

The constitutionality control in the Greek legal order - a European country which follows the American system!

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Legal Policy Forum

77

Spyridon Vlachopoulos

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in the Greek legal order
– A European country
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**The constitutionality control in
the Greek legal order
– A European country which
follows the American system! –**

von

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Institut für Rechtspolitik
an der Universität Trier

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A.

The constitutionality control in Greece¹ is perhaps an interesting subject for a German academic. Although Greece is a small country in the south of the European continent, it does not follow the European system of the constitutionality control. On the contrary, the Greek legal order follows the American system. There is a historical explanation for that and I am going to analyze later why Greece follows the American system.

But let us begin with the basics: First of all, in Greece there is no Constitutional Court. The “Bundesverfassungsgericht” does not exist in Greece. On the contrary, it is written in our Constitution that every court, even that of first instance, has the right and the duty to control the constitutionality of laws. Consequently, Greece follows the American system. Of course, the US Supreme Court plays a very significant role concerning the interpretation of the Constitution, but, literally speaking, it is not a Constitutional Court. The US Supreme Court is designed to decide over the major “hard” cases and not to control the constitutionality of the laws, as is the case with the Constitutional Courts in Europe.

¹ For an introduction to the constitutionality control in Greece, see *Epaminondas Spiliotopoulos*, *Judicial Review of Legislative Acts in Greece*, *Temp. L.Q.* 56 (1983), pp. 463-502; *Wassilios Skouris*, *Constitutional Disputes and Judicial Review in Greece*, in: *Christine Landfried* (ed.), *Constitutional Review and Legislation*, Baden-Baden, Nomos Verlagsgesellschaft, 1989, pp. 177-200; *Prodromos Dagtoglou*, *Die Verfassungsgerichtsbarkeit in Griechenland*, in: *Christian Starck, Albrecht Weber* (Hrsg.), *Verfassungsgerichtsbarkeit in Westeuropa*, Teilband I: *Berichte*, Baden-Baden, Nomos Verlagsgesellschaft, 1986, pp. 363 et seq.; *Philippos C. Spyropoulos, Theodore Fortsakis*, *Constitutional Law in Greece*, Wolters Kluwer International-Ant. N. Sakkoulas, 2009, pp. 206-207.

B.

After these introductory remarks, let us now come to the basic characteristics of the Greek legal order and of the Greek system of constitutionality control. In Greece, there are three Highest Courts: The Areopag (*Ários págos* in ancient Greek), the highest court for criminal and civil cases (the equivalent to the Bundesgerichtshof), then, the Council of State as the highest court for administrative cases (the equivalent to the Bundesverwaltungsgericht) and last, the Court of Audit (the equivalent to the Bundesfinanzhof).

The Areopag is the oldest highest court founded in the 19th century, whereas the Council of State was founded in 1929. Already from the 1870's, the Areopag under the obvious influence of the jurisprudence of the US Supreme Court (see the famous decision *Marbury v. Madison*), exercised the constitutionality control. Actually, Greece was one of the first European countries which controlled the constitutionality of the law provisions. At that time, in the majority of the European countries, there was no distinction between constitutional and under-constitutional law. In other words, in the 19th century, the European legal theory and jurisprudence were not familiar with the notion of the superiority of constitutional law and, at that time, there were no Constitutional Courts. That is why it is very important that the Areopag followed the constitutionality control and the American system.

Since the 1870's, the constitutionality control became a constitutional custom. Every court controlled the constitutionality of laws. The constitutionality control by every court as a constitutional custom lasted until 1927. In 1927, for the first time, the Greek Constitution explicitly established that the courts have the duty to control the constitutionality of laws. So, in 1927, the

custom of constitutionality control became a written constitutional provision.

This is the historical dimension. The crucial question is why this system of constitutionality control still exists today in Greece and why there is no Constitutional Court, contrary to the majority of European countries. The explanation has to do with the Greek constitutional history. Greece suffered from a dictatorship from 1967 until 1974. For the first time in the Greek legal history a constitutional court was introduced in the so-called "Constitution" (there is no real constitution during a military dictatorship) of 1968. Today, many Greek lawyers still believe that we should not introduce a constitutional court in Greece because this is an influence of the dictatorship of the military junta between 1967 and 1974.

