17</sup> See Valentina Giomi and Fabio Merusi, “Politica economica e monetaria” in Mario P. Chiti and Guido Greco (eds), *Trattato di diritto amministrativo europeo. Parte speciale* (Milano, Giuffrè, 2007), 1454; Armin Hatje, “The Economic Constitution within the Internal Market”, in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Oxford and Munich, Hart and C.H. Beck, 2009), 615.

constitutional law in Europe.

## 2. Financial Constitutional Arrangements as Part of the Law of the Constitution

The origins of modern constitutionalism are usually traced back to parliaments struggling with monarchs for control over taxation and public expenditure. English constitutional history provides, of course, the best examples. Thus, the origins of constitutionalism – even before Article XVI of the French Declaration of 1789 was conceived of<sup>18</sup> – are closely related to a seminal version of what contemporary constitutional scholarship frames in terms of financial constitutional law<sup>19</sup>. Incidentally, these non-revolutionary roots might be a reason to explain why constitutional charters are often quite elusive with regard to public finance as a fundamental part of the fabric of government<sup>20</sup>.

The underlying assumption was that parliaments – the representative organs of the people-at-large – would have normally opposed the executive's need for money (meaning, in most cases, the military expenditure of monarchical national states in the early Modern Age). As was written, “the executive normally tends to exaggerate the necessity or appropriateness of expenses ... whereas legislatures reveal a willingness ... to limit the executive action ... by preventing or moderating increased expenditures”<sup>21</sup>.

However, there is another founding myth, of equal strength. According to this account, the origins of constitutional *law* are intimately linked to the rise of judicial review in the United States, and a subsequent wave of judicialization of constitutional questions<sup>22</sup>. Under this perspective, the position of financial constitutional law becomes much more disputable. This is an area of constitutional law where there has traditionally been limited room for judicial review.

How can these two narratives reconcile with each other? Another seminal moment of European constitutional history – the struggle over the Prussian military budget under Bismarck – is

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<sup>18</sup> According to which “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution”.

<sup>19</sup> See Maurizio Fioravanti, “Constitutionalism” in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Heidelberg, Springer, 2009), 263.

<sup>20</sup> See Giacinto della Cananea, *Indirizzo e controllo della finanza pubblica* (Bologna, Il Mulino, 1996), 10. As for “revolutionary constitutionalism”, see Leonard F.M. Besselink, *A Composite European Constitution. Een Samengestelde Europese Constitutie* (Groningen, Europa Law Publishing, 2007).

<sup>21</sup> Giuseppe Ricca Salerno, *Scienza delle finanze* (Firenze, Barbera, 1890), 111.

<sup>22</sup> See Alessandro Pizzorusso, “Il diritto costituzionale e il genere letterario ‘note a sentenza’” in Alessandro Pace (ed), *Corte costituzionale e processo costituzionale: nell'esperienza della rivista “Giurisprudenza costituzionale” per il cinquantesimo anniversario* (Milano, Giuffrè, 2006), 855; Martin Loughlin, *Foundations of Public Law* (Oxford, OUP, 2010), 288. A subsequent wave of *judicialization of politics* has been observed in the last decade: see e.g. Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts”, 11 *Annual Review of Political Science* (2008), 93; Sabino Cassese, “The Will of the People and the Command of the Law. Constitutional Courts, Democracy and Justice” in Vittoria Barsotti and Vincenzo Varano (eds), *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale. Dialogo di diritto comparato* (Napoli, Edizioni scientifiche italiane, 2012), 17.

even more telling, and allows us to develop a more proper understanding of all the issues involved. That conflict over budgetary decisions ultimately resulted in (and has been steadily interpreted as) a *great compromise* between the legislative and the Chancellor. This fundamental moment in European constitutional history was a landmark in the rise of a German model of “pure” constitutional monarchy<sup>23</sup>. Meanwhile, financial constitutional issues had decisively been attracted towards the area of tension (*Spannungsfeld*) of the relations between the executive and the legislature. The theoretical outcome of that clash in the 1860s – Paul Laband’s conception of budget as a law in formal sense<sup>24</sup> – has left its mark until recently: it is still the case in Germany that public budgets may be reviewed only to a limited extent by the *Bundesverfassungsgericht*<sup>25</sup>.

### 3. Major Aspects of the Recent Reforms

This paragraph will briefly present the most important innovations brought about by recent constitutional amendments in the four most important Member States in the Eurozone and Hungary. The subsequent paragraph will be devoted to discussing some particular issues in these reforms, notably the conditions and the limits of enforcement by constitutional courts and the possibility of derogations.

All these reforms have been initiated out of concern over the current financial turmoil. However, their geneses are quite different. The German reform was part of a wider, long-standing debate about the internal balance of German federal order: most of all, it aimed at coping with financial instability in some *Länder*, the most important manifestation of which was *Land* Berlin’s application for bailout, or, more precisely, for a declaration of budgetary emergency<sup>26</sup>. That is why it was labelled as “Second Reform of Federalism” (*Föderalismusreform II*). Since then, it has served as a blueprint for reform throughout Europe, both at the national and international level. In Hungary, the drafting of Articles 36 and 37 of the Fundamental Law was part of a controversial process of constitution-making amidst severe political and financial crisis. In Italy and Spain, constitutional amendments were hastily approved in order to face pressure coming from EU

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<sup>23</sup> See R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge, Cambridge University Press, 1995), 222-23.

<sup>24</sup> See Paul Laband, *Das Budgetrecht nach den Bestimmungen der Preußischen Verfassungs-Urkunde unter Berücksichtigung der Verfassung des Norddeutschen Bundes* (Berlin, Guttentag, 1871).

<sup>25</sup> As will be explained later in more detail, the Federal Constitutional Court of Germany does not exercise review of public budgets under the procedures of concrete review or individual constitutional complaint.

<sup>26</sup> See German Federal Constitutional Court, judgment of the Second Senate of 19 October 2006 (BVerfGE 116, 327), at [http://www.bundesverfassungsgericht.de/entscheidungen/fs20061019\\_2bvf000303.html](http://www.bundesverfassungsgericht.de/entscheidungen/fs20061019_2bvf000303.html). See also commentary by Wolfram Höfling, “Haushalts- und Finanzverfassung in der Krise. Steuerungsschwächen, Fehlanreize, Reformoptionen”, 46 *Der Staat* (2007), 163; Markus C. Kerber, “Der Souverän des Bundesstaatsnotstands. Anmerkungen zur finanzverfassungsrechtlichen Argumentation und finanzwissenschaftlichen Methodik des Bundesverfassungsgerichts in seinem Urteil vom 19.10.2006”, 46 *Der Staat* (2007), 229.

institutions<sup>27</sup> and financial markets. After that, twenty-five out of twenty-seven Member States of the EU signed the TSCG, which requires the contracting parties to constitutionalize a balanced-budget clause. In France, the executive presented a draft constitutional amendment bill in the wake of the publication of the Euro Plus Pact, in Spring 2011. However, the bill could not be approved before the expiration of the French Parliament. By then, the TSCG had been signed. Since a new President and a renewed legislature took office, France has decided to implement the Fiscal Compact in its domestic legal order by means of organic and ordinary legislation instead of constitutional amendment.

*a. Germany: Stability as a Guiding Principle*

The quest for political, economic and financial stability is a typical feature of German constitutional and political culture since the end of the Second World War and the establishment of the Federal Republic<sup>28</sup>. Thus, it should come as no surprise that the regulation of budgetary issues in the Constitution has always been unusually (by European standards) wide-ranging and detailed. Indeed, a “golden rule” was already present in German constitutional law before 2009. In the late 1960s the first Grand Coalition extensively modified the financial part (*Finanzverfassung*) of the Bonn Basic Law. As noticed above, this earlier version of the “golden rule” admitted public debt provided that most of the revenue obtained by means of borrowing be used to finance investment. Meanwhile, the Stability Law proclaimed the so called “magic square”: price stability, high employment, a sound balance of trade, and steady and adequate economic growth.

It should be noticed, however, that German constitutional norms basically entrusted political office-holders with achieving the goal of financial stability. The best example is the so-called “Höpker-Aschoff Clause” at Article 113 BL, which allows the executive to make interventions in the legislative process in order to limit possible parliamentary excesses<sup>29</sup>. This constitutional provision has been sharply criticized by commentators because it seems not to consider the real dynamics of the budgetary process in contemporary democracies, where the executive and “its”

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<sup>27</sup> In August 2011, the retiring President of the European Central Bank, Jean-Claude Trichet, and its designated successor Mario Draghi wrote a now-infamous letter to the Prime Minister of Italy, where they stated that “[a] constitutional reform tightening fiscal rules would also be appropriate” (full text of the letter available at [http://www.corriere.it/economia/11\\_settembre\\_29/trichet\\_draghi\\_inglese\\_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?fr=correlati](http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?fr=correlati)).

