

"Pandemic, Fundamental Rights and Democracy - The Greek Example" **

A. The pandemic and the *acquis* of modernity - A challenge to fundamental rights and liberal democracy

1. The Coronavirus pandemic is not only a health, economic and social challenge but a major challenge for national constitutions, international law and the EU legal order as well. More precisely, the pandemic is evolving into a comprehensive challenge to the *acquis* of modernity, i.e. liberal democracy, human rights and the guarantees of the rule of law, the nation state and its sovereignty, the organization of international society and the role of the United Nations and international organizations, regional cooperation, European integration and solidarity, and the degree of economic development and the “western way of life”. Our analysis will be focused on fundamental rights, while also making some necessary references to the function of liberal democracy institutions.

2. The Greek case is comparatively interesting in many ways. Greece has emerged from an economic crisis lasting nearly ten years (2009-2019); a crisis that led to harsh austerity measures and brought to action the judicial control on the constitutionality of the relevant legislation, but also its compatibility with EU law and the European Convention on Human Rights. The Greek Debt Crisis also led to changes in the rules of the economic governance of the EU and the Eurozone.

During the current pandemic crisis, Greece reacted swiftly to the threat and has imposed restrictions on freedom of movement and other measures of social distancing- with success, as shown in epidemiological data. All the while, the Greek

Parliament remains in operation, without imposing a state of emergency, without requesting derogation from the ECHR and with all the procedural channels open to judicial control.

The first key argument of the present contribution is that, as showcased by the Greek example, the necessary measures in accordance with international scientific recommendations to bring the pandemic under control, can be taken without the suspension of the relevant constitutional provisions or the activation of Article 15 of the ECHR, i.e. the derogation from its provisions. It is enough to impose restrictions that are provided for, if needed, both at the level of the national Constitution and at the level of the ECHR. Suspension of the national parliament is not only unnecessary, but also potentially dangerous, since the active presence of the Parliament in crisis management, as well as the possibility of judicial scrutiny, serves as a fundamental guarantee of the rule of law and liberal democracy. These guarantees provide the guidelines for the path to be followed in the management of an acute and global health crisis by a democratic society.

The second main argument of this present contribution is that for the duration of restrictive measures that comprise the so-called social distancing and mainly concern the freedom of movement and related rights, other fundamental rights must be absolutely respected and exercised intensively, as a counterweight.

3. The pandemic highlights on an international scale that the protection of health and therefore the protection of life in peacetime is the major good, the synonym of public interest. Explicitly included among the reasons that justify restrictions to the exercise of fundamental rights in many constitutional and international texts is the protection of public health or health in general. Even where this is not explicitly stated, it is inferred from other concepts including health protection, and the need to address health crises, situations that may adversely affect the life of society or the nation, natural or man-made disasters. It is ultimately inferred from the concept of public interest, even in the form of a law towards which the constitutional and international regulations on the protection of human rights hold reservations.

4. Everything concerning health generally mostly applies to the protection of life as a right and as a condition, as the basic ontological element of human value, as a natural condition for the existence of humanity, regardless of any legal and moral assumptions of political entities. The protection of life is an explicit provision of article 5 (2) of the Greek Constitution and of article 2 of the ECHR.

5. Certainly, restrictions on fundamental rights in order to protect health and, for the most part, life, usually refer to difficult, but more or less predictable situations. The world is now facing a health threat, invisible and asymmetrical, beyond the social, political and cultural boundaries that have been established in the so-called western world.

B. Social distancing and the consequent restriction of fundamental rights - The distinction between “constituant” and “constitué” law of necessity

1. Social distancing measures were imposed in order to prevent the spread of coronavirus and achieve the most effective time management possible in order for national healthcare systems to prepare and withstand the load and secondly, in order to internationally come closer to using effective medicine and the application of therapeutic protocols, while waiting for a vaccine. In many countries of the world, therefore, fundamental rights have been restricted and especially the freedom of movement and all related rights (such as freedom of assembly), the exercise of which involves physical movement. In most cases, despite delays or ambivalence, restrictions were imposed, either general (e.g. of national scale and for the entirety of the population) or local (in regions with a high number of cases) or for specific categories of people (e.g. individuals entering a country). These restrictions comply with the recommendations of the World Health Organization and the European and national scientific and advisory bodies. These measures are therefore, according to current data, the scientifically necessary and recommended method of addressing the pandemic.

