STYLIANOS-IOANNIS G. KOUTNATZIS

The Proportionality Principle in Greek Judicial Practice

ABSTRACT

Greek courts have recognized constitutional supremacy as the basis for judicial review of the constitutionality of legislation since the late nineteenth century. However, they have long maintained a deferential attitude to the political branches of government. Initially, they have seemed to consider the mere existence of a legislative limitation a sufficient basis to uphold its constitutionality, without reviewing its necessity in light of the least restrictive alternatives. Following the proportionality's explicit constitutional guarantee since 2001, courts and constitutional scholars have undertaken proportionality scrutiny more often. However, in the wake of the financial crisis vestiges of the longstanding deference regain intensity in the Council of State case law, whereas the standards of constitutional scrutiny remain partly inconsistent among different domains of constitutional law. On the other hand, the Areios Pagos case-law fails to adequately distinguish between proportionality and balancing; it also misconstrues proportionality's purpose as limiting limitations rather than fundamental rights. All in all, while references to proportionality abound in the case law, they mostly fail to structurally and meaningfully apply the proportionality requirements. At the same time, the judicial application of the proportionality principle in Greece has also demonstrated its limits. Being intrinsically related with the rule-exception relation between fundamental rights and their limitations, the proportionality principle is not in a position to adequately deal with constitutional conflicts affecting several fundamental rights positions that are equally entrenched at the constitutional level.

KEYWORDS

Greek Constitution, judicial review, proportionality principle, judicial self-restraint, judicial activism

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1. *Introduction*

Around the globe, the judicial application of constitutional law centers on the implementation of the rigorous proportionality principle as the fundamental boundary with which all limitations on rights should comply. In its native Germany, the proportionality principle has triggered a theoretical debate on its exact constitutional source, with views ranging between fundamental rights and *Rechtsstaat* that is the German conception of rule-of-law[1]. The structure of fundamental rights indicates though that the scope of protection of fundamental rights delineates *in principle* areas of freedom that are not subject to state intervention[2]. Accordingly, limitations on fundamental rights can justify an intervention in the scope of protection only exceptionally and in compliance with the proportionality principle[3]. Consistent with this, German courts have initially developed the three-pronged proportionality approach, successively assessing the legitimacy of the goal, the suitability, necessity and proportionality *stricto sensu* of the means used[4]. Admittedly, the reception of the proportionality principle in other European jurisdictions and overseas has not always followed this pattern consistently[5]. Nonetheless, the three-pronged approach still forms the standard framework for the theoretical illustration of the principle's application. This is of relevance in Greece as well, whereas the current Constitution after its 2001 amendments explicitly provides (art. 25 § 1 *alinea* 4) that

> «restrictions of any kind which, according to the Constitution, may be imposed upon these rights [of the human being as an individual and as a member of the society] should be provided either directly by the

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1 See KOUTNATZIS 2010a, 349 f., with further references.

2 ALEXY 1985, 517 f., convincingly refers to a *prima facie* precedence of legal freedom and equality.

3 On the interplay between the rule-exception relationship between fundamental rights and their limitations and the proportionality principle, see KUNIG 1986, 350-355, with further references.

4 BVerfGE 19, 342 (348-9); 55, 159 (165).

5 For a comparative overview, see KOUTNATZIS 2011, 32-59.

Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality».

After the illustrating overview of the proportionality principle as explicitly enshrined in the Greek Constitution after 2001 provided in this volume by Antonis Chanos (CHANOS 2016), I will now focus on the application of the proportionality principle in Greek judicial practice. In international comparison, Greek courts recognized the judicial power to review the constitutionality of legislation very early based on constitutional supremacy. However, from the late nineteenth century to the late twentieth century, Greek courts have generally deferred to the political branches of government, and in practice have rarely challenged legislative or executive acts on constitutional grounds. The application of the proportionality principle generally follows this pattern.

Following an overview on the system of judicial review in Greek constitutional law (section 1), this article will focus on the development of the interplay between judicial self-restraint and judicial activism with respect to the application of the proportionality principle (section 2).

2. *The System of Judicial Review*

2.1. *Judicial Organisation*

The Greek judicial system is divided into functionally different sub-systems, each with its own high court. The courts are divided into administrative, civil and criminal courts (art. 93 § 1 Const.)[6]. The Areios Pagos Court (*Άρειος Πάγος*) sits at the apex of all civil and criminal courts; the Council of State (*Συμβούλιο της Επικρατείας*), modelled on the French *Conseil d'Etat*, functions primarily as the supreme administrative court (art. 95 Const.)[7]. The Constitution also provides for a third high court[8], the Court of Audit (*Ελεγκτικό Συνέδριο*), to which no lower courts correspond, and which has comparatively limited judicial responsibilities[9]. In addition, the current 1975 Constitution established a Supreme Special Court (*Ανώτατο Ειδικό Δικαστήριο*) charged with a number of responsibilities of a constitutional nature, namely the adjudication of electoral disputes; the settlement of jurisdictional conflicts between the courts and the administrative authorities, or between different judicial jurisdictions; the interpretation of a statutory provision or an assessment of its constitutionality when conflicting judgements are issued among the high courts of different jurisdictions; and the designation of rules of international law as generally acknowledged (art. 100 § 1 Const.)[10]. The Supreme Special

[6] While justice is administered by three hierarchies of courts (administrative, civil and criminal), the same judges regularly alternate between civil and criminal courts. See, e.g., KERAMEUS 2008, 342-344. On the Greek high courts, see, in general, KLAMARIS 1997, 289-299.

[7] According to art. 95 Const., the Council of State's jurisdiction «pertains mainly to a) the annulment upon petition of enforceable acts of the administrative authorities for excess of power or violation of the law, b) the reversal upon petition of final judgements of ordinary administrative courts, as specified by law, c) the trial of substantive administrative disputes submitted thereto as provided by the Constitution and the statutes, d) the elaboration of all decrees of a general regulatory nature».

[8] The Constitution additionally appoints specialized high courts for adjudicating suits against magistrates for faulty wrongful judgement (art. 99), criminal offences of Cabinet members or undersecretaries committed during the discharge of their duties (art. 86), and based on 2001 amendments, disputes concerning remunerations and pensions of magistrates (art. 88 § 2).

[9] Being primarily an institution charged with auditing government expenditures, the judicial function of the Court of Audit is limited to disputes concerning pensions and the liability of civil or military servants (art. 98 Const.).

[10] For more information on the Supreme Special Court's jurisdiction, see, e.g., ILIOPOULOS-STRANGAS 2007, 80-83.

Court is composed of the presidents and judges of Greece's high courts who exercise this role along with their other judicial duties and in some procedures with two law professors[11]. While the high court presidents serve in the Supreme Special Court *ex officio*, all other members of the Court are chosen by lot for two-year terms (art. 100 § 2 Const.).

2.2. *Control of Legislative and Executive Acts*

2.2.1. *Origins and Development of Judicial Review throughout Greece's Constitutional History*

In Greek constitutional history, the origins of judicial review of the constitutionality of legislation can be traced back to the 19th century. Initially, the Areios Pagos dispelled the notion of judicial review of the constitutionality of legislation, emphasizing that the courts are merely required to apply legislation and pronounce judgement on this basis, and are not authorized to fault a statute or strike it down on the grounds that the sovereign parliament had no power to enact it[12]. However, after groundbreaking rulings at the lower level[13], the Areios Pagos changed course[14]. According to a seminal Areios Pagos ruling handed down in 1897, «when […] a statutory provision contravenes the Constitution, modifying through an ordinary statute a fundamental provision of the Constitution, the court is entitled not to apply this [statutory] provision in the matter that it is adjudicating»[15]. In view of this, since the late 19th century, judicial review of the constitutionality of legislation has traditionally rested on the Greek Constitution's rigid character and its position as the supreme law of the land[16]. While less detailed, the Areios Pagos' reasoning is generally similar to the U.S. Supreme Court's reasoning in the seminal *Marbury v. Madison* decision[17], although no direct influence has been identified[18]. Similarly, Greece's subsequent Constitutions of 1911 and 1952 – in contrast, to the short-lived Constitution of 1927[19] – included no explicit provisions on judicial review of the constitutionality of legislation. However, the Areios Pagos, as well as the Council of State, since its very first ruling after its establishment in 1929[20], have continued to recognize the judicial power to refrain from applying unconstitutional legislation on a regular basis. As a result, judicial review of legislation gradually developed into a constitutional custom.

[11] Art. 100 § 2 Const. requires the inclusion of law professors on the bench when the Supreme Special Court adjudicates conflicts between the courts and the administrative authorities or between different jurisdictions or controversies on the interpretation or constitutionality of a statutory provision.

[12] See Areios Pagos judgement no. 198/1847, Collection of Areios Pagos Judgements in Civil Cases, Athens 1847, 765 ff. (771), adding that «the contrary system would result in the impropriety of subordinating the parliamentary statute under the judicial power, while the judiciary should be subordinate to the statute, applying it exactly, rather than faulting it».