<sup>28</sup> See Francesco Palermo and Jens Woelk, *Germania* (Bologna, Il Mulino, 2005), 45.

<sup>29</sup> “(1) Laws that increase the budget expenditures proposed by the Federal Government, or entail or will bring about new expenditures, shall require the consent of the Federal Government. This requirement shall also apply to laws that entail or will bring about decreases in revenue. The Federal Government may demand that the Bundestag postpone its vote on bills to this effect. In this event the Federal Government shall submit its comments to the Bundestag within six weeks. (2) Within four weeks of the Bundestag adopting such a law, the Federal Government may demand that it vote on the law a second time”. Article 113 of the Basic Law has been interpreted as a constitutional codification of Standing Order no. 48 of the British House of Commons.

parliamentary majority normally tend to seek the very same policy objectives – in fact, this clause has never been applied<sup>30</sup>. If one turns to financial governance in the German federal order, the overall balance of this complex system was overseen by an intergovernmental consultative body, the Financial Planning Council (*Finanzplanungsrat*).

Before the 2009 reform, the enforcement of the *Finanzverfassung* by the German *Bundesverfassungsgericht* was limited to constitutional disputes between federal constitutional organs, or between the Federation and *Länder*, and abstract review of legislation at request of the *Bund*, *Länder*, or parliamentary minorities (*abstrakte Normenkontrolle*). There seemed to be no place, in turn, for concrete review of legislation (*konkrete Normenkontrolle*) or individual constitutional complaints (*Verfassungsbeschwerden*). This circumstance could be interpreted as a sign of the pre-eminence of those procedures of constitutional review most closely related to the political process and a long-term effect of Laband's (apparently outmoded) theory of budget as a law in the formal sense.

The 1969 financial Constitution (still in place in the 1990s) was an important model when the Economic and Monetary Union was established.

As the German Federal Constitutional Court (in)famously held in 2007, “the normative program of Article 115(1), second sentence, of the Basic Law [before 2009] has actually turned out not to work efficiently as a constitutional instrument of rational taxation and limitation of the state debt policy”<sup>31</sup>. This judgment has been heavily criticized because it lied (at least) halfway between constitutional interpretation and constitutional politics; in any case, the *Bundesverfassungsgericht* was ultimately claiming that an approach to financial constitutional issues premised on a distinction between different kinds of borrowing and relying upon the role of political office-holders was insufficient. Perusing the reasoning of the judges in Karlsruhe, one could glimpse the message that a thinner constitutional entrenchment of substantial limitations of the budgetary process was no longer enough – some sort of thicker entrenchment of the financial constitution was necessary.

In 2009, the second Grand Coalition modified again the *Finanzverfassung* in order to prevent, as far as possible, the emergence of financial crises in the *Länder*. According to Article 109(3) and 115(2), public budgets shall be balanced “without revenue from credits”. This principle is deemed to be satisfied when revenue obtained by the borrowing of funds “does not exceed 0.35 percent in relation to the nominal gross domestic product”. These provisions, also known as the

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<sup>30</sup> See Helmut Siekmann, “Artikel 113” in Michael Sachs (ed), *Grundgesetz: Kommentar* (5th edn, München, C.H. Beck, 2009), 2258.

<sup>31</sup> German Federal Constitutional Court, judgment of the Second Senate of 9 July 2007 (BVerfGE 119, 96, 142 f.), at [http://www.bverfg.de/entscheidungen/fs20070709\\_2bvf000104.html](http://www.bverfg.de/entscheidungen/fs20070709_2bvf000104.html). As has been noted, “federal indebtedness has risen from approximately 25,7 milliards Euro to more than 1 billion Euro today since the reform of Article 115 of the Basic Law came into force, in 1969” (Mayer (n 1) 268).

“debt brake” (*Schuldenbremse*), apply both to the Federation and the *Länder*. The Financial Planning Council was replaced by a Stability Council, another intergovernmental body entrusted with “the continuing supervision of budgetary management of the Federation and the *Länder*”, in order to “avoid a budgetary emergency”; in the worst scenario, the Stability Council will define the principles for the establishment and administration of programs for taking care of budgetary emergencies (Article 109a).

*b. Spain*

The German emphasis on stability is hardly shared by the other legal systems I am considering in this article.

Unlike the German Basic Law, the Spanish Constitution of 1978 was more laconic with regard to financial issues. Before 2011, Article 134, the fundamental provision in its “financial Constitution”, was chiefly interested in making the national executive the central actor in budgetary processes and enhancing its pre-eminence vis-à-vis the legislature<sup>32</sup>. Apart from that, Article 135 contained some prescriptions on public borrowing. If one also considers organic and even ordinary legislation, however, a principle of budgetary stability was already present in the Spanish legal system, and the Constitutional Court recognized its constitutional foundations in a judgment of 2011<sup>33</sup>.

A draft constitutional amendment bill introducing a constitutional balanced-budget clause was presented to the Spanish lower house on 26 August 2011 in order to react to widespread concerns about public finances in the Spanish State and Autonomous Communities. After an exceptionally rapid parliamentary approval, the constitutional reform received the royal assent on 27 September 2011. According to the new text of Article 135, “All Public Administrations shall adapt their actions to the principle of budgetary stability”. Article 135 contains dynamic clauses, referring to deficit and debt limits defined at the EU level. The rules on constitutional standing before the Spanish *Tribunal Constitucional* have been left unchanged.

After that, Article 135 has been implemented by organic law no. 2/2012<sup>34</sup>. An important role will be played by the Fiscal and Financial Policy Council (*Consejo de Política Fiscal y Financiera*), an intergovernmental body which can be roughly compared with the German Financial Planning

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<sup>32</sup> See i.e. Article 134(6) of the Constitution (not modified in 2011): “Any non governmental bill or amendment which involves an increase in appropriations or a decrease in budget revenue shall require previous approval by the Government before its passage”.

<sup>33</sup> See *Tribunal Constitucional*, judgment no. 134/2011 of 20 July 2011, available at <http://hj.tribunalconstitucional.es/HJ/it/Resolucion/Show/6916>.

<sup>34</sup> *Ley orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera*, available at <http://www.boe.es/boe/dias/2012/04/30/pdfs/BOE-A-2012-5730.pdf>.

Council.

*c. Italy: The Weight of Interpretation*

Article 81(3) of the Italian Constitution<sup>35</sup> states that “Any law [other than the budget] involving new or increased spending shall detail the means therefor”. This is one of the most controversial clauses in the Constitution of 1948. Its ambiguity is the outcome of a clash between diverging economic views at the Constituent Assembly<sup>36</sup>; this ambiguity, however, is also a result of subsequent constitutional developments. The Italian Constitutional Court has made it clear that the quest for a balanced budget should be seen as a political goal rather than a legal obligation. The Constitutional Court, holding that “it is clearly possible [for the government] to ... make debts in order to provide the means for future spending”, has even been said, perhaps with some overestimation of its role, to have paved the way for the current disastrous level of state indebtedness in Italy<sup>37</sup>.

Apart from these claims, the important point is that Article 81(4) was not meant to dictate substantial limitations to budgetary processes – rather, its ultimate goal was to limit parliamentary initiatives in the domain of public finance. That might also have contributed to the difficult reviewability of laws involving increased spending before the Constitutional Court: Article 81 played a role in the relationship between political office-holders rather than in the architecture of the legal system as a whole<sup>38</sup>. As said before, it dealt with political goals rather than legal obligations. The current rules on legal standing before the Constitutional Court are problematic because they seem to restrict, to a considerable extent, the reviewability of ordinary state legislation under the new constitutional balanced-budget clause. Furthermore, the Court of Auditors, which in principle is entitled to challenge the legitimacy of financial laws before the Constitutional Court under Article 81, has not been particularly zealous in exercising this power<sup>39</sup>. Subsequent attempts at improving the effectiveness of Article 81 have usually relied on a rationalization of parliamentary

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<sup>35</sup> Article 81(4) before the latest constitutional reform in April 2012, which did not modify its text.

<sup>36</sup> In fact, some of the Italian constituent fathers advocated for the construction of this constitutional provision as a balanced-budget clause. This interpretive approach, however, has never prevailed through the course of Italian constitutional history: see della Cananea (n 20), 93-94.