2. The imposition of restrictions on fundamental rights based on decisions of the competent national bodies, even when these are strict, stricter than usual and longer in duration (which depends on epidemiological data and technical estimates of the international scientific community), is a choice within the framework of the theory of restrictions and the "restrictions of restrictions" of human rights. The provisions of national, European and international law relating to the protection of rights continue to apply, as they provide for the option of imposing restrictions, as allowed by law, always following principle of proportionality and under judicial control.

3. The legal situation changes when, through the application of relevant provisions of the national Constitution or international conventions such as the ECHR (derogation under Article 15), special legal regimes of exception come into effect and which, regardless of their name, provide not only the restriction of fundamental rights and related guarantees, but also the suspension of the relevant provisions.

4. The national constitutions of the Member States of the European Union and the Council of Europe shall provide for such exceptions, under different names. This is mainly the declaration of a state of emergency (État d'urgence) or a state of siege (état de siege/Martial Law). In some cases these special legal situations are indistinct from each other, while in other cases they differ depending on the gravity of the measures they justify and the factual basis they invoke, while in some cases (such as that of the Hungarian Constitution) other forms of exception are provided for, i.e. due to war or danger¹.

5. Such a possibility of derogation, that is, the suspension of the protective power of many rights, under strict substantive and procedural conditions, is provided for as noted, in Article 15 of the ECHR. In order for Article 15 to apply, there a war or another "public danger threatening the life of the nation" must occur and the Secretary-General of the Council of Europe must be notified. In my opinion, the corresponding

¹ From the relatively recent literature, *Oren Gross - Fionnuala Ni Aolain, Emergency Powers in Theory and Practice*, Cambridge University Press, 2006

regime provided for in the national Constitution or the national common law of the Member State must also have entered into force according to the principle of subsidiarity governing the ECHR. Already however, ten Member States of the Council of Europe and the ECHR, including EU Member States, have already notified the Secretary General of the Council of Europe on the activation of Article 15, because according to their national Constitution or their national legal order, they have been placed in a similar state of emergency / exception².

6. Nonetheless, in all cases of exception, both nationally and internationally, there is a core of non-suspended rights that are protected in any case or with minimal deviations. One such is the right to life (Article 48 (1) of the Greek Constitution *e contrario* and Article 15 (2) of the ECHR).

7. Before we proceed to discussing the exceptions, I find it useful to refer more generally to the law of necessity and to distinguish between what I propose we call "constituent" and what I propose we call "constitué" law of necessity. The "constitué" law of necessity includes the provisions of the constitutions or international or EU law during minor or major situations of force majeure and necessity. The "constituant" law of necessity stems from newfound real situations extending beyond the provisions of the legal order (not those that are characterized by current law as "unpredictable", but for which there is a provision on how they will be treated, as in Article 44 (1) of the Greek Constitution)³.

8. The reasons (actual conditions and purposes provided for by the Constitution) that justify restrictions on the exercise of fundamental rights must now be assessed in the context of the so-called multilevel constitutionalism, which can in no way lead to a multilevel restriction of fundamental rights, i.e. a multiplication of restrictions. Multi-

² see *Kanstantsin Dzehtsiarou*, COVID- 19 and the European Convention on Human Rights, Strasbourg Observers, 27.3.2020, *Jeremy McBride*, COVID-19 and the European Convention on Human Rights, ECHR Blog, 27.3.2020

³ see in more detail in Greek, *Ev. Venizelos*, Is the national legislation implementing the memoranda a law of necessity? in: *Ev. Venizelos*, Democracy between History and Conjuncture, Patakis Publications, 2018, p. 484 et seq., where more references can be found.

level constitutionalism offers successive levels of protection of human rights: the National Constitution, the European Convention on Human Rights, the Charter of Fundamental Rights of the EU etc. It is very common that the clauses restricting rights are “richer” in international law than in the national constitution. For example, Articles 4 to 25 of the Greek Constitution do not contain as many restrictive clauses as the ECHR and the Additional Protocols, where almost every article that establishes one or more rights includes a second paragraph that explicitly provides for the possibility of imposing restrictions provided by (national) law and which are necessary in a democratic society in order to deal with a number of critical issues, including the protection of (public) health⁴.