C.

The constitutionality control is guaranteed in two Articles of the Greek Constitution. The first one is Art. 93 § 4 and the second is Art. 87 § 2. According to these provisions, every court should control the constitutionality of the laws and safeguard the application of the Constitution. Concerning the basic characteristics and the fundamental features of the constitutionality control in Greece, the first question which arises is that of time: The constitutionality control in Greece is exercised *a posteriori*. In other words, in Greece there is no possibility for a Court to control the constitutionality before the law enters into force, with the exception of the *ex ante* control of the Presidential Acts by the Council of State and of the pension bills by the Court of Audit. Nevertheless, in the Greek legal theory it was proposed by several scholars to introduce through a constitutional revision the control of the constitutionality before the law enters into force. This *ex ante* control should be exercised by the Highest Special Court (Art. 100 of the Greek Constitution) or by a new Constitutional Court. Indeed, in certain areas of law (e.g. criminal law, tax law, electoral law) the security of law, which is very closely affiliated to the principle of the rule of law, is of such great importance, that the *ex ante* constitutionality control seems to be much more appropriate than a *posteriori* control. This explains why an introduction of a constitutionality review before a law enters into force has intensified discussions among Greek legal scholars in the last years.

D.

According to the Greek Constitution, every court has the right and the duty to examine the constitutionality of the law in each concrete case pending before it. Nevertheless and from a practical point of view, the constitutionality review is driven, through the courts of first and second instance and after a considerable period of time, to one of the highest courts (Areopag, Council of State or Court of Audit).

Certainly, matters of constitutionality may arise in every field of law, but the vast majority of constitutional cases appear in the area of public law, that means while applying law provisions regulating the relations between the State and the citizens. Cases of constitutionality can also arise when constitutional provisions are applied in the frame of private relations, according to the “Drittwirkungstheorie” which was elaborated in Germany mainly in the field of labour law. But this is the exception. Most of the constitutionality matters are to be found in the field of public law. Keeping that in mind, it is not wrong when some constitutional lawyers call the Council of State a *de facto* constitutional court. Moreover, since 2010 (Law 3900/2010), it is possible to drive a case which is important for a large number of citizens directly from the administrative Court of First Instance to the Council of State (the so called “pilot” process), thus avoiding the elapse of long periods of time during the normal procedure in order to finally come to a decision by the Council of State after passing through the administrative courts of first and second instance.

But what happens if the same law provision is decided by two of the Highest Courts and these two disagree about the constitutionality of the law? Such conflicts must be removed by the legal order and that is why in Greece a special court, the “Highest Special Court”, exists. According to Article 100 of the Greek

Constitution, this court is composed by judges of all three Highest Courts and its decisions are binding for all other courts. Thereby, the Highest Special Court solves conflicts between the other Highest Courts concerning the constitutionality of the law.

E.

A further important issue which should be analyzed is the object of the constitutionality control. In Greece, the courts only examine the conformity of the content of the law. They exercise the so-called “substantial” constitutionality control, which in most cases refers to the violation of the fundamental rights. The Greek courts also examine the “external” typical features of the law (e.g. if the law was enacted by the parliament, signed by the President of the Greek Republic and published in the Official Journal). On the contrary and although not explicitly prohibited by the Constitution, they do not control the “formal” constitutionality of laws, “the internal” procedural aspects of the law-making (e.g. if the law should be enacted by the Plenary and not by a Section of the Parliament, if the Members of Parliament present were sufficient in order to achieve the necessary majority, if the bill contains provisions which are not relative to the main object of it etc.). According to the Greek jurisprudence, all these procedural aspects are part of the “interna corporis” of the Parliament and their judicial review would violate the principle of separation of powers (Art. 26 of the Greek Constitution). I belong to the academics who criticize this point of view, since there is no prohibition in the Greek Constitution to control the procedural aspects of the lawmaking. Moreover, the demand to safeguard the Constitution is not limited to the protection of fundamental rights. It refers to every constitutional provision, even the procedural provisions of the Constitution. The Constitution must be respected as a whole and not only its part which refers to fundamental rights.