<sup>37</sup> Italian Constitutional Court, *sentenza* no. 1/1966, at <http://www.cortecostituzionale.it>. See Giuseppe Di Gaspare, “Innescare un sistema in equilibrio della finanza pubblica ritornando all’art. 81 della Costituzione” in Giuseppe Di Gaspare and Nicola Lupo (eds), *Le procedure finanziarie in un sistema multilivello* (Milano, Giuffrè, 2005), 201.

<sup>38</sup> See Valerio Onida, *Le leggi di spesa nella Costituzione* (Milano, Giuffrè, 1969); Valerio Onida, “Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento” in *Le sentenze della Corte costituzionale e l’art. 81, u.c., della Costituzione. Atti del seminario svoltosi in Roma Palazzo della Consulta nei giorni 8 e 9 novembre 1991* (Milano, Giuffrè, 1993), 19.

<sup>39</sup> It is worth adding, however, that this also happened as a result of the decline (as an effect of legislative politics) of the traditionally understood control function, of which a central element was the central role of the legalistic, formal approach of the Court of Auditors.

financial procedures, which lie, almost by definition, largely outside the scope of the Constitutional Court. In 2009, Parliament approved a new law on public finance and accountancy, which provides for a more transparent budgetary decision-making process and strengthened parliamentary oversight<sup>40</sup>.

The process of amending Article 81 was quite confused: in fact, as many as fourteen private members' bills were presented in Parliament in order to amend the provision dealing with (state) public finances in the Italian Constitution<sup>41</sup>. The final text is the result of a parliamentary compromise. The new Article 81(1) and (2) provide that "The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle. No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle [...]". Moreover, Article 5(1)(f) of constitutional law no. 1/2012 provides for the establishment, within the Houses of Parliament, of "an independent body [i.e., a Fiscal Council] entrusted with analyzing and reviewing the performance of public finance and assessing compliance with budgetary rules".

#### *d. France : Searching for a Golden Rule*

French constitutional law has been marked by extensive change in financial procedures in the last decade. These reforms might be seen as a (meaningful) part of a wider movement of constitutional reform which was intended to modernize the constitutional framework of 1958, leaving its fundamental features unaltered.

Financial procedures were chiefly disciplined by an organic ordinance of 1959 which, according to constitutional provisions and the Gaullist institutional project, sought to ensure the pre-eminence of the executive in financial procedures<sup>42</sup>. Recent transformations have not affected the precedent situation of executive dominance – instead, they have aimed at strengthening parliamentary control over the executive and its financial propositions, thereby improving the final quality of budgetary decisions. This was the aim of the *loi organique* on public budgets of 2001 (LOLF), whose significance was confirmed and strengthened at the highest level of the legal system

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<sup>40</sup> *Legge 31 dicembre 2009, n. 196 (Legge di contabilità e finanza pubblica)*. See Livia Mercati, "New Rules about Public Finance and Accountancy: Annual Report – 2011 – Italy" (2011), at [http://www.ius-publicum.com/repository/uploads/17\\_01\\_2011\\_19\\_46\\_Mercati\\_uk1.pdf](http://www.ius-publicum.com/repository/uploads/17_01_2011_19_46_Mercati_uk1.pdf), and critical assessment by Chiara Bergonzini, "Teoria e pratica delle procedure di bilancio dopo la legge n. 196 del 2009", 31 *Quaderni costituzionali* (2011), 39.

<sup>41</sup> Article 119, laying down the (broad) foundations of the Italian system of "fiscal federalism", was also amended in 2012 in order to impose balanced-budget constraints on regional and local governments. Article 119(6), as amended in 2001, contained a clause very similar to the 1969 German golden rule: it allowed regional and local governments to borrow funds only to finance investment.

<sup>42</sup> *Ordonnance n° 59-2 du 2 janvier 1959 portant loi organique relative aux lois de finances*, available at <http://www.diplomatie.gouv.fr/fr/IMG/pdf/02159.pdf>.

by the “great” constitutional reform of 2008<sup>43</sup>. On that occasion, another innovation went largely unnoticed: the amended text of Article 34(7) of the Constitution provides that “the multiannual public guidelines for public finances ... shall be part of the objective of balanced accounts for public administration”. Therefore, a “golden rule” was already present in the constitutional text but was largely unobserved. It remains to specify what it entails.

The following developments can be summarized as a difficult path towards some kind of entrenchment of a *règle d’or*. The draft constitutional amendment bill initiated in 2011 is based not on a simple balanced-budget rule but on triennial (at least) “frame laws (*lois-cadre*) for balanced public finance”, with compulsory *a priori* review of frame laws and annual budgetary laws by the *Conseil constitutionnel*.

As a result of the election of President Hollande, Article 3(2) TSCG will probably be implemented by means of organic legislation. More properly speaking, the draft organic law finally implements Article 34 of the Constitution, as amended in 2008: multiannual Programming Laws (*lois de programmation des finances publiques*) should seek balanced finances in the middle term. As can be seen, France appears committed to a more flexible approach (or a difficult adaptation) to the *règle d’or*. Article 8 of the draft organic law provides for the establishment, within the Court of Auditors, of a High Council of Public Finance (*Haut Conseil des finances publiques*), whose mission is to elaborate forecasts and give advice with regard to Programming Laws and annual public budgets.

#### *e. Hungary*

Another interesting example (although not easily comparable without defining some contexts more precisely) comes from the controversial Hungarian (or, to be more precise, Magyar) Fundamental Law of 2011. This completely new constitutional charter was intended to mark a sharp break with the recent national Communist and Post-Communist past in a country haunted by the risk of financial catastrophe and which is not part of the Eurozone. It was approved by a one-party legislative supermajority among political contestations; a draft version had been criticized by the Venice Commission of the Council of Europe. According to Article 36 of its Section on “The State”,

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<sup>43</sup> See e.g. Article 24(1) of the French Constitution, as modified in 2008: “Parliament shall pass statutes. *It shall monitor the action of the Government. It shall assess public policies*” (emphasis added). According to Article 47-2 (added in 2008), “(1) The Court of Auditors shall assist Parliament in monitoring Government action. It shall assist Parliament and the Government in monitoring the implementation of Finance Laws and Social Security Financing Laws, as well as in assessing public policies. By means of its public reports, it shall contribute to informing citizens. (2) The accounts of public administrations shall be lawful and faithful. They shall provide a true and fair view of the result of the management assets and financial situation of the said public administrations”. See also Guy Carcassonne, “La LOLF et le renouveau du contrôle”, 25 *Revue française de finances publiques* (2007), no. 97, 77; Jean Arthuis, “La dégradation des finances publiques: la loi en échec, le contrôle et l’évaluation en recours”, 34 *Pouvoirs* (2010), no. 134, 83.

Parliament cannot adopt a State Budget Act allowing state debt to exceed half the Gross Domestic Product (para. 4). As long as state debt exceeds half the Gross Domestic Product, Parliament may only adopt a State Budget Act which contains state debt reduction in proportion to the Gross Domestic Product (para. 5). Most importantly, “any deviation from the provisions in Paragraphs (4) and (5) shall only be possible during a special legal order, to the extent required for mitigating the consequences of the causes, and if there is a significant and enduring national economic recession, to the extent required for redressing the balance of the national economy”<sup>44</sup>. *All these parliamentary activities, however, are subject to the prior consent of a Budget Council* which has an ultimately political legitimation and whose duration exceeds that of the legislature (Article 44).

#### **4. Questionable Features of National Constitutional Reforms in the Eurozone**

These recent constitutional reforms are not immune from interpretive and functional problems. With some noteworthy exceptions, they contain a probably dysfunctional blend of legal and economic concepts, and provide detailed regulation of issues which have not a properly constitutional substance: ultimately, they might be regarded as a particular manifestation of a general trend towards a degradation of the quality of constitutional norms<sup>45</sup>. Moreover, financial constitutions were often modified without taking into account their necessary coordination with other “structural” aspects of constitutional orders. In this paragraph, enforceability and derogations will be examined in order to make some points on the magnitude of these transformations.

##### ***a) Enforcing Balanced-Budget Clauses***

A first issue that one should consider is the actual enforceability of the new constitutional clauses, which is by now (implicitly or not) required by the Fiscal Compact<sup>46</sup>. The new constitutional norms lay down more precise normative frameworks, which legislators are supposed to comply when drafting the annual budget. Thus, the role of those bodies whose primary mission is judicial review of legislation, i.e. constitutional courts, is inevitably addressed. In my opinion, the picture is mixed, and this uncertainty is not merely a result of the inevitable ambiguity of concepts whose defining core lies somewhere between the domains of economics and law.

