ANTONIS CHANOS

New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution

ABSTRACT

The aim of the following paper is to explore and criticize some aspects of the constitutionalisation of the Greek legal order in relation to the principle of proportionality. As a result of the "legislative activism" of the revisionist constitutional legislator, the proportionality principle has been part of the written Greek Constitution since 2001. The paper distinguishes between two forms of constitutionalisation that occur through the application of the proportionality principle, a methodological and a substantive one; which form applies depends on how the principle is perceived – as a (general) interpretive principle or as a substantive constitutional principle with full binding force. The paper analyses some methodological aspects concerning, first, judicial reviews, especially constitutionality reviews, and, second, the application of the principle of proportionality by judges in the framework of the constitution-conforming and constitution-oriented interpretations. Lastly, the paper attempts to point out some important elements of the constitutional treatment of this constitutional principle, which is important and yet controversial in its nature, structure and function, in Greek legal theory and in the (sometimes excessive) application of the principle in the legal argument of the Greek courts.

KEYWORDS

Proportionality principle, constitutionalisation, teleological interpretation, constitutionality review

ANTONIS CHANOS*

New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution

1. *Introduction*

With the revision of the Constitution in 2001, the Greek constitutional legislator took a step that is of great originality within Europe and even across the world. He included, in the provisions of art. 25, par. 1 of the Greek Constitution, a subparagraph (d), which expressly establishes the principle of proportionality. This is a principle that, although it is recognised in more and more legal orders worldwide as a principle of constitutional calibre, is an unwritten principle of constitutional law, developed by the jurisprudence of the courts (especially the constitutional courts) and the theory of constitutional law (there is no need to mention here how decisive has been the contribution of the jurisdiction of the German Federal Constitutional Court in the development of this principle).

The wording of art. 25, par. 1, subpar. d of the Constitution, as amended following the revision of 2001, reads as follows: «Restrictions of any kind which, according to the Constitution, may be imposed upon these rights [scil. individual and social rights] should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality». It should also be noted that even before this explicit introduction of a constitutional guarantee, the principle was recognised in the jurisdiction of the Council of State by its Decision 2112/1984.

Since 2001, Greek legal science has embarked on a lively discussion, both theoretical and judicial, about various aspects of the principle of proportionality. This discussion continues, with constant tension and interest. In what follows I would like to present some aspects of this debate, as it takes place primarily at a theoretical level. The question that I consider here is whether this explicit introduction of the principle of proportionality in the Constitution has satisfied, fifteen years later, the expectations of the constitutional legislator. Also, in order to place this paper in the thematic framework of this special issue, I would like to deal with the question of whether this explicit introduction of the principle in the written Constitution has contributed to the development of a (new) constitutionalism in Greece[1].

* Associate Professor in Legal Methodology and Law and Technique, Panteion University of Social and Political Sciences, Athens. Email: antonis.chanos@gmail.com.

[1] Cf. CONTIADES 2002; VENIZELOS 1999; VENIZELOS 2001.

For the purposes of this paper, I would like to focus on a specific feature of the (new) constitutionalism, which we usually call the "constitutionalisation of the legal order", namely, the extent and intensity of the regulatory effect of the constitutional imperatives and evaluations (as well as in our case, the expressly guaranteed constitutional principle of proportionality) on the (Greek) legal order. To further limit my subject, I am interested in some important methodological aspects of this process of constitutionalisation, a process that I find to be actually carried out by means of specific theoretical conceptions and practical uses of the constitutional principle of proportionality. These methodological aspects concern, first, the relation between the principle of proportionality and the interpretation of the law (especially the teleological interpretation), second, judicial review, especially constitutionality review, when the principle of proportionality is applied (the proportionality test), and, third, the application of the principle of proportionality by a judge during the interpretation of plain (sub-constitutional) law. The first of these I will call the "methodological", and the second and the third I will call the "substantive", constitutionalisation of the Greek legal order through the principle of proportionality. There is, in fact, a tendency to move away from a limiting and towards an expansive and/or intensive conception of the principle of proportionality and of its use in the legal order that leads to these forms of constitutionalisation through this principle.

Before I begin with the methodological constitutionalisation of the legal order through the principle of proportionality (conceived here as a general interpretation principle, related internally to the teleological interpretation), I consider it important to refer to the conceptual structure of the principle. The elements of the conceptual structure of the principle of proportionality, as shaped by the jurisdiction of the German Federal Constitutional Court and accepted by prevailing academic opinion in Greece, are the following three criteria: first, the criterion of suitability, that is, the issue of whether the instrument (for example, a legislative measure) is in itself capable of accommodating the intended, and in any aspect lawful, purpose; secondly, the criterion of necessity, that is the question of whether otherwise appropriate means are the least burdensome for the intended legitimate objective; and, thirdly, the criterion of proportionality *stricto sensu*, that is, the question of whether there is a reasonable relationship between the chosen means, as appropriate and necessary means, and the objective pursued.

