Judicial Review of the Constitutionality of Laws during the Economic Crisis in Greece: The Methodological Transition from the Marginal to the Intensive Review Model

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Abstract. This paper focuses on the methodology of judicial review of the constitutionality of laws in Greece during the period of economic crisis. First, it examines the concept and legal base of the constitutional review carried out by the Supreme Courts of Greece. Then, it analyzes the methodology followed by the courts and highlights the different review models that were applied during the period of economic adjunction. Finally this paper examines the role of Judge regarding the principle of the Separation of Powers.

Keywords: constitutional judicial review, principle of proportionality, public interest, separation of powers

Introduction

In Greece, all courts have the power to entertain claims of unconstitutionality (diffused system). In the context of this system, each court, regardless of its position in the judicial hierarchy, the branch of justice to which it belongs and the type of dispute it is called upon to resolve, has jurisdiction to examine the constitutionality of the law, which is applicable over the dispute (Boukouvala, 2020).

The system of constitutional checks and balances is an essential element of democratic Government. It is based on the principle of the Rule of Law (Article 25 par. 1 of the Constitution) and the principle of the Separation of Powers (Article 26 of the Constitution). The courts are legitimized to exercise constitutional review and have the mission to enforce the law in a specific dispute, because they enjoy all the guarantees of an independent and impartial power, endowed with responsibilities of "judgment" and not "action" or "will" (Sakellaropoulou, 2007).

The review of the constitutionality of laws is also based on the following constitutional provisions: Article 87 par. 2, which stipulates: "*In the discharge of their duties, judges shall be subject only to the Constitution and the laws; in no case whatsoever shall they be obliged to comply with provisions enacted in violation of the Constitution*". Article 93 par. 4, which stipulates: "*The courts shall be bound not to apply a statute whose content is contrary to the Constitution*."

In Greece, therefore, the constitutional review of laws is **diffuse, decentralized, incidental, and concrete**. Each judge of all instances may decide whether the law he is called upon to apply is in accordance with the Constitution. Judges are bound by the laws enacted by the legislature, but the supreme law is the Constitution, which binds them all: if a law is contrary to the Constitution, the judge is obliged **not to apply** it due to his compliance to the Constitution. However judicial review can be exercised only in specific cases or controversies and only after laws have been taken into effect or have already occurred, and then only when they involve a specific dispute between litigants.

However, in practice, it has been observed by theorists that the initial image of diffuse control is changed through the common procedural provisions of the legal remedies. The review is in fact concentrated at the level of the three Supreme Courts and, in fact, usually in their Plenary Session and, in cases of disagreement between two of them, at the level of the Supreme Highest Court (Skouris & Venizelos, 1985; Venizelos, 2006).

Indeed, the only case of main and centralized review in Greece is when the Special Highest Court (SCH) is convened. The SHC is convened when two of the three highest courts of the country (Council of State, Supreme Court, Court of Audit) issue contradicting decisions regarding the constitutionality of a law. In this case, the SHC makes a final decision on the constitutionality of the law as the main object of the trial and not in the context of specific disputes (i.e. it does not rule on cases pending before the disputing courts). Its decision, if it considers the law unconstitutional, has the consequence of the **disappearance of the law from the legal order**. According to Article 100 of our Constitution: "1. *A Special Highest Court shall be established, the jurisdiction of which shall comprise: a)… e) Settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Council of State, the Supreme Civil and Criminal Court or the Court of Audit … 5. When a section of the Council of State or chamber of the Supreme Civil and Criminal Court or of the Court of Audit judges a provision of a statute to be contrary to the Constitution, it is bound to refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court of this article. The plenum shall be assembled into judicial formation and shall decide definitively, as specified by law*."

