



Strasbourg, 30 July 2017

CDL-JU (2017)004
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**16th meeting of the Joint Council
on Constitutional Justice**

Mini-Conference on

**“COURAGEOUS COURTS:
SECURITY, XENOPHOBIA AND
FUNDAMENTAL RIGHTS”**

Karlsruhe, Germany

19 May 2017

**Safeguarding the constitutional position of foreigners does not
pose a threat to Greek society: Lessons from the jurisprudence of
the Council of State of Greece**

REPORT BY

Ms. Theodora ZIAMOU
Associate Judge at the Council of State of Greece

1. The present role of European constitutions

Constitutions have a symbolic and educative function. They are the expression of the identity of the state and of the culture of the society they refer to. Nowadays there is rarely one single culture in one society; in this context constitutions do not articulate the demands of predetermined social identities but constitute themselves these identities, standing above the struggles of civil society. This unifying role of constitutions becomes all the more important under the present circumstances when many European states have lost their greatest unifier and pacifier, that is, economic growth and prosperity. The modern type of economic crisis brings to surface old problems of cultural minorities, group rights as well as the challenge to incorporate foreign actors into the society either temporarily or permanently. The constitutional treatment of persons foreign to the state and to the society is for every country a question of historical memories and national civilization. When this treatment is based on the qualities of understanding and kindness to people who do not share the same national identity but became members of the same society, most of the times, as a result of extraordinary situations, it reinforces the position of the state in the international arena and sheds light on the country's future prospects. This is the case of Greece.

2. The role of the Council of State exercising constitutional jurisdiction

The Council of State of Greece is the supreme court in constitutional as well as in administrative matters. It has the power to review laws and rule on constitutional issues as they arise, within the boundaries of its competence to review administrative action and decide cases. This means that the Court, when making its judgements, is aware of its task not just to tailor a remedy to fit the parties before it but rather to address the greater constitutional issues of its rulings. This judicial stance becomes apparent in the jurisprudence of the Council of State on alien and minority or group rights which concern relations among different cultures in the same polity. In such cases the Court has to calculate with threats arising from the action or non-action of other political communities or from the networks of interaction that cut across community boundaries. Thereby the living interpretation of the relevant constitutional provisions becomes the cornerstone of the Court's judgements.

Article 5 para. 2 of the Greek Constitution states that "all persons within the Greek State enjoy full protection of their life, honour and freedom, irrespective of nationality, race, creed, or political allegiance. Exceptions shall be permitted in such cases as are provided for by international law. Aliens persecuted for acts carried out in defence of their freedom shall not be extradited." This provision dictates that the principle of the rule of law is to be applied uniformly to all people on Greek territory, whether Greek citizens or aliens. Over the years the Council of State of Greece has made sure that aliens get compensation from the State when they fulfil the conditions established by law and that their social security rights remain intact even if there is an indication that an illegality is involved in the conditions of their entrance or stay in Greece. At the same time the Court has emphasized the obligation of the State to create the conditions for the undisturbed exercise of basic individual rights by aliens, like religious rights or rights to peaceful assembly and has contributed to the fight against xenophobic ideologies by sanctioning any behaviour that could be perceived as degrading or as an act of violence against foreigners. At the same time the Council of State has upheld the universal principle that the State's interests in retaining sovereignty and safeguarding security in both its internal and external relations has priority in the regulation of issues like the accordance of Greek citizenship, participation in municipal elections and election of Greek citizens of foreign ethnic origin to public office.