9. In the Greek Constitution, restrictions for reasons of protection of public health are explicitly provided for in the interpretative clause under Article 5 of the Constitution, which has existed since 1975 (when the Constitution came into force), but was retained during the 2001 revision in conjunction with paragraph 4 of the same article which was significantly amended, as the possibility of taking individual administrative measures was completely prohibited. Individual measures can only be judicial, they cannot be administrative, as was for example the infamous measure of displacement during the civil war, the post-war period and the dictatorship (1946-1974). There is now a complete constitutional guarantee of personal freedom, freedom of movement and establishment. No individual administrative measures can be taken; however, legislative measures can be taken for reasons of protection of public health and the health of citizens⁵.

In addition to this basic provision of Article 5, public health as a constitutionally protected good is explicitly included in a system of provisions of the Greek Constitution which is activated when there is danger, i.e. a crisis.

The articles in question are:

⁴ See, for example, *Nicolas Bonbled- Céline Romainville*, *Etat d’exception et crises humaines aiguës: Débats récents autour du terrorisme et des nouvelles formes de crise*, *Annuaire International de justice constitutionnelle*, XXIV- 2008, pp.429 et seq.

⁵ A relevant study was published in Greek in tempore non suspecto: *Tina Garani - Papadatou and Venetia Velonaki*, *Human Rights and Infectious Diseases*, *ΔτΑ*, 66 (2015), p. 791 et seq.

- article 18 (3), which allows the requisitions of property in order, among other reasons, to deal with a crisis in public health
- article 22 (4) of the Constitution, which allows the requisition of personal services, i.e. the imposition of forced labor, among other things for reasons of protection of public health.

10. The Greek Constitution provides for a basic mechanism of “constitué” Law of necessity which is activated “under extraordinary circumstances of urgent and unforeseeable need “. This is the mechanism of article 44(1), i.e. the ability of the President of the Republic to issue "Acts of Legislative Content", after a proposal by and in agreement with the Government, which is essentially responsible for this issuance. These acts are issued in order to deal with a situation or event that cannot be dealt with under the provisions of the legislation in force and when there is no time to pass a parliamentary law -even via an urgent procedure. This "urgent and unforeseeable need" is therefore not required to be a "state" or to be declared as such. The political estimation of the Government to use this possibility is enough. However, the procedure is under the control of the Parliament, which has the competence to ratify or not an Act of Legislative Content. If these acts are not ratified within the time limit set by the Constitution, they cease to apply. In any case, the content of the act is subject to judicial review of constitutionality and compatibility with the ECHR and EU law -as long as the Legislative Act maintains its special legal nature as an act of the executive branch and when it is ratified by law.

11. Continuing with the Greek example, the constitutional provisions invoked by the Act of Legislative Content of 20.3.2020 entitled “Urgent measures to address the consequences of the risk of dispersal of the COVID-19 coronavirus, the support of society and entrepreneurship and ensuring the smooth operation of the market and public administration” in paragraph 1 of its preamble, are as follows:

- paragraph 1 of Article 44 on the possibility of issuing Acts of Legislative Content, in combination with:

- paragraphs 1, 4 and 5 of Article 5, i.e. the free development of the personality, the prohibition of administrative measures and the new paragraph 5 added in 2001 on the right to health, but not the interpretative statement under Article 5,
- paragraph 3 of Article 18 which, as we have seen, provides for the possibility of requisitions of property,
- paragraph 4 of Article 25 (Article 25 contains the rules for the interpretation of the whole system of individual rights) which explicitly imposes the “debt of national and social solidarity”, but does not lead to a multiplication of tolerated restrictions,
- paragraph 3 of Article 21 which explicitly establishes the right to access healthcare services (as a social right different from the individual right to health which since 2001 is guaranteed expressly in Article 5 (5)),
- paragraph 1 of Article 22 which explicitly refers to the right to work and the protection of work as an obligation of the state (but does not invoke paragraph 4 which allows the requisitions of personal services),
- paragraphs 1 and 2 of Article 106, i.e. the responsibility of the state for the national economy and development and the constitutional limits of private economic initiative in the name of the general interest. It is an allusive but clear reference to the need for a shift to a traditional Keynesian view of the role of the state in the economy, as it must support the real economy and the financial system with state aid, overcoming the constraints of economic governance of the EU and the Eurozone. After all, the general escape clause from the Stability Pact has already been activated at EU level.

It is very important to see how the first pandemic Act of Legislative Content itself and all subsequent acts address their legal and factual basis. In the second paragraph of its preamble, the Act invokes the actual fact of the urgent need to "limit the dispersion of the COVID-19 coronavirus and take the necessary measures to ensure the support of society and entrepreneurship and the smooth functioning of the market and public administration, as well as the protection of national and EU borders".

