The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death

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Each time a crisis emerges, the law is entitled to seize the exceptional moment and contain it, within the limits of democracy and the rule of law. Legal *normality*, as a vague standard, is usually redefined by the legislator and the courts and rapidly adjusted to reality. The constitutional value of *public interest* comes into conflict with civil liberties and scholars begin to question the law. The saga of the (Greek) coronavirus crisis-law is, like everywhere, utterly reduced to the *proportionality* of the exceptional measures of the (Greek) State, but its *moral* and *political* implications seem far broader and ambiguous.

Balancing the "Emergency Law"

The normative definition of the emergency state is provided by article 48 ("state of siege") of the Greek Constitution, which is applied to threats on national sovereignty and security from external or "internal" enemies of the State. Under these rare conditions, the State is authorized to *suspend* civil rights and liberties (such as freedom of association, the freedom of the press and habeas corpus). In other words, this constitutional provision becomes our *ultimum refugium,* when the existence of the State and the Constitution is heavily compromised.

By contrast, the Greek version of "emergency law" in times of crisis, other than the one described above (for instance, the recent economic crisis), is mainly based on article 44 (1) of the Constitution. The latter is suitable for facing natural disasters or social and economic disruptions and unexpected events. The executive power adopts the "Acts of Legislative Content", a sort of decrees legally equivalent to the Parliament's law.

This controversial way of "fast-track" legislating by the executive has been severely criticized throughout the financial crisis, turning out to be a powerful weapon on the hands of the Government in view of bypassing parliamentary deliberation and freely imposing its sovereign will. However, article 44 (1) provides the executive with flexibility and efficiency, if *prudentially* applied, and the pandemic is without doubt an exemplary occasion. Furthermore, the Greek Constitution and the courts refer to the notion of public interest and to the principle of proportionality (article 25 (1) of the Constitution) as fundamental *counter-limits* of rights.

The coronavirus pandemic has given birth to consecutive Acts of Legislative Content (submitted to the Parliament for approval) and ministerial decisions restricting various constitutional rights and establishing an *atypical "emergency law"*. The exercise of rights is not fully suspended but provisionally limited in order to protect the individual (article 5 (5) of the Constitution) and the social right (a positive obligation of the State, article 21 (3) of the Constitution) to health.

Public health is solemnly recognized by the Constitution and the courts as one of the major components of public interest (see also article 18 (3) and the interpretative clause for the article 5 (4) of the Constitution). To this end, the right to personal autonomy and freedom (article 5 (1) and (3) of the Constitution) has been seriously curtailed as the Greek Government announced a ban on all unnecessary transport and movement across the country. The freedom of movement is allowed only for specific reasons including working, shopping, visiting a doctor and assisting a person in need of help, individual exercising or walking a pet or attending a ceremony. Citizens leaving their domiciles have to declare the purpose of their movement (by filling a document or sending an SMS)

and are obliged to carry their ID or passport with them. Besides the restrictions on free movement, the Government has imposed the closure of hotels (with minor exceptions), courthouses, theaters and cinemas, gyms and playgrounds, cafes, restaurants, bars, shopping malls, museums and archaeological sites and food outlets, excluding supermarkets, pharmacies and take-away/delivery food outlets. Moreover, public spaces are literally deserted while entrance to all parks, beaches, ski camps etc. is forbidden to the public. Significant restrictions have also been applied on the right of religious freedom, given the fact that churches remain open only for private prayer. Freedom of assembly has been essentially suspended, being allowed up to a maximum of 10 persons. All schools and universities are closed and adapting to online education. Last but not least, Greece has closed its borders to all non-EU citizens (has also banned flights from and to Italy, Spain, UK and Turkey) and the repatriation of Greeks living abroad is strictly conditioned.