Judicial review of the constitutionality of laws is **essential and not formal**. The courts check whether the **content of the law contradicts the content of the Constitution**. In other words, they check only the essential and not the formal unconstitutionality of the law. They do not check the observance of the procedural provisions of the Constitution, the internal formal unconstitutionality, the constitutional rules that concern the process of elaboration, submission, discussion and voting of laws and the distribution of responsibilities between the state bodies for their voting. These elements belong to within the functioning of the parliamentary body and are not checked, in view of the principle of the Separation of Powers and the autonomy of the parliament. In case of unconstitutionality, the courts simply do not apply the law and take a decision that applies only to the parties of the legal dispute. They do not annul the unconstitutional law, as in the systems of centralized control (Boukouvala, 2020).

The Methodology of Judicial Review of the Constitutionality of Laws in Greece during the Period of Economic Crisis

The Greek Government decided in 2010 to implement an economic policy program in close consultation with the European Commission, the European Central Bank, and the International Monetary Fund (IMF). The result of this policy was the issuance of many pieces of legislation, which, with the aim of reducing the State's expenditures and increasing its revenues, resulted in significant reductions in salaries and insurance benefits and, respectively, significant increases in tax burdens. The Courts found themselves in the need to evaluate from a constitutional point of view many of the above legislative initiatives, already from the beginning of the economic crisis but also throughout its duration, until today.

The regulations contained in the so called "memorandum laws" caused a difficult and largely new problem for the Council of State and the Court of Audit. Mr. Sarmas, Vice-President of the Court of Audit vividly describes: "O*n the one hand, courts, respecting the principle of Separation of Powers, had to recognize in the legislature, responsible for political decision-making, a margin of action capable of guaranteeing its* ***freedom to legislation issuance****. On the other hand, the courts had before them the parties who did not seek the respect of a* ***vague objective legality****, but the* ***restoration or the removal of the violation of their fundamental rights*** *that had been crucially affected by the measures taken*" (Sarmas, 2019).

Thus, our jurisprudence, during the period of economic crisis, in its attempt to balance the conflicting interests, did not apply a single methodology, but diverged, depending on the

time phases that concerned the legislated measures. In particular, during the initial period of implementation of the fiscal measures (from 2010 to 2014), the judicial authority recognized to the legislator a **wide discretion in choosing the means**, in order to serve a constitutionally legitimate purpose (**marginal control**), while in the subsequent period (from 2014 to 2018), judicial review required the legislator to justify not only the reason why it imposed a measure restricting a constitutional right, but also the reason why it specifically chose that measure and not some another milder (**intensive control**) (Kaidatzis, 2015). Respectively, during the first period, the Supreme Courts of the country showed a **tendency of judicial self-restraint**, judging as constitutional the initiatives of the legislator, while in the course, especially after the year 2014, the intensity of judicial review increased.

1st Sub-period (2010-2014)

With the decision no. 668/2012, the Council of State, sitting as a full court, ruled that the reduction of salaries and pension benefits of employees and pensioners in the public sector established by the laws nos. 3833/2010 and 3845/2010, was part of a wider, fiscal adjustment program, which aimed to rescue first and then reform Greek economy. These aims fall within the concept of public interest and at the same time constitute objectives of common interest in the euro area, whereas the European Union law implements the obligation for fiscal discipline and stability of the euro area as a whole. The Court accepted that these measures, due to their nature, immediately contributed to the reduction of public expenditure and in this sense they were not, in principle, **manifestly**, **inappropriate** for the attainment of the objectives pursued by them, **nor were they unnecessary**. The Court **explicitly** took into account the fact that the legislature's assessment of the measures to be taken in order to deal with the critical financial situation as identified by it is subject to **only marginal judicial review**.

With the decision no. 1620/2011, the Council of State ruled that the differentiation, between the interest rate related to the debts of the State and the higher interest rate applicable to the debts of individuals, entailing the reduction of the state debt, is fully justified. This is because it contributes to the **achievement of the major national interest goals of ensuring fiscal balance initially and thus preventing the economic collapse of the country**. So, the Court decided that the disputed differentiation of the interest rates, implied by Article 21 of the Code of Public Laws, does not violate the constitutional principle of equality or the Article 1 of the First Additional Protocol to the ECHR, taking into account that there is a reasonable relationship between the interest rates.