It therefore invokes further constitutional purposes, in addition to the need to protect public health and the national economy. These include defense and security, internal and external, and border protection (first by the police and then perhaps by the

military) which do not fully comply with the specific provisions of the Greek Constitution mentioned in the first paragraph of its preamble.

The Act, however, does not invoke in its preamble the ECHR or any regulations of EU law or the International Covenant on Civil and Political Rights.

12. We can now return to the distinction I proposed (see point 7) between "constitué" and the "constituant" law of necessity and relate it to an urgent situation or situation of need without the declaration of a State of emergency. An urgent situation is a real situation provided for and regulated by law, it is not an unpredictable situation, nor does it need to be declared as such, nor does it question the validity of fundamental rights and guarantees of the rule of law. All branches of law - civil law, criminal law, administrative law (force majeure), procedural law in all its versions - provide for situations of force majeure or need. These situations can range from the "Plank of Carneades" in criminal law to the application of provisions such as those we saw concerning the requisitions of personal services or properties and especially the issuance of Acts of Legislative Content in constitutional law.

13. Such provision at the level of the Greek Constitution is (as we saw in point 9) and that of the interpretative statement under Article 5 on the imposition of measures (not only individual administrative measures) for reasons of protection of public health or the health of citizens. These measures are taken "as required by law." Therefore, these are first of all legislative measures taken by a parliamentary law or by an Act of Legislative Content under the conditions of article 44 (1) of the Greek Constitution. These measures can be specified in regulatory administrative acts under the conditions of Article 43 of the Constitution, while they are applied by individual administrative acts (e.g. imposing administrative sanctions in cases of violation of measures or the provision of permits provided by relevant legislation and regulations). The main measure that can be imposed is obviously the restriction of freedom of movement to fight communicable diseases.

14. When the national Constitution provides for the official declaration of a state of emergency or even a state of siege, the relevant regulations belong to the “constitué” law of necessity too. The relevant provisions of the Constitution must be fully respected. The same applies to the case of the conditions for the application of Article 15 of the ECHR. Anything that goes beyond this by invoking a “constituant” law of necessity calls into question the constitutional order.

C. A parallel to the discussion on the law of necessity during the economic crisis

1. In Greece, during the period of the economic crisis (2009-2019), the law of necessity was effortlessly invoked. There are many who, scientifically, politically and even jurisprudentially, have spoken on the law of necessity, arguing that the economic crisis and the need to take harsh and exceptional measures were beyond the scope of the Constitution or the ECHR or EU law. This approach corresponded to that which took place during the period of the constitutional-political anomaly from the Nazi Occupation of Greece during the Second World War up until the Constitution of 1952, with the “mandatory laws” and the legislative decrees in combination with the crucial question whether the Supreme Court for administrative cases and the Supreme Court for civil and criminal cases at that time could examine the fulfillment of conditions for issuing mandatory laws or other legislative acts by invoking the “constituant” law of necessity without or beyond constitutional provisions.

2. However, as I have already pointed out (above, point B7), when you are called to deal with an urgent situation, it does not mean that you are led to resort to what I mentioned as the “constituant” law of necessity, i.e. to a law of necessity that transcends the Constitution, invoking the clause *salus populi suprema lex esto*.

3. In Greece in 1974, the Turkish invasion of Cyprus, the military call-up, the collapse of the dictatorship, the change of regimen, all led to the need to issue a series of constitutional act, followed by resolutions of the first Parliament after the dictatorship, which were not based on the Constitution because it did not exist at that

point. The constitutional acts (of the executive branch) and the resolutions (of the Parliament) issued before the 1975 Constitution came into force, were "mini-constitutions" themselves, meant to regulate emergencies, and were self-referential.

4. In Greece, during the economic crisis, there were no such rules of "constituant" law of necessity. There has been an intense and often conflicting interpretation of the Constitution, many laws have been passed via urgent procedure in the Parliament, many Acts of legislative content have been issued, strict fiscal measures have been enacted, but at the same time there has been intense and extensive judicial review of the constitutionality of this legislation. There was constant scrutiny by the European Court of Human Rights through individual applications, scrutiny by the EU General Court, the EU Court of Justice, international arbitral tribunals and so on. We were called upon to deal with a deep and long-lasting crisis that led to the introduction of new rules at the level of the legislation and the application of existing constitutional provisions, which have been activated in the sense of "constitué" law of necessity⁶.