2. *Methodological Constitutionalisation of the Greek Legal Order through Proportionality, Conceived as a General Interpretation Principle*

In the Greek discussion, the principle of proportionality is occasionally treated as a general principle for the interpretation of legal provisions[2]. According to this opinion, proportionality, conceived as a principle of interpretation, is included in the method of teleological interpretation (in a broad sense), and especially of objective teleological interpretation[3]. Thus, particularly in the context of this theory of the objective teleological system of law, the interpretative principle of proportionality is considered as a version of the teleological argument, as «a particular phase of a teleological interpretation of the law», with the constitutionality control and the control of conformity with European law as its application fields[4]. So construed as a principle of interpretation, proportionality is nothing but a «mere stage of the process of specification, the process of determination of the "suitable" means in relation to the objective "purpose"»[5].

[2] MITSOPOULOS 2002; BEYS 2005, 179.
[3] KARASSIS 2002, 491, nt. 9.
[4] MITSOPOULOS 2005, 176.
[5] MITSOPOULOS 2002, 647.

According to George Mitsopoulos, the vague concept of proportionality expresses the rational relationship between the means and the more general purpose. The conceptual structure of proportionality is, in this view, not the composition of the three specific control criteria mentioned above, but the relationship between the suitable means and the general purpose, «so that it is for the interpreter to determine the criterion of specialization»[6].

During the specification of the concept of proportionality, the criterion is (or must be) determined by the interpreter of the law, on the basis of which – according to Konstantinos Tsatsos, the founder of the theory of the teleological system of law – «between two opposing objectives can be found this one which must prevail, because it is the most suitable means for the more general objective to be attained, of which the specific objectives are to be considered as means»[7]. The interpreter has to take this criterion into consideration during the concretisation of the principle of proportionality, in order to establish the major premise to which the specific case is to be subordinate, and does not consider the three conceptual elements of the principle of proportionality mentioned above, according to the predominant view[8].

The principle of proportionality is, however, not merely an interpretative principle forming part of the teleological interpretation of a legal provision to which the law of conformation and application is to be applied[9]. Besides, even if the principle of proportionality were in fact to be considered as a mere manifestation of the teleological interpretation method[10], it should be apparent that these two have different ranges. Whereas the teleological interpretation finds its object in legal provisions of any kind (be they constitutional laws or ordinary statutes), the principle of proportionality is rather limited to the judicial control and interpretation of the provisions of ordinary statutes that set restrictions on constitutional freedoms[11].

The principle of proportionality is, instead, a judicial standard for the review of the constitutionality of legal provisions[12], which review must take place in any case in which those provisions lay down a measure that restricts constitutional freedoms. It does not provide a proper interpretation tool for constitutional provisions or for plain legal provisions, but it does provide an appropriate tool to be used in the submission of interpretative findings as part of an additional control, the judicial control of constitutionality. Since the judicial review of the constitutionality of the law in general is, *at least in principle*, completely independent of the interpretive process, the control of constitutionality based on ”the criteria of proportionality” must be fully autonomous from the purposive interpretation of the relevant provisions[13]. Judicial review of the proportionality of a plain law provision certainly *implies* interpretation (purposive or not, as well as the interpretation of the relevant constitutional provision), but it is neither identical with the general interpretative process nor “fully integrated” in the teleological interpretation[14]. On the contrary, it is methodologically completely distinct from the interpretive process of the judicial activity and it follows this process in respect of logic and time.

It has also rightly been remarked that substantive judgments, such as judgments on suitability, necessity and proportionality in the narrow sense, must be delivered

6 MITSOPOULOS 2002, 648 ff. and 651, nt. 14.
7 TSATSOS 1978, 116.
8 MITSOPOULOS 2005, 172.
9 For more details, see my critical considerations in CHANOS 2010a and CHANOS 2010b. Cf. PAPANIKOLAOU 2005, 20.
10 See also STATHOPOULOS 2010, 833. Nevertheless, for this author, the proportionality principle is also, and above all, a constitutional norm.
11 Cf. CHRYSSOGONOS 2006, 94 f.
12 PAPANIKOLAOU 2005, 19 ff. and 23.
13 *Contra*, PODIMATA 2010, 621.
14 PODIMATA 2010, 621.

«in particular within the limits of judicial review of the constitutionality of laws. The judge has no power, usually neither the knowledge, to indicate to the legislator what measures are *most relevant for attaining* objectives of economic, residential, educational etc. policy. *The judge's power is exhausted in the identification of which measures are obviously unnecessary, inappropriate or disproportionate to pursue the legislative policy objectives*» (emphasis mine)[15].