The common interrogation of citizens and legal scholars is whether these extraordinary measures of *confinement* are necessary in a democratic society, according to the proportionality principle and public interest. In this thorough exercise of balancing, the legal argument is inevitably mediated, not to say absolutely determined, by the real facts, the overwhelming *scientific data* on the coronavirus (the suggestions of the World Health Organization, the cases and the rate of deaths in China, USA, Italy, Spain, France, the studies on the virus and its aggression etc.) and their pragmatolocigal correlation with the *temporary* restrictions on rights.

Thus, it is hard to suggest *epistemically* and therefore *legally*, contrary to the vast majority of experts (doctors, epidemiologists, health-care institutions etc.), that the almost "general lock-down/quarantine" fails to properly address the pandemic, nor that, in this absolute and uncontrolled urgency, the legal measures taken were not strictly necessary or even that other alternative ways were at our disposal out there, at this very moment, so as to achieve in a less restrictive manner the *noble* goal of preserving public health and, ultimately, the right to life.

In any case, these actual limitations should not be confused with a total suspension or suppression of the core of constitutional rights. The obvious plasticity of the proportionality principle may undermine them but also enhances the law-maker's capacity to handle urgent situations and accommodate the uneven reality. In fact, also in European Union and ECHR law, there is always a wide *margin of appreciation* for the State when facing threats to public safety/health and the constitutional value of health and life is at stake. Back in Greece, the courts and especially the Council of State have recently demonstrated (during the financial crisis) their *self-restraint,* when the vital public interest has been jeopardized, and have recognized the political responsibility and the priority of the Government and the legislator to deal with the crisis. Consequently, all *empirical* (the scientific discourse and the facts of the pandemic) and *normative* elements (mainstream constitutional theory, judicial review and the courts' authentic interpretation of the proportionality principle, the provisional character of the "emergency law" and the normative priority, at the very moment, of the public interest) tend to ease the reasonable doubts regarding the conformity of the measures with the Greek Constitution.

From Rights to Duties and the Return of the Nation-State

Even if the legal narrative remains, for the time being, rather linear, the fight against the virus seems to breed broader moral and political implications for our constitutional culture. In Greece, the so-called "era of human rights" and their strong judicial protection (for the last 40 years-period called "Metapolitefsi") has entered a state of decline. Already having been heavily affected by the economic crisis, social and individual rights are once again mitigated. None can accurately (under)estimate the macro socio-economic effects (e.g. on labor and social policies) of the coronavirus, even if its resilience proves to be low, neither neglect the high risk for individual freedoms, such as privacy. The pandemic crisis shifts, like the financial one, the constitutional paradigm from the ground of rights to the capital notion of public interest and constitutional

objectives. Rights, in this context, are not considered as trumps (R. Dworkin), the strongest claims against authority, because the normativity of common health/good simply exceeds them. The lethal virus challenges *liberalism* and the republican conceptionof *salus populi* is revitalized.

In this ongoing evolution, the notion of right is conceptually altered as its exercise falls under the judicial scope of the famous "harm principle". To sum it up: each one of our actions, even the more insignificant and private one, may contaminate the other. In the absence of a therapy or a vaccine against coronavirus, the individual and moral duty for one's health is converted to a collective one and the *ethic* of responsibility claims its universality and supremacy over the personal interest. In constitutional terms (article 25 (4) of the Constitution), our personal freedom mixes up with the social obligation of solidarity and care.

At an institutional level, the crisis leads to a certain "comeback" of the administrative State and the national public (health) service. Citizens rely much more on the State's sovereignty and capacity than on civil society and private institutions. The old "Nation-State" (borders, public services etc.) seems to experience its *renaissance* and national interest emerges along with a rising political "protectionism" (mainly in the United States and the UK), attempting to *reverse* the flow of globalization. Above all, in the sense of legal and political philosophy, the coronavirus outbreak reminds us the foundation of Social Contract and the mere *necessity* of public authority, the power required to absorb citizens' panic and take over the responsibility for their lives, responding to their basic instinct of survival. By staying home and staying safe, the existential core of rights (health, life) is preserved. Nonetheless, *the cost (or the eventual benefit)* of this hard and uncertain balancing for our modern way of life and contemporary constitutionalism remains to be seen.

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