5. The Coronavirus pandemic and the measures applied to address it form a situation that is unprecedented in the Western world in the last few decades, an extremely intense situation; we are still within the limits of the legal order though. An "interpretation of necessity" may be required, but it will be an interpretation of the existing provisions of the legal order at all levels - the national constitution, the EU law, the ECHR. We are under emergency conditions, but we do not have a state of exception in the sense of the term in interwar theoretical debates. That is, we have not been led to situations that were Carl Schmitt's favorite subject (who talked about something more extreme and historically rare than the usual state of siege) or are now Giorgio Agamben's favorite subject about how you can try or break the limits of the

⁶ In more detail, *Evangelos Venizelos*, State Transformation and the European Integration Project. Lessons from the Financial Crisis and the Greek Paradigm, CEPS, Special Report No 130, February 2016. For a different approach on the subject, see *Jan Christoph Suntrup*, From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Cost of EU Financial Crisis Management, *German Law Journal*, vol.19, No 2,2018)

legal order by moving between the state of exception , the right to resist and a privileged "political crime"⁷.

6. We are within the limits of legal order and this is evident not only by the measures, both legislative and administrative, that Greece is taking, but also by the measures taken by almost all other EU member states (with some exceptions such as Hungary to which we will refer below) and the EU itself in its privileged field which is economic governance, monetary policy, quantitative easing, all the measures announced by the European Commission, the European Council, the Council of Europe and the ECB after the activation of the general escape clause of the Stability Pact.

D. The movement restriction measure - Could milder measures have been taken?

1. The restriction of physical movement automatically leads to a domino of restrictions on the exercise of a chain of fundamental rights. Because the freedom of movement has historically given birth to the market, politics, public space. It is what gave birth, to a large extent, to the freedom of political thought, expression, dissemination of ideas, religious freedom. At the core of modernity lies the unification of space under state control. That is why the state is a key acquis of modernity. Thus, when physical movement is necessarily restricted -because it cannot be avoided and it is done in order to protect the major good of life and health-, thus automatically affects economic freedom (freedom of the market, freedom of trade and industry, freedom of profession and business, freedom of work). Restrictions are imposed on the relevant fundamental freedoms of EU law, namely the free movement of persons, capital, goods and services, on the freedom of establishment and the freedom to provide services. The area of freedom, security and justice is not functioning. In fact,

⁷ Indicatively, see *Carl Schmitt*, Political theology. Four Chapters on the concept of sovereignty, translated by George Schwab, foreword by Tracy Strong, University of Chicago press, 2005. *Giorgio Agamben*, State of Exception, University of Chicago Press, 2005. relevant international literature of recent years, François Saint-Bonnet, L'état d'exception, PUF, 2001.

the single market is not functioning, at least in terms of persons. The Schengen agreement has been suspended. The freedom to assembly, including the freedom of religious assembly, is restricted. Without freedom of movement there is no assembly, so there is no objective possibility of collective worship inside or outside the temple. The freedom of education is influenced by its traditional form of close quarter organized teaching and distance education becomes compulsory.

2. The assessment that the measure of restriction on freedom of movement is necessary and appropriate arises from the fact that this measure is applied -rapidly and with determination in some cases, with ambivalence and delays in others- in almost all countries. This measure is recommended by the international scientific community, the WHO and it is obvious that it is the only one that yields results. Countries that had initially flirted with the “herd immunity” policy without interruption of economic and social activity (lockdown), such as the United Kingdom and the United States, also follow this logic now⁸. Of course, epidemiological data is changing, science is making anxious efforts to find therapeutic and preventive solutions. Therefore, both the intensity and the duration of the restrictive measures must be re-evaluated based on the evolution of international scientific assumptions. This is required by the principle of proportionality, the perceptions of a democratic society, the completeness of the reasoning of the relevant administrative and legislative acts.

3. Could milder measures have been taken? As shown from common experience, no. That is due to the fact that such hesitations in other countries have led to failure. It has become clear that if you do not flatten the (infection cases) curve, you will not be able to offer the necessary and vital health services. You will let people die helpless, which is what happened in Italy and Spain. While at least, even if you do not universally control the spread of the virus, you will be able to control the time over which it spreads, so you will help the healthcare system to withstand the load. In this sense,

⁸ For the UK, see *Stephen Tierney and Jeff King*, The Coronavirus Bill, UK Constitutional Law Association, blog, 24.3.2020. and all the discussion on this blog. For a relatively early discussion in the US, see *Ed Richards*, The Coronavirus and the Constitution, The Volokh Conspiracy, 10.2.2020.

the relevant administrative acts and the laws under which they were ratified by the Greek Parliament have the absolute, global-level justification, based on the recommendations of experts⁹.

