Greece's experience with providing citizens access to constitutional justice

I am deeply honored to participate in this conference organized by the President and the members of the Constitutional Court of Bulgaria who I warmly thank for their hospitality. I would also like to congratulate the President of the Constitutional Court of Bulgaria for her initiative to establish the Balkan Constitutional Courts Forum as a means to strengthen the cooperation among the Constitutional and Supreme Administrative Courts in the Balkan region.

I will present you briefly the constitutional review of laws in Greece.

According to article 26 of the Greek Constitution, which establishes the separation of the powers, the legislative function is exercised by the Parliament and the President of the Republic, the executive function is exercised by the President of the Republic and the Government, while the judicial function is exercised by the courts. According to Montesquieu's expression, in continental law countries, such as Greece, the judge is the "mouth of the law", i.e. he reproduces the will of the legislator, respecting the democratic legitimacy of the latter. The Greek constitutional law assigns the review of the constitutionality of laws to the judiciary.

In principle, the Greek Constitution, provides for repressive judicial review of the constitutionality of laws (i.e. it takes place after the enactment and implementation of the law). However, it also provides for two cases of preventive judicial review (which takes place before the enactment and implementation of the law). These are the elaboration of presidential regulatory decrees by the Council of State (Article 95(1d) of the Constitution) and the opinion of the Supreme Financial Court on bills concerning pensions (Articles 98(1d) and 73 of the Constitution). Nowadays, the legal basis of this control is provided by Articles 87(2), 93(4) and 100 of the Constitution.

Greece, as is well known, is one of the few countries that, long before the implantation in Europe of the Kelsen's centralised model of control, had turned to the American tradition of judicial review. For more than a century and a half, in our country the courts have been exercising diffused constitutional review of laws, i.e. every judge, regardless of his or her position in the hierarchy has the power, but also the obligation, not to apply a law that is contrary to the Constitution. The American conception of the Constitution as a higher law, which must in practice prevail over any other, as expressed in the Supreme Court's landmark decision of 1803 Marbury v. Madison, deeply influenced the thinking of Greek jurists in the

19th century and sealed our understanding of the relationship between the Constitution and the law.

The judicial review of laws in Greece was established by case law in the second half of the 19th century. In 1897 the Supreme Civil and Criminal Court (Arios Pagos) issued the historic decision 23/1897 and for the first time did not apply provisions of a law because they were contrary to the Constitution. In that time the only other European country that exercised constitutional review of laws was Norway. None of the European countries that acted as legal and institutional models for the Greek legal system in the 19th century, such as France, Germany and Belgium, exercised such a review.

Another explanation for the establishment of the judicial review of laws in Greece at such an early stage is the common and - already since the foundation of the new Greek State - widespread perception among citizens and jurists of the supremacy of the Constitution. The prevalence of this perception led to the establishment of the judicial review of the constitutionality of laws: since the legislator must be checked for compliance with constitutional limits, this control is exercised in an effective manner by the courts - the body established as a control mechanism by the Constitution. On the other hand, since all powers are equally submitted to the Constitution and therefore equal to each other, the content of judicial review was shaped accordingly: the courts are not superior to the legislator, they do not substitute the legislator, they cannot legislate, but always remain within the scope of their function as courts, i.e. they resolve a specific dispute and their judgment is valid only between the parties. This means that they do not review the law per se in an abstract manner, but they review the application of the law in a certain dispute.

The Greek judicial review of constitutionality of laws retains these basic characteristics up to this day, i.e. repressive, diffuse, incidental, specific review. In principle, the review is called diffuse because it is not exercised by a single Supreme or Constitutional Court, but by any court, regardless of its position in the hierarchy or jurisdiction (administrative, civil, penal court of first or second instance and the high courts), in accordance with an express constitutional provision (Article 87 par. 2 of the Greek Constitution), when the court is called upon to apply a provision of law and resolve a particular dispute. However, the control of constitutionality of legislation is exercised within certain frames. Since the control is entrusted to the courts, it means that it is, by necessity, a legal and judicial control, a control of legality and not of utility (this can be tested through the reasoning of the judgment). Furthermore, since the entry into force of the Constitution of 1975, powerful mechanisms of concentration of control have been developed. Article 100 paragraph 1 of the Constitution

provides for the jurisdiction of the Supreme Special Court to resolve a dispute over the constitutionality of provisions of law if the three high courts (the Council of State, the Supreme Civil and Criminal Court or the Supreme Financial Court) have issued conflicting decisions. Paragraph 5 of Article 100 of the Constitution provides that if a question of constitutionality arises before the Chambers of the Supreme Courts, it shall be referred to their Plenum. Furthermore, law 3900/2010, a landmark law for Greek administrative procedural law, provided for the 'pilot trial' and the 'preliminary question'. According to these procedures, a case which falls under the jurisdiction of an administrative court of first instance, then the court of appeal and finally the Council of State is referred directly to the Council of State in order to resolve by its decision a legal issue which, according to its nature, is of general interest and is expected to raise numerous trials. The ‘pilot trial’ was basically established in order to deal with the contemporary phenomenon of mass trials (in tax, social security, education, environmental, etc. matters), which usually raise serious questions of constitutionality, resulting in an overall significant judicial delays and entailing the risk of issuing conflicting decisions by the administrative courts of first and second instance. Moreover, Greek procedural law provides the possibility, during the hearing of these cases in the high courts, for many categories of interested parties, who have pending cases in which the same issues of constitutionality are raised, to be heard by exercising an intervention. In this way, the high court decides after taken into account the allegations of the parties of all these categories. ‘Pilot trial’ is proved to be very successful during the economic crisis in Greece, when issues of constitutionality concerning pension and lump sum benefit cuts, various tax burdens, issues of service status and salaries of civil servants (university faculty members, doctors of the national health system, etc.) were resolved in a short time.