3. *Proportionality as a Control Norm and as an Action Norm*

The principle of proportionality is a constitutional principle with a binding, normative content. This content is, nevertheless, of strong methodological interest, since it includes, for example, the requirement for judicial judgments to be justified in a specific and detailed way (art. 93, par. 3 Constitution). The principle of proportionality is methodologically interesting[16], not because it is taken to be integrated into the teleological method, but because it functions in a very specific way as an important normative benchmark for legal arguments. This takes place in the context of the constitution-conforming interpretation or in the context of the constitution-oriented interpretation of provisions of plain (sub-constitutional) law, as we will see in the following considerations. We might say that the relationship between the principle of proportionality and the teleological (or the systematic) interpretation is not an *internal* but an *external* one.

The principle of proportionality is, therefore, a fully binding[17] substantive rule of immediate effect, and yet its binding nature has different functions. It is a constitutional norm with a content that is directly binding on all addressees (the legislator, the courts and the administration). However, at this point it is important to stress that the principle *nevertheless binds state organs in different ways*, according also to the principle of distinct powers: it binds the legislator (and the regulatory administration) as a direct action norm, while it primarily binds the courts as a constitutionality control norm.

The constitutional principle of proportionality, particularly when addressed to the plain legislator, constitutes a "restriction of the restrictions" that he can incorporate in constitutional rights and, in general, in legal relationships and transactions of a power-exercising character such as criminal law, consumer protection law or labour law. It «does not apply in any case of the exercise of discretion, but only if the state action affects a certain constitutional right»[18]. However, it seems that it would be more accurate to distinguish between the principle of proportionality in the (negative) form of the *prohibition* of an unreasonable measure, on the one hand, and the (positive) *requirement* for a fair settlement (balance) of conflicting interests by the legislator, on the other. In the first case the function of the principle is restrictive; that is, it consists of "limiting potential restrictions" of fundamental rights. In the second case, the function of the principle is compensatory or balancing.

Just as the principle of proportionality addresses the rule-maker directly, it also addresses the judge directly. The judge, however, is both addressed and bound by the principle, primarily in its control function. That is to say, in this case the principle of proportionality operates as a criterion for the control of the constitutionality of legal provisions, particularly *insofar as they restrict fundamental rights*. In what follows, I will analyse some methodological aspects concerning, first, judicial reviews, especially constitutionality reviews, and, second, the application of the principle of proportionality by the judge in the framework of the constitution-conforming and the constitution-oriented interpretations.

[15] STAMATIS 2009, 516. See also CHRYSSOGONOS 2006, 94.
[16] STAMATIS 2009, 519.
[17] ORFANOUDAKIS 2003, 64.
[18] GOGOS 2005, 300.

The mission of the judicial review of the proportionality of measures that restrict fundamental rights is, mainly, the control of the constitutionality of a legal provision by deciding whether it is a suitable and necessary measure in order to achieve an objective already recognised as such, as well as being (in the strict sense) proportionate to this.

The principle of proportionality is a criterion, in particular, for the constitutionality control of measures that restrictive individual freedoms. When addressed to the judge, it primarily has a control function. This control aspect of the principle of proportionality is what could be relied on (although in a rather one-sided way, I am afraid) when it is suggested that the judge is the main addressee of the requirement of art. 25, par. 1, subpar. d of the Constitution.

The proportionality-conforming interpretation of the sub-constitutional law, in the same way as, in general, its constitution-conforming interpretation (otherwise called "interpretation in conformity with the Constitution"), is closely related to the judicial review of the constitutionality of sub-constitutional provisions. It is not an "interpretation" in the literal sense. It is aimed not at the situation in which the conceptual determination of a legal provision is applied, but at the situation in which the normative force of a provision is maintained in spite of its partial non-constitutionality. In the same way as the general "interpretation in conformity with the Constitution", the interpretation of laws in conformity with the constitutional principle of proportionality is therefore more a technique of the judicial review of the constitutionality of laws, than an interpretation method in itself[19]. It actually concerns not the conceptual content of the legal provision, but its validity. It is incorrect, therefore, to argue that interpretation in conformity with the proportionality principle is part of either systematic interpretation[20] or teleological interpretation[21].

Contrary to the proportionality-conforming interpretation, the plain proportionality-*oriented* interpretation is, indeed, a form of interpretation in the literal sense of the term. This means that in specific cases like the concretisation of general clauses and other rather vague legal concepts[22], certain arguments on the proportionality-*oriented* interpretation can be made, which can, indeed, enrich the conceptual depth of the provisions.

Further, the proportionality-oriented interpretation, just like the general "constitution-oriented interpretation", is not autonomous. It must be considered to be included in the more general systematic or even teleological method of interpretation, and it can take place only in the framework of these classical criteria of interpretation.