The “spirit” of the TSCG could prove to be particularly innovative. This is true above all of

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<sup>44</sup> Magyar Fundamental Law, English translation available at <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>.

<sup>45</sup> See e.g. Pierre de Montalivet, “La dégradation de la qualité de la norme constitutionnelle sous la Ve République”, 119 *Revue du droit public et de la science politique* (2012), 925.

<sup>46</sup> See discussion by Jean-Victor Louis, “Un traité vite fait, bien fait? Le traité du 2 mars 2012 sur la stabilité, la coordination et la gouvernance au sein de l’Union économique et monétaire”, 48 *Revue trimestrielle de droit européen* (no. 2/2012), 5.

Article 8(2) TSCG, according to which “[i]f the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1% of its gross domestic product”. Among the violations which the CJEU might be asked to examine, there may well be imperfect national compliance with the TSCG at the constitutional level<sup>47</sup>. There seems to have been an escalation in the response to financial downturns at the European level. This point is confirmed by the fate of the Stability and Growth Pact. Indeed, the Pact was already a good example of entrenchment of substantial restrictions to the budgetary process, which led many to think that national balanced-budget constitutional amendments were not actually necessary in order to improve the condition of public finances. The well-known decision of the CJEU in the *Commission v. Council* case eventually justified the decision of the Council not to follow recommendations from the Commission<sup>48</sup>.

What can be said with regard to national constitutional courts?

In the case of Germany, the constitutional parameters of legitimacy look more precise than they used to be before 2009 – thus, their justiciability should “have improved”<sup>49</sup>: the new wording of Article 115 BL is much more detailed than it once was. Looking at the procedures by which an action might be brought before the *Bundesverfassungsgericht*, however, one would barely recognize any major innovations. The admissible procedures appear to be limited to abstract review, conflicts among constitutional organs, or conflicts between *Bund* and *Länder*. Concrete review or individual complaints are probably to be excluded. Thus, even if the new constitutional norms provide a much more analytical framework of legitimacy for judicial review, their actual justiciability still depends on politically-prompted procedures.

The same might be said of Spain<sup>50</sup>. The current organization of the system of constitutional review in Spain makes it quite difficult to challenge the constitutional legitimacy of (state) public budgets before the *Tribunal Constitucional*. In fact, such a procedure might only be initiated by parliamentary minorities or, possibly, the national ombudsman (*Defensor del Pueblo*) (Article 162(1) of the Spanish Constitution). The possibility that the Court of Auditors (*Tribunal de*

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<sup>47</sup> Oral intervention by Miguel Poiaras Maduro at the Joint Workshop “The Constitutional Architecture of the Economic Governance in the European Union”, Florence, 23 March 2012.

<sup>48</sup> Court of Justice of the European Union, Case C-27/04, *Commission v. Council* (2004). See Imelda Maher, “Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion”, 29 *European Law Review* (2004), 831 (expressing a more optimistic approach with regard to the willingness of the Court to enforce the Pact); Rita Perez, “Corte di giustizia e regole fiscali dell’Unione”, 10 *Giornale di diritto amministrativo* (2004), 1073; Giomi and Merusi (n 17), 1479-1480.

<sup>49</sup> Mayer (n 1), 301.

<sup>50</sup> See Cristina Fasone, “La giustiziabilità della clausola sul pareggio di bilancio in Spagna. Quali indicazioni per il caso italiano?” in Carmela Decaro, Nicola Lupo and Guido Rivosecchi (eds), *La “manutenzione” della giustizia costituzionale. Il giudizio sulle leggi in Italia, Spagna e Francia* (Torino, Giappichelli, 2012), 221.

*Cuentas*) will go before the *Tribunal Constitucional* is quite limited. Conversely, the State might challenge the legitimacy of public budgets of the Autonomous Communities much more easily – even in this regard, however, the recent reform has not brought about any changes.

As already observed above, there is quite limited room for judicial review of budgets before the Constitutional Court in Italy. An early version of the Italian balanced-budget constitutional amendment empowered the Court of Auditors to “request a ruling on constitutional legitimacy for violation of the financial coverage requirement referred to in the third paragraph of Article 81”, thus ambiguously codifying the present situation or, more probably, providing the Court of Auditors with more standing before the Constitutional Court. Be that as it may, such provision has disappeared in the most recent version of the amendment – there, in turn, the establishment “of an independent body within the Houses of Parliament” was announced, whose task is to monitor and check public finance trends and compliance with budgetary rules. This choice has been sharply criticized by the Italian Court of Auditors itself in its advisory opinion on the proposal of the balanced-budget amendment<sup>51</sup>.

Even if fiscal councils should play a complementary role vis-à-vis other independent institutions, both the Italian Court of Auditors and the French *Conseil constitutionnel* went to the bother of making it clear that their powers, and those which the brand new bodies will exercise, are clearly distinct<sup>52</sup>.

As for the Hungarian Fundamental Law, its provisions may look like the most developed attempt at de-politicizing financial issues. Its real goal, however, might rather be to “codify” and “eternize” the financial policies of the present-day majority party. Evidence for such claim comes from the parallel limitation of the power of the Hungarian Constitutional Court to review the legitimacy of most financial measures<sup>53</sup>.

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<sup>51</sup> See *Corte dei conti* (Italian Court of Auditors) (*sezioni riunite in sede consultiva*), advisory opinion no. 3/2011 (13 December 2011), at [http://www.corteconti.it/export/sites/portalecdc/documenti/controllo/sezioni\\_riunite/sezioni\\_riunite\\_in\\_sede\\_consultiva/2011/delibera\\_3\\_2011\\_cons.pdf](http://www.corteconti.it/export/sites/portalecdc/documenti/controllo/sezioni_riunite/sezioni_riunite_in_sede_consultiva/2011/delibera_3_2011_cons.pdf). See also Gaetano D’Auria, “Sull’ingresso in Costituzione del principio del ‘pareggio di bilancio’ (a proposito di un recente parere delle sezioni riunite della Corte dei conti)”, 137 *Il Foro italiano* (2012), part III, 55.

<sup>52</sup> *Conseil constitutionnel*, Decision no. 2012-653 DC of 9 August 2012 (*Traité sur la stabilité, la coordination et la gouvernance au sein de l’Union économique et monétaire*), at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-653-dc/decision-n-2012-653-dc-du-09-aout-2012.115444.html>, paragraphs 27: “The *Conseil constitutionnel* is entrusted with reviewing financial laws, and it will have to exercise such review taking into account the advice of those independent institutions which will have preliminarily been established”.

<sup>53</sup> Article 37(4) of the Magyar Fundamental Law: “As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence ... only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship”.

## b) Exception française: A Plausible One?

There is, in fact, a Member State within the EU where constitutional review of financial constitutional law has been in place for many years, and constitutional judges have been developing vast and significant case-law concerning financial issues<sup>54</sup>. These judges even declared the constitutional illegitimacy of a public budget in the late 1970s<sup>55</sup>. Furthermore, in this country the constitutional clause on the limitation of parliamentary profligacy has always been effectively enforced<sup>56</sup>.

However, this exception – France – is a rather complicated one. As far as its genesis, functions, composition and procedural features are concerned, the *Conseil constitutionnel* has had a unique history among constitutional courts<sup>57</sup>. Moreover, the French Constitution and organic legislation<sup>58</sup> contain very analytical rules on financial procedures, and the *Conseil* was entrusted with their enforcement in order to preserve the respective domains of action of the executive and legislative branches. Indeed, this is a reflex of the original role of the *Conseil* as a keeper of the constitutional prerogatives of the executive in the face of much-feared exorbitant claims of the legislative. It was a paradoxical reversal of the earlier meaning of (political) financial constitutionalism: by the mid-1950s, the executive was supposed to control Parliament and its alleged willingness to profligacy<sup>59</sup>. Before the introduction of the *question prioritaire de constitutionnalité* in 2008 – which should not have any particular effects in this field – legislative deliberations could be reviewed exclusively at the request of legislative or executive (i.e. political) office-holders. The above-mentioned provision of Article 40 of the Constitution, limiting parliamentary financial initiatives, was just another component of this constitutional strategy<sup>60</sup>.

As said above, French constitutional law has been marked by an extensive reform of financial procedures in the last decade. The Balladur Committee, which submitted a report on constitutional reform to the newly elected President Sarkozy in October 2007, suggested

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<sup>54</sup> See Alexandre Mangiavillano, “La saisine parlementaire et le contrôle de constitutionnalité des lois de finances” (7th French Congress of Constitutional Lawyers, Paris, September 2008, <http://www.droitconstitutionnel.org>).