The same methodology was followed by the Council of State in a series of decisions judging as constitutional all the legislative measures enacted during the implementation of the first Memorandum of Understanding. So, the imposition of a non-regular contribution to the income of natural persons imposed by the law no. 3758/2009 was deemed lawful on the grounds that the high incomes should contribute more for the confrontation of the crisis. So, it was judged that this measure was not **apparently inappropriate or contrary** to the principle of tax capacity and was therefore not contrary to the Constitution (Council of State, Judgment no. 1685/2013).

Similarly the "haircut" of Greek bonds (broadly known as PSI), which took place in March 2012 was judged to be compatible to the constitution, as this was done for "**reasons of public interest**" (Council of State, Judgment no. 1116/2013). In this case, the Greek authorities and the private sector had in the first place agreed on a voluntary exchange and a reduction of 53.5% of the value of the government bonds held by the private creditors [Private Sector Involvement (PSI)]. By Law 4050/2012 of 23 February 2012, Greece exchanged all these bonds (including the securities held by creditors who had rejected the voluntary exchange offer) on the basis of "collective action clauses" (CAC). As a result, the nominal value of the

exchanged bonds of private creditors decreased by 53.5% compared to the value of the original bonds.

The same approach was adopted concerning the legislative measures taken to regulate private legal relations. Characteristically, the Council of the State considered as constitutional a series of measures such as the reduction of salaries by 22% for employees and by 32% for younger employees under 25, the abolition of the family allowance, the suspension of the binding effect of the national general collective labor agreements (lower salaries) after negotiations between employers and employees. The court recognized that the articles 2 to 5 of the contested Act of the Council of Ministers 6/2012 limited the scope of collective autonomy, as well as the general labor and wage rights of employees of the private sector of the economy and public enterprises. These arrangements as well as the reduction of the minimum wages and salaries, which was initially imposed by Article 1 of the Act no. 6/2012 and, subsequently, by the law no. 4093/2012, constituted a **serious reduction of the rights of the employees** and a corresponding weakening of their position (Papadopoulos, 2017). However, the Court judged that they were **part of a wider system of regulations and measures**, which extended to a wide range of public policy areas and were described in detail in the Memorandum, a text of a purely technical nature, the scientific quality and adequacy of which cannot be reviewed by the court. These measures aimed - as mentioned in the explanatory report of this law and were analyzed in more detail in the Memorandum - to address the acute problem of inflation of government debt and budget deficits, through, inter alia, structural reforms in the labor market, by reducing labor costs and improving the competitiveness of the Greek economy. The Court explicitly stated that it lacked the power to review legislative choices but nevertheless judged that these measures, taken under the very exceptional circumstances set out, in front of the risk of default and the collapse of the national economy with unforeseen economic and social consequences, do not appear as **inappropriate** or **not necessary** for the achievement of the above, constitutionally legitimate, purpose. The Court repeated that it can only exercise the marginal control of the constitutionality of the respective regulations of law no. 4046/2012 and of the Act no. 6/2012 (Council of State, Judgment no. 2307/2014).

A common feature of the aforementioned decisions is the **marginal review of the constitutionality** of the laws, which was expressed through the **self-restraint of the court** and **the recognition of the dominant role of the Legislator**, due to the extraordinary and critical conditions for the country. The Legislator, who was represented in Court by the competent Minister, simply had to prove that the measures he took were not "**unnecessary**" or **"inappropriate"**, citing the explanatory memorandum of the Law, without detailed, specialized and thoroughly documented studies. The burden of proving the "non-necessity" of the measures falls on the plaintiff. In simple terms, the judicial reasoning is worded as follows: "**The measures are considered constitutional, unless proven otherwise**" (Kaidatzis, 2016).

