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Modern challenges for the Rule of Law in Greece

Key words: Enforcement of Judgments, Lack of efficient mechanisms for the examination of complaints, Minority Associations, Overcrowding of Prisons

Summary. The Rule of Law is safeguarded by Greek Constitution. At the same time the jurisprudence of the Greek Courts acknowledges Rule of Law as a meta-principle from which other principles such as legal certainty and guarantee of legitimate expectations come from. The main components of the Rule of Law, such as separation of powers, protection of human rights, independent judiciary, and review of constitutionality, are enshrined by Greek Constitution and legislation. The implementation of the European Convention on Human Rights by the state agents and the judiciary is quite sufficient. However, there are some grey zones with regard to the implementation of the Rule of Law main principles by state agents and the judiciary. The loopholes do not refer to the formal safeguards provided by Rule of Law, but on how such safeguards are enforced. There are four distinct areas where we could locate these deficiencies. They are the following: a) the enforcement of judgments by public authorities b) the overcrowding of prisons and the lack of efficient mechanisms for the examination of complaints filed against policemen c) The dissolution by public authorities of associations formed by people who identify themselves as Turks and d) The majoritarian twist in the election of the members of independent authorities the Greek Constitution provides for.

Współczesne wyzwania dla rządów prawa w Grecji

Słowa kluczowe: wykonywanie wyroków, brak skutecznych mechanizmów rozpatrywania skarg, stowarzyszenia mniejszości, przeludnienie więzień

Streszczenie. Zasada państwa prawa jest chroniona przez grecką konstytucję. Jednocześnie orzecznictwo sądów greckich uznaje zasadę państwa prawa za metazasadę, z której wywodzą się inne zasady, takie jak pewność prawa i gwarancja uzasadnionych oczekiwań. Główne elementy zasady państwa prawa, takie jak podział władzy, ochrona praw człowieka, niezależne sądownictwo i kontrola konstytucyjności, są zapisane w greckiej konstytucji i prawodawstwie. Wdrożenie Europejskiej Konwencji Praw Człowieka przez organy państwowe i sądownictwo uznaje się za wystarczające. We wdrażaniu głównych zasad państwa prawa przez funkcjonariuszy państwowych i sądownictwo istnieją jednak pewne szare strefy. Luki te nie odnoszą się do formalnych zabezpieczeń zapewnianych przez państwo prawa, ale do sposobu egzekwowania tych zabezpieczeń i są one wyraźnie widoczne w czterech obszarach. Są to: a) wykonywanie wyroków przez władze publiczne b) przepełnienie więzień i brak skutecznych mechanizmów rozpatrywania skarg na policjantów c) rozwiązywanie przez władze publiczne stowarzyszeń tworzonych przez osoby identyfikujące się jako Turcy oraz d) majorytarny zwrot w wyborze członków niezależnych władz, jaki przewiduje grecka konstytucja.

The drift of some EU member states into illiberal democracies and the treatment of these regimes by the EU institutions has renewed theoretical interest in the concept of the Rule of Law. In a series of decisions of the European Commission and the CJEU, Hungary and Poland were found to be in breach of Article 2 of the Treaty on European Union (TEU), which refers directly to the Rule of Law as a fundamental principle of EU construction, and were sanctioned under Article 7 TEU.

As the cases show, the EU institutions treat the principle of the Rule of Law as a meta-principle which includes a set of individual principles, such as effective judicial protection, a right which is enshrined in Articles 19(3) of the Treaty on the Functioning of the European Union (TFEU) and 47 of the Charter of Fundamental Rights (FR). The effective guarantee of judicial independence is considered, according to the CJEU, as a source of positive obligations for the member states[1].

