

**ASPECTS OF JUDICIAL ACTIVISM
IN GREEK POLITICAL AND ADMINISTRATIVE CULTURE**

**Vasileios G. TZEMOS - Maria-Eliana PRAVITA - Anthony
MAKRYDEMETRES**

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ABSTRACT

The Greek political system is organised according to the principle of separation of powers (legislative, executive, judicial). The differentiation of jurisdiction in a unified political system is of a relative and not of an absolute nature, so that certain procedures of interdependence and crossing of authorities may be taken account of. Judicial activism rises in cases where a judicial organ seems to be setting itself a legal rule, as well as in cases where a judicial decision may seem to proceed to a displacement of an administrative one. Within

the Greek judicial practice can be discerned a degree of ‘decentralisation’ and diffusion of the spots of likely judicial activism.

1. THE CONSTITUTIONAL CONFINES OF THE JUDICIARY

The Greek political system is organised according to the principle of separation of powers, which is considered as a precondition and guarantee for the normal functioning of democracy and the protection of human rights. A fundamental dimension of this principle is the division of jurisdiction and responsibility among the basic organs and institutions of the political system.

Thus, article 26 of the Greek Constitution provides that the legislative function is exercised by the Parliament and the President of the Republic, the executive function is assigned to the President of the Republic and the Government, and the delivery of justice belongs to the Courts, whose decisions are enforced in the name of the Greek people.

The division of authority among the basic organs of the political system forms a principle of political organisation that is of general value almost in all contemporary political systems which purport to function in a democratic manner. Separation of powers and the provision of respective checks and balances in the exercise of authority forms a precondition to liberty and democracy according to this most fundamental principle based on experience. The main value of separation of power is that each distinct institutional bloc may provide

checks and balances to the potential of concentration of more power by the other (thus, “*le pouvoir arrête le pouvoir*”, as Montesquieu (1994 A: 297) put it)¹.

The separation of functions or jurisdiction among the three main sets of authorities of modern polity (legislative, executive, judicial) forms the *Grundnorm* on the basis of which the functioning of democratic political systems is organised. In particular, it is a method of averting concentration of power in any one of the major power blocs of the state. In historical terms the executive authority, which is the oldest and the most powerful of the rest, is thereby circumscribed (because of the independence of the other two) in its potential to usurp of either legislative or judicial authority. Respectively, the legislative power may not legitimately either execute the laws or arbitrate nor the judicial power legislate or implement policy decisions.

The normal functioning of democratic politics depends therefore upon the respect of this kind of separation of authorities and the division of responsibilities. Needless to say that the differentiation of jurisdiction in a unified political system is of a relative and not of an absolute nature, so that certain procedures of interdependence and crossing of authorities may be taken account of. The most significant of them is that in parliamentary systems, for instance, the Government is based on the support of the legislative branch, and the appointment of the heads of the judiciary is the outcome of choices made by it (the Cabinet).

Independence would not, however, be seen to undermine the fundamental division of authorities and responsibilities among distinct institutions. The coordination and the necessary integration of the political system as a whole depend on the respect of the relative authority and the complementarity of functions of each branch of the state (legislative,

¹ As James Madison put it in his intervention in the *Federalist Papers* (N° 47): “*The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny*” (1961: 301).

executive, judicial). The more delicate the balance among the various organs of the state, the greater the legitimacy of the political system as a whole. That is the essence and hidden value of democratic governance.

2. THE POTENTIAL OF JUDICIAL ACTIVISM

Part E of the Greek Constitution enhances principles and rules that refer to the judicial power which is responsible for the delivery of justice on concrete cases. In order to fulfill its mission, the judicial authority is vested with personal and functional independence of the judges, who enjoy the constitutional guarantee of tenure in the performance of their duties. The judiciary has according to the Constitution the authority to examine not only the legality in the performance of the executive organs of the state, but also the constitutionality of the laws themselves (Ktistaki & Papadimitriou, 1998: 927-928). Namely, the judiciary is enabled with authority to decide in particular cases, whether concrete legal enactments contravene the Constitution and are ordained not to apply any law that is contrary to the Constitution. As a matter of fact, according to the Greek constitutional tradition, all judicial formations (even courts of first instance) are vested with the authority to review the constitutionality of all Greek law.