[13] See Athens Court of Appeals judgement nos. 1710/1892, «Themis» («*Θέμις*») 1892-1893, 5; 1847/1893, «Themis» 1892-1893, 615; Athens Court of First Instance judgement no. 3504/1892, «Themis» 1892-1893, 474.

[14] For an insightful analysis of the origins of constitutional review in Greece, see VEGLERIS 1967, 445-455; DROSSOS 1996, 181-200.

[15] See Areios Pagos judgement no. 23/1897, «Themis» 1898, 329 (concerning the expropriation of land at Lake Kopaida).

[16] On the concept of "constitution" in the Greek legal system, see generally ILIOPOULOS-STRANGAS, PREVEDOUROU 2003, 262 f.

[17] 5 U.S. 137 (1803).

[18] See also MANITAKIS 2004, 461.

[19] Art. 5 of the 1927 Constitution, providing that «judicial power is vested in independent courts subject only to the law», included an «interpretative clause» stipulating that «the true sense of this provision is that the courts have the duty not to apply statutes, if their contents are contrary to the constitution».

[20] See Council of State judgement no. 1/1929, «Themis» 1929, 361.

2.2.2. *Judicial Review under the Greek Constitution of 1975*

2.2.2.1. *Constitutional Basis of Judicial Review*

The 1975 Constitution, which was enacted after the restoration of democracy in Greece in the wake of a seven-year military dictatorship and which remains in force today[21], added explicit provisions on judicial review of legislation pertaining to constitutional norms. The Constitution states that «the courts shall be bound not to apply a law with content that is contrary to the Constitution» (art. 93 § 4). Additionally, the Constitution stipulates that «in no case whatsoever shall [judges] be obliged to comply with provisions enacted in violation of the Constitution» (art. 87 § 2). In contrast to *substantive* claims, no judicial review of statutory legislation is generally available to allege a violation of constitutional provisions on legislative *procedure*[22], which is regarded as parliamentary "*interna corporis*"[23].

2.2.2.2. *Primary Features of Judicial Review*

The Greek system of judicial review has remained largely unchanged since the introduction of the judicial review power in the late nineteenth century. Accordingly, Greek courts generally follow a *diffuse*, *incidental* and *concrete* system of review[24]. Generally speaking, all courts (civil, criminal and administrative) of all levels are charged with the control of the constitutionality of statutes to the extent necessary for adjudicating a particular case. Lacking a constitutional jurisdiction as such, *structural* (*organizational*) *controversies* among state organs are not subject to judicial resolution. Further, the Greek Constitution does not provide for a review of the constitutionality of statutes on an *abstract* basis (either before or after their entry into force), irrespective of a specific case[25]. By the same token, unlike Germany's constitutional complaint (*Verfassungsbeschwerde*), Greece's constitutional system offers no *direct action* to rule upon the constitutionality of statutes. In addition, as a general matter[26], no judicial remedies are available to directly challenge the legislature's *failure* to fulfil its constitutional obligations (e.g., in cases that it does not implement the Constitution's social rights guarantees)[27]. However, provided that the exercise of legislative duties is clearly constitutionally required, the *state liability norms*[28] offer an indirect means to compel the legislature to fulfil its constitutional duties[29].

[21] While the constitutional amendments of 1986 and 2008 had no bearing on judicial review of legislation, the 2001 amendments limited the judicial review power of the high court panels. See *infra*, section 2.2.2.3.

[22] For an exception, see art. 73 § 2 *alinea* c Const., providing that «the insertion of provisions pertaining to pensions in bills introduced to regulate other matters, is not permitted under penalty of nullity».

[23] Parliamentary "*interna corporis*" is usually called "internal formal constitutionality" to distinguish it from "external formal unconstitutionality", which is limited to the external attributes of statutes (i.e., promulgation by the President of the Republic and publication in the *Government Gazette*) and is subject to judicial review. See, e.g., CHRYSSOGONOS 2014, 141 f.

[24] See, in general, ILIOPOULOS-STRANGAS, LEVENTIS 2010, 294 ff.; SPYROPOULOS, FORTSAKIS 2009, 206 f.; ILIOPOULOS-STRANGAS, KOUTNATZIS 2011, 540-555.

[25] Exceptionally, the Court of Audit is charged with issuing advisory opinions concerning bills on pensions or on the recognition of service for granting the right to a pension (art. 98 § 1 d Const.), which encompasses *inter alia* constitutional considerations.

[26] But cf. the Council of State's far-reaching jurisprudence on environmental matters; on this issue, see *infra*, section 3.2.

[27] See generally TSATSOS 1988, 212, arguing for political rather than legal remedies in cases of legislative inaction; but see ILIOPOULOS-STRANGAS, LEVENTIS 2010, 296-297, countering that the constitutional provisions on judicial review of the constitutionality of legislation do not differentiate between acts and omissions of the legislature.

[28] The basic provision for state liability for unlawful damage caused by public servants in the Greek legal system is art. 105 of the Introductory Law to the Civil Code.

[29] See, e.g., PAVLOPOULOS 2015, 366-368; ILIOPOULOS-STRANGAS 1998, 311-336.

Consistent with the formulation of art. 93 § 4 Const., a statutory provision found by a court to be unconstitutional *cannot be applied* in a specific case before the court. In contrast, the courts normally have no power to *strike down* a statutory provision found to be unconstitutional. Rather, unconstitutional provisions remain generally valid and can be applied in future cases.

2.2.2.3. *Means of Concentration of Review*

Despite adopting a diffuse approach to judicial review as a matter of principle, in fact, the availability of legal remedies against judicial decisions[30], the lower courts' standard practice of following the pronouncements of the high courts, and the constitutionally based option for individuals to directly challenge executive acts before the Council of State[31], have resulted in a substantial concentration of judicial review. Consequently, some scholars consider the Council of State as Greece's constitutional court *par excellence*[32].

In addition, while, as a matter of principle, the diffuse system of judicial review had no exceptions under the previous Greek Constitutions, the 1975 Constitution directly qualified this approach to foster legal certainty and consistency. On condition that high courts of different jurisdictions have issued conflicting judgements on the substantive unconstitutionality of a statutory provision, the Constitution provides a conflict-resolution mechanism. The Constitution requires Greece's high courts – the Council of State, Areios Pagos and Court of Audit – to refer issues of unconstitutionality (or interpretation) of this statutory provision to the Supreme Special Court[33], which is charged with settling the conflict (art. 100 § 1 e Const.)[34]. In the meantime, any judicial proceedings that depend on the outcome of the Supreme Special Court's consideration of the matter are suspended[35]. The Constitution explicitly provides that the Supreme Special Court's judgements are irrevocable (art. 100 § 4 *alinea* a Const.), thus preventing all forms of subsequent appeal to the Supreme Special Court and all other judicial or non-judicial bodies. The Supreme Special Court declares unconstitutional statutory provisions to be invalid *erga omnes* (i.e., not only inapplicable) as of the date of publication of the respective judgment (*ex nunc*), or as of the date specified in the ruling (art. 100 § 4 *alinea* b Const.). In light of this, the Supreme Special Court assumes duties of a negative legislator[36] prompting constitutional scholars to call it a *quasi-Constitutional Court*[37]. Nevertheless, the Supreme Special Court generally adopts a strict approach regarding admissibility[38]. Consequently, the invalidation of a parliamentary statute following a Supreme Special Court ruling has occurred only in exceptional

[30] Apart from appeals initiated by the litigants themselves, Greek procedural law provides the so-called "revision in favour of the law", which may be initiated by the Public Prosecutor of the Areios Pagos in civil and criminal cases and by the Minister in charge or the "General Commissioner of State" in administrative cases; see respectively Code of Civil Procedure, art. 557; Code of Criminal Procedure, art. 505 § 2; Presidential Decree no. 18/1989, art. 53 § 5.

[31] See *infra*, note 46 and accompanying text.

[32] Cf., e.g., VENIZELOS 1994, 15-18.

[33] Provided that the conflicting judgements requirement is met, ordinary legislation gives every individual with standing (as well as public officials, such as the Minister of Justice and the Public Prosecutor of the Areios Pagos) the right to bring a motion to the Supreme Special Court (see Act no. 345/1976 [Supreme Special Court Code], art. 48).

[34] For details on this procedure, see DAGTOGLOU 2007, 289-311; ILIOPOULOS-STRANGAS 2007, 75-91.

[35] See Act no. 345/1976 [Supreme Special Court Code], art. 50 § 3.

[36] Consistent with this, Act no. 345/1976 [Supreme Special Court Code] requires in art. 21 § 2 the publication of the Supreme Special Court's judgements in a special issue of the *Government Gazette*.

[37] Cf., e.g., DAGTOGLOU 2007, 292; see also ILIOPOULOS-STRANGAS 2007, 79: «Cour […] plutôt […] de compétences constitutionnelles que constitutionnelle […]».

[38] For an overview, see BACOYANNIS 1998, 321 f.

circumstances[39]. Despite this caveat, in view of the Supreme Special Court's jurisdiction in constitutional matters, Greece's judicial review system under the 1975 Constitution reflects a mixture of both diffuse and concentrated elements. Accordingly, despite the usual classification of the Greek system as following the American model of judicial review[40], the Greek system does not neatly fit the traditional definition of the American nor the European system of constitutional adjudication[41].