It should also be noted here that the principle of proportionality is a constitutional rule with no independent content, so that it cannot function *alone* as a safe interpretative criterion[23]. It is constitutionally treated as a "limitation of restrictions" on fundamental rights, and it cannot, therefore, operate in a genuine way without the interpretative reference of the relevant interests and rights to certain constitutional rights (an interpretation oriented to the fundamental rights). Therefore, the principle of proportionality applies neither directly nor in any case of the exercise of discretion or the interpretation of general clauses and vague legal concepts, but only indirectly, namely when a certain state action affects a constitutional right.

[19] See PINAKIDIS 2001.
[20] See KASIMATIS 2006.
[21] ROTH 1998, 564.
[22] With reference to the civil law see PAPANIKOLAOU 2006, 76.
[23] Cf. CHRYSSOGONOS 2006, 94 f.

4. *Substantive Constitutionalisation of the Greek Legal Order through Proportionality, Conceived as a Constitutional Principle*

The positive judicial review of proportionality in the strict sense (at least in its most powerful version) requires the existence of a fully proportional measure and does not seem to distinguish, therefore, specific density gradients in the judicial review. Indeed, the *ex post* search for the most "proportional-rational" measure in the judicial review of constitutionality corresponds to the most intensive form of the control of the proportionality of the content of a restrictive measure.

A particular, and relatively dominant, version of the recognition of a "positive" sense of the proportionality test sees the content of the proportionality *stricto sensu* in the weighing of advantages and disadvantages or costs and benefits. Here, what is

> «wanted [is] a strict equivalence (*scil*. of the disadvantages and the benefits of a regulation or measure), in the sense, that the advantages – if not outweigh – at least equal and neutralize the upcoming disadvantages of the measure (and indeed in all aspects) (so called principle of "balance of costs and benefits"). This is namely a regulation, which tends to an optimum effect, so that the best service of the public interest with the lesser possible social costs can be achieved»[24].

Instead of weighing the gravity of the infringement of the fundamental right against its justificatory basis (namely the constitutionally legitimate objective that the infringement of the right seeks in this case to promote[25]) it seeks a «strict clearing and a sort of "algebraic equation" between the disadvantages and advantages, in the present and in the future, of the invasive regulation in all areas»[26].

In that conception, the proportionality test appears as an "optimising control". It is rightly observed, however, that the judicial review of proportionality is «disconnected from seeking "the optimum relationship" and therefore the consideration of alternatives, which does not comply anyway with its structure»[27]. Otherwise, it is, in fact, conceptually identical with the interpretative criterion of practical concordance, which is dictated by the principle of the unity of the Constitution and requires a mutual "proportionate" limitation of individual rights[28].

As aptly remarked, the concept of this kind of "positive" proportionality[29] is often confused with the concept of practical concordance, so that proportionality can incorrectly be considered to «aim the selection of the most harmonious and proportionate solution among several solutions»[30]. While the principle of practical concordance requires the mutual limitation and, therefore, "optimisation" of two variable elements (such as constitutional rights or values, etc.), proportionality refers to the two sides of the relationship between a means and an end, one of which, namely the end, is considered as stable[31].

[24] CONTOGIORGA-THEOCHAROPOULOU 2005, 76. Against the proportionality review as a balancing of costs and benefits, which he correctly considers as «the extreme model of a positive proportionality» and a practically impossible mathematic undertaking, see KOUTNATZIS 2009, 428 ff. and 434 f.

[25] KOUTNATZIS 2009, 428 nt. 136, with reference to TSATSOS 1985, 247.

[26] CONTOGIORGA-THEOCHAROPOULOU 1989, 54 f.

[27] DALAKOURAS 1993, 139; see also SLOTE 1989.

[28] For more about the principle of practical concordance, which was developed by the German constitutional lawyer Konrad Hesse, see SPYROPOULOS 1999, 143 ff.

[29] For the distinction between a "positive" and a "negative" concept of proportionality, see CHANOS 2009, who gives more detail.

[30] DALAKOURAS 1993, 173. See also BEYS 1999, 483. In contrast, TSATSOS 1985, 175 ff., seems to understand the principle of proportionality as being identical with the principle of practical concordance.

[31] Cf. ÁVILA 2007, 114.

Moreover, of decisive importance here is the distinction between genuine (real) and apparent (not real) conflicts of interest, legally protected goods, legal values etc. While in the case of apparent conflicts the application of the principle of practical concordance, and hence the "symmetrical" protection of seemingly conflicting constitutional goods, may be sufficient, the principle of proportionality requires the existence of a real conflict, as «only the real conflict justifies the restriction of a constitutional right and therefore the application of a restriction of restrictions»[32].

The judicial review of proportionality *stricto sensu*, in particular, aims to ascertain the (non) existence not of a "strictly proportionate-rational" measure, that is, not of *the optimal relationship*[33] between the restrictive measure and the purpose of the restriction, but of *a mere reasonable relationship* between them[34]. That is why the "optimising" proportionality test makes the whole concept of the proportionality principle closely similar to practical concordance[35], especially if the latter is understood as seeking the middle solution (or the so-called rule of the "golden mean"[36])[37].