This methodology, which is a dominant practice of the Council of State under normal circumstances, was confirmed by the European Court of Justice in the judgment of 7 May 2013, Koufaki and ADEDY v. Greece. The Court noted that the adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history. In that connection the Court reiterated that the notion of "public interest" was to be considered necessarily extensive. In this sense the margin of appreciation available to the legislature in implementing social and economic policies is a wide one. The Court thus should respect the legislature's judgment as to what is "in the public interest" unless that judgment is **manifestly without reasonable foundation** (Pervou, 2016; Sychenko, 2017).

Furthermore, according to the settled case-law of the European Court, the principle of proportionality requires that acts of the EU institutions should be appropriate for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is

necessary in order to achieve those objectives. With regard to judicial review of compliance with those conditions the Court has accepted that in the exercise of the powers conferred on it **the EU legislature must be allowed a broad discretion** in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. **Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure**, since its legality can be affected **only if the measure is manifestly inappropriate** having regard to the objective which the competent institution is pursuing. Therefore, according to the European Court of Justice, the legislature must apply the principle of proportionality in making its political decisions by choosing the least onerous measure, and the Judge is not entitled to substitute his own assessments for those initially introduced by the Legislature (ECHR, American Express Company and others, 2018; ECHR, Vodafone and others, 2010; Sarmas, 2019).

2nd Sub-period (2014-2018)

From 2014 onwards, there has been a shift in the methodology of case law review, from marginal to intensive. The Supreme Courts of the country solemnly began to take into account the **cumulative effect of the measures**, i.e. the fact that the measure at issue in each case was imposed after previous measures had been imposed, which, overall judged, imposed an excessive burden on those who already suffered. The cumulative effect of the measures was considered to infringe the principles of proportionality, demanded full documentation of the necessity of the judged measure and in fact required its prior documentation with data that the legislator actually had taken into account before the legislation was finalized. This is an **international originality**, which is worth considering by quoting some typical decisions.

With the judgments 2287 and 2288/2015 of the Plenary Session of the Council of State, the cuts in pensions, which occurred, pursuant to the second Memorandum of Understanding (Laws no 4046/2012, no 4051/2012 and no 4093/2012), were deemed unconstitutional. The reasoning of the Council is rather interesting: (a) these cuts were introduced following previous pension cuts - which were deemed constitutional, (b) two years had passed since the first shock of the financial crisis and the danger of collapse and (c) a specific, thorough and documented study on the necessity and appropriateness of the measures had not been carried out before the measures were taken.

In particular, these decisions ruled that in cases of extremely unfavorable fiscal conditions, according to article 22 par. 5 of the Greek Constitution, the intervention of the legislator for the reduction of the still awarded pensions must not violate the constitutional core of the social security right, that is, the granting to the pensioner of such benefits as allow him to live with dignity. In order to enable the judicial review of the relevant legislative measures from the above constitutional points of view, it was considered that the legislator, when taking measures that reduce pension benefits, is obliged to have carried out a special, thorough and scientifically substantiated study. From this study should emerge that a) the specific measures are **indeed appropriate** but **also necessary** for tackling the problem of the viability of social security institutions, taking into account the factors that caused it, so that the adoption of these measures is in line with the constitutional principles of proportionality and equality in public burdens, and b) the consequences of these measures on the living standards of the affected persons, combined with **all measures taken** (e.g. taxes), with **all the socio-economic conditions of the given situation**, taken cumulatively, do not have, such an effect as to lead to an unacceptable violation of the core of the constitutional right to social security. Following these, it was judged by the above decisions that the disputed provisions of Laws 4051/2012 and 4093/2012 are contrary to the above constitutional provisions, as well as to Article 1 of the First Additional Protocol of the ECHR, because these provisions attempted, **for the umpteenth time, a new reduction of pension benefits of the same group of affected citizens**, without

having been preceded by **a thorough study**, which established and substantially demonstrated that the taking of the specific measures was in line with the relevant constitutional commitments arising, inter alia, from the institution of social security, the principles of equality and proportionality and the protection of human dignity.