Greece's 2001 constitutional revision raised an additional, and quite controversial, qualification of the diffuse system of judicial review. When high court panels (i.e., sections of the Council of State, the Areios Pagos or the Court of Audit) find a statutory provision unconstitutional, they are bound to refer the issue to the respective plenum (art. 100 § 5 *alinea* a Const.). The only exception to this obligation is when the issue of the provision's constitutionality has been adjudicated by a previous decision of the plenum or of the Supreme Special Court (art. 100 § 5 *alinea* b Const.). As a result, high court panels have *less* power to exercise judicial review of the constitutionality of legislation than lower courts, the latter having no obligation to refer the adjudication of a claim of unconstitutionality to another body[42]. In practice, however, high court plenums generally follow the high court panel's position on the issue of constitutionality[43]. As for the consequences of the plenum's holding of unconstitutionality, the Constitution does not empower high court plenums to strike down parliamentary statutes. The latter power rests exclusively with the Supreme Special Court. Accordingly, a high court plenum's finding of unconstitutionality results in the statute being inapplicable in the specific case pending before the court, but will remain in the books and could apply in future cases[44]. Recent changes in procedural legislation reinforce the concentration trend in judicial review of legislation, enabling the direct referral of major administrative disputes to the Council of State (art. 1 Act 3900/2010).

As a matter of principle, convergence exists between the courts' control of constitutionality and conventionality of statutes with respect to their compatibility with international treaties that have been incorporated into Greek domestic law, among them quintessentially the European Convention on Human Rights (ECHR)[45].

2.2.2.4. *Control of Executive Acts*

In terms of judicial review of executive acts, Greek administrative courts review the constitutionality and the legality of administrative actions[46], including both individual and general measures (i.e., in the terminology of Greek administrative law, "individual" and "normative" administrative acts). While the courts generally exercise judicial review of statutes on an incidental basis and do not apply unconstitutional (or unconventional) statutes, but leave them in force, the Greek Constitution establishes (in addition to incidental review of executive acts) the direct jurisdiction of the Council of State «to annul […] upon petition enforceable acts of the administrative authorities for excess of power or

[39] For examples of invalidation of parliamentary statutes ordered by the Supreme Special Court, see ILIOPOULOS-STRANGAS, LEVENTIS 2010, 264.

[40] See, e.g., MANITAKIS 2004, 460-462.

[41] See also KASSIMATIS 1999, 39.

[42] For a critical perspective, see, e.g., VLACHOPOULOS 2001, 83-97; for a defense of the amendment's rationale see VENIZELOS 2002, 363-367.

[43] For empirical data on the first years of application of the revised art. 100 § 5 Const., see SAKELLAROPOULOU 2008, 39-42, pointing out that the Council of State's plenum has followed the panel's opinion of unconstitutionality in 22 out of 25 cases adjudicated under the revised art. 100 § 5 Const. until March 2007.

[44] See, e.g., MAVRIAS 2014, 294.

[45] On control of conventionality, see, e.g., KABOĞLU, KOUTNATZIS 2008, 464-466, with further references.

[46] See, in general, SPILIOTOPOULOS 2001, 123-140; EFSTRATIOU 2014, 291-299.

violation of the law» (art. 95 § 1 a Const.).

Recent Council of State decisions have tended to qualify the usual dichotomy between judicial review of legislative and executive acts. Thus, responding to the political branches' occasional tendency to enact planning regulations of an individual nature per statute in order to bypass direct judicial review, the Council of State has emphasized that this practice is constitutionally permissible only exceptionally[47]. Individuals *cannot* directly challenge legislative acts that include individual measures, i.e., planning regulations that do not require for their implementation executive acts[48]. However, they *can* challenge any administrative action in implementation of the statute, regardless of whether this action amounts to an enforceable act with the meaning of art. 95 § 1 a Const.[49].

3. *The Application of Judicial Review and the Proportionality Principle*

From a formal perspective, most scholars agree that judicial decisions – with the sole exception of Supreme Special Court decisions that strike down a parliamentary statute (art. 100 § 4 *alinea* 2 Const.)[50] – do not constitute a source of law in Greece[51]. Accordingly, Greek courts' decisions in constitutional matters generally have no force of precedent and their legal effect is limited *inter partes*. As a matter of constitutional law, the same court in a future occasion, along with other courts and the political branches of the state have no obligation to follow a previous judicial interpretation of the Constitution.

Ingrained in a civil-law tradition, Greek judges have long adopted a deferential approach to the legislative and executive branches of government, regularly privileging parliamentary sovereignty over fundamental rights and scrupulously protecting state interests at every cost[52]. Since the 1990s, Greek courts have increasingly played a vital role in fleshing out and developing constitutional standards; more recently, the outbreak of the financial crisis has resulted in a pragmatic jurisprudence that aims at identifying constitutional boundaries, without exceedingly infringing upon the political branches' prerogatives in responding to the crisis' exigencies. The application of the proportionality principle has been a predominant vehicle in developing this interplay between judicial restraint and judicial activism.

3.1. *The Greek Courts' Deferential Tradition*

Despite Greece's comparatively early recognition of judicial review of legislation as a matter of principle, traditionally, Greek courts have failed to meaningfully and consistently scrutinize the constitutionality of legislation. Rather, emphasizing the need to respect legislative prerogatives, the courts have typically considered the mere existence of legislation that restricts constitutional rights as a sufficient basis to uphold its constitutionality. Accordingly, Greek courts have long operated on the basis of a substantive "presumption of constitutionality of statutes", and have extended this presumption far beyond a procedural

[47] Council of State (Full Bench) judgement no. 1847/2008, «To Syntagma» («The Constitution» [law journal – *ToS*]) 2008, 708 ff. (715-716).

[48] Council of State (Full Bench) 3976/2009, «Efimerida Dioikitikou Dikaiou» («Public Law Journal» – *EfimDD*) 2010, 863 ff.; but cf. Council of State judgement no. 391/2008, *EfimDD* 2008, 184 ff.

[49] Council of State (Full Bench) 3053/2009, «Dikaiomata tou Anthropou» («Human Rights» [law journal – *DtA*]) 2010, 564 ff. (567); 376/2014, «Theoria kai Praksi Dioikitikou Dikaiou» («Theory and Practice of Administrative Law» [law journal – *TPDD*]) 2014, 138 ff. (140).

[50] See *supra*, section 2.2.2.3.

[51] See, e.g., SPYROPOULOS, FORTSAKIS 2009, 78.

[52] See, e.g., ALIVIZATOS 1993, 71, pointing out that the Greek judge acts «more as an agent of the state than as an independent arbitrator»; see also YANNAKOPOULOS 2004, 456.

assumption of validity until a judicial pronouncement is made. Consequently, they have considerably overestimated the presumption's legal importance[53]. Consistent with this, Greek courts have regularly failed to use the proportionality principle to resolve cases that pit a rights-based claim against a public-interest justification for the infringement of that right. For instance, during the 1950s and 1960s, when the Greek courts exceptionally cited the ECHR, they tended to cite the limitation clauses in art. 8-11 § 2 ECHR[54] to assert that legislative and administrative measures were not inconsistent with the ECHR, but they failed to engage in a necessity review of these measures[55]. The courts' deferential position to the political branches of government persisted throughout most of the 1970s and 1980s.

To avoid reaching a holding of unconstitutionality, Greek courts have regularly interpreted statutory law as conforming to the Constitution[56]. In so doing, however, they have occasionally interpreted the Constitution to be in accordance with statutory law rather than conversely or they have exceeded the permissible limits of interpretation to avoid reaching a judgement of unconstitutionality[57].

3.2. *Phases in the Judicial Implementation of the 1975 Constitution*

The implementation of the Greek Constitution of 1975 can be viewed in five phases[58].

In the initial phase, in the *first* years after the 1975 Constitution was in force, the judicial implementation of the Constitution oscillated between traditional and new elements. In most cases, the courts made no use of the new Constitution's potential to conscientiously and comprehensively protect fundamental rights. For instance, the courts narrowly construed the "right of a person to a prior hearing" before administrative actions or measures[59] despite the unqualified wording of art. 20 § 2 Const.; they derived no justiciable obligation from art. 22 § 4 Const., providing that «the state shall care for the social security of the working people»[60]; and they also avoided a broad interpretation of art. 22 § 2 Const., which guarantees collective labour bargaining[61]. Nonetheless, on some occasions, for instance, in cases involving the freedom of expression[62] and press[63] and the constitutional protection of the environment[64], the Council

[53] On the presumption of constitutionality, see, e.g., VENIZELOS 2008, 258 f.; for a critical perspective, see, e.g., TASSOPOULOS 1998, 355-362; SPYROPOULOS 2001, 287-290; CHRYSSOGONOS 2014, 146-149.

[54] Art. 8-11 § 2 ECHR lists legitimate grounds for restricting the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association, provided these restrictions are «necessary in a democratic society».