The cases for which Hungary and Poland were audited concern judicial independence, which is seen by the EU institutions as a key element of effective judicial protection. The independence of judges is seen as a necessary institutional precondition so that the protection of rights through judicial review does not become a meaningless concept[2]. The EU's intervention demonstrates that the institutions of the administration of justice and their functioning constitute an essential and not a procedural element of the rule of law. It is indicative that Hungary and Poland have tried to avoid scrutiny by the EU institutions by arguing that the infrastructure of the courts is one of the matters over which the EU has no competence. However, the Commission's and the CJEU's treatment of the question of the internal organisation of the courts in the Member States as a substantive rather than a procedural issue has allowed the EU institutions to apply the Rule of Law principle when reviewing breaches of EU law by Member States. The emergence of this dimension of the Rule of Law may provide an opportunity for a fruitful reflection on the application by the EU Member States of the individual principles constituting the normative content of the Rule of Law.

The Greek Case

The establishment of the Rule of Law and the creation of appropriate institutions that make the protection of its individual elements effective is provided for both at the level of the Greek Constitution[3] and at the level of legislation. However, as the

[1] See: K.L. Scheppele, D.V. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, "Yearbook of European Law" 2020, pp. 3-19.

[2] On the role of courts in the protection of the Rule of Law, see: J. Waldron, *The rule of law and the role of courts*, "Global Constitutionalism" 2021, vol. 10, issue 1, pp. 91-105.

[3] Article 25(1)(d) of the Greek Constitution expressly enshrines the principle of the Rule of Law. The Greek Constitution enshrines also all the basic components of the Rule of Law, such as

case law of the ECtHR on specific categories of cases highlights, there are practices of state institutions which do not constitute isolated violations of the principle of the Rule of Law but constitute systemic threats to the Rule of Law in Greece due to the large number of cases and the non-resolution of the issues which constitute a permanent reason for the condemnation of Greece by the ECtHR[4].

a) The obligation for the administration to comply with judicial decisions.

According to Article 95(5) of the Greek Constitution, the public administration is obliged to comply with the decisions of the courts. The case law of the Greek courts has held that the public administration must take any action necessary for the implementation of a court decision, otherwise the content of the constitutional provision is negated. The obligation to comply covers all judicial decisions and not only final decisions. The obligation to comply with judicial decisions as enshrined in the Greek Constitution is understood as a positive obligation of the state institutions which makes the protection of the right to judicial protection enshrined in Article 20 C and 6 para 1 ECHR effective.

The procedure for establishing a breach of the relevant obligation by the administration and the way of compliance is provided for in Law 3068/2002. This is an "executive" law of the Constitution, the adoption of which makes it possible to implement the constitutional provision, as this provision is not considered as self-executed[5].

However, the procedure provided for by Law 3068/2002 weakens the positive obligation of compliance provided for by the Constitution, as in the event of a breach of the relevant obligation by the administration there is no effective mechanism to enforce full compliance with the operative part of the decision. According to Law 3068/2002, the competence to establish the administration's non-compliance with a judicial decision is vested in three-member judicial councils to which

Separation of Powers, Protection of Rights, Review of Constitutionality. It should be mentioned also that the jurisprudence of the Greek Courts considers the Rule of Law as a source of other principles, such as the guarantee of legitimate expectations and legal certainty. On the Rule of Law in the Greek Constitutional Discourse, see: E. Venizelos, *Lectures in Constitutional Law*,(in Greek) Athens-Thessaloniki 2021, pp. 210, 383-389.

[4] The persistency of the problems in these areas as has been recorded by the jurisprudence of the ECtHR is a strong indication that such issues constitute systemic threats to the Rule of Law in Greece.

[5] In these cases, enacting the Constitution "executive law" is a constituent for the exercise of the right, because if the law did not exist it would be impossible to determine the key elements of the concept protected by the right, that is, should the legislature not define marriage, it would not be possible for the Constitution to protect marriage, as the holder of the right would not be able to have an effect on the legal reality and make use of the possibilities to act on the rights held. On the issue of the so-called "executive laws" see: R. Alexy, *A Theory of Constitutional Rights*, Oxford 2001, p. 123.

any interested party may appeal[6]. However, according to the law, if the Council finds that the administration has violated the relevant obligation, it can only impose a fine on the administration and not force it to take the necessary measures to comply. In fact, according to ECtHR case law, the relevant law does not create a mechanism which makes compliance with court decisions mandatory and is therefore a law which is not compatible with the ECHR as the obligations under Article 6 of the ECHR include not only the adoption of a court decision but also the obligation to implement it[7]. The imposition of a fine for non-compliance does not fulfil this objective. The administration has discretion to comply as Law 3068/2002 does not provide for a substitution mechanism for the administration in case the administration refuses to comply.