For the same reason, the reductions of the salaries of military personnel and university professors, the reductions in the pensions of the judiciary, of the doctors of the National Health System and other insurance funds were deemed unconstitutional (Council of State, Judgement nos. 2192/2014, 4471/2014; Court of Audit, Judgement no. 4327/2014). The general reasons of public interest invoked by the Administration to justify the disputed reductions were not enough to make them constitutionally tolerable.

The Council of State justifies the differentiation of the judicial review in terms of methodology as follows: The previous judgments on the constitutionality of the rules issued pursuant to the first Memorandum evaluated as crucial the fact that "*there was an immediate risk of collapse of the country's economy and bankruptcy*". The subsequent laws which were issued pursuant to the second Memorandum were voted, when two years had passed after the initial shock and the first urgent measures had already been taken. The Court, therefore, **reversed the burden of proof** and **required the Legislature to demonstrate the necessity, appropriateness, and sticto sensu proportionality** of budgetary measures, so that it could be judicially examined whether the principles of proportionality and equality in public burdens were respected. In other words, a significant procedural burden was added to the Legislator, not in order to control his political choices, but in order to make **effective judicial review** possible. In simple words, the judicial reasoning was reversed: "**The measures are not constitutionally tolerated, unless proven otherwise** (Kaidatzis, 2016)."

In the above mentioned cases, the principle of proportionality has been used to determine the legitimacy of regulatory intervention obviously with increased intensity. The differentiation of the intensity level of the principle of proportionality is not new in the course of its application. As it is stated, "*in its modern incarnation, proportionality is a three or four-part structured test for assessing the exercise of discretionary power but does not come with any a priori or in-built level of intensity. The intensity with which it is applied is decided by the courts and **will vary between different types of case**. There is no particular intensity of review built into the test…. **The latter jurisprudence powerfully demonstrates the variable intensity with which proportionality review can be used**. The intensity of review is indicative of the degree of control that the courts believe is fitting for the particular type of case. Some rights are more important than others, and not all cases concerning the same right are of equal significance. The courts must then exercise creative judgment as to the level of proportionality review that is most appropriate for that type of rights-based challenge*" (Craig, 2020). Consequently, if a court is minded to engage in intensive substantive proportionality review, as the Greek Court of the 2nd sub-period, it will be more minded to demand more evidence to substantiate the contested decision and impose the burden of persuasion predominantly on the state trying to justify the suitability and necessity of its measure (Pirker, 2013).

Conclusion

In the context of the Greek constitutional legal order, the Judge must prudently and seriously draw **the limits of the review of the constitutionality** of the laws, beyond which the unchecked substantive assessment of the Legislator is extended. The setting of these limits is particularly important and must be very convincing, as this judgment is not reviewed by any other state body.

The choice of the methodological instrument (marginal or intensive review) has a decisive influence on the result of the review, which requires the Judge to justify his choice, following, for reasons of legal certainty, general and uniform criteria. On this issue of criteria,

the judgments we have described agree on the following point: **The more severe the restriction of the right affected by a piece of legislation, the deeper the reasoning on which the piece of legislation is based**. And the Judge is called upon to investigate, not the correctness of political assessments and choices, but the compatibility of legislative measures with the Constitution. The Judge does not prescribe the appropriate measures to be legislated, nor does he even annul the law, he simply does not apply it. Subsequently the democratically legitimized legislator takes over, who has broad power to formulate his policies and make his decisions after complex evaluations and assessments of both political and economic or social nature (Tridimas, 2009). Otherwise, as it has been pointed out, the exercise of the judicial review carries the risk of a possible **judicial activism** whereby judges allow their personal views about public policy, among other factors, to guide their decisions (Vrontakis, 2011)**.**

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