E. The functioning of democratic institutions and the Parliament in particular

1. The functioning of democratic institutions is also affected. The parliament is exercising both the legislative work and the parliamentary control subduedly and under great pressure. In reality, parliamentary committees are under-functioning. There are problems in the operation of local government bodies. There are problems in the functioning of the collective entities of civil society. France was forced to postpone the second round of municipal and regional elections. A planned constitutional referendum for the establishment of a new constitution has been postponed in Chile. In Poland, the insistence on holding presidential elections in May provoked a reaction from the opposition. In South Korea, parliamentary elections were held under strict health protection measures. In the United States, the Supreme Court did not accept the general application of the rule that allows voters to be absent on election day to vote by Ballot in the local elections in Wisconsin. In Greece, it would be unthinkable to organize a referendum pursuant to Article 44 (2) or to collect signatures for a popular legislative initiative. It is very likely that we will face problems in interpreting constitutional provisions that set strict deadlines concerning the conduction of periodic elections or the completion of other constitutional procedures.

Let me give an example: if according to the Greek Constitution the issue of postponing the parliamentary elections due to a pandemic arises, despite the explicit constitutional provisions that require elections no later than thirty days after the end of the four-year parliamentary term (Article 53 (1)) or dissolution of the Parliament

⁹ For legal concerns about the restrictions in Italy, see *Alessandra Spadaro*, Do the containment measures taken by Italy in relation to Covid- 19 comply with human rights law ?, EJIL: Talk, 16 March 2020. At verfassungsblog.de there is a constant flow of comments on the measures taken in various countries and the related legal and political concerns. *Tom Gerald Daly*, on COVID-DEM, democratic-decay.org , monitors and gathers the international debate, mainly on constitutional law issues.

(interpretative Clause pursuant to Article 41), the postponement must be accepted as long as it is medically necessary in accordance with international scientific assumptions and as long as the restriction on the freedom to movement and assembly is in force. In this case, however, the Parliament must not be dissolved -although there is a reason for dissolution- or its term must be extended despite the end of the four-year parliamentary term until the restrictions affecting the smooth running of political life are lifted. The dissolution of the parliament or the end of the parliamentary term without the holding of elections is something inconceivable under the democratic principle. Methodologically, I do not choose the proportional application of article 53 (3), since the proportional categorization of the pandemic under “war” would also pave the way for the proportional categorization of the pandemic under “war” pursuant to Article 48 of the Greek Constitution which regulates the state of siege status.

2. Nevertheless, in Hungary, the operation of the parliament has been suspended, with alarming ease. This has provoked a new wave of reactions in relation to Hungary's stance towards the values of the EU and the Council of Europe. The letter of the Secretary General of the Council of Europe in 24.3.2020 addressed to the Hungarian Prime Minister is very indicative of this. In Poland, the government is currently pushing towards holding the scheduled presidential elections. It is true that the postponement of elections is a decision lying at the margins of the Constitution, and the ECHR. Ensuring the institutional functions of Western democracy under pandemic conditions is a prerequisite for the existence of European societies.

3. The pandemic is a global threat, but there is no global uniformity of political systems, there are democratic and liberal regimes that manage the health crisis, and there are also authoritarian regimes that manage the crisis. We must therefore look at how the efficiency of the state can be paired with democracy and liberalism. The pandemic is already a major historical and institutional laboratory in which the resilience of liberal democracy and the guarantees of the rule of law are being tested. The theory of constitutional law is called upon to help strengthen the resilience of constitutional democracy under conditions of unprecedented health crisis, based on

fundamental principles, on what is institutionally reasonable in a democratic society, i.e. the need to protect the medical/biological prerequisites of social cohesion and life.

F. Could the pandemic lead to the implementation of Article 48 of the Greek Constitution and the declaration of a state of siege?