A further issue is the waiting time until the procedure is finally completed. Even in cases where compliance is achieved, the average time from the issuance of the court decision to compliance by the administration is 28 months and 18 days, while in cases where non-compliance is found and a fine is imposed, the average waiting time is 49 months and 14 days. On this point there is even a divergence in the case law of the three-judge panel of the Council of State (the Greek Supreme Administrative Court) and the ECtHR as to whether or not this delay constitutes again a violation of Article 6 ECHR. According to the CoS, in cases where the administration complies, Article 6 ECHR is not violated regardless of the time of compliance. On the contrary, according to the case-law of the ECtHR, compliance must take place within a reasonable time because delay in compliance constitutes a form of violation of the obligations under Article 6 ECHR[8].

b) Prison overcrowding / police violence

A second category of cases which provide strong evidence of systemic problems relating to aspects of the Rule of Law are cases concerning convictions of Greece for violations of Articles 2 and 3 of the ECHR. Most of the cases in this category concern the use of lethal force or inhuman and degrading treatment by police officers and the living conditions in Greek prisons.

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[6] The Judicial Councils are composed by judges who hold an office in the Court the judgment of which has not be implemented. Thus, there are Judicial Councils for each individual court in Greece.

[7] See among others, Robotis and Roboti v Greece, 25.01.2007 (application.no: 32141/04, par 19-20).

[8] Vassiliadou v Greece, 6.04.2017 (application no: 32884/09, par. 36). The ECtHR unanimously held that the administration's compliance after 6 years violates the obligation to comply which derives from Article 6 of the ECHR. On the issue of the non-implementation of judicial decisions by public authorities through the jurisprudence of the ECtHR see: Y. Ktistakis, *The Ineffectiveness of the Judicial Councils,* [in:] *The execution of the ECtHR judgments in Greece*, ed. L.A.Sicilianos, Athens 2021, pp. 95-111.

The ECHR has condemned Greece in a series of judgments for cases of police brutality involving the use of lethal force and inhuman or degrading treatment and torture. In the majority of cases, Greece was condemned because the current legal framework for investigating police violence was found to be inadequate, with the result that the police officers involved were not convicted or disciplined. According to established ECHR case law, the absence of an adequate legal framework for the effective investigation of complaints constitutes a violation of Articles 2&3 ECHR[9]. In other words, it is not enough to enact laws punishing specific acts of police officers, but there must be mechanisms to ensure that the laws are respected. In recent years, the legal framework for investigating complaints has been improved by two laws adopted in 2016 and 2020, which created an independent mechanism for investigating complaints, in which the Ombudsman is also involved. However, even today there remains the problem of identifying the police officers involved, as Greek police officers involved in incidents of violence often wear uniforms without insignia, making it almost impossible to identify them.

Regarding the problem of prison overcrowding, the ECHR has several times condemned Greece for violation of Articles 3 and 13 of the ECHR. The conviction for violation of Article 13 concerns the lack of an adequate legal framework which would allow prisoners to request improvement of their living conditions, while the conviction for violation of Article 3 of the ECHR concerns the conditions of detention in Greek prisons[10]. A number of recent laws have attempted to decongest prisons, but according to the available statistics, more than half of the prisons in Greece in 2019 were over 100% full, with an upward trend.

c) Unions of persons belonging to minorities.