A quite "constitutionalistic" and methodologically unacceptable position argues that the interpretative orientation of the judge in constitutional provisions enjoys an *in abstracto* priority over other interpretative criteria[38]. Similar to this is the claim that a positive determination by means of a constitution-oriented interpretation requires that «this version of interpretative solution is to be *preferred that is more in harmony with the Constitution than any other*» (emphasis is mine)[39].

The plain proportionality-oriented interpretation, as well as the more general constitution-oriented interpretation of legal provisions, does not make up what could be called an interpretative rule of *preference*[40], but it is in fact "integrated" in the individual classical interpretation criteria, particularly the systematic and teleological ones. Thus it can enrich them with additional normative and argumentational meaning, especially when it does not simply confirm an interpretative solution based on these criteria that has already found, which is often the case[41]. So the relative autonomy of sub-constitutional law from the Constitution also becomes respected[42]. Metaphorically speaking, there therefore exists no such thing as a "direct horizontal effect" of the principle of proportionality[43], but if there is any such effect then it is an indirect one.

5. *Constitutionalistic Tendencies in the Conception and Use of the Principle of Proportionality in Greek Legal Theory and Judicial Practice*

To summarise, the following constitutionalistic elements of an expansive theoretical conception and practical use of the principle of proportionality in the Greek legal order, referring to both the structure and the function of the principle, can be observed.

[32] ORFANOUDAKIS 2003, 33, nt. 42.
[33] For a more general discussion of this issue see SLOTE 1989.
[34] DALAKOURAS 1993, 173; ÁVILA 2007, 118. Cf. the remark of MANITAKIS 1994, 209, about the "substantive" side of the principle of proportionality, which «refers to the idea of the *suitable measure* or the *reasonable relation*» (emphasis mine).
[35] BARNES 2008, 247.
[36] With reference to the Aristotelian doctrine of *mesotes* see BEYS 2005, 180 and *passim*.
[37] Cf. CONTOGIORGA-THEOCHAROPOULOU 1989, 115.
[38] See STAMATIS 2009, 459.
[39] STAMATIS 2009, 466.
[40] See CHRYSSOGONOS 1994, 230.
[41] PINAKIDIS 2001, 485 ff.
[42] For the relative independence of civil law from constitutional law, see PAPANIKOLAOU 2006, 138.
[43] STATHOPOULOS 2010, 835.

The first element is the concept of a positive (that is, an intensive, substantive and optimising) proportionality test, leading to the identification of the principle of proportionality with the methodological principle (well-known in constitutional law) of practical concordance.

The second constitutionalistic element is the accentuation of the interpretive function of the principle, to the detriment of its control function, and, in particular, the incorrect understanding of the principle as a general, purely methodological, principle, as well as its identification with the teleological interpretation of the law. The relationship between proportionality – correctly conceived as a substantive and fully binding constitutional principle – and the teleological interpretation (as well as the systematic interpretation) is not an *internal,* but an *external* one. It is established through what can be called a "proportionality-oriented" interpretation of the sub-constitutional law, which is a common form of the more general "constitution-oriented" interpretation. The latter should properly be understood not as an autonomous kind of interpretation, but as a kind of systematic(-teleological) interpretation.

The third constitutionalistic element is the abandonment of a well-balanced relationship within the structure of the principle of proportionality. It is the relationship between the teleological aspect of the principle, namely the relationship between the purpose of the restriction of a constitutional right (conceived as fixed) and the means of the restriction (that is, the legal provision itself, conceived as variable) on the one side, and the balancing aspect of the principle, that is, the relationship between two constitutional rights (understood in this case as variable elements), on the other. The one-sided emphasis of the teleological aspect of the principle of proportionality (as observed, for example, in the case mentioned immediately above of the identification of proportionality with the teleological interpretation), which is reflected particularly in the sub-principles of appropriateness and necessity, at the expense of the weighing-and-balancing-related element of the principle, which finds its expression in the sub-principles of necessity and proportionality in the strict sense, leads to a distortion of the whole structure of the constitutional proportionality principle.

Fourthly, the converse case, namely the one-sided (over)emphasis on the balance-related element of the structure of the proportionality principle against the teleological one, leads *par excellence* to a constitutionalistic theoretical conception and practical treatment of the principle. This occurs particularly in the case when the principle is misunderstood to mean "proportionality that seeks the (most) reasonable relation", which is to be achieved through balancing[44], rather than being seen in its "classical" conception (namely in its form as a "restriction of restrictions" of constitutional rights, and as a "proportionality of the interference" in the protective field of individual and social rights – in German: *Eingriffsverhältnismäßigkeit*). Only the last meaning of the principle, established in art. 25, par. 1, subpar. d of the Constitution, realises the relationship between rule and exception among fundamental rights and their restrictions[45], whereas its meaning as "proportionality seeking the most reasonable relation" is related instead to the reversal of this relationship, that is, the perception that the mutual restriction of fundamental rights is the rule (especially when these are being understood, as they are according to the theory of fundamental rights as principles, just as optimisation requirements).