The tradition of judicial review of all pieces of legislation has been perceived as a bastion of constitutionalism and respect for the rule of law as well as an institutional guarantee of democracy. If combined, however, with a spirit of legalism or formalism, in the sense of mistrust to executive governance, may not eschew the criticism of undue judicial activism.

The phenomenon of judicial activism, in the negative sense, refers to instances of excessive intervention on the part of judicial organs in matters of setting or implementing legislation. In particular, judicial activism rises in cases where a judicial organ seems to be setting itself a legal rule, as well as in cases where a judicial decision may seem to proceed to a displacement of an administrative one.

As far as the review of constitutionality of ordinary legislation, judicial activism is exhibited whenever a court of justice seems to overstretch its legitimate review of the formal status of positive legislation getting into matters of policy options and decisions. Political expediency or issues of ideology and policy aims cannot be assessed nor reviewed by legal means in an objective manner.

A characteristic example of an instance of overstretching of judicial reasoning into areas of political choice may be discerned in a recent ruling of the Council of State concerning legislation providing for the citizenship rights of residents of non-European origin and their participation in local elections (Law 3838/2010). Since the relevant constitutional clause assigns a wide discretion to Parliament to specify the conditions for acquiring Greek citizenship, a court of justice cannot assume the role of specifying these conditions by interpreting the Constitution in a ‘creative’ or farfetched manner. By doing so the judge would exhibit an instance of rather excessive or undue judicial activism. His constitutional authority is not to set but to apply the law already set by Parliament.

A more complicated argument would hold, however, that the court of justice in contemporary society is not simply the mouth pronouncing the law; it does also have the authority to interpret the spirit of constitutional principles or general ideas especially in ‘hard’ cases of value conflict or disagreement (Latournerie, 2011: 135 ff., especially 137). But when matters are pretty clear and straight forward, there is no need for interpretation: *interpretatio cessat in claris*. Otherwise by acts of interpretation courts of justice might be seen as getting involved even in a latent manner in areas of legislation, which lies outside their legitimate field of jurisdiction according to the Constitution.

3. CONTAINING DISCRETIONARY ADMINISTRATION

The exercise of administrative discretion which is intrinsic to executive action has to take place within the confines of law, *secundum legem* and not beyond it (*ultra vires*). To the extent, however, that administrative organs and authorities are assigned by respective pieces of legislation with the discretionary authority to determine in particular cases how to

act and serve in their best reasoned judgment the public interest, it is hard to set in a fixed manner the exact limits of control of legality on the part of the courts of justice.

There is no doubt that in a law abiding polity whenever administrative organs exercise their discretion by reaching respective decisions have to uphold the fundamental principle and values of the rule of law and uphold the Constitution.

The review of legality of administrative discretion by the courts of (administrative) justice in concrete cases brought before them raises for them too a wide area of discretionary judgment concerning the evaluation of the lawfulness (fidelity to law) of administrative action. Their control consists of the assessment and the evaluation of whether the Administration has exceeded the outer limits of its discretionary authority and jurisdiction, so that a reversal or correction of its performance ought to take place. Judicial activism in that case may be seen to be rising whenever the courts substitute the content of the administrative decision rather than correct its unlawfulness.

To the extent, however, that administrative action is beset by value loaded or indeterminate notions, the performance of respective organs takes place within an open textured area of law verging on policy choices that cannot be easily assessed by concrete legal standards on the part of the courts of justice. If the latter are tempted into those policy areas of vague notions and political considerations can be seen as exhibiting instances of undue judicial activism. That occurs whenever administrative action purports to serve the public interest, social peace, common interest, public order, economic development, protection of the environment, due time and so on. These notions invite for value judgments and assessment for the respective social phenomena and situations, which are subject to political disagreement and even social conflict.