Greece has been repeatedly condemned by the ECHR for violating Article 11 of the ECHR because Greek courts reject registration requests for associations established by persons belonging to the Muslim minority on grounds of public order. In fact, Greece has been placed under enhanced surveillance by the Committee of Ministers of the Council of Europe for three of these cases[11].

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[9] See among others, Andersen v Greece, 26.4.2018, (application.no:42660/2011).

[10] On the issue of overcrowding in Greek prisons see: Factsheet- "Detention Conditions and Treatment of Prisoners"/ "Personal Space in multi-occupancy cell and prison overcrowding", in https://www.wchr.co.int?Documents/FS_Detention_conditions_ENG.pdf, last access 18.06.2022. See also: G. Nicolopoulos, *The overcrowding of prisons as a violation of Human Rights. The Greek Ombudsmans' perspective*, (in Greek), [in:] *The execution of the ECtHR judgments in Greece*, ed. L. Alexandros Sicilianos, Athens 2021, pp. 132-147.

[11] Bekir Ousta v Greece, 11.10 2007, (application.no: 3515/2005), Emin and others v Greece, 27.03.2008, (application.no: 31411/2005), Turkish Union of Xanthi and others v Greece, 27.03.2008. (application.no:26698/2005). For a general overview on these cases see: S. Charitaki, *The case of the*

According to Greek law, associations acquire legal personality through their registration in a special register kept in the country's courts of first instance. However, their registration is subject to a court decision which checks whether the legal conditions for the establishment of the association are fulfilled. Furthermore, according to Article 105(3) of the Civil Code, an association may be dissolved by a court decision if its operation constitutes a threat to public order.

The Greek courts, on the basis of the above provisions, have either refused to register the associations or proceed to their dissolution if the members of the association identify themselves as persons of Turkish origin and this self-identification is also included in the name of the association. The reasoning of the Greek courts is that the Lausanne Treaty, which Greece and Turkey have signed and ratified, recognises only one minority, the Muslim minority. Therefore, the choice of a name for an association which may create confusion as to which minorities are recognised in Greece is contrary to public order. However, as the ECHR has held in a series of judgments, the right of individuals to self-determination includes their ethnic self-determination. It is an individual and not a collective right, the only limit to which is recourse to violence on the part of members of an association[12]. If the action of the members of an association is peaceful, it cannot be prohibited, even if its name refers to the ethnic characteristics of its members in a way that is incompatible with international treaties.

This case law of the Greek courts has led to a number of convictions of Greece for violation of Article 11 of the ECHR. Subsequently, because despite the continuous convictions the jurisprudence of the Greek courts has not changed, Greece has been placed under enhanced surveillance for this category of cases. The reaction of the Greek legislator was to introduce a new remedy which allows for a retrial of the case by the competent courts, in case the ECtHR considers that the interpretation of the ECHR by the Greek courts in a case is not compatible with the case law of the ECtHR. However, the first case of this category (minority associations) heard by the Greek courts did not lead to the adaptation of Greek case law to that of the ECtHR. The request for a reopening of the proceedings was rejected on formal and substantive grounds. The Court of Cassation, (840/20021) held that in this particular case the request for reopening of the proceedings to comply with an ECtHR judgment was similar to a request that the same applicants had

associations formed by people who belong to the Muslim minority of Thrace in the ECtHR jurisprudence, (in Greek), [in:] *The execution…*, pp.147-153

[12] Stankov and United Macedonian Organization Iliden v Bulgaria, 2.10.2001, (application.no: 29225/95 & 29221/1995, par. 97).

re-submitted to the same court a few years ago. Consequently, it could not re-examine the request because it was bound by the ne bis in idem principle !!!.[13]

It should be noted, however, that other supreme courts outside the Court of Cassation have also demonstrated a relative reluctance to comply with the obligation to comply with ECtHR judgments. The Council of State (1992/2016) held that the relevant obligation of Greek courts to comply with the judgments of the ECtHR is only accepted under six conditions which must be met cumulatively.