The judicial review of laws in Greece, apart from being, in principle, diffuse, is also incidental, i.e. the law is not reviewed in its whole and in abstracto. Only the provision which is crucial and necessary to the outcome of the pending case is tested, and if it is found unconstitutional, it is set aside in the pending case. The judge does not have the power to annul the unconstitutional legislative provision nor to declare it void. The provision is set aside in the pending case but it continues to bind and to be enforced until its amendment or repeal by a new law. (This is the normal course of action followed by the Government and the Parliament). Only exceptionally the law is declared void by a court decision. That is the case when the Supreme Special Court is called upon to resolve a dispute over the

constitutionality of a legislative provision and finds it unconstitutional. Then the legislative provision is removed from the legal order.

The establishment of the Greek constitutional review of laws system for more than one hundred years was the basis for the formation and development of the rule of law in Greece. The success of this system is due to the way this review has been exercised. This way of delivering constitutional justice has contributed a lot to the familiarity of the country's legislative and executive bodies and the legal community with this system. It has also contributed to the society’s awareness of the dominant position of constitutional rules in Greek legal order and thus helped to instill in each citizen the feeling that he enjoys direct judicial protection.

Since the entry into force of the Constitution of 1975, judicial review of constitutionality of laws by the Council of State has often led to changes in important areas of law. Various decisions can be mentioned: decision 2281/2001 in Plenum, in which it was held that the indication of religion on police identity cards violates religious freedom, decision 250/2008 in Plenum, in which it was held that personal detention as a means of collecting public revenue is contrary to the principles of protection of human dignity and personal freedom. The Court's case law is also of crucial importance and rich in the field of equality, judicial protection and environmental protection. For example, the decisions of the Plenary Session of the Court (in Plenum 3018/2014, 1323/2016), in which it was held that the complete exclusion of women from access to the profession of Special Guard of the Greek Police, as well as to all technical specialties of the profession of Professional Soldier of the Land Army constitutes a divergence from the constitutional principle of gender equality.

Finally, it is worth noting that the role of the Council of State as quasi-Constitutional Court became particularly important in the period of the economic crisis (2010 and onwards). The Court, exercising its jurisdiction and reviewing the constitutionality of measures adopted during that period, was once again the refuge of citizens against the state power. For example, it held that successive cuts in salaries of civil servants and pensions in the first two years of the crisis were legitimate and in accordance with the Constitution, but then held that further cuts in the pensions after the first two years, of the same category of citizens, required justification by the legislator with studies justifying the need of those cuts and not the adoption of other measures. Furthermore, during the period of the COVID-19 pandemic, the Council of State held some interesting decisions. For example, it held that the need to deal with a serious risk to public health constitutes a reason, in principle, that justifies the

imposition of restrictions on the exercise of the right to assembly (in Plenum 1681/2022), the prohibition of travel for hunting (in Plenum 1284/2022), the compulsory use of non-medical masks, the restriction of movement and the suspension of activities (in Plenum 1147/2022), taking into account the obligation of the State to protect human life and health, together with the obligation to safeguard the functioning of the health system.

It is obvious that in the current period, in which our society continues to face multiple crises (economic, pandemic, climate change etc.), the judge bears even greater burdens in the interpretation and application of the Constitution. At the same time, the citizens' expectations of him are increasing. Judicial discourse gains a wider audience and the so-called hard cases in theory are of a major concern in the public sphere. The recent case law, which has been called upon to strike a balance in exceptional circumstances, has demonstrated the close link of rights with the public interest and the fact that the relationship between judge and legislator is governed by complex legal-political issues as well as technocratic balances. In particular, when exercising constitutional review of laws, the judge becomes the regulator of relations between state bodies and a guarantor of the fundamental rights guaranteed by the Constitution, especially when these are challenged.

The judicial review is an essential element of the checks and balances that characterizes modern democratic regimes and is of crucial importance for the rule of law. Given that the conditions and consequences of such review concern directly or indirectly the great majority of fundamental issues of constitutional law and in particular the protection of human rights, one of the most serious and critical challenges a modern judge is facing when is called upon to review the constitutionality of a law is to achieve the necessary balance between judicial self-restraint and the exercise of full and effective constitutional review, while being committed to principles such as impartiality and neutrality.

Thank you very much for your attention.

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