Last but not least, an expansive and/or intensive interpretive orientation for the proportionality principle within the framework of the systematic (or teleological) interpretation of plain law provisions leads to a constitutionalistic approach to the sub-constitutional law as well. Besides often being unnecessary, at least to the extent that the plain legislator has indeed respected the principle of proportionality and has already "integrated" it into his provisions, an excessive interpretative orientation is also methodologically mistaken, as it ignores two important issues: first, the relative

[44] This is the case of what in German legal theory and according to Ernst-Wolfgang Böckenförde is called "Angemessenheits-Verhältnismäßigkeit", see BÖCKENFÖRDE 1991, 183 f.

[45] KOUTNATZIS 2009.

autonomy of the various branches of sub-constitutional law, which it attempts to break down, by showing no interest in other, fully operational and reasonable, solutions that have been in place for many years through an application of the legal dogmatics of these branches and that have already been confirmed in the practice of the courts; second, the priority of the plain law against the Constitution in the application of law (in German: *Anwendungsvorrang des einfachen Rechts*). These two parameters support the simply subsidiary nature and role of the principle of proportionality in the interpretation and application of plain law provisions in specific cases.

6. *Conclusions*

In conclusion, it must be remarked that the recognition of a "positive" content to the principle of proportionality takes two forms in Greek legal theory and judicial practice: first, an understanding that seeks to establish foremost, if not exclusively, a "rational" relation (which, however, is seldom well defined) between two elements like principles or interests etc. (in German: *Angemessenheits-Verhältnismäßigkeit*, or proportionality that seeks the [most] reasonable relation); second, an understanding that requires an excessive direct interpretative recourse (or orientation) to the principle without there being sufficient consultation with the relevant provisions of sub-constitutional law in the first place. Both forms are increasingly frequent in Greek legal dogmatics, and they form a tendency to expand the scope of this constitutional principle.

We can, therefore, differentiate between a rather limiting and a rather expansive theoretical conception and practical use of the principle of proportionality. According to the extent and/or intensity of the judicial control or application of the principle of proportionality, we can talk of more or less constitutionalistic theoretical conceptions and practical uses of this principle, namely conceptions and uses that often contribute to a rather methodologically uncontrolled constitutionalisation of the Greek legal order. This trend towards a "horizontal" expansion of the scope meets strong resistance from those who point to the risks of an "excessive" reliance on the principle of proportionality (particularly in its positive sense). It also suggests that one should return to a moderate application of the principle with a dispassionate awareness of its limits, as those limits are expressed by the "negative" version of the principle, primarily in the sense of a very important criterion for the judicial review of constitutionality.

Fifteen years after the explicit inclusion of the principle of proportionality in the provisions of the Greek Constitution, one can safely maintain that this establishment and "imposition", as it were, of the principle of proportionality by the Greek revisionist constitutional legislator did not prevent a lively and ongoing scientific and jurisprudential debate on the nature, structure, operation, etc. of this constitutional principle and its place in the Greek legal system. However, the risks for the Greek legal order that stem from the varied constitutionalistic use (and often misuse) of this important and controversial principle in its various specific aspects are far from extinct.

References

ÁVILA H. 2007. *Theory of Legal Principles*, Dordrecht, Springer, 2007.

BARNES J. 2008. *The Meaning of the Principle of Proportionality for the Administration*, in BAUER H., CALLIESS C. (eds.), *Verfassungsprinzipien in Europa – Constitutional Principles in Europe – Principes Constitutionnels en Europe*, Athens-Berlin-Bruxelles, Bruyland, 2008, 219 ff.

BEYS E. 1999. *Η αρχή της αναλογικότητας, από το δημόσιο στο αστικό και διοικητικό δικονομικό και ιδιωτικό δίκαιο* (The Proportionality Principle, from the Public Law to the Civil and Administrative Law and Private Law), in «Dike», 30, 1999, 467 ff.

BEYS K. 2005. *Η αριστοτελική κατανόηση της δικαιοσύνης υπό το πρίσμα της μεσότητας και η σύγχρονη δικαιική αρχή της αναλογικότητας* (The Aristotelian Conception of Justice under the Scope of Mesotis and the Contemporean Legal Principle of Proportionality), in «Dike», 36, 2005, 174 ff.

BÖCKENFÖRDE E.-W. 1991. *Grundrechte als Grundsatznormen. − Zur gegenwärtigen Lage der Grundrechtsdogmatik*, in ID., *Staat – Verfassung – Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Frankfurt a.M., Suhrkamp, 1991, 159 ff.