<sup>55</sup> *Conseil constitutionnel*, Decision no. 79-110 DC of 24 December 1979 (*Loi de finances pour 1980*), at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1979/79-110-dc/decision-n-79-110-dc-du-24-decembre-1979.7728.html>.

<sup>56</sup> “Private Members’ Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure”.

<sup>57</sup> See Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford, OUP, 1992).

<sup>58</sup> *Ordonnance n° 59-2* (n 42).

<sup>59</sup> See Joseph Barthélemy, “Le procès de la Commission des finances” in *Mélanges Carré de Malberg* (Paris, Sirey, 1933), 265.

<sup>60</sup> See Michel Lascombe and Xavier Vandendriessche, “Premier bilan du droit d’amendement parlementaire en régime LOLF”, 24 *Revue française de finance publiques* (2006), no. 94, 49.

(unsuccessfully) that a *Comité d'audit parlementaire* be established within the legislature<sup>61</sup>.

The proposed constitutional amendments on the *règle d'or* laid for compulsory *a priori* review of frame laws and annual budgetary laws by the *Conseil constitutionnel*, which should prevent subsequent challenges of their legitimacy under the *question prioritaire de constitutionnalité*<sup>62</sup>. The more recent draft organic law concerning financial planning and governance<sup>63</sup> no longer provides for a compulsory *a priori* review by the *Conseil constitutionnel* – this, however, is a modification of ultimately little significance, for there is already no particular difficulty for parliamentary minorities wishing to challenge public budgets before the *Conseil*. With care to preserve *marges de manœuvre* for political office-holders, France continues to go its own way in the management of financial constitutional issues.

### ***c) Derogations: Majoritarian Parliamentary Politics Taking Its Revenge?***

The other side of this issue is whether and when derogations to basic provisions of financial constitutions are admitted, or, in other words, how constitutional legislators shaped the certain amount of flexibility which the TSCG itself sees as inevitable (Article 3(3)(b)). This point does not necessarily concern the relationship between legislatures and courts, but the ability of parliaments to evaluate the existence of exceptional circumstances and permit a derogation of fiscal constitutional limits must be analysed in order to understand how deep the wave of depoliticization of budgetary issues has gone so far.

If legislative supermajorities are required in order to determine the existence of a possible cause of derogation, this would be another sign of a decisive shift in the internal balance of financial constitutional law. Nevertheless, national legal systems are quite suspicious about taking this step.

In Germany, for instance, during the elaboration of the “second federal reform” there was some debate about a provision requiring a two-thirds majority of members of the *Bundestag* in order to recognize an emergency situation allowing for departure from the debt brake<sup>64</sup> – eventually, however, an absolute majority of the *Bundestag* members (i.e., in most cases, a “Chancellor

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<sup>61</sup> Report *Une Ve République plus démocratique*, p. 54 (at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics//074000697/0000.pdf>).

<sup>62</sup> See Article 23-2 of *ordonnance* no. 58-1067, as modified in 2009: “The Court shall rule without delay, giving reasons for its ruling, as to the transmission to the *Conseil d'État* or the Court of Cassation of the application for a priority preliminary ruling on the issue of constitutionality. Such transmission shall require that the following conditions be met: ... 2° Said provisions has not previously been found to be constitutional in the holding of a decision of the Constitutional Council, except in the event of a change of circumstances”.

<sup>63</sup> See n 3.

<sup>64</sup> “If so, the principle of parliamentary legitimacy with regard to majoritarian decisions and responsibility would be severely affected in one important aspect” (Ines Härtel, “Föderalismusreform II. Bund-Länder Finanzbeziehungen im Lichte aktueller Ordnungsanforderungen”, 58 *JuristenZeitung* (2008), 441).

majority”, *Kanzlermehrheit*) was seen as sufficient<sup>65</sup>. The same has happened in Spain<sup>66</sup> and Italy<sup>67</sup> in the last few months.

This is perhaps a sign that there is a great need for flexibility – and, what is more, flexibility clauses are seen as an occasion for parliamentary majorities (and the executives which they support) to regain some ground. An absolute majority is obviously more than a mere plurality, which is the usual quorum required for parliamentary deliberations – still, present-day electoral rules and party systems shape the real meaning of the requirement of an absolute majority in all of these countries. Furthermore, it is far from self-evident that constitutional courts decide to engage in a difficult, controversial scrutiny of the degree of “extraordinariness” of the economic situation after a parliamentary vote.

Such a situation might change, however, if the CJEU acquired a role in enforcing the obligation not only to enact, but also to respect the constitutional golden rule in national budgetary procedures<sup>68</sup>: this might be an important incentive for national constitutional courts to engage more actively in constitutional review in the light of balanced-budget clauses<sup>69</sup>. When asked to assess the compatibility of the TSCG with the German constitutional order, the *Bundesverfassungsgericht* took the trouble to specify that the competence of the CoJ under Article 8(1) TSCG “is just limited to the codification of these instruments but does not extend to their concrete application”<sup>70</sup>.

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<sup>65</sup> See article 115(2) of the German Basic Law, as modified in 2009: “Revenues and expenditures shall in principle be balanced without revenue from credits. ... In cases of *natural catastrophes or unusual emergency situations beyond governmental control and substantially harmful to the state’s financial capacity*, these credit limits may be exceeded on the basis of a decision by a majority of the members of the Bundestag. The decision has to be combined with an amortization plan” (emphasis added).

<sup>66</sup> See Article 135(4) of the Spanish Constitution, as modified in 2011: “The limits of the structural deficit and public debt volume may be exceeded only in case of *natural disasters, economic recession or extraordinary emergency situations that are either beyond the control of the State or significantly impair the financial situation or the economic or social sustainability of the State*, as appreciated by an absolute majority of the members of the Congress of Deputies” (emphasis added).

<sup>67</sup> See Article 81(2) of the Italian Constitution, as modified in 2012: “No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle, or, *subject to authorisation by the two Houses approved by an absolute majority vote of their Members in exceptional circumstances*” (emphasis added).

<sup>68</sup> See Fabbrini (n 16), 19. According to Article 8 TSCG, “The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission’s report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice”. If one relies on the preparatory works, a more minimalist interpretation should be correct.

<sup>69</sup> It has been observed, however, that the Italian Constitutional Court has a history of effectively implementing (to a certain extent at least) seemingly undetermined constitutional clauses: see Gino Scaccia, “La giustiziaabilità della regola del processo di bilancio”, 2 *Rivista AIC* (2012), no. 3, at <http://www.rivistaaic.it/articolorivista/la-giustiziabilit-della-regola-del-pareggio-di-bilancio>; Massimo Luciani, national report on Italy (28th International Roundtable on Constitutional Justice, Aix-en-Provence, September 2012).

<sup>70</sup> German Federal Constitutional Court, judgment of the Second Senate of 12 September 2012 (2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2BvR 1440/12, 2 BvE 6/12), para. 316. The judgment is available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html). Likewise, the *Conseil*

To conclude on this point, flexibility clauses show that there must be some room left for the political branches, at least for the time being.

## 5. Lessons from the US

Comparison with the USA constitutional experience is useful because it shows the difficulties of the practical implementation of the principles of fiscal constitutionalism. Reliance on judicial review and distrust towards the mechanisms of representative democracy – at least at the state and municipal level – have a longer-lasting history in the US<sup>71</sup>.

Fiscal constitutionalism has led to subsequent waves of constitutional entrenchment at the state level in the USA. It is therefore possible to draw a distinction between public purpose requirements, limiting the authority of state governments to providing financial assistance to private enterprises and dating back to the pernicious effects of state assistance to private firms in the 1820s and 1830s; debt limitations, among which balanced-budget clauses, which were entrenched as a result of the wave of tax increases adopted to pay off the state debts accumulated during the canal and railroad boom in the very same period; and tax and expenditure limitations, which have been developing since the late 1970s as part of a wider “tax revolt”<sup>72</sup>.