On these occasions it is very hard on the part of the courts of justice to maintain straight line between activism and restrain. As John Locke had already envisaged (1990: 212), “*the executive authority is assigned with discretion to do many things on choice without clear guidance by law*”. That may perhaps be due to the recognition of the impotence of deciding in advance in detail matters of social and economic life in a most dynamic era. On

these occasions the law is limited into setting a rather loose framework in the context of which administrative action may subsequently take place.

Even a concrete order in an institutional setting might allow a room of discretion on the part of each recipient².

An indicative instance of judicial activism exhibited by courts in setting the limits of administrative discretion refers to the clarification of the legitimate responsibilities of local authorities in serving the local interest by their action. Nor the Constitution neither the respective legislation specify in more concrete sense the notion of ‘local interest’. The Council of State, traditionally, upholds a policy of judicial interpretation of the above notion in a rather narrow manner, leading thus to solutions or choices in favor of state responsibility. Namely, the responsibility of local authorities to serve the local interest tends to be interpreted on the part of the courts in a narrower rather than broader sense recognising for them a circumscribed area of responsibility in serving the local interest. That may be considered as an instance of judicial activism. As a result, the discretionary authority of central organs of the state seems to be augmented.

A further instance of judicial activism seems to be taking place whenever the courts of justice are tempted to substitute the administrative decision in case that the Administration delays or refuses to correct its performance in accordance to the ruling of successive judgments of the courts of justice condemning its previous conduct.

The opinion has been advanced that, if the Administration keeps on delaying in enforcing the respective judicial decision, the courts of justice could even proceed in a positive action by supplying an administrative decision themselves (Symeonides, 2003: 270,

² According to the relative example referred to by Kelsen (1990: 128), “if official A orders official B to arrest subject C, B must use his own discretion to decide when, where, and how he will carry out the warrant to arrest C; and these decisions depend upon external circumstances that A has not foreseen and for the most part cannot foresee”.

Rantos & Papaspyrou, 2006: 29-30). That may be seen as an example of legitimate judicial activism. The point is whether this kind of conduct on the part of the court of justice contravenes the constitutional confines of its legitimate role and jurisdiction. Substituting or even replacing administrative performance would seem to amount to a gross violation of the principle of separation of powers. The first to blame for that, however, is the Administration itself, to the extent that it fails to correct its performance in accordance to the ruling of a court of justice. For the latter, nonetheless, to proceed to substituting the administrative decision itself would seem to be a little bit off the limits (Makrydemetres & Pravita, 2010).

4. TWO PARTICULAR DEFINITIONS OF JUDICIAL ACTIVISM

The notion judicial activism (Scharpf, 1965, Schuppert, 1980, Tzemos, 2004: 65 ff., Lindquist & Cross, 2009) could further be specified into two more concrete ways (Tzemos, 2010a: 737 ff.). Thus, judicial activism takes place when a judge, in order to decide upon a case brought before him/her, does not apply standing regulations (that is, he/she does not subsume the real facts of the case at hand into a pre-standing written or unwritten legal rule), but proceeds into setting a new rule. In that case a judicial formation, within the framework of exercising its jurisdictional function, produces a new legal rule for the needs of a specific case – “*it legislates on a specific case*”.

However, according to a second approach, each form of specific formulation of a new legal rule by a court does not automatically translate into judicial activism. The stand of the court producing a new legal rule would be described as ‘activist’ only when the new specific ruling appears arbitrary or influenced by the court’s (i.e. the judges’) political assumptions or choices. Hence, judicial activism cannot take place unless the judicial decision suffers from evaluative considerations or arbitrariness on the part of the judge. When the formulation of the new legal rule takes place in a specific case so that the court provides a solution to a problem brought before it, or when it takes place in the spirit of the respective legal order and not arbitrarily, that cannot be considered as judicial activism.