CHANOS A. 2009. *«Αρνητική» και «θετική» έννοια της αρχής της αναλογικότητας: Εννοιολογικά στοιχεία και δικαστικός έλεγχος* («Negative» and «Positive» Notion of the Proportionality Principle: Conceptual Elements and Judicial Review), in KOUTOUPA-RENGAKOU E., BARBAS N., PREVEDOUROU E., GOGOS K. (eds.), *Χαριστήριο εις Λουκά Θεοχαρόπουλο και Δήμητρα Κοντόγιωργα-Θεοχαροπούλου* (In Honour of Loucas Theocharopoulos and Dimitra Contogiorga-Theocharopoulou), vol. 3, Thessaloniki, Sakkoulas, 2009, 659 ff.

CHANOS A. 2010a. *Τελολογική ερμηνεία του δικαίου και αρχή της αναλογικότητος* (Teleological Interpretation of Law and Principle of Proportionality), in STRANGAS J., PAPACHARALAMBOUS C. (eds.), *Σκοπός, τελεολογία και δίκαιο* (Purpose, Teleology and Law), Athens-Baden-Baden-Paris, Sakkoulas, Nomos & L'Harmattan, 2010, 343 ff.

CHANOS A. 2010b. *Τελολογική ερμηνεία των νομικών διατάξεων και τελολογικό σύστημα του δικαίου* (Teleological Interpretation of Legal Provisions and Teleological System of Law), in MORFAKIDES, M., PAPADOPOULOU, P., AGGELIS, D. (eds.), *Κωνσταντίνος Τσάτσος: Φιλόσοφος, συγγραφέας, πολιτικός* (Konstantinos Tsatsos: Philosopher, Author, Politician), Granada-Athens, Korali, 2010, 185 ff.

CHRYSSOGONOS K. 1994. *Η σύμφωνη με το Σύνταγμα ερμηνεία των νόμων στη νομολογία του Συμβουλίου της Επικρατείας* (The Constitution-conforming Interpretation of Law in the Jurisprudence of the State Council), in «To Syntagna», 1994, 223 ff.

CHRYSSOGONOS K. 2006. *Ατομικά και Κοινωνικά δικαιώματα* (Individual and Social Rights), 3 ed., Athens, Sakkoulas, 2006.

CONTIADES X. 2002. *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001* (The New Constitutionalism and the Fundamental Rights after the 2001 Revision), Athens-Komotini, Sakkoulas, 2002.

CONTOGIORGA-THEOCHAROPOULOU D. 1989. *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο* (The Principle of Proportionaity in the Internal Public Law), Thessaloniki, Sakkoulas, 1989.

CONTOGIORGA-THEOCHAROPOULOU D. 2005. *Η αρχή της αναλογικότητας (Σημεία Εμβαθύνσεως και Προβληματισμού)* (The Principle of Proportionality: Points of Deeper Examination and Questioning) in CONTOGIORGA-THEOCHAROPOULOU D., KOUTOUPA-RENGAKOU E. (eds.), *Εμβάθυνση Δημοσίου Δικαίου. Ειδικά Θέματα Διοικητικού Δικαίου* (Deeper Examination of Public Law. Special Issues of Administrative Law), Athens-Thessaloniki, Sakkoulas, 2005, 76 ff.

DALAKOURAS T. 1993. *Αρχή της αναλογικότητας και μέτρα δικονομικού καταναγκασμού* (Principle of Proportionality and Procedural Coercion Measures), Athens-Komotini, Sakkoulas, 1993.

GOGOS K. 2005. *Πτυχές του ελέγχου αναλογικότητας στη νομολογία του Συμβουλίου της Επικρατείας* (Aspects of the Proportionality Review in the Jurisprudence of the State Council), in «Human Rights – Special Issue 3», 2005, 299 ff.

KARASSIS M. 2002. *Θεμελίωση και λειτουργία του υπαγωγικού συλλογισμού κατά το αντικειμενικό τελολογικό σύστημα δικαίου* (Foundation and Function of the Subsumptive Syllogism According to the Objective Teleological System of Law), in ID., *Μελέτες γενικής θεωρίας δικαίου και αστικού δικαίου Ι* (Essays on General Theory of Law and Civil Law I), Athens-Komotini, Sakkoulas, 2002, 486 ff.

KASIMATIS G. 2006. *Μορφές ερμηνείας ιεραρχικής εναρμόνισης του δικαίου. Οι νέες διαστάσεις της συστηματικής ερμηνείας του δικαίου* (Interpretation Forms of the Hierarchical Harmonization of Law. The New Dimensions of the Systematic Interpretation of Law), in «To Syntagma», 2006, 5 ff.