[55] See, e.g., the Council of State (Full Bench) judgement no. 607/1967, «Epitheorissi Dimossiou Dikaiou & Dioikitikou Dikaiou» («Public and Administrative Law Journal» - *EDDD*) 1967, 183–184 (exclusion of citizens from working in a public transportation company because of their possible political allegiances); see also the Council of State (Full Bench) judgement no. 575/1966, *EDDD* 1966, 311–312 (justification of civil mobilisation by reference to art. 4 § 3 c ECHR).

[56] For an overview, see, e.g., CHRYSSOGONOS 1994, 223-279, with further references.

[57] For instance, the Council of State construed the statutorily required "permission" of the Orthodox Church for the construction of religious sites of other denominations – against the wording of the statutory law in force at the time – to be a mere nonbinding opinion for the executive branch, thus finding no violation of religious freedom according to the Greek Constitution and the ECHR. See Council of State (Full Bench) judgement no. 1444/1991, «Nomiko Vima» ("Legal Forum" - *NoV*) 1991, 626 ff. (627).

[58] For further analysis, see KOUTNATZIS 2007, 171-176.

[59] See, e.g., Council of State judgement nos. 1905/1977, *ToS* 1977, 455 ff. (456-457) and 3417/1998, *ToS* 1979, 110 ff. (111).

[60] See, e.g., KREMALIS 1998, 441-455.

[61] Cf., e.g., Council of State (Full Bench) judgement no. 632/1978, *ToS* 1978, 178 ff. (180-181); Areios Pagos (Full Bench) judgement no. 626/1980, *ToS* 1981, 110 ff. (111-112).

[62] Cf., e.g., Council of State judgement no. 2209/1977, *ToS* 1977, 636 ff. (637), emphasizing that limitations of the military personnel's freedom of expression should not abrogate the "core" of the freedom of expression.

of State relativized its customary deferential position in exercising judicial review of the constitutionality of legislation without recognizing yet though the constitutional status of the proportionality principle.

The *second* period of the Constitution's judicial implementation coincided with the socialist government's ascendancy to power, from 1981 to 1989. During this eight-year period, the relationship between the state's political and judicial branches was intensely debated[65], As a matter of principle, the courts adopted a deferential approach, recognizing the legislative and executive branches' need for significant leeway[66]. Accordingly, the courts have upheld the constitutionality of controversial statutes such as the reform of university legislation[67], as well as the state broadcasting monopoly[68], and the assignment of the management of the Greek Orthodox monasteries' property to a state institution, which was widely perceived as the state's confiscation of Greek Orthodox Church's property[69]. In 1984, for the first time, the Council of State explicitly recognized the constitutional stature of the proportionality principle as a corollary of the rule of law principle[70], noting that «legislative and administrative limitations on individual rights should be necessary and related with the law's intended goal»[71]. Nevertheless, at least up to the late 1980s, the Greek courts typically failed to thoroughly scrutinize the constitutionality of legislative and executive acts based on proportionality considerations[72]. Instead, they regularly upheld limitations of constitutional rights on the nebulous grounds of "public interest", even when specific constitutional provisions could have been cited as a source of limitations[73].

Despite the general reluctance, towards the end of the 1980s, Greek courts began setting clear limits on the political branches of government on specific domains of state action. Most notably, the courts began to more carefully scrutinize the constitutionality of state measures that negatively impacted the environment. For instance, in 1988, the Council of State started considering the existing status of urban planning regulations to be constitutionally entrenched[74]. Accordingly, planning regulations changes can be made only if they do not diminish the protection of the natural and settled environments. Moreover, based on the constitutional protection of the environment, the Council of State began upholding rigorous limitations on constitutional property rights even without compensation. In this vein, proportionality considerations played a limited role, potentially indicating their inherent uneasiness in dealing with constitutional conflicts.

[63] Cf., e.g., Council of State (Full Bench) judgement no. 903/1981, *ToS* 1981, 701 ff. (704-705), holding that the statutory delegation for the executive branch to determine the minimum allowed price of newspapers violates the Constitution's freedom of press guarantee.

[64] Cf. e.g., the Council of State (Full Bench) judgement no. 811/1977, *ToS* 1977, 442 ff. (445), directly deducing from art. 24 Const. the executive branch's obligation to consider environmental aspects in the weighing of interests.

[65] See, e.g., ANDROULAKIS 1985, 1505-1515; STATHOPOULOS 1991, 87-123.

[66] Cf. ALIVIZATOS 1993, 72: «The traditional self-restraint of the civil law judges ultimately prevailed over their political inclinations».

[67] Cf. Supreme Special Court judgement no. 30/1985, *ToS* 1985, 182 ff. (186 ff.); Council of State (Full Bench) judgement no. 2923/1987, *ToS* 1987, 747 ff. (749).

[68] Cf. Council of State (Full Bench) judgement no. 5040/1987, *ToS* 1987, 727 ff. (728-729).

[69] Cf. Council of State judgement no. 5057/1987, *NoV* 1988, 801 ff. (802 ff.); but see the European Court of Human Rights judgement of 9 December 1994, Serie A, Nr. 301 A – *Holy Monasteries v. Greece* (finding a violation of art. 6 § 1 ECHR – right to a fair trial – and art. 1 of the First Protocol of the ECHR – protection of possessions).

[70] For a pioneering explanation of the proportionality principle in the Greek legal system as a general interpretation principle that does not need further constitutional justification see KONTOGIORGA-THEOCHAROPOULOU 1989, 25 f.

[71] Council of State judgement no. 2112/1984, *ToS* 1985, 63 f. (64).

[72] See also GERAPETRITIS 1997, 123 f., arguing that the proportionality principle is adequately subsumed within Greek administrative law.

[73] See, e.g., the Council of State (Full Bench) judgement nos. 400/1986, *ToS* 1986, 433 ff. (436-437); 1094/1987, *ToS* 1987, 279 ff. (281 ff.). For a criticism, see, e.g., DAGTOGLOU 1986, 425-433.

[74] See Council of State (Full Bench) judgement no. 10/1988, *ToS* 1988, 117 ff. (120-121); see also *supra*, section 2.2.2.3.

In the *third* stage, from the late 1980s to the late 1990s, the Council of State, most notably its fifth section, further developed and refined its environmental jurisprudence[75]. In cases of conflict between environmental concerns and other constitutionally protected interests, the Council of State effectively accorded priority to environmental protection. In contrast, in other areas, the courts maintained their customarily deferential approach, reacting reluctantly to the claim of unconstitutionality. For instance, in accordance with their traditional position, Greek courts reduced the constitutional protection of property rights to the rights *in rem*[76] and generally upheld the constitutionality of statutes retroactively abrogating claims, even when these claims had been recognized by final judicial decisions[77].

While effectively maintaining a balance between a restrained and an activist posture, during this period the courts failed to adequately explain the differences in the breadth and depth of judicial review in different constitutional domains. While Greek courts gradually, but not consistently, subjected legislative and executive actions to more rigorous scrutiny, this greater scrutiny did not always correspond to a coherent proportionality review. Rather, when the courts did apply a proportionality test, they tended to scrutinize the appropriateness and necessity of state action. In contrast, they typically avoided engaging in proportionality *stricto sensu*. Consistent with this, most constitutional scholars considered such analysis equivalent to a scrutiny of the *wisdom*, rather than the *constitutionality* of state actions[78]. In addition, in assessing the appropriateness and necessity of state action, Greek courts have tended to strike down merely "obvious" violations of the proportionality principle[79].

The *fourth* period in the development of Greece's constitutional jurisprudence, from the late 1990s to the end of the 21st century's first decade, led to a certain alignment of judicial review standards. Partly influenced by international human rights law, *inter alia* Greek courts have qualified the preferential treatment of the state as a litigant[80] and have struck down the statutory ban of compulsory enforcement of judicial decisions against the State[81] and the detention of individuals for failure to pay a debt owed to the State[82], thus abandoning several traditional assumptions. Similarly, regarding the scope of property rights, after initially conferring protection on all possessions based on art. 1 of the ECHR's First Protocol[83] Greek courts have begun broadly interpreting the property clause of the Greek Constitution (art. 17) to encompass

[75] For an overview, see, e.g., ILIOPOULOS-STRANGAS, LEVENTIS 2010, 276 f.; CHRYSSOGONOS, CONTIADES 2003, 21-41; PAPASPYROU 1999, 63-84.

[76] See, e.g., the Council of State judgement no. 2705/1991, *EDDD* 1992, 456 and the Areios Pagos judgement no. 363/1995, *ToS* 1996, 1050.

[77] Cf., e.g., the Council of State judgement no. 1272/1994, «Dioikitiki Diki» («Administrative Trial» [law journal – *DiDik*]) 1994, 1151 f. and the Areios Pagos judgement no. 345/1994, *NoV* 1995, 246 f.