Indeed, scholars are often very sceptical about the merits of entrenching financial policies in constitutional texts: states facing balanced-budget requirements often seek to move as much spending off-budget as possible. Moreover, incentives to use accounting strategies to hide overruns are created: this is at least paradoxical if you compare it with the European situation and the reasons – e.g. misrepresentation of data in public budgets – which have led to the elaboration of the Fiscal Compact. More interestingly, the link between constitutionally entrenched fiscal discipline and the overall economic health of a state is questionable<sup>73</sup>. Apart from this, it seems that political office-

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*constitutionnel*, while reaffirming its constitutional mission of reviewing *lois de finances*, underlined that “Article 8 stipulates the conditions under which, following the presentation of a report by the European Commission which concludes that *one of the parties has not complied with paragraph 2 of Article 3*, the Court of Justice of the European Union may be seized by one or more parties to the Treaty”, and concluded: “Considering that *paragraph 2 of Article 3 does not require that the Constitution be amended in advance*, the provisions of Article 8 do not have the effect of enabling the Court of Justice of the European Union to assess within this framework whether the provisions of the Constitution are compatible with the terms of this Treaty; that accordingly, if France decides to give effect to the rules laid down in paragraph 1 of Article 3 of the Treaty in accordance with the procedures stated in the second alternative in the first sentence of paragraph 2 of Article 3, Article 8 will not infringe the essential conditions for the exercise of national sovereignty” (*Conseil constitutionnel*, Decision no. 2012-653 DC (n 52) paras. 29-30 (emphases added)),

<sup>71</sup> See Richard C. Schragger, “Democracy and Debt”, 121 *Yale Law Journal* (2012), 864.

<sup>72</sup> See Richard Briffault, “Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law”, 34 *Rutgers Law Journal* (2003), 907. Interestingly, balanced-budget clauses do not allow contract debt without the approval of a *supermajority* in the legislature, of voters in a referendum, or both (Briffault mentions, among others, Article IX(15) of the Constitution of Michigan, providing that state long-term debt requires approval of two-thirds of members of each house of the state legislature and a majority of state voters in referendum).

<sup>73</sup> Schragger (n 71). See also Susan P. Fino, “A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions”, 34 *Rutgers Law Journal* (2003), 959. A good example for this point is the fate of Proposition 13 (and the

holders are neither strongly nor properly influenced by financial constitutional provisions.

Furthermore, courts in the US have been remarkably shy in constructing and enforcing those clauses. There might be three main reasons for this: first, courts tend to treat fiscal limits not as issues of fundamental rights (i.e. “truly” constitutional issues) but, rather, as ordinary legislation. Secondly, judges, who are often directly elected, might share programmatic orientations with political office-holders (this is a unique American feature, however, which seems unimaginable in Europe)<sup>74</sup>; and thirdly, courts may be influenced by the degree to which the provisions reflect current political values and enjoy contemporary political support<sup>75</sup>.

All of these circumstances might have contributed to undermining the authority of state constitutions in the US. This is all the more convincing if one considers that the Federal Constitution has very little to say about the financial aspects of constitutional law, except for conferring some powers on the Congress or setting procedural requirements for public expenditure.

The American experience shows that fiscal constitutional provisions raise many important questions. To summarise, a balanced-budget amendment should be enforceable, “it should nevertheless permit carefully delimited degrees of flexibility in its applications” in order to meet possible economic emergency, and it should be politically neutral<sup>76</sup>.

## 6. Assessing Transformations

### a. *The Procedural vs. the Substantial*

How can reforms throughout Europe be interpreted? Is there a direction in this wave of constitutional change? Are we facing some kind of transformation of the way constitutional law deals with financial issues?

Most important studies of financial constitutional law tend to analyze the rise and transformations of “financial constitutions” in the light of a dichotomy<sup>77</sup>. According to those insights, on one side there is a kind of constitutional politics which relies on *procedural* aspects of budgetary decision-making processes in order to improve the operation of the financial constitution.

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more recent Proposition 30) in California: see Editorial, “Proposition 30 could save California from catastrophe”, *The Globe and Mail* (Toronto, 4 November 2012), at <http://www.theglobeandmail.com/commentary/editorials/proposition-30-could-save-california-from-catastrophe/article4887059/>.

<sup>74</sup> It has been suggested, however, that elected judges, rather than those nominated by the governor and confirmed by the legislature, might be more willing to enforce fiscal constitutional rules effectively (see Henning Bohn and Robert P. Inman, “Balanced Budget Rules and Public Deficits: Evidence from the U.S. States”, National Bureau of Economic Research Working Paper no. 5533, April 1996, available at <http://www.nber.org/papers/w5533>).

<sup>75</sup> Briffault (n 72); see also Donald B. Tobin, “The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences”, 12 *Journal of Law and Policy* (1996), 153.

<sup>76</sup> Theodore P. Seto, “Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More)”, 106 *Yale Law Journal* (1997), 1456.

<sup>77</sup> See e.g. Guido Rivosecchi, *L'indirizzo politico finanziario tra Costituzione italiana e vincoli europei* (Padova, Cedam, 2007).

Accordingly, this scholarship is mostly interested in the allocation of powers and competences as an aspect of the relationship between the executive and the legislature. From the viewpoint of constitutional legal scholarship, this trend of legislative and constitutional reform can be seen as another step forward in the rationalization of political power<sup>78</sup>. Classical examples for the procedural option are those constitutional provisions which allow the executive to limit those parliamentary initiatives which may have financial implications<sup>79</sup>. Those clauses, however, have been criticized for failing to encompass the actual operation of relationships between the executive and the legislature. They seem to envisage a latent conflict between these two branches of government, thus downplaying the osmotic relationship between the executive and *its* parliamentary majority and the possibly negative effects of such cooperation<sup>80</sup>.

In the last three decades, the success of procedural financial constitutionalism has been the result of a wave of administrative reforms (e.g. New Public Management)<sup>81</sup> in most Western countries, and an increasing consciousness that institutional arrangements for public budgeting do matter<sup>82</sup>. Its main supportive forces lie in some international organizations (e.g. the IMF or the OECD) promoting, among others goals, transparency of budget documents, multiannual budgeting, strengthened ex-post scrutiny, and so forth<sup>83</sup>. The most elaborated legal output of this trend is perhaps the French LOLF *loi organique* on public budgets of 2001 (LOLF), whose significance was confirmed and strengthened at the highest level of the legal system by the “great” constitutional reform of 2008. The same could be said about Italian law no. 196/2009, containing a comprehensive reform of public finances and accounting. The preamble of Directive no. 2011/85/EU, which seeks greater homogeneity among national budgetary processes, is particularly eloquent on this respect: it stresses the importance of “the availability of fiscal data”, the damages brought about by “biased and unrealistic macroeconomic and budgetary forecasts”, and the crucial role of transparency “in ensuring the use of realistic forecasts for the conduct of budgetary policy”.

On the other side, *fiscal constitutionalism* – heavily influenced by the Virginia-based Public Choice School – is more interested in the constitutional entrenchment of substantial limitations to

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<sup>78</sup> As it was meant by Boris Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel* (Paris, Marcel Giard, 1931).

<sup>79</sup> See above discussion of the German Höpker-Aschoff Clause.

<sup>80</sup> Siekmann (n 30).

<sup>81</sup> See Sabino Cassese, “The Rise of the Administrative State in Europe”, 60 *Rivista trimestrale di diritto pubblico* (2010), 981.

<sup>82</sup> See Alberto Alesina and Roberto Perotti, “The Political Economy of Budget Deficits” (1995), Staff Papers – International Monetary Fund 1; Chiara Goretti and Luca Rizzuto, “Il ruolo del parlamento italiano nella decisione di bilancio – evoluzione recente e confronto con gli altri paesi” (2010), at [http://www.bancaditalia.it/studiricerche/seminari/2010/parlamento\\_italiano/goretti\\_rizzuto.pdf](http://www.bancaditalia.it/studiricerche/seminari/2010/parlamento_italiano/goretti_rizzuto.pdf).

<sup>83</sup> See Giuseppe Pisauro, “La valutazione della spesa e il processo di bilancio”, 16 *Giornale di diritto amministrativo* (2010), 684.

budgetary decisions. The focus here is more on the *content* of financial decisions than on procedures. The most common (and discussed) manifestations of this trend are balanced-budget constitutional amendments. The chief goal of fiscal constitutionalism is to obtain (by means of formal constitutional entrenchment) something which was originally an unwritten constitutional principle (or “an old-time fiscal religion”) before the fundamental turning point of the establishment of the post-war welfare state<sup>84</sup>. It should be noticed, however, that Paul Leroy-Beaulieu, a leading authority in classical economics, pleaded for a milder version of the golden rule, allowing public debt in order to finance investment (as happened in Germany, incidentally, between 1969 and 2009)<sup>85</sup>.

According to the letter of Art. 3(1) TSCG – the so-called “Fiscal Compact” – and of many of the new balanced-budget clauses in national constitutions throughout the Economic and Monetary Union, fiscal constitutionalism is undoubtedly having one of its finest hours.