F.

Concerning the intensity of the constitutional control, the Greek jurisprudence accepts that the Parliament enjoys a margin of appreciation. That means that a law can be declared as unconstitutional only if its unconstitutionality is evident (although the notion of “evident” itself is not evident at all!). If the judge has doubts about the constitutionality of a law but, on the other hand, its unconstitutionality is not clear, he/she will not declare it as unconstitutional. This way of judicial approach is comparable with the so-called “*verfassungskonforme Auslegung*”. However and although the margin of appreciation is accepted by all Greek courts, there are some cases where this attitude is not followed in practice. In certain areas of law the constitutionality control is very intensive, for example in the field of environmental law. Environmental law is a quite characteristic example. For many years and until the appearance of the recent economic crisis in 2010, the control of the constitutionality in favour of the environmental protection (Article 24 of the Greek Constitution) was quite intensive and the Council of State accepted the unconstitutionality of several law provisions. After the appearance of the economic crisis, when the Greek society realized the importance of economic development and the need to conciliate economic growth with environmental protection, the jurisprudence of the Council of State became more moderate.

G.

The consequences of a law provision being found unconstitutional by a Greek court are not the same as in Germany. The court only refrains from applying the provision in the specific case pending before it, but does not remove it from the legal order, thus other courts may find the law constitutional and apply it. There are some cases, although rare, where courts of the first/second instance do not follow the jurisprudence of one of the three highest courts. Only if the Highest Special Court of Article 100 of the Constitution finds a law provision unconstitutional, the relevant provision is removed from the legal order. This is also the reason why the relevant decisions of the Highest Special Court are published in the Greek Official Journal, although it is actually intended to publish only laws, not court decisions.

H.

The aforesaid refers to judiciary constitutionality control in court. What about executive power? Do public servants have the right to review a law's constitutionality? According to the legal theory and also to some court decisions, the administrative authorities have the competence to control the constitutionality of laws. This competence is, however, limited to "extreme" cases. Such an extreme case is given when the unconstitutionality is beyond any doubt. An unlimited right of the public servant to control a law's constitutionality would cause a problem especially under the aspect of the security of law.

An exception is accepted for the five independent administrative authorities, which are granted by our Constitution. Those are the data protection authority, the "Medienrat", the "Ombudsman" and the authorities for the secrecy of the correspondence and the recruitment of the public servants. The members of these independent administrative authorities do not have the duty to follow the instructions given by the Ministers. In other words, they enjoy an independence which is comparable to that of judges. Because of this independency and their constitutional establishment, it is accepted that these independent administrative authorities enjoy similar rights as judges concerning constitutionality control.

I.

To sum up: Does the Greek system have advantages? The answer to this question is definitely positive. The fact that every court is obliged to control the constitutionality of laws can be seen as a guarantee against constitutional violations. In a democratic society in which the rule of law is applied, the possibility for the political power to manipulate even one court is quite remote. But it is certainly impossible for a political power to manipulate all courts.

These advantages of the Greek system of constitutionality control require that the courts are fully independent. That is the case in Greece where the courts are independent and the personal and functional independence of the judges is protected by the Greek Constitution (Articles 87 et seq.). However, the nomination of the presidents and vice-presidents of the three highest courts can be considered as problematic. They are nominated by the President of the Republic, but actually selected by the government (Article 90 paragraph 5 of the Greek Constitution). Some argue that because they are nominated by the government, they will decide in the “hard cases” with political relevance in favour of the government by which they were selected. I am not sure if that problem really exists, but this impression is shared among several members of Greek society.

Does the Greek system have disadvantages? The answer to this question is definitely also positive. As I have already pointed out, it takes a very long time until a case is decided by one of the highest courts and at the end (in case of disagreement between them) by the Highest Special Court. This causes legal uncertainty and consequently damages to the rule of law.