[78] Cf. CHRYSSOGONOS 2006, 90 ff., with further references; see also KONTOGIORGA-THEOCHAROPOULOU 1989, 57, 63-66, 117-118, emphasizing the need to resort to proportionality stricto sensu only exceptionally; GOGOS 2005, 311 f., differentiating the intensity of judicial scrutiny between necessity and proportionality *stricto sensu*; ORFANOUDAKIS 2003, 64-68, arguing against an explicit reference to proportionality *stricto sensu*, implicitly accepting though this stage of the analysis as being self-evident; for proportionality *stricto sensu* as an intrinsic element of the proportionality scrutiny, cf. TSATSOS 1988, 247.

[79] See, e.g., the Council of State judgement no. 1149/1988, *ToS* 1988, 325 f. (326), holding that the ban in the use of the terms "medical center" and "health center" from private businesses does not contravene the constitutionally guaranteed professional and economic freedom without assessing less-restrictive alternatives.

[80] Cf. Council of State (Full Bench) judgement nos. 2808/2002, *ToS* 2003, 164 ff.; 1780/2006, *ToS* 2006, 953 ff. (954); Areios Pagos (Full Bench) judgement no. 12/2002, *ToS* 2002, 316 f.

[81] Cf. Areios Pagos (Full Bench) judgement no. 21/2001, *ToS* 2002, 106 ff. Since the 2001 constitutional amendments, art. 94 § 4 *alinea* 3 Const. explicitly provides that «judicial decisions are subject to compulsory enforcement also against the public sector, local government agencies and public law legal persons, as specified by law».

[82] Cf. Council of State (Full Bench) judgement no. 250/2008, *ToS* 2008, 235 ff.; Supreme Special Court judgement no. 1/2010, *DiDik* 2010, 196 ff.

[83] See Areios Pagos (Full Bench) judgement no. 40/1998, *NoV* 1999, 752 f. (753).

not only *in rem* rights, but also *in personam* rights[84]. Moreover, the courts have explored new dimensions in interpreting constitutional guarantees, thus considerably extending their scope. For instance, since 1998 the Council of State has construed the constitutional principle of gender equality to allow positive measures that aim to establish an actual equality between men and women[85]. After a long debate, the Council of State ultimately followed the Areios Pagos by extending the application scope of a statutory provision to groups of persons unconstitutionally excluded. Overcoming earlier doubts, the Greek courts have also recognized the constitutional status of the protection of legitimate expectation[86], thus setting considerable limits on the legislature. They have also found that not only the compulsory, but also the optional inclusion of religious affiliation in identity cards violates the constitutionally guaranteed right to religious freedom (art. 13 Const.)[87]. On the other hand, the Council of State has recently qualified some of its environmental jurisprudence. Although the particulars of the Council of State's doctrinal approach are questionable[88], this development has effectively helped harmonize judicial review standards across different substantive areas of constitutional law.

As already noted, since its 2001 amendments, the Greek Constitution explicitly enshrines the proportionality principle as an explicit boundary with which all limitations on rights should comply. Subsequently, Greek constitutional scholars[89] and courts[90] have tended to scrutinize not only the appropriateness and necessity of state measures, but also the proportionality *stricto sensu* between rights-based claims and public-interest justifications for the infringement of these rights. However, the Council of State has limited itself to striking down only state measures that are *obviously* inappropriate or disproportional. For instance, in applying the "obviousness" test, excessive customs fines potentially amounting up to ten times the taxes due, were deemed constitutional without any meaningful proportionality scrutiny[91], thus subsequently resulting in the European Court of Human Rights finding a violation of the European Convention on Human Rights' First Protocol[92]. Some scholars attempt to reconcile the proportionality principle with a concept of lenient judicial scrutiny on institutional grounds. According to this approach, constitutional rules have divergent meanings vis-à-vis the political branches of government and the judiciary; they require from the former necessary and proportional rights limitations, empowering though the latter to scrutinize only "obvious" disproportionality[93]. However, the Constitution's unqualified wording does not allow such a distinction[94].

On the other hand, Areios Pagos construes proportionality *stricto sensu* as requiring an overall cost-benefit analysis[95]. Admittedly, the conceptual confusion between proportionality and balancing lingers in

[84] See Areios Pagos (Full Bench) judgement no. 6/2007, *NoV* 2007, 1613 ff. (1616, 1617).

[85] See Council of State (Full Bench) judgement no. 1933/1998, *ToS* 1998, 792 f. (793). After the 2001 amendments the Constitution explicitly allows the «adoption of positive measures for promoting equality between men and women» (art. 116 § 2 Const.).

[86] See Council of State judgement no. 1508/2002, *DtA* 2003 (Special Issue), 354 ff. (357). See also the contributions in *Rule of Law and Legitimate Expectation*, *DtA* 2003 (Special Issue), 11 ff.; MOUZOURAKI 2005, 143-152.

[87] See Council of State judgement no. 2283/2001, *ToS* 2001, 1026 ff. (1041).

[88] Cf. ANTONIOU 2004, 969-981.

[89] See, e.g., CHRYSSOGONOS 2006, 92.

[90] See, e.g., Areios Pagos judgement (Full Bench) no. 43/2005, *NoV* 2005, 1587 ff.

[91] See, e.g., Council of State (Full Bench) judgement no. 990/2004, *DtA* 2005, 834 ff. (854 ff.).

[92] ECHR, *Mamidakis v. Greece*, 35533/04, 11.1.2007, finding that the imposition of the fine dealt such a blow to the applicant's financial situation that it amounted to a disproportionate measure in relation to the legitimate aim pursued, thus violating art. 1 of Protocol No. 1.

[93] See PAPASPYROU 2004, 403-405; in a similar vein KAIDATZIS 2012, 263 ff.

[94] See KOUTNATZIS 2010b, 439 ff.

[95] See, e.g., Areios Pagos (Full Bench) judgements no. 10/2003, *NoV* 2003, 1410 f. (1411), 43/2005, *NoV* 2005, 1587 f. (1588) and 27/2008, *NoV* 2008, 2153 f. (2154); see also KOUTNATZIS 2010b, 421, with further references.

several jurisdictions, such as the United States, South Africa, Japan and Brazil.[96] It has also led to intense scholarly critique against the European Court of Human Rights' case law deconstructing proportionality as a whole as an assault on human rights[97]. However, the rule-exception scheme between fundamental rights and their limitations is not consistent with an overall balancing exercise thus requiring a conceptual distinction between proportionality and balancing. Most notably, the necessity prong of the proportionality analysis rests upon the fundamental right against which the limitation's necessity will be assessed, being intrinsically unsuitable to addresses constitutional conflicts. In addition, while conceptually equating proportionality and balancing, the Areios Pagos freedom of speech jurisprudence consistently tends to scrutinize the proportionality in the *exercise* of fundamental rights rather than *rights limitations*. In defamation proceedings it has regularly held that the use of terms likely to impugn character and reputation of public figures, such as "notorious crazy nationalist"[98] or "Karagiozis" (meaning a type of puppet in a Greek shadow play) who had "broken his sworn oath"[99] is not necessary as the same opinion could have been expressed less severely[100]. Moreover, Areios Pagos has also tended to exclude the judiciary from the potential recipients of the proportionality principle. For instance, consistent with a longstanding reluctance against the constitutionalization of private law that is prevalent among Greek civil judges and academics[101], Areios Pagos had until recently failed to assess against the proportionality standards lower courts' holdings adjudicating "reasonable" compensation for moral damages in application of the Civil Code (art. 932)[102]. While on this last issue a seminal 2015 Areios Pagos resulted in upholding the application of the proportionality principle[103], vestiges of the longstanding judicial reluctance to fully enforce proportionality persist. Against the backdrop of both the explicit guarantee of the proportionality principle in art. 25 § 1 of the Greek Constitution and the rule-exception relation between fundamental rights and their limitations, it is highly doubtful whether this deferential approach meets constitutional requirements.

Since 2010, Greek constitutional jurisprudence has entered a *fifth* period due to the outbreak of the financial crisis. The bail-out agreements negotiated with the country's international creditors included, *inter alia*, subsequent sets of cuts in public sector wages and pensions, private sector minimum wage, interventions in collective bargaining law, increased taxes and a compulsory exchange of securities imposed against private bondholders (Collective Action Clause). In assessing the constitutionality of these measures, the Greek courts demonstrated considerable self-restraint[104]. In the first place, in a 2012 seminal ruling, the Council of State upheld the measures prescribed in the first bailout agreement. It emphasized that the cuts in wages and pensions are part of a broader program, including both fiscal and structural measures, and are subject merely to marginal judicial scrutiny[105]. Similarly, subsequent

[96] For comparative references, see KOUTNATZIS 2011, 41-44, 51 f., 55.

[97] See TSAKYRAKIS 2009, 468 ff.

[98] Areios Pagos 1462/2005, «Elliniki Dikaiossini» («Hellenic Justice» [law journal – *EllDni*]) 2006, 190 ff.

[99] Areios Pagos 1843/2004, NOMOS (Database).

[100] The European Court of Human Rights has regularly found these Areios Pagos judgments to contravene art. 10 of the ECHR for failing to adequately distinguish between "facts" and "value judgments". See, e.g., ECHR, *I Avgi Publishing and Press Agency S.A. and Karis v. Greece*, 15909/06, 5.6.2008 and ECHR, *Katrami v. Greece*, 19331/05, 6.12.2007.