1. Taking everything into account, we are before an acute situation of necessity, which, however, cannot lead to the implementation of Article 48 of the Greek Constitution and the declaration of a state of siege. Article 48 is also part of the "constitué" law of necessity because it is expressly provided for in the Constitution, in a manner consistent with the provision of Article 15 of the ECHR and Article 4 of the International Covenant on Civil and Political Rights. In order for Article 48 to be implemented and for the country to come under a state of siege, with the strict procedural conditions that this requires (qualified majority, deadlines, permanent presence of parliament, etc.), there must be a war in the sense of both the real situation and legal proclamation - that is, a combination of legal and real situation, not quasi-war, i.e. "war of ideas" or war against "evil" - or military call-up/mobilization due to external danger or a direct threat to national security or an armed movement to overthrow the democratic regime.

2. Is it possible for the concept of war to change content through this "interpretation of necessity" that I spoke of? Is it possible to assume that the "war" against the virus is an asymmetrical and hybrid war that allows even the application of the provision of Article 48? Or that there is a matter of national security, because the suspension of the functions of the economy, creates a problem that is connected with both foreign policy and security and defense policy or with public security (although this is a concept different from national security referred to in Article 48)?

I believe that all the necessary legislative, administrative and practical measures can be taken without reaching extreme dilemmas about the interpretive limits of Article 48. We are not referring now to countries with authoritarian regimes, but to Europe, the most developed region in the world in which liberal democracy and the rule of

law, the welfare state, are endowed. Greece in this global health crisis seems much more flexible, determined and effective than big and powerful Western countries. In addition, the adequacy, resilience and deep liberalism of the current Greek Constitution seem to be verified under real and extreme conditions. It seems to provide for a very careful regulation of issues related to emergencies, the restrictions of fundamental rights and guarantees of the rule of law, the rich constitutional protection of personal liberty and security, constitutional caution for the declaration of a state of siege¹⁰.

G. The need for counterweights that protect fundamental rights and liberal democracy - The open question of privacy and personal data protection.

1. There is an equally urgent need to ensure that the modern social contract is maintained. That the modern society, which flirted with postmodern libertinism, with the challenges of the Fourth Industrial Revolution and the advances in biotechnology, is not in danger of returning to the "state of nature" in the sense that the term has in political theory, in the state before the social contract, the state of "bellum omnium contra omnes". Now the "biochemical", archaic core of a modern society has emerged, a society that has proved to be more fragile than one might expect, and all our sociological analyses give way before the need for anthropological approaches to the ontologically fundamental questions of human existence.

2. In the conditions of necessity in which we find ourselves, it may be necessary to maintain for a long time measures that restrict movement and therefore social and economic activity. This should not lead to a disorganization of the *acquis* of modernity, to a questioning of the obvious about what democracy, the rule of law, culture, progress, solidarity mean. From this entire situation, however, the nation-state (which is a key element of modernity) emerges as a manager of crises and the *ultimum*

¹⁰ A summary of the discussion on article 48 and further bibliographic indications can now be found by anyone interested in *S. Koutnatzis*, comment under article 48, in: *F. Spyropoulos / X. Kontiades / Ch. Anthopoulos / G. Gerapetritis*, *Syntagma. Per article Interpretation*, Sakkoula Publications, 2017, p. 947 et seq., in Greek.

refugium of the citizens. We must therefore examine how counterweights can be created that will, to the greatest extent possible, ensure the acquis of liberal democracy and the rule of law.

3. I believe that counterweights should begin with ensuring the functioning of democratic institutions, even without always having a personal presence and physical contact. It is very important that the democratic institutions, the Parliament, the decentralized authorities, the European Parliament, continue their operation, even by making use of teleconferences or other such practices. And of course, another counterweight is the absolute respect for all other rights, which are not linked to the restrictions on movement and social interactions that are necessary in order to stop the spread of the virus and to raise a barrier against the pandemic.

4. So of course there must be absolute respect for the fundamental goods and rights that we want to protect under the current conditions. These are the right to life and the right to health, combined with the fundamental duty of national and social solidarity. The urgent need to stop the pandemic and protect these "existential" goods and fundamental rights renders the restrictions on freedom of movement and all related rights, proportional and legitimate. Be that as it may, these strict restrictions must be accompanied by counterweights that keep the "shell" of the rule of law and liberal democracy alive.

5. Counterweights include, for example, absolute respect of:

- the principle of equality
- the right to participate in the information society (which is expressly protected in the Greek Constitution pursuant to Article 5A which was added during the 2001 revision. This right must be practically protected against the risks posed by network traffic overload.
- the right to personal security.
- penal liberalism
- procedural rights to a "natural judge", judicial hearing, fair trial, prior administrative hearing.