KOUTNATZIS S.-I. 2009. *Η συμβολή της αρχής της αναλογικότητας στην πραγμάτωση της σχέσης κανόνα-εξαίρεσης μεταξύ θεμελιωδών δικαιωμάτων και περιορισμών τους* (The Contribution of the Proportionality Principle to the Realization of the Relationship of Rule and Exception between Fundamental Rights and Their Restrictions), in KOUTOUPA-RENGAKOU E., BARBAS N., PREVEDOUROU E., GOGOS K. (eds.), *Χαριστήριο εις Λουκά Θεοχαρόπουλο και Δήμητρα Κοντόγιωργα-Θεοχαροπούλου* (In Honour of Loucas Theocharopoulos and Dimitra Contogiorga-Theocharopoulou), vol. 3, Thessaloniki, Sakkoulas, 2009, 393 ff.

MANITAKIS A. 1994. *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας* (State of Law and Judicial Review of Constitutionality), Athens-Thessaloniki, Sakkoulas, 1994.

MITSOPOULOS G. 2002. *«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος* ("Horizontal Effect" and "Proportionality" as Provisions of the Revisioned Constitution), in «Human Rights», 15, 2002, 641 ff.

MITSOPOULOS G. 2005. *Θέματα γενικής θεωρίας και λογικής του δικαίου (*Issues of General Theory and Logic of Law), Athens-Komotini, Sakkoulas, 2005.

ORFANOUDAKIS S. 2003. *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη. Από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση* (The Principle of Proportionality in the Greek Legal Order. From Its Judicial Application to Its Constitutional Establishment), Athens-Thessaloniki, Sakkoulas, 2003.

PAPANIKOLAOU P. 2005. *Οι δικαιοηθικές αρχές στο Ενοχικό Δίκαιο του Μιχ. Π. Σταθόπουλου* (The Legal-ethical Principles in the Law of Contact of Mich. P. Stathopoulos), Athens-Komotini, Sakkoulas, 2005.

PAPANIKOLAOU P. 2006. *Σύνταγμα και Αυτοτέλεια του Αστικού Δικαίου* (Constitution and Independence of the Civil Law), Athens-Komotini, Sakkoulas, 2006.

PINAKIDIS G. 2001. *Η «σύμφωνη με το Σύνταγμα ερμηνεία». Τεχνική του Δικαστικού Ελέγχου της Συνταγματικότητας των Νόμων ή μέθοδος ερμηνείας του Νόμου δια του Συντάγματος* (The "Constitution-conforming Interpretation": Technique of the Judicial Constitutionality Review or Method of Law Interpretation through Constitution?), in «To Syntagma», 2001, 461 ff.

PODIMATA E. 2010. *Και πάλι για την αρχή της αναλογικότητας. Μεθοδολογικός προσανατολισμός με αφορμή την ΟλΑΠ 6/2009* (Again about the Principle of Proportionality. Methodological Orientation on the Occasion of the Decision 6/2009 of the Plenum of the Aeropag), in «Nomiko Vima», 58, 2010, 600 ff.

ROTH W. 1998. *Die verfassungsgerichtliche Überprüfung verfassungskonformer Auslegung im Wege abstrakter Normenkontrolle*, in «Neue Zeitschrift für Verwaltungsrecht», 1998, 563 ff.

SLOTE M. 1989. *Beyond Optimizing*, Cambridge (Mass.), Harvard University Press, 1989.

SPYROPOULOS P. 1999. *Η ερμηνεία του Συντάγματος. Εφαρμογή ή υπέρβαση της παραδοσιακής μεθοδολογίας του δικαίου;* (The Interpretation of the Constitution: Application or Transgression of the Traditional Methodology of Law?), Athens-Komotini, Sakkoulas, 1999.

STAMATIS K. 2009. *Η θεμελίωση των νομικών κρίσεων. Ένα κριτικά πρακτικό πρότυπο ερμηνείας του δικαίου* (The Justification of Legal Judgements. A Critically Practical Pattern of the Interpretation of Law), 9 ed., Athens-Thessaloniki, Sakkoulas, 2009.

STATHOPOULOS M. 2010. *Αναλογικότητα, εύλογη αποζημίωση και αναιρετικός έλεγχος* (Proportionality, Reasonable Compensation and Appeal Review), in «Nomiko Vima», 58, 2010, 833 ff.

TSATSOS D. 1985. *Συνταγματικό Δίκαιο* (Constitutional Law), vol. 3, Athens, Sakkoulas, 1985.

TSATSOS K. 1978. *Το πρόβλημα της ερμηνείας του δικαίου* (The Problem of the Interpretation of Law), 2 ed., Athens, Sakkoulas, 1978.

VENIZELOS E. 1999. *The Consensual and Corroborative Revision of the Hellenic Constitution*, in «Jahrbuch des öffentlichen Rechts der Gegenwart», 47, 1999, 99 ff.

VENIZELOS E. 2001. *The 2001 Revision of the Greek Constitution and the Relevance of the Constitutional Phenomenon*, in «European Review of Public Law», 13, 2001, 1291 ff.