[101] See MITSOPOULOS 2002, 656; PAPANIKOLAOU 2006, 71-79.

[102] See, e.g., Areios Pagos (Full Bench) 27/2008, *NoV* 2008, 2153 f. (2154).

[103] See, e.g., Areios Pagos (Full Bench) 9/2015, *NoV* 2015, 1696 ff. (1702).

[104] See CHRYSSOGONOS, KOUTNATZIS 2014, 35-37; KAMTSIDOU 2013; AKRIVOPOULOU 2013.

[105] See Council of State (Full Bench) 668/2012, *ToS* 2012, 3 ff. Numerous commentaries on this decision were published in *ToS* 2012, 89 ff. See also CONTIADES, TASSOPOULOS 2013, 207, identifying a paradoxical self-restraint «where the Court proclaims that it shall only exercise marginal review and employs contrarily a rigorous version of

holdings upheld a real estate tax through electricity bills, merely prohibiting cutting off the electric service in case of non-payment on freedom of contract grounds[106] and an expanded financial contribution for annual incomes exceeding 60,000 euros[107]. Against this background, consistent with early variations in the scope of proportionality vis-à-vis different categories of fundamental rights[108], the Greek financial emergency emphatically resulted in a self-restrained variation of proportionality[109]. Scholars have described this tendency as reflecting a transformation of the proportionality principle that operates not only as a limitation of statutory limitations but also as a balancing technique[110]. In the wake of the financial crisis, Greek judicial practice thus failed to consistently implement proportionality as a rigorous means of judicial scrutiny.

More recently, the successive effect of austerity measures has led the courts to conclude that the political branches of government have overstepped the constitutional boundaries with respect to issues such as additional cuts in the wages of judges[111], military personnel[112] and university professors[113]. In drawing from substantive constitutional provisions a mandate to treat preferentially these categories of public officials, this line of reasoning concluded that the citizens' constitutional duty of social and national solidarity precludes continuously burdening particular categories of citizens in violation of the proportionality and equality principles rather than taking structural measures or collecting tax revenues that are due by other categories of citizens. Nevertheless, despite reversing the initial pattern of the crisis jurisprudence, these latest decisions still fail to structure their judicial reasoning along the lines of the three-pronged proportionality test. In addition, the recent examples of judicial empowerment target almost exclusively State expenditures, leaving intact measures that aim at increasing state revenues without any convincing justification on proportionality grounds. Similarly, the Council of State has recently struck down further reductions in pensions, lacking a detailed study on their suitability and necessity to effectively address the viability of social security institutions[114]. Although this study was considered necessary to ensure compatibility with the proportionality and equality principles, the emphasis on procedural rather than substantive considerations[115] tends to significantly narrow the scope of the proportionality scrutiny. In other words, recent case law tends to foreclose proportionality scrutiny on substantive grounds provided that a set of merely procedural requirements is met. In other areas as well, ambivalence in the implementation of proportionality persists. Council of State occupational freedom jurisprudence ostensibly adopts the German three-steps doctrine (*Dreistufenlehre*) that distinguishes the scope of judicial scrutiny of occupational practice regulations, subjective access limitations and objective access limitations. In practice, though, the Council of State tends to differentiate the intensity of judicial review depending on the political branches' professed grounds for a

proportionality to support the legislative choices». On the conformity of this first set of measures with the ECHR, see also ECHR, *Ioanna Koufaki v. Greece* and *ADEDY v. Greece*, 57665/12 and 57657/12, 7.5.2013.

[106] See Council of State (Full Bench) 1972/2012, *NoV* 2012, 1550 ff.

[107] See Council of State (Full Bench) 1685/2013, *EfimDD* 2013, 192 ff.

[108] See KONTOGIORGA-THEOCHAROPOULOU 1989, 50-54, 67-77, 121 f., arguing for less intense proportionality scrutiny with respect to the constitutional equality principle, procedural fundamental rights and economic freedom.

[109] Cf. CONTIADES, FOTIADOU 2012, 683.

[110] See CONTIADES, FOTIADOU 2012, 669.

[111] See Special Court of art. 88 § 2 Const. 89/2013, available at: http://www.edd.gr/index.php/component/content/article/23-news/announcements/110-misthodikeio-89 (accessed on 26 April 2016).

[112] See Council of State (Full Bench) 2192/2014, *ToS* 2015, 185 ff. (210).

[113] See Council of State (Full Bench) 4741/2014, *ToS* 2015, 226 ff. (249).

[114] See, e.g., Council of State (Full Bench) 2287/2015, *TPDD* 2015, 668 ff. (672-673), requiring a comprehensive study to ensure constitutionality of further pensions reductions.

[115] For a broader overview of similar trends in comparative social rights adjudication, see CONTIADES, FOTIADOU 2012, 674-684.

limitation; thus it has upheld limitations on the number of new pharmacies on public health grounds, while striking down similar limitations that aim at protecting the existing pharmacies' viability[116].

4. *Concluding Remarks*

In sum, Greek courts have recognized constitutional supremacy as the basis for judicial review of the constitutionality of legislation since the late nineteenth century. The Greek system of judicial review is diffuse and incidental as a matter of principle, although it provides several factual and legal avenues for concentrating judicial review power in the high courts' plenums and the Supreme Special Court.

Despite recognizing their power to review and rule upon the constitutionality of legislation, in exercising this power, Greek courts have long maintained a deferential attitude to the political branches of government. Initially, they have seemed to consider the mere existence of a legislative limitation a sufficient basis to uphold its constitutionality, without reviewing its necessity in light of least restrictive alternatives. In recent years, the courts and constitutional scholars have pursued proportionality considerations more often. However, vestiges of the courts' longstanding deference remain and regain intensity in the wake of the financial crisis. In addition, the standards of constitutional scrutiny remain partly inconsistent among different domains of constitutional law. Most typically, the Council of State has prioritized environmental considerations over other constitutionally entrenched rights or interests; in recent years, it has exercised more rigorous scrutiny with respect to specific categories of claims raised by judges, military personnel, university professors and retired persons. On the other hand, the Areios Pagos case-law fails to adequately distinguish between proportionality and balancing and misconstrues proportionality's purpose as limiting limitations rather than fundamental rights; Areios Pagos has recently abandoned the longstanding limitation in the potential recipients of the proportionality principle. All in all, though, while references to proportionality abound in Greek case law, they mostly fail to structurally and meaningfully apply the proportionality requirements.

In light of Greece's previous experiences of failing to act upon the axiom of constitutional supremacy, judicial empowerment in reviewing the constitutionality of statutes is a positive development. Nevertheless, despite recent steps in this direction, even after the 2001 amendments much remains to ensure a uniform and consistent application of the proportionality principle, notwithstanding the predispositions of the individual judges. In this vein, it is critically important to draw the appropriate consequences from the rule-exception scheme between fundamental rights and their limitations, clearly distinguish between proportionality and *ad hoc* balancing, and restore consistency in the application of proportionality among different constitutional domains. At the same time, the judicial application of the proportionality principle has also demonstrated its limits. Being intrinsically related with the rule-exception relation between fundamental rights and their limitations, the proportionality principle is not in a position to adequately deal with constitutional conflicts affecting several fundamental rights positions that are equally entrenched at the constitutional level. The usual maxim that requires a practical concordance between these positions[117] lacks the structure of the proportionality principle and needs further analysis in order to guide doctrinal analysis. Against this background, the worldwide ascendancy of proportionality also demonstrates its limits – in Greece as everywhere.

[116] Cf. Council of State (Full Bench) 3665/2005 (Full Bench), *DiDik* 2006, 391 ff. with Council of State (Full Bench) 421/2014 (Full Bench), NOMOS (Database).
[117] HESSE 1995, 28.

References

AKRIVOPOULOU C.M. 2013. *Facing l'etat d'exception: The Greek Crisis Jurisprudence*, in «International Journal of Constitutional Law Blog», 2013. Available at: www.iconnectblog.com/2013/07/facing-letat-dexception-the-greek-crisis-jurisprudence (accessed on 26 April 2016).

ALEXY R. 1985. *Theorie der Grundrechte*, Baden-Baden, Nomos, 1985.

ALIVIZATOS N. 1993. *The Presidency, Parliament and the Courts in the 1980s*, in CLOGG R. (ed.), *Greece 1981-89. The Populist Decade*, London, Palgrave Macmillan, 1993, 65 ff.

ANDROULAKIS N. (Ανδρουλάκης Ν.) 1985. *Το «κράτος των δικαστών» - Ένα ανύπαρκτο σκιάχτρο* (The "State of the Judges" – A Nonexistent Spectre), in «Nomiko Vima [Legal Forum (law journal)]», 33, 1985, 1505 ff.

ANTONIOU TH. 2004. *Η στάθμιση ως μέθοδος ερμηνείας στη νομολογία του Συμβουλίου της Επικρατείας* (Balancing as a Method of Interpretation in the Council of State's Case Law), in *Jubilee Book for the Council of State – 75 Years (Τιμητικός Τόμος Συμβουλίου Επικρατείας – 75 χρόνια)*, Athens-Thessaloniki, Sakkoulas, 2004, 969 ff.