The first sense of judicial activism is theoretically more lucid, armed with arguments stemming from the principles of democracy, the rule of law and the distinction of powers. It is also clearly inspired by the positivist school of jurisprudence (Kelsen, 1949, Dias, 2005). The second one is more realistic and functional, appreciating significant transformations within the positivist legal paradigm that characterise modern general theory of law (Dworkin, 1977, Alexy, 1994, Rawls, 1999, as well as Sourlas, 1995, Stamatidis, 2002). In short, one may define judicial activism according to an organic-formal criterion or according to a functional criterion.

5. ACTING UNDER THE SUSPICION OF JUDICIAL ACTIVISM

Judging may be analysed into three distinct categories (Tzemos, 2010a: 737 ff.): a) adjudicating upon a specific case brought before a court by applying a generally standing legal rule. Doing so, the judge exercises his/her jurisdiction by subsuming the facts of the specific case to the premise of an already standing legal rule. In applying standing and clear cut law, there is no room, there can be no place for judicial activism. The court's ruling may be correct or incorrect in the sense that it may be based upon a correct or erroneous interpretation of the law or submission of the true facts to a rule of law.

b) Within a second category of cases, the judge, despite the fact that there is a standing legal rule in force, in order to solve the case brought before him/her, does not apply the aforementioned legal rule, as the judge ought to, but proceeds into modifying it, thus creating a new legal rule, or failing to take it into consideration, oversees it, and does not apply it. In this type of cases there appears to take place non-permissible judicial activism regardless the particular criterion along which it can be defined.

c) Within a third category of cases, the judge is called to solve issues brought before the court, without there being a clear cut legal rule offering a specific solution to the case. In this instance, the court proceeds into formulating a new legal rule, on the basis of which the specific case is dealt with. The law-making or 'law-production' of the judge for the needs of the specific case may either be derived from the spirit, or the 'system' of existing legal order,

or be pronounced in a creative manner by himself, on the basis of the appreciative system of the court. Law-setting emerges in both cases. When the judge's jurisdictional boundaries are extended to 'specified legislation' to avoid denial of justice³, law-production that derives from the spirit and the economy of law can be seen as a legitimate ('benevolent') form of judicial activism according to the organic criterion or as non-employment of judicial activism according to the functional criterion. On the contrary, the specified formulation of a new legal rule in an arbitrary manner by the judge constitutes whatever the case may be illegitimate ('malevolent') judicial activism.

6. LEGAL SOURCES, LEGAL RULES AND MODES OF INTERPRETATION

The specific form that the sources of law may develop within a legal order, the nature and function of the legal rules within it and the manner of functioning and the hierarchy of the methods of interpretation perform a significant part in determining the jurisdictional boundaries of the judicial power within the specific legal order.

The sources of law⁴ differ in accordance with the particular nature of each legal order, and cannot be examined in a general and abstract way, as if legal orders constituted an homogeneous whole. Depending on the "*existential constitutional characteristics*" (Tzemos, 2010a: 737 ff.) of each legal order, its sources of law are formed and placed in hierarchical

³ Explicitly so, within the Swiss legal order, see article 1 of the Swiss Civil Code, where, as long as there appears a vacuum of law, the judge is granted with the power to legislate in a specific case. Regarding the European legal order this theory is convincingly and strongly maintainable, but not definite.

⁴ Regarding the sources of Greek law, see Aravantinos, 1983: 79 ff., Spyridakis, 1985: 13 ff., Panagopoulos, 1999: 18 ff., Georgiades, 2002: 18 ff., Stamatis, 2002: 107 ff., Spyropoulos, 2006: 4 ff., Spiliotopoulos, 2011: 35 ff., Gaudemet, 2009: 249 ff.

context. As sources of law are considered the different kinds and categories of written or unwritten general and abstract rules of law of each legal order.