- the right to associate.
- religious freedom, with the necessary exception concerning the right to religious assembly and collective worship
- the freedom of speech, opinion, information, dissemination of ideas, press and electronic media, participation in social media
- protection of property
- environmental protection
- all rights of political action and participation that do not conflict with restrictions on freedom of movement.
- all social rights.

Nothing is completely self-evident and everything is worth reminding. I therefore propose a system of counterweights within fundamental rights, by activating and intensively using all the fundamental rights not connected with the need to control the pandemic.

6. In practice, the next step would be to challenge the right to privacy and the absolute protection of sensitive personal data, to bring into debate the scope of Articles 9 and 9A of the Greek Constitution, Article 8 of the ECHR, the Convention 108 and the relevant provisions of EU primary and secondary law (mainly the GDPR) through systems for the collection of epidemiological data and even monitoring citizens' health, and especially that of potential carriers of the virus. This is already happening, as we can see, in Singapore and partly in Israel or it is being proposed through various applications that are already being tested or proposed internationally, sometimes by collecting anonymous data, sometimes by the voluntary participation of an individual to a specific surveillance system (taking and sending a selfie or use of an application for digital tracing).

On the other hand, can someone, citing their privacy and personal data - health information is sensitive personal data par excellence - refuse to state that they have symptoms? Or can someone, knowing that they are infected, walk about citing the exceptions to the restrictions on movement?

The European Data Protection Board, in a statement issued on 19.03.2020, leaves much room for action to Member States, always within the framework of the GDPR and the ECHR and under judicial review. The EDPB cites the issues that have already arisen and considers that all necessary measures can be implemented in the context of article 9 (2) of the GDPR. The Greek Authority for the Protection of Personal Data is more cautious in the wording of the Guideline issued on 18.03.2020 “on the processing of personal data in the context of COVID-19 management”.

7. It is therefore very crucial that any counterweight to the rule of law and the intensive exercise of constitutional rights operates in order to maintain the climate and atmosphere of a substitute public space, even that is digital. The “armor” of liberal democracy should function as a feeling and as a guarantee in order for us to see how this situation -which is unfortunately still in its infancy- will develop in the best possible way for the life and health of citizens and those living in our country and around the world, but also in the best way for liberal democracy, fundamental rights and the rule of law.

H. The role of the EU and the challenge it faces

1. Of course, the challenges concern economic law in its broader definition and primarily the rules of the EU and the eurozone on economic governance. In terms of fiscal governance, the member states of the eurozone and, of course, the rest of the EU Member States now possess a great deal of discretion, as restrictions from the Stability Pact have been lifted through the application of the general escape clause. Thus, measures such as the provision of state aid and the funding of the real economy (and not just the financial sphere) can be implemented. This may need to be implemented on a larger scale. We will see what happens next. Of course, on the day after the crisis. EU member states will each be at their own level, at the level of productive power and competitiveness each one possesses and at the respective level of public debt. This will create a lot of problems that we thought were solved because the financial crisis had supposedly reached its end and we returned to normal.

2. Could the EU have implemented at its own level legislative and administrative measures, such as the restriction on movement? The EU cannot, in the context of its competences, impose such restrictions on the exercise of human rights. Only member states can impose such restrictions. Now, the sovereignty of the state as the ultimum refugium in the management of a crisis is being tested. At the current level of European integration, no state, be it large such as Germany or medium, such as the Netherlands or Greece, would be allowed to be deprived of its responsibilities concerning the health and lives of their citizens. It is a matter of national security in this regard. One cannot entrust these to European mechanisms and be deprived of such decisions, which are crucial to the life of a society and a nation.

3. All of these are related to other issues, including migration and refugee flows, foreign policy and security and defense policy. When faced with new situations, new challenges, when the core of modernity is challenged, we have to resort to the fundamentals. We have to be able to identify and protect fundamental guarantees.

I. Final remarks

Fighting back and claiming that, for example, it is unconstitutional to ban religious gatherings for the sake of protecting public health or that a general ban on movement cannot be imposed, is a sign of scientific “sloppiness” and historical and social irresponsibility, which not only disregards citizens’ health and their safety, but also their anxiety towards an asymmetric threat. Finally, it does not respect the need to preserve the fundamental features of European democracy, the rule of law and the European welfare state with specific, practical and applicable measures. –

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