Of course, the recent economic crisis was a very negative evolution also for the legal system, but it also gave “food for

thought” to legal scholars and interesting cases to the courts to decide. One example is the constitutionality control of the austerity measures like the cut of the salaries of the public servants. For the “elite” of them, e.g. the judges, the policemen and army officers, the university professors and the doctors of the public hospitals, the courts decided that the measures were unconstitutional. On the contrary, the cut of the salaries was not found unconstitutional for all other public servants. The majority of the austerity measures were found constitutional. Perhaps, this has to do with the mentality of Greek judges who are not elected by a political body and do not have the political legitimation of the judges of a constitutional court. They do not enjoy the necessary political legitimation which a judge needs in order to decide cases of great political importance.

Let us come to the final conclusion. Of course, in every legal system you can find advantages and disadvantages. Should we change the system of constitutionality control in Greece? My answer is negative, at least if we take into account as criteria the so-called “legal civilization” and legal tradition of the country. According to my point of view, tradition constitutes a very important element of a country’s identity. Greece has a very long tradition concerning the constitutionality control and the way the courts examine the constitutionality of the law provisions. Nevertheless and as mentioned above, there is a very important deficit concerning the procedural aspects of law making, which are not controlled by the judiciary concerning their conformity with the Constitution. All procedural aspects of law making, which are controlled by a constitutional court like the “Bundesverfassungsgericht”, are not controlled in Greece. This is something we must change in order to safeguard the respect of the whole Constitution and not only part of it.

Annex: Greek Constitution 1975/1986/2001/2008

Article 87

1. Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence.
2. In the discharge of their duties, judges shall be subject only to the Constitution and the laws; in no case whatsoever shall they be obliged to comply with provisions enacted in violation of the Constitution.

Article 93

4. The courts shall be bound not to apply a statute whose content is contrary to the Constitution.

Article 100

1. A Special Highest Court shall be established, the jurisdiction of which shall comprise: ...

e) Settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Audit.

2. The Court specified in paragraph 1 shall be composed of the President of the Supreme Administrative Court, the President of the Supreme Civil and Criminal Court and the President of the Court of Audit, four Councillors of the Supreme Administrative Court and four members of the Supreme Civil and Criminal Court chosen by lot for a two-year term. The Court shall be presided over by the President of the Supreme Administrative Court or the President of the Supreme Civil and Criminal Court, according to seniority. In the cases specified under sections (d) and (e) of the preceding paragraph, the composition of the Court shall be expanded to include two law professors of the law schools of the country's universities, chosen by lot.

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The constitutionality control in the Greek legal order – A European country which follows the American system! –

Although geographically it belongs to Europe, as far as the constitutionality control of the statutory provisions is concerned, Greece follows the American system. That means that there is no Constitutional Court and, on the contrary, every court (even those of first instance) are entitled, and indeed obliged, to control the constitutionality of the laws (Articles 87 par. 2 and 93 par. 4 of the Greek Constitution). The Greek Courts examine only the substantial and not the formal constitutionality of the statutory provisions. If a court comes to the result of the unconstitutionality, then the statutory provision is not annulled and removed from the legal order, but it is not applied by the court in the relevant court procedure. The only – rather rare – case where a statutory provision is erga omnes annulled is when this is ordered by a decision of the Highest Special Court (Article 100 of the Greek Constitution), following a disagreement between two of the three highest Courts, namely between Symvoulío tis Epikrateias (highest Administrative Court), Areios Pagos (Cassations Court in Civil and Criminal procedures) and Elegtikó Synedrio (Court of Audit).

The presentation is going to examine the origins of the Greek system of the constitutionality control. It will also focus on the advantages and disadvantages of the Greek system and on the scientific and political discussion. Last but not least, the presentation will examine the role of the Council of State, which, although formally not a Constitutional Court, in practice issues the vast majority of the court decisions which accept the unconstitutionality of statutory provisions.