This article does not follow in the path of the studies that rely on this classic distinction (procedural vs. substantial approach). In my opinion, the most interesting aspect in constitutional reforms since 2009 lies in the observation of how financial constitutions work and how they are enforced, if at all. The relevant question is not the *what* (i.e. whether financial constitutions take the shape of a procedural arrangement or a substantial requirement) but the *how* of financial constitutional law. This distinction might be useful to explain the ongoing transformations in the EU. It draws on the current debate about the respective virtues of “political” and “legal” constitutionalism, notions which have been coined in order to interpret the internal tensions characterizing present-day constitutional life in Anglo-Saxon countries.

The ongoing debate about the financial constitution of the EU can hardly be analysed in the light of the conceptual categories of US fiscal constitutionalism. The quest for financial (and, supposedly, economic and political) stability is much more important to the European debate than Public-Choice-inspired projects of constitutional reform. Fiscal constitutionalism appears to be related to an American line of thought – ultimately arguing for a reduction in the size of government – which cannot be easily recognized in present-day European debates: as it was accurately noted,

“simplifying formulas – e.g. ‘less government, more market’ – are imperfect and elusive syntheses. In fact, the State is replaced by other public powers (the EU, independent authorities) and the diminution of the key role of public powers is fully counterbalanced by

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<sup>84</sup> See James M. Buchanan and Richard E. Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes* (San Diego, Calif., Academic Press, 1977), ch. 2; Antonio Martino, “Budget Deficits and Constitutional Constraints”, 8 *Cato Journal* (1989), 695.

<sup>85</sup> See French National Assembly, *Rapport fait au nom de la Commission spéciale chargée d'examiner le projet de loi organique (n° 198), après engagement de la procédure accélérée, relative à la programmation et à la gouvernance des finances publiques*, 10 (submitted 3 October 2012), at <http://www.assemblee-nationale.fr/14/pdf/rapports/r0244.pdf>.

their role as rule-making and monitoring authorities<sup>86</sup>.

### ***b. The Political vs. the Legal***

Theories of political constitutionalism – and the political constitution – state that political office-holders “are held to constitutional account through political means, and through political institutions (for example, Parliament)”. A legal constitution, on the other hand, “imagines that the principal means, and the principal institution through which the government is held to account is the law and the court-room”<sup>87</sup>. Political constitutionalism defends the democratic process against judicial review “not on the ground that democracy is more important than constitutionalism, rights or the rule of law, but because democracy embodies and upholds these values”<sup>88</sup>. Political constitutionalism can be said to have developed as a democratic reaction against a perceived hyper-judicialization of constitutional issues<sup>89</sup>. Therefore, it tries to rehabilitate the virtues of the political process as a fundamental component of contemporary constitutionalism.

For the purposes of this study, the most evident practical difficulty about political constitutionalism – and its concrete outcomes in the contemporary constitutional landscape – is the actual weakness of contemporary parliaments. Such weakness is particularly serious when it comes to the legislature exercising its scrutiny function vis-à-vis the executive. Concisely speaking, “the political constitution relies on the rigour and vigour of the political process. The more open, transparent, participatory, representative and deliberative politics is, the better the model will work in practice”<sup>90</sup>. However, the rise of strongly centralized executives since the 1980s has led to an apparent marginalization of parliaments<sup>91</sup>. This situation seems particularly serious when it comes to holding the executive to account<sup>92</sup>; with regard to the legislative function, in turn, the picture might be more nuanced, most of all in *non-financial* issues<sup>93</sup>.

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<sup>86</sup> Sabino Cassese, “La nuova costituzione economica” in Sabino Cassese (ed), *La nuova costituzione economica* (5th edn, Roma-Bari, Laterza, 2012), 324. See also Giulio Napolitano, “The Role of the State in (and after) the Financial Crisis: New Challenges for Administrative Law” in Susan Rose-Ackerman and Peter L. Lindseth (eds) *Comparative Administrative Law* (Cheltenham, Elgar, 2010); Giulio Napolitano (ed), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali* (Bologna, Il Mulino, 2012).

<sup>87</sup> Adam Tomkins, *Public Law* (Oxford, OUP, 2003), 18-19.

<sup>88</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, CUP, 2007), 260. See also J.A.G. Griffith, “The Political Constitution”, 42 *Modern Law Review* (1979), 1; Jeremy Waldron, “The Core of the Case against Judicial Review”, 115 *Yale Law Journal* (2006), 1346.

<sup>89</sup> See Marco Goldoni, “Il ritorno del costituzionalismo alla politica: il ‘Political’ e il ‘Popular’ Constitutionalism”, 30 *Quaderni costituzionali* (2010), 733.

<sup>90</sup> Tomkins (n 87), 20.

<sup>91</sup> See Leopoldo Elia, “La presidenzializzazione della politica”, 22 *Teoria politica* (2006), 5.

<sup>92</sup> See Adam Tomkins, “What is Parliament For?” in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing, 2003), 53; Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford, Oxford University Press, 2006).

<sup>93</sup> See Anthony W. Bradley and Cesare Pinelli, “Parliamentarism” in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012), 668-69; Alain

The importance of this point is particularly striking when financial issues are concerned: as said above, attempted reforms in many countries have tried, not so much to alter the balance of power between the legislative and executive branches (thereby opposing an arguably inevitable trend in favour of the latter), as to strengthen parliamentary oversight in order to obtain healthier public finances and a more transparent and effective implementation of public policies. Nowadays, oversight is supposed to be the main parliamentary activity in semi-presidential systems or those parliamentary systems where the executive can rely on strong and docile majorities<sup>94</sup>. Here lies the most serious structural problem of any financial constitution, no matter what it provides for: the vigour of the political process, and the limited capacity of representative assemblies to effectively exercise their functions – be they of policy co-determination or of oversight – vis-à-vis the executive. In light of this broad context, what changes can be discerned in the respective positions of the branches involved in the management of day-to-day business?

On the side of parliaments, the failure of representative legislatures to affirm their role in budgetary matters has been relentlessly observed. In Germany, scholars have claimed that a “deparliamentarisation” (*Entparlamentarisierung*) of budget is taking place<sup>95</sup>. Discussion of budget plans was said to be a “pointless rite” forty years ago<sup>96</sup>. Recent attempts to reinvigorate parliamentary oversight were apparently unsuccessful in the short term. Legislators in continental European jurisdictions are not particularly interested in controlling the execution of the budget, due partly to a lack of political incentives<sup>97</sup>. Meanwhile, strong executives have acquired extensive control over the budgetary process.

Thus, the case for a (prevailing) political understanding of financial constitutional issues might not be so strong as long-standing legal traditions might suggest. So what about a *legalization* of this part of the law of the constitution? What kind of judicial review will European constitutional courts be willing to perform when dealing with considerably “thicker” financial constitutions?

In the debate about political constitutionalism the greatest emphasis has been placed on judicial review when it assesses the compatibility of legislation with constitutional rights. However, the challenge of legal constitutionalism is not less ambitious when it comes to the review of power-

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Delcamp, “La perception du contrôle parlementaire. Comment le rendre plus attractif”, 34 *Pouvoirs* (2010), no. 134, 109; Luca Gori, “Problemi di ‘metodo’ per una ricerca sulla decretazione d’urgenza ed il ruolo del Parlamento” in Roberto Zaccaria (ed), *Fuga dalla legge? Seminari sulla qualità della legislazione* (Brescia, Grafo, 2011), 95.

<sup>94</sup> See Fabbrini (n 16), 15.

<sup>95</sup> Christian Waldhoff, “Grundzüge des Finanzrechts des Grundgesetzes” in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 5, *Rechtsquellen, Organisation, Finanzen* (3rd edn, Heidelberg, C.F. Müller, 2007), 898.

<sup>96</sup> Sabino Cassese, “Controllo della spesa pubblica e direzione dell’amministrazione”, 4 *Politica del diritto* (1973), 40 f.

<sup>97</sup> See e.g. Carcassonne (n 43), 81.

related or “structural” constitutional provisions<sup>98</sup>. Some authors try to engage with this issue by means of a relativization of this (not rigid)<sup>99</sup> *summa divisio* of constitutional provisions. They claim that some kinds of structural review are distinguishable from rights review and are not susceptible to democracy-based objections. Goldsworthy, for instance, includes among those clauses: provisions dividing powers within a federation; “manner and form” requirements governing the composition, powers, and procedures of the legislature and its houses; requirements that only independent courts may adjudicate legal disputes concerning the rights and duties of the litigants; and provisions forbidding states or provinces within a federation from discriminating against the residents or businesses of other states or provinces<sup>100</sup>. What may this mean with regard to constitutional courts in the EMU? One might expect, for instance, that they engage in a stricter scrutiny of constitutional procedural guarantees of the budgetary process than they used to do before<sup>101</sup>. The great question, however, is still how far they will go in reviewing legislation under the new, substance-focused constitutional clauses.