3. Uniform application of the rule of law principle: Equal rights against the Greek state

Awarding compensation in times of severe economic crisis or securing pensions for all people that fulfil the relevant conditions set by law, constitute two of the biggest challenges faced by Greek courts in the present time. In the first case the Council of State refused to accept that the particular harm suffered by a minor alien, even in circumstances in which he acted illegally, is left uncompensated. This case concerns the right of an Albanian illegal immigrant to receive compensation from the Greek State for wrongful acts committed against him by state organs. This alien was a minor who was injured and incapacitated for life by a border guardian shooting in the air during a persecution expedition, while he was attempting to avoid controls and escape arrest near the borders of North-western Greece. The majority opinion in this case (Council of State Decision 877/2013) upheld the decision of the Court of Appeal and granted compensation to the illegal immigrant recognizing a 30% shared liability because of the reactionary behaviour of this alien during his persecution by the border police officers combined with the fact that he tried to enter Greece illegally. Remarkably enough there was a strong dissenting opinion in this judgement that supported the view that not even this degree of shared liability should be recognised to the detriment of this alien and that the case should be sent back to the Court of Appeal which ought to take a harder look at the facts of the case and decide whether, in the actual circumstances of the case at hand, the injury of the alien was inextricably linked to his attempt to avoid border controls but not to his attempt to enter Greece illegally.

In the same line of reasoning the Council of State ruled in Decision 539/2016 that the right of a Bulgarian woman to receive the pension of her deceased Greek husband was hindered neither by the fact that the alien did not hold a valid residence permit nor by the inability of the alien to prove that she fulfilled the conditions for legal residence. Although in general the rules governing the obligation of the State to search the legal residence of aliens claiming benefits from the State are to be implemented as a matter concerning the public order of the Greek State, the social rights of aliens in this case were accorded precedence. For the Greek Supreme Court, the fact alone that this Bulgarian woman did not possess a valid permission of residence when she got married in Greece to a Greek citizen, was not enough to set aside the constitutional rights that this woman enjoyed as a result of her marriage to a Greek citizen and of her cohabitation with him, which entitled her to all social and welfare benefits even after her partner's death.

4. Undisturbed exercise of basic individual / group rights by aliens

Aliens should be accorded the same basic individual rights as Greek citizens, as long as the laws of the state as well as the public order are respected. In the old but still remarkable Decision 3226/2000 of the Council of State, the revocation of the residence and work permit of a Muslim Pakistani as well as his registration in the catalogue of unwanted aliens, solely on the grounds of his participation in a publicly-held religious assembly of 3000 Muslims in Athens, were annulled by the Court, as it was held that this particular public assembly was neither forbidden prior to the event nor did it arise from the facts of the case that criminal actions or acts against the public order and security were committed during the assembly. The fact alone that this alien took part in a religious meeting of Muslims did not reach the degree of violation of the public interest that is required in order to revoke the residence and work permit of an alien living in Greece.

According religious – group rights to Muslims is of particular importance in Greece. It is generally accepted by the Court that the notion of “public interest” encompasses all interests of people residing in Greece. Laws 3512/2006 and 4014/2011 introduced a complete set of provisions that gave to Muslims living in Greece the possibility to exercise their religious duties

in a way congruent with the general public interest, namely, by establishing a private-law legal body with the task to manage the function of a mosque, that was to be constructed in Athens. With Decision 2399/2014 of the plenary session of the Council of State, the state financing of the construction of a mosque in Athens was upheld on the grounds that it was well justified by the reasons given by the Greek State: The idea of the construction of a mosque derived from the obligation of the State towards the great number of Muslims, Greek or non-Greek, who are living in Greece but do not have a greater legal place of worship, to safeguard the exercise of their religious rights in unified way, as the main expression of their social life in Greece. The special circumstances that led to the enactment of the above Laws were held to justify this kind of differential but not preferential treatment of Muslims living in Greece. This differential treatment of Muslims was held not to contravene the Greek Constitution, because it did not entail any negative consequences for other religions or for people who are not members of other religions at all. A word should also be said here about the dissenting opinion in this case, which expressed concerns only as to the what-could-be-seen as preferential treatment of Muslims who did not ask themselves for such a mosque and who until then were not otherwise hindered in the exercise of their religious rights, having the use of 120 mosques all around Greece, albeit unauthorised ones.