BACOYANNIS C. (Μπακογιάννης Κ.) 1998. *Ο θεσμός του ΑΕΔ: Απολογισμός της εικοσαετίας* (The Supreme Special Court Institution – 20 Years in Retrospect), in *20 χρόνια Σύνταγμα 1975 (20 Years 1975 Constitution)*, Athens-Komotini, Ant. Sakkoulas, 1998, 311 ff.

CHANOS A. 2016. *New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution*, in «Diritto & questioni pubbliche», 16, 2, 2016, 191 ss.

CHRYSSOGONOS K. (Χρυσόγονος Κ.) 1994. *Η σύμφωνη με το Σύνταγμα ερμηνεία των νόμων στη νομολογία του Συμβουλίου της Επικρατείας* (Statutory Interpretation in Conformity with the Constitution in the Council of State's Case Law), in «To Syntagma» [«The Constitution» (law journal)], 20, 1994, 223 ff.

CHRYSSOGONOS K. (Χρυσόγονος Κ.) 2006. *Ατομικά και Κοινωνικά Δικαιώματα* (Individual and Social Rights), 3 ed., Athens, Nomiki Vivliothiki, 2006.

CHRYSSOGONOS K. (Χρυσόγονος Κ.) 2014. *Συνταγματικό Δίκαιο* (Constitutional Law), 2 ed., Athens-Thessaloniki, Sakkoulas, 2014 (in cooperation with S.-I. Koutnatzis).

CHRYSSOGONOS K., CONTIADES X. 2003. *Der Beitrag Griechenlands zur europäischen Rechtskultur: der verfassungsrechtliche Umweltschutz*, in «Jahrbuch des öffentlichen Rechts», 52, 2003, 21 ff.

CHRYSSOGONOS K., KOUTNATZIS S.I. 2014. *Demokratie und Verfassung in der Zeit der Krise. Überblick zu Ursachen und Implikationen aus der Sicht Griechenlands*, in KÜBLER D., STOJANOVIC N. (eds.), *Demokratie in der Europäischen Union-Democracy in the European Union*, Zurich, Schulthess, 2014, 31 ff.

CONTIADES X., FOTIADOU A. 2012. *Social rights in the age of proportionality: Global economic crisis and constitutional litigation*, in «International Journal of Constitutional Law», 10, 2012, 660 ff.

CONTIADES X., TASSOPOULOS I. 2013. *The Impact of the Financial Crisis on the Greek Constitution*, in CONTIADES X. (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Farnham, Ashgate, 2013, 195 ff.

DAGTOGLOU P. (Δαγτόγλου Π.) 1986. *Δημόσιο συμφέρον και Σύνταγμα (Public Interest and Constitution)*, «To Syntagma» [«The Constitution» (law journal)], 12, 1986, 425 ff.

DAGTOGLOU P. (Δαγτόγλου Π.) 2007. *Die Verfassungsgerichtsbarkeit in Griechenland*, in STARCK CH., WEBER A. (eds.), *Verfassungsgerichtsbarkeit in Westeuropa*, 2 ed., Baden-Baden, Nomos, 2007, 289 ff.

DROSSOS Y. (Δρόσος Γ.) 1996. *Δοκίμιο Ελληνικής Συνταγματικής Θεωρίας (An Essay on Greek Constitutional Theory)*, Athens-Komotini, Ant. Sakkoulas, 1996.

EFSTRATIOU P.M. 2014. *Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Griechenland*, in BOGDANDY A.V., CASSESE S., HUBER P.M. (eds.), *Handbuch Ius Publicum Europaeum*, vol. 5: *Verwaltungsrecht in Europa: Grundzüge*, Heidelberg, Müller, 2014, 227 ff.

GERAPETRITIS G. 1997. *Proportionality in Administrative Law*, Athens-Komotini, Ant. Sakkoulas, 1997.

GOGOS K. 2005. *Πτυχές του ελέγχου αναλογικότητας στη νομολογία του Συμβουλίου της Επικρατείας* (Aspects of Proportionality Scrutiny in the Council of State Case Law), in «Dikaiomata tou Anthropou ["Human Rights"] (law journal)», special issue, 2005, 299 ff.

HESSE K. 1995. *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20 ed., Heidelberg, Müller, 1995.

ILIOPOULOS-STRANGAS J. 1998. *La responsabilité de l'Etat en tant que législateur*, in «Revue hellénique de droit international», 51, 1998, 311 ff.

ILIOPOULOS-STRANGAS J. 2007. *Les décisions de la Cour spéciale suprême grecque et leur mise en œuvre*, in COUR CONSTITUTIONNELLE D'ANDORRE (ed.), *Colloque de justice constitutionnelle de la Principauté d'Andorre*, Andorra, 2007, 75 ff.

ILIOPOULOS-STRANGAS J., KOUTNATZIS S.I. 2011. *Constitutional Courts as Positive Legislators*, in BREWER-CARIAS A. (ed.), *Constitutional Courts as Positive Legislators – A Comparative Law Study*, Cambridge, Cambridge University Press, 2011, 539 ff.

ILIOPOULOS-STRANGAS J., LEVENTIS G. 2010. *Der Schutz der sozialen Grundrechte in der Rechtsordnung Griechenlands*, in ILIOPOULOS-STRANGAS J. (ed.), *Soziale Grundrechte in Europa nach Lissabon – Eine rechtsvergleichende Untersuchung der nationalen Rechtsordnungen und des europäischen Rechts*, Baden-Baden-Athens-Brussels-Vienna, Nomos-Sakkoulas-Bruylant-Manz, 2010, 249 ff.

ILIOPOULOS-STRANGAS J., PREVEDOUROU E. 2003. *Greece – Le droit de l'Union européenne et les Constitutions nationales*, in BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (ed.), *F.I.D.E., XX. Congress London 30 October-2 November 2002*, vol. 2: *Reports and Conclusions*, London, 2003, 259 ff.

KABOĞLU I.Ö., KOUTNATZIS S. I. 2008. *The Reception Process in Greece and Turkey*, in KELLER H., STONE SWEET A. (eds.), *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, Oxford-New York, Oxford University Press, 2008, 451 ff.

KAIDATZIS A. (Καϊδατζής Α.) 2012. *"Μεγάλη πολιτική" και ασθενής δικαστικός έλεγχος. Συνταγματικά ζητήματα και ζητήματα συνταγματικότητας στο "Μνημόνιο"* ("Big policy" and weak judicial review. Constitutional issues and issues of constitutionality in the "Memorandum"), in «To Syntagma» [«The Constitution» (law journal)], 1, 2012, 259 ff.

KAMTSIDOU I. 2013. *L'intérêt public aux temps de crise.* Available at: www.constitutionalism.gr/site/linteret-public-aux-temps-de-crise/ (accessed on 26 April 2016).

KASSIMATIS G. (Κασιμάτης Γ.) 1999. *Συνταγματική δικαιοσύνη* (Constitutional Adjudication), Athens-Komotini, Ant. Sakkoulas, 1999.

KERAMEUS K.D. 2008. *Judicial Organization and Civil Procedure*, in KERAMEUS K.D., KOZYRIS PH.J. (eds.), *Introduction to Greek Law*, 3 ed., Alphen aan den Rijn, Kluwer Law International, 2008, 341 ff.

KLAMARIS N.K. 1997. *Die Funktion und die Rolle der obersten Gerichtshöfe Griechenlands*, in SCHILKEN E., BECKER-EBERHARD E., GERHARDT W. (eds.), *Festschrift für Hans Friedhelm Gaul zum 70. Geburtstag*, Bielefeld, Gieseking, 1997, 289 ff.

KONTOGIORGA-THEOCHAROPOULOU D. (Κοντόγιωργα-Θεοχαροπουλου Δ.) 1989. *Η αρχή της αναλογικότητος στο εσωτερικο δημοσιο δικαιο* (The Proportionality Principle in Domestic Public Law), Thessaloniki, Sakkoulas, 1989.

KOUTNATZIS S.I. (Κουτνατζής Σ.-Ι.) 2010a. *Kompromisshafte Verfassungsnormen*, Baden-Baden, Nomos, 2010.

KOUTNATZIS S.-I. (Κουτνατζής Σ.-Ι.) 2010b. *Η συμβολή της αρχής της αναλογικότητας στην πραγμάτωση της σχέσης κανόνα-εξαίρεσης μεταξύ θεμελιωδών δικαιωμάτων και περιορισμών τους* (The Contribution of the Proportionality Principle in Realizing the Rule-Exception Relation between Fundamental Rights and Their Limitations), in *Χαριστήριο εις Λουκά Θεοχαρόπουλο και Δήμητρα Κοντόγιωργα Θεοχαροπούλου* (Essays in Honour of Loukas Theocharopoulos and Dimitra Kontogiorga-Theocharopoulou), vol. 3, Thessaloniki, Aristotle University of Thessaloniki, 2010, 393 ff.