## 7. Concluding Remarks

In light of the above discussion, it appears that the current European scene is contradictory and not exempt from paradoxical traits.

First, there is an evident paradox. On the one hand, the German Federal Constitutional Court has been strenuously defending the sovereignty of German constituent power and “the *political formation* of the economic, cultural and social living conditions” at the national level, among which “fundamental fiscal decisions on public revenue and public expenditure”<sup>102</sup> occupy a central place.

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<sup>98</sup> See Adrienne Stone, “Judicial review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review”, 28 *Oxford Journal of Legal Studies* (2008), 1.

<sup>99</sup> See Massimo Luciani, “I diritti costituzionali tra Stato e Regioni”, 33 *Politica del diritto* (2002), 349-50; Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York, Norton, 1999).

<sup>100</sup> See Jeffrey Goldsworthy, “Structural Judicial Review and the Objection from Democracy”, 60 *University of Toronto Law Journal* (2010), 153 f.; Nicholas Aroney, “Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism”, 27 *University of Queensland Law Journal* (2008), 129. Similarly, in the American debate about judicial activism, “[i]t is often argued ... that there is greater justification for court policymaking in some areas than in others: and that the only concrete boundary that can be traced in this regard is between judicial interventions in substantive policy areas and judicial interventions ensuring minimal ‘*representation-reinforcement*’ requirements” (Leonardo Pierdominici, “Constitutional Adjudication and the ‘Dimension’ of Judicial Activism. Legal and Institutional Heuristics”, STALS Working Paper no. 3/2011, 15; paper available at [http://www.stals.ssup.it/files/Pierdominici\\_3\\_2011.pdf](http://www.stals.ssup.it/files/Pierdominici_3_2011.pdf)).

<sup>101</sup> There is some evidence, for example, that the Italian Constitutional Court has been stressing more effectively the nexus between Article 81(3) Const. and financial stability in the last few months: see Camilla Buzzacchi, “Copertura finanziaria e pareggio di bilancio: un binomio a rime obbligate?”, 2 *Rivista AIC* (2012), no. 4, at <http://www.associazionedeicostituzionalisti.it/articolorivista/copertura-finanziaria-e-pareggio-di-bilancio-un-binomio-rime-obbligate>.

<sup>102</sup> German Federal Constitutional Court, judgment of the Second Senate of 30 June 2009 (2 BvE 2/08, 2BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 – *Lisbon judgment*), paragraphs 249 and 252, at [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html).

On the other hand, a “Europe that is speaking German” would like to drive Member States to incorporate the golden rule in their Constitutions, thereby limiting the political process<sup>103</sup>.

Secondly, there is a seemingly unstoppable push towards the normative entrenchment of some kind of fiscal constitutionalism – this trend, however, is perhaps just the last stage (in Europe, at least) of a transnational movement of constitutional politics<sup>104</sup>. However, I think that the other, perhaps more dramatic shift towards legal constitutionalism has not yet completely manifested itself.

Even if it is announced in the Fiscal Compact that it will “fully respect the prerogatives of national Parliaments” (Article 3(2)), its more innovative provisions clearly represent a corrosion of political decision-making at the national level (not to mention national constitutional identities, which should be protected under Article 4 TEU). It is not clear, however, the extent to which such corrosion would take place – and financial constitutional laws will be *legalized*. In fact, the (cautiously limited) room for constitutional review of legislation under those clauses in France, Germany, Italy and Spain looks more like Germanic *Staatsgerichtsbarkeit* – a kind of review deeply rooted in the political process. Be that as it may, this is perhaps another chapter in the long history of constitutional conflicts within federal (or, more broadly, complex) legal systems and the perceived, incremental trend towards the quest for judge-made (instead of political) solutions<sup>105</sup>.

According to a recent major account of the foundations, transformations and possible decline of Western public law, the present age is marked by the rise of the so-called ephorate, “a new branch of government comprising office-holders who possess the type of expertise and specialised knowledge that has become the basis of effective governmental decision-making ... [it] expresses a new phase in the development of government”<sup>106</sup>. Loughlin argues that financial issues are the area where this trend towards depoliticization is most evident. Is that hypothesis correct when recent constitutional transformation within the EU are taken into account? In my opinion, the answer should be slightly nuanced: even the apparent victory of a substantial approach to financial constitutional issues – with the constitutional entrenchment of balanced-budget clauses – may not

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<sup>103</sup> See LB and JHR, “The Fiscal Compact and the European Constitutions: ‘Europe Speaking German’”, 8 *European Constitutional Law Review* (2012), 1; Giacomo DelleDonne, “Le procedure di bilancio tra equilibri delle forme di governo e ricerca della stabilità economica: una ricostruzione comparatistica delle esperienze francese e tedesca”, 13 *Diritto pubblico comparato ed europeo* (2011), 489 f.

<sup>104</sup> See Raffaele Bifulco, “Il pareggio di bilancio in Germania: una riforma costituzionale postnazionale?”, 1 *Rivista AIC* (2011), no. 3, at <http://www.associazionedeicostituzionalisti.it/articolorivista/il-pareggio-di-bilancio-germania-una-riforma-costituzionale-postnazionale>.

<sup>105</sup> See Hans Kelsen, “Die Bundesexekution. Ein Beitrag zur Theorie und Praxis des Bundesstaates, unter besonderer Berücksichtigung der deutschen Reichs- und der österreichischen Bundes-Verfassung” in *Festgabe für Fritz Fleiner zum 60. Geburtstag* (Tübingen, Mohr Siebeck, 1927), 127; Stefano Grassi, “Conflitti costituzionali” in *Digesto delle discipline pubblicistiche*, III, 1989, 362.

<sup>106</sup> Loughlin (n 22), 450.

result in their real depoliticization. The answer depends on the cleavage between a political and a legal understanding of constitutionalism, and how deep the shift towards the latter has been so far.

Perhaps the most plausible path of the legalization of financial constitutions is related to the (still vague) emergence of *new* constitutional goods, e.g. responsibility towards future generations, which lies, almost inevitably, beyond the scope of incumbent representative assemblies (and the executives which they support). In the words of a German *Land* Constitutional Court which was declaring the illegitimacy of a budgetary law, “citizens and parliaments in the future have to be protected against the risk of losing their necessary possibilities of financial action (according to their criteria) to cope with problems of the day”<sup>107</sup>.

According to constitutional pluralists, there are essentially “three main sources of constitutional and democratic added value” which supranational integration in the EU can bring to national constitutional democracies. Among these, the taking into account of out-of-state interests that may be affected by the national political process (outbounded democratic externalities) and self-imposed external constitutional discipline within national democracies are of the greatest relevance for the purposes of this analysis<sup>108</sup>. They provide an insightful interpreting framework for the negative effects of a Member State’s unhealthy financial conduct in the whole Economic and Monetary Union and the positive interplay of national and supranational constitutional disciplines.

Thus, preservation of the *political* aspects of financial constitutions in the future might provide the most plausible justification for their actual *legalization* in the present. It remains for constitutional courts to find out an appropriated balance between these two essential components of constitutionalism when adjudicating cases under the new balanced-budget clauses.

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<sup>107</sup> Constitutional Court of North Rhine-Westphalia, Judgment of 15 March 2011 (VerfGH 20/10), at [http://www.vgh.nrw.de/pressemitteilungen/2011/05\\_110315/110315\\_VGH\\_Urteil.pdf](http://www.vgh.nrw.de/pressemitteilungen/2011/05_110315/110315_VGH_Urteil.pdf). See also Portuguese Constitutional Court, *acórdão* no. 353/2012 of 5 July 2012, Opinion by Justice Maria Lúcia Amaral, at <http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html>.

<sup>108</sup> See Miguel Poiars Maduro, “Three Claims of Constitutional Pluralism” in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012), 62. For this remark I am indebted to Carlo Maria Cantore and Giuseppe Martinico. The “external constraint” (*vincolo esterno*) is a recurring motif in the Italian debate, where it is seen as a crucial catalysing force in the process of modernization of Italian legal and economic institutions (Guido Carli, *Cinquant’anni di vita italiana* (Roma-Bari, Laterza, 1993), 5 f.).