5. The fight against xenophobic ideologies

Securing judicially the individual, social and group rights of aliens living in Greece is not enough. The Court has to contribute also to the creation of the mentality of “philoxenia” and fight against the ideology of “xenophobia”. In the unanimous Decision 518/2015 reached by the Council of State in plenary session the Court expressed its distrust against the xenophobic party of “Chryssi Avgi” (translated in English as “Golden Dawn”). Although the Court was cautious not to condemn this party openly (criminal proceedings against some of its members were at the time and are still in progress), it ruled unequivocally that the decision of the administration to discontinue the regular state financing of this party (to which all political parties are entitled on the basis of Art. 29 para. 2 of the Greek Constitution), which was authorised by law 4203/2013 in the case of party leaders who face criminal charges for organized crime and terrorism (especially against foreigners), was intended to protect the country and its democracy and was in accordance with the ECHR, the case-law of the Strasbourg Court of Human Rights and, of course, the Greek Constitution. The challenged administrative decision was deemed as a preventive administrative measure of temporary character which served the legitimate aim of preventing the channelling of public money to criminal activities and the support of organizations that present themselves as political parties in order to act against the Greek state and the public order. This measure did not go against the proportionality principle either, since it was not of criminal nature, the amount forfeited was to be returned in the case of criminal acquittal and in any case the election costs of the party (to which it was allowed to participate) could in any case be covered by other means.

In a previous case (Decision 1196/2011) the imposition by the National Radiotelevision Council of the administrative sanction of recommendation on a big TV-channel for characterising, during a journalistic program, police officers as “Philippine” (in the sense of servants) in order to protest against the decision of the State to use police officers not for the fight against terrorism but for the private security of celebrities, was upheld by the Court on the grounds that distinguishing people by reference to a certain population group is unnecessary and by nature degrading for these particular foreigners and serves to reproduce stereotypes that should not be allowed by the constitutional culture of Greek society.

6. Retaining sovereignty in internal and external relations

a) Awarding Greek citizenship to foreigners

Notwithstanding the open-minded as well as open-hearted attitude towards foreigners, the core-character of the Greek State referring to the Greek nation, has to remain Greek. With Decision 460/2013, the Council of State (*in plenum*) ruled that the provisions of law 3838/2010 according to which the Greek citizenship is awarded to aliens on the basis of purely formal criteria (5-year legal stay of the parents of the alien in the country, 6-year attendance at Greek schools, non required continuous stay after graduation until the submission of the application), contravene the Greek Constitution. This is because from articles 1 par. 2 and 3 (principle of people sovereignty), 4 par. 3 (withdrawal of Greek citizenship), 16 par. 2 and 3 (right to education), 25 par. 4 (duty of social and national solidarity) and 29 par. 1 (right to vote) of the Greek Constitution follows that the existence of a genuine bond between the alien and the Greek state and society, which is based on elements passed from generation to generation with the assistance of smaller social groups (family) and organized state units (education), constitutes the minimum condition and limit for the award of Greek citizenship. The determination of the persons who constitute the notion of "Greek People" remains under the sovereign competence of the national legislator who is not limited by international law to determine the acquisition of Greek citizenship conditions and relevant proceedings, given the fact that there is not an individual right to citizenship. Furthermore, the regulations of Law 3838/2010 which grant to aliens who haven't acquired the Greek citizenship, a limited right to vote and to be elected at the elections for the 1st Degree local authorities, do not comply with the articles 4 par. 4 (principle of equality), 51 par. 3 (the right to vote), 52 (free expression of the popular will) and 102 par. 1, 2 and 4 (local government agencies) of the Greek Constitution, given the fact that the "People" who legitimize the exercise of public authority deriving either from the State or from the local government, can only be composed of Greek citizens, namely of persons who have already acquired the Greek citizenship.