KOUTNATZIS S.I. (Κουτνατζής Σ.-Ι.) 2011. *Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee*, in «Verfassung und Recht in Übersee», 12, 2011, 32 ff.

KOUTNATZIS S.I. (Κουτνατζής Σ.-Ι.) 2007. *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Griechenland*, in BOGDANDY A.V., CRUZ VILLALON P., HUBER P.M. (eds.), *Handbuch Ius Publicum Europaeum*, vol. 1, Heidelberg, Müller, 2007, 151 ff.

KREMALIS K. 1998. *Der Verfassungsschutz des Rechts auf Sozialversicherung der Arbeitnehmer nach der griechischen Rechtsprechung*, in RULAND F., PAPIER H.J., MAYDELL B.B. V. (eds.), *Verfassung, Theorie und Praxis des Sozialstaats. Festschrift für Hans F. Zacher zum 70. Geburtstag*, Heidelberg, Müller, 1998, 441 ff.

KUNIG PH. 1986. *Das Rechtsstaatsprinzip*, Tübingen, Mohr Siebeck, 1986.

MANITAKIS A. (Μανιτάκης Α.) 2004. *Ελληνικό Συνταγματικό Δίκαιο*, τόμ. Ι: *Θεμελιώδεις έννοιες* (Greek Constitutional Law, vol.1: Fundamental Concepts), Athens-Thessaloniki, Sakkoulas 2004.

MAVRIAS K. (Μαυριάς Κ.) 2014. *Συνταγματικό Δίκαιο* (Constitutional Law), 5 ed., Athens, Dikaio kai Oikonomia, 2014.

MITSOPOULOS G. (Γ. Μητσόπουλος) 2002. *«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος* ("Drittwirkung" and Proportionality as Provisions of the Revised Constitution), in «Dikaiomata tou Anthropou ["Human Rights"] (law journal)», 15, 2002, 641 ff.

MOUZOURAKI P. 2005. *Le principe de confiance légitime en droit administratif hellénique*, in «Revue française de droit administratif», 21, 2005, 143 ff.

ORFANOUDAKIS S. (Ορφανουδάκης Σ.) 2003. *Η αρχή της αναλογικότητας* (The Proportionality Principle), Athens-Thessaloniki, Sakkoulas, 2003.

PAPANIKOLAOU P. (Παπανικολάου Π.) 2006. *Σύνταγμα και αυτοτέλεια του αστικού δικαίου* (The Constitution and the Autonomy of Civil Law), Athens-Komotini, Ant. Sakkoulas, 2006.

PAPASPYROU N. (Παπασπύρου Ν.) 1999. *A Farewell to Judicial Passivity: The Environmental Jurisprudence of the Greek Council of State*, in «Journal of Modern Greek Studies», 17, 1999, 63 ff.

PAPASPYROU N. (Παπασπύρου Ν.) 2004. *Το ζήτημα της έντασης του δικαστικού ελέγχου συνταγματικότητας* (The Issue of Intensity of Judicial Review of Constitutionality), in *Jubilee Book for the Council of State – 75 Years (Τιμητικός Τόμος Συμβουλίου Επικρατείας – 75 χρόνια)*, Athens-Thessaloniki, Sakkoulas, 2004, 399 ff.

PAVLOPOULOS P. (Παυλόπουλος Π.) 2015. *Η αστική ευθύνη του Δημοσίου κατά τους κανόνες του δημοσίου δικαίου* (State Civil Liability according to Public Law), in GERONTAS A., LYTRAS S., PAVLOPOULOS P., SIOUTIS GL., FLOGAITIS SP. (Γέροντας Απ., Λύτρας Σ., Παυλόπουλος Πρ., Σιούτη Γλ., Φλογαΐτης Σπ.) (eds.), *Διοικητικό Δίκαιο* (Administrative Law), 3 ed., Athens-Thessaloniki, Sakkoulas, 2015, 353 ff.

SAKELLAROPOULOU AIK. (Σακελλαροπούλου Αικ.) 2008. *Ο έλεγχος της συνταγματικότητας των νόμων υπό το άρθρο 100 παρ. 5 του Συντάγματος: δικονομική οργάνωση του ελέγχου ή περιορισμός του διάχυτου ελέγχου;* (The Control of Constitutionality of Legislation under art. 100 § 5 Const. Procedural Organisation of Control or Limitation of Diffuse Control?), in MANITAKIS A., FOTIADOU A. (Μανιτάκης Α., Φωτιάδου Α.) (eds.), *Το Συνταγματικό Δικαστήριο σε ένα σύστημα παρεμπίπτοντος ελέγχου της συνταγματικότητας των νόμων* (The

Constitutional Court in a System of Incidental Control of Constitutionality of Legislation), Athens-Thessaloniki, Sakkoulas, 2008, 23 ff.

SPILIOTOPOULOS E. 2001. *Le contrôle juridictionnel de l'action administrative*, in SPILIOTOPOULOS E., MAKRYDIMITRIS A. (eds.), *L'Administration Publique en Grèce*, Athens-Komotini, Ant. Sakkoulas, 2001, 123 ff.

SPYROPOULOS PH. 2001. *Die Vermutung der Verfassungsmäßigkeit der Gesetze und die verfassungskonforme Gesetzesauslegung*, in KASSIMATIS G., STOLLEIS M. (eds.), *Verfassungsgeschichte und Staatsrechtslehre. Griechisch-deutsche Wechselwirkungen*, Frankfurt a.M., Klostermann, 2001, 283 ff.

SPYROPOULOS PH., FORTSAKIS TH. 2009. *Constitutional Law in Greece*, Alphen aan den Rijn, Kluwer Law International, 2009.

STATHOPOULOS M.P. 1991. *Reviewing the Constitutionality of Laws: Democracy between the Scylla of Authoritarianism or Populism and the Charybdis of Aristocratism*, in «European Review of Public Law/Revue Européenne de droit public», 3, 1991, 87 ff.

TASSOPOULOS G. (Τασόπουλος Γ.) 1998. *Ο ρόλος του δικαστή κατά τον έλεγχο της συνταγματικότητας των νόμων: αυτοπεριορισμός ή ακτιβισμός* (The Role of the Judge in Reviewing the Constitutionality of Legislation: Self-Restraint or Activism?), in *20 χρόνια Σύνταγμα 1975* (20 Years 1975 Constitution), Athens-Komotini, Ant. Sakkoulas, 1998, 339 ff.

TSAKYRAKIS S. 2009. *Proportionality: An assault on human rights?*, in «International Journal of Constitutional Law», 7, 2009, 468 ff.

TSATSOS D. (Τσάτσος Δ.) 1988. *Συνταγματικό Δίκαιο – Θεμελιώδη δικαιώματα: Γενικό Μέρος* (Constitutional Law – Fundamental Rights: General Part), Athens-Komotini, Ant. Sakkoulas 1988.

VEGLERIS PH. 1967. *La Constitution, la Loi et les Tribunaux en Grèce*, in «Annales de la Faculté de Droit de Liège», 19, 1967, 439 ff.

VENIZELOS E. (Βενιζέλος Ε.) 1994. *Οι ιδιομορφίες του ελληνικού συστήματος δικαστικού ελέγχου της συνταγματικότητας των νόμων: παράγοντας εντατικοποίησης ή περιορισμού του ελέγχου* (The Particularities of the Greek System of Judicial Control of the Constitutionality of Legislation: A Factor of Intensive or Limited Scrutiny?), in ID. (ed.), *Η ερμηνεία του Συντάγματος και τα όρια του δικαστικού ελέγχου της συνταγματικότητας των νόμων* (The Interpretation of the Constitution and the Limits of Judicial Review of the Constitutionality of Legislation), Athens-Komotini, Ant. Sakkoulas, 1994, 13 ff.

VENIZELOS E. (Βενιζέλος Ε.) 2002. *Το αναθεωρητικό κεκτημένο* (The "Acquis" of the Constitutional Revision), Athens-Komotini, Ant. Sakkoulas, 2002.

VENIZELOS E. (Βενιζέλος Ε.) 2008. *Μαθήματα Συνταγματικού Δικαίου* (Courses in Constitutional Law), 2 ed., Athens-Komotini, Ant. Sakkoulas, 2008.

VLACHOPOULOS S. (Βλαχόπουλος Σπ.) 2001. *Ο έλεγχος της συνταγματικότητας των νόμων από τα Τμήματα των Ανωτάτων Δικαστηρίων* (The Control of Constitutionality of Legislation by High Court Sections), in «Δικαιώματα του Ανθρώπου [Human Rights]», 9, 2001, 83 ff.

YANNAKOPOULOS K. (Γιαννακόπουλος Κ.) 2004. *Τα δικαιώματα στη νομολογία του Συμβουλίου της Επικρατείας* (Rights in the Council of State's Case Law), in TSAPOGAS M., CHRISTOPOULOS D. (Τσαπόγας Μ., Χριστόπουλος Δ.) (eds.), *Δικαιώματα στην Ελλάδα 1953-2003* (Rights in Greece 1953-2003), Athens, Kastaniotis, 2004, 439 ff.