These conditions are: a) the violation of an ECHR provision found by the ECtHR must be causally related to the reasoning and the operative part of the relevant decision of the Council of State, so that the removal of the said violation and its consequences can be achieved through the (total or partial) disappearance of the contested decision of the Court and through the new judgment it is possible to remove the violation (e.g. this condition does not apply where the ECtHR has merely found a violation of Article 6 ECHR, solely in terms of exceeding the reasonable duration of the proceedings); (b) compliance with the relevant ECtHR judgment does not entail a violation of a constitutional provision, which (although it takes precedence over the ECHR,) but must, however, be interpreted, as far as possible, in a manner 'friendly' to the ECHR as interpreted and applied by the ECtHR, in particular in the sense that, if more than one version of the meaning of a constitutional provision can be reasonably supported, that must be interpreted in a manner 'friendly' to the ECHR as interpreted and applied by the ECtHR, the Greek judge must, at least in principle, choose the one that can be 'reconciled' with the ECHR and the relevant case-law of the ECtHR, not the one that leads to a conflict with the latter; (c) compliance with the judgment of the ECtHR does not lead to a breach of another obligation of the country under international law, in particular under European Union law, which, in view of its content and the circumstances of the particular case and after weighing the conflicting legal interests, is considered to be more important than that arising from Article 46 ECHR, (d)

[13] The Turkish Union of Xanthi appealed to the ECtHR with the application No. 26998/2005 in which it requested that its dissolution for reasons of public order be considered contrary to the ECHR. The ECtHR held that the Greek courts which ruled that the dissolution of the association was not contrary to the ECHR, violated Article 11 of the ECHR, because they did not take account the relevant case-law. After the ECtHR judgment (27.03.2008), the association requested that the decisions of the Greek courts be revoked, a request that was rejected because at that time (2008) the remedy of retrial was not provided for (Court of Cassation 353/2012). When, after the relevant remedy was introduced in 2017, they attempted to revoke it again, their request was rejected because a previous court decision (353/2012) on the same request existed (Court of Cassation 840/2021). According to the Court of Cassation, if the new request was granted, then the principle of ne bis in idem which requires that the same party should not be tried again for the same act would be violated. Thus, in its judgment the Court of Cassation considers the Greek courts and public authorities as parties in a dispute and equates the conviction of an individual with the conviction of a State by the ECtHR.

compliance with the judgment of the ECtHR is not, having regard to the circumstances of the particular case, contrary to another overriding reason relating to the public interest, the pursuit of which, weighed against the need to comply with the judgment of the ECtHR, is considered, in accordance with the principle of fair balance, to be superior to (e) the judgment of the ECtHR, which attributes to organs of the Hellenic Republic a violation of one or more provisions of the ECHR, is not manifestly incomplete, vague and/or arbitrary as to its legal (and/or factual) basis, having regard to the criteria of assessment inferred from the relevant case-law of the ECtHR itself (and, in particular, its broad composition), but also that of the Court of Justice of the European Union (CJEU), the fundamental principle of the (procedural and substantive) subsidiarity of the ECtHR's review, as well as its obligation to provide adequate reasons for its decisions[14], (f) the finding of a violation of the ECHR by a Member State of the Council of Europe is not contrary to the ECtHR case law.[15] Thus, the Greek courts are very reluctant to comply with the ECtHR judgments even if the legislator provides for the means to compliance.

d) Strengthening the majority instead of the consensual model in the election of the members of the independent authorities

According to the Greek Constitution, the protection of certain rights is entrusted to independent authorities whose establishment is directly provided for by the Constitution. These authorities are the Personal Data Protection Authority, the Communications Privacy Authority and the National Broadcasting Council. Under the provision of Article 101A C as in force from 2001 to 2019, the selection of the members of the independent authorities was made by a 4/5 decision of a special committee of the parliament. In other words, the consensus of the two largest parties represented in parliament was necessary. However, there were several problems in the election of the members of the independent authorities, because the political parties perceived the requirement to achieve a 4/5 majority as a means to veto the election of the persons they did not want to be selected. The result of this practice was that, because the required majority could not be achieved, it was not possible to elect the necessary number of members of an independent authority to constitute a quorum. It was therefore impossible for that authority to function[16].