b) Allowing indirect foreigners' participation in public office

Apart from tightening the conditions of according Greek citizenship, the Council of State had the opportunity to examine the conditions for the participation of ethnic foreigners in public office. The 5th Section of the Hellenic Supreme Administrative Court (Council of State), in major composition, had the occasion to give an opinion on admission requirements to Jewish Communities, in the exercise of its competence to elaborate on two draft presidential decrees concerning the proposed regulations of the Jewish Communities of Athens and Larissa (Opinions No. 171-2/2010). The Court delivered its advisory opinion taking into account Statutes 2456/1920 and 4837/1930 on Israelites' Communities, which stipulate that such communities are public law associations and exercise public authority under the supervision of the Greek State, since they act in the public interest while pursuing the purely religious goals of the organization of a religious community (minority), of relevant charities and of the education of Israelites' children. Such public-law associations enjoy also tax privileges and have the capacity to issue administrative acts in their given area of action. In accordance with standing jurisprudence, dated as early as 1932 and based on the constitutional principles of religious pluralism and equality as well as of neutrality and impartiality of the State towards all religious (ethnic) communities (minorities), the Court repeated its position that the public-law character of such bodies is not unconstitutional and is in agreement with the case-law of the European Court of Human Rights, since the same public-law organization applies also to East-Orthodox churches, Metropoles and monasteries (as a consequence of the constitutional principle of non-separation between State and Church) and finally also to the Muslim Moufti associations. (Mouftis are considered civil servants since they are accorded the judicial function to apply Islamic law on Greek territory). Although it is not stated in Opinions 171-2/2010, it is understood

that the Israelites governing the Jewish communities may not be of non-Greek nationality and this would not be contrary to the Greek Constitution which, in principle, reserves the right of equal access to public office only to Greek citizens. This is because the same applies also for the Moufti, who is according to law (Statute 1920/1991), a Greek Muslim and is appointed and removed from office *via* presidential decree. According to Council of State Decisions 466/2003 and 1333/2001, a Moufti can only be appointed by the Greek state; the election of the Moufti by the Greek Muslims themselves can not be allowed since such a direct election by the people would go against the Greek constitutional system of appointment of civil servants by the Greek state itself. It would also contravene the international law treaties governing the relations between Greece and Turkey, which dictate the equal treatment and full equalization of Greek members of the Muslim minority with the rest of the Greeks.

At the moment, the Greek Constitution does not support the separation between Church and State and therefore, for reasons of equality of treatment, the public-law organization is the legislatively preferred form of organization for all religious communities (of all ethnic origins) operating in Greece. However, the 5th Section of the Hellenic Supreme Administrative Court expressed the opinion that, in order to avoid the creation of relations of dependence and cross linkage with state authority and until a uniform regime of religious communities and churches is established, the form of private-law association, in cases not hindered by Greece's international-law commitments, should be considered as the optimum legislative choice. The organizational form of private-law association is mostly suited to a modern democratic state based on the principles of religious equality, neutrality and impartiality, which require the organization and function of religious communities according to unified rules that secure their autonomy and exclude their dependence and relation with state power.

7. The contribution of the Council of State in fostering unity in Greek society

The rejection of xenophobic ideologies has always been apparent in Greece's national policy and in the jurisprudence of the Council of State. In the Greek Court itself is the one thing that brings together cosmopolitan democratic party-politics and different judicial approaches, giving a unanimous response to those who doubt Greece's place in Europe. Of course, in order to do that and at the same time maintain law and order in the society, the State has to sustain its character as a State composed primarily of Greek citizens. In our constitutional system there is no place for the natural law of a national group protecting its national identity by distinguishing itself from other societal groups with the ultimate aim to legalise its prejudicial treatment against others. Co-existing with people from different cultures does not alter the national and cultural identity since it cultivates respect for human dignity and puts the person's needs in the centre of all controversies or arguments. Stereotypes and prejudice are not signs of thinking individuals and it is a shame to project to foreigners the fear and menace that we feel ourselves from the challenges of globalisation, of natural disasters, of the economic crisis. We are not threatened by the "others" – we will be threatened by them once we begin to accept exceptions to the protection of their rights.