[14] This precondition literally means that the Greek Judge considers herself competent to review the ECtHR case law in terms of its compatibility to the ECHR.

[15] According to the Greek representative to the Council of Europe, Professor Venizelos, these conditions are as strict as the conditions set by the Constitutional Court of Russia for Russian courts to comply with ECtHR rulings.

[16] It should be noted that the Greek Constitution did not provide for any mechanism to break the deadlock.

During the 2019 amendment of the Greek Constitution, the provision of article 101A was changed and it is now provided that a 3/5 majority is required for the election of members, while the term of office of members that expires is extended until the election of new members, despite the fact that the Constitution itself stipulates that the term of office of members must last for a certain period of time (article 101A(b)).

These changes undermine the independence of the members of the Independent Authorities as it is now much easier for the first parliamentary party to determine the composition of the Independent Authorities as the consent of the second party is not required. Moreover, if it chooses to veto the selection of new members, the functioning of the authority will not be jeopardised as the term of office of the expiring members will be extended until the necessary majority for the election of new members is reached, so there will be no effective leverage to agree to the selection of persons proposed by the opposition. These changes may make the election of members easier and the functioning of the authorities more efficient, but they remove the element of efficiency from the guarantees of personal and functional independence the Constitution provides, for the members of Independent Authorities[17].

Concluding Remarks

The Greek Case is quite indicative that in the Rule of Law concept procedural and substantive issues are merged. From the above mentioned analysis turns out that all four grey zones related to the implementation of the Rule of Law principles in Greece have a procedural component, namely the source of the deficiency is not an omission in terms of Law or Constitution, but omissions linked to the implementation of Law, Constitution and European Convention on Human Rights by state agents.

The procedural aspect of the Rule of Law concept makes clear, that the principles which are related to this concept breed positive obligations which should be fulfilled by state agents when implementing the substantive safeguards of the Rule of Law. Procedural positive obligations aim to the fulfillment of fairness to the best possible degree and contribute to a better human rights protection from a substantive point of view[18].

At the same time, the procedural aspect of the Rule of Law concept makes clear also the importance of institutions and their smoot operation in the enjoy-

[17] See: N. Papaspyrou, *The main characteristics of the 2019 amendment of the Greek Constitution*, (in Greek), "Efimerida Dioikitikou Dikaiou" (Administrative Law Journal) 2021, no. 6, pp. 761-764.

[18] See: L. Lavrysen, *Human Rights in a positive state*, Cambridge 2016, pp. 52-53

ment of freedom[19]. Smooth operation of institutions which are responsible for the implementation of the Rule of Law principles, safeguard that people are not dependent upon the choices of others. Thus well -functioning of institutions, including their independence towards majoritarian premises is a precondition for the efficient fulfilment of the Rule of Law[20]. What the Greek case makes clear is that the ineffectiveness of institutions might be a threat against the Rule of Law, that is equivalent to substantive inefficiencies.

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[19] See: A. Ripstein, *Force and Freedom*, Cambridge Massachusetts 2009, pp. 232-267.

[20] A clear indication that majoritarian premises determine the attitude of Greek political system towards the Rule of Law principle is the recent case of wiretapping the phone of Socialist Pasok leader, Nikos Androulakis, who is also a member of European Parliament – a move the government itself called legal but wrong. The Hellenic Authority for Communication Security and Privacy (ADAE) conducted a series of investigation and audits that revealed how state officials had been under surveillance by the spy agency. ADAE's last audit took place at the request of the main opposition Syriza leader Alexis Tsipras and unveiled that six more senior state officials, including the heads of the Greek armed forces and the labor minister, have been placed under surveillance by the state spy service (EYP). However, when the Head of ADAE asked to inform the parliamentary committee confidentially of his latest findings, the ruling party blocked it since it has the majority of seats in the commitee.