Within continental legal systems⁵ the sources of law are as a rule written and only exceptionally unwritten. The latter may occur under the condition that particularly strict presuppositions concur (mainly the fulfillment of the conditions for custom-establishment). The jurisprudence of the courts, according to the established view (Spyropoulos, 2006: 116 ff.) does not constitute a source of law. On the contrary, within the Anglo-Saxon legal tradition (Fromont, 2009: 92 ff., Graf v. Bernstorff, 2006, Feldman, 2004), the judgments of the courts form a main source of law in accordance with the principle of the precedent. The law of the European Union falls under neither of these two basic traditions of legal systems, but stands in an innovative position regarding the nature of the sources of law, as it is creatively and partially influenced by both. The sources of the law of the European Union lay closer to the sources of the continental law, where, according to the leading opinion, the judgments of the court are not a source of law. The European legal order is constituted by legal rules of the primary ('constitutional'), the secondary (derivative) European law and the international conventions, which the European Union concludes, but also by unwritten general principles of European law. The general principles of European law are usually the product of solid jurisprudence of the Court of the European Union (Tridimas, 2006).

The nature and structure of the rules of law⁶ also tend to be transformed (Tzemos, 2010b: 54 ff.). Within the positivist continental legal orders the legal rule assumes the structure of a rational judgment and more specifically of a hypothesis comprised of premises (major and minor ones). It is composed by two sentences, one hypothetical (real one) and one as a main sentence (legal consequence). The legal rule defines the legal consequence that

⁵ The Greek law belongs to this system (Fromont, 2009: 17 ff.).

⁶ For the Greek legal order see Michelakis, 1968: 21 ff., Aravantinos, 1983: 123 ff., Spyridakis, 1985: 29 ff., Stamatidis, 2002: 12 ff.

takes place, when certain real events occur. Practically, it has the structure of a conclusion (legal consequence), to which the applicant of the law (judge or administrative official) reaches or does not reach a decision by submitting the real facts of each case at hand to the legal rule (major premise of it). Based on this classic motif, the legal rule is fully binding, structurally predetermined, of a generally being in force content. Through the procedure of submission of the real facts of a specific case to a legal rule, the latter is either applied or not applied. It cannot be applied a little or a lot. Neither can it be modified, as a rule, by the judge. It can only be differently interpreted.

Nevertheless, within the contemporary legal world, there globally appears a tendency that transpires all kinds of systems: the legal rule is rapidly evolving into a more pliable structure. It is transformed into a principle-value that tends to realisation, without being generally and abstractly fully binding. This principle is applied by the judge, not through the procedure of submitting real facts to a clear cut legal rule, but through its interpretation and application in accordance with standing principles, such as those of justice, equity, proportionality and so on (Gerapetritis, 1997, Orfanoudakis, 2003, Tzemos, 2004, 2009: 402 ff., 2010: 54 ff.), as well as the principle of subsidiarity especially within the context of European law. Focal point of this view of the sources of law is the part of the measuring tools that are prone to more flexible and unpredictable dynamics than the classic, static yet relatively safe traditional method of submission of the facts of minor premise to the abstract rule of the major one. The judge, within the framework of the new era of the legal interpretation, gets transformed from applicant of the law into a mediator in the creation of law.

Furthermore, depending on the methods of interpretation of the law (Spyropoulos, 1999, Stamatis, 2002: 254 ff.) within a legal order, the width of the jurisdictional field of discretionary action of the judge is also affected. The main methods of legal interpretation are the grammatical, the systematic and the teleological one, the historical and the comparative ones being of a subsidiary nature. Within the positivist context of a traditional legal structure, the grammatical interpretation plays the dominant part, whereas the systematic and teleological ones complete the interpretational gaps that the former leaves open. On the contrary, within the framework of the non-strictly positivist legal orders, such

as that of European law with its intense/genial teleology (Tzemos, 2009: 402 ff.), but also within the radically and extendingly rising empire of the legal rules/principles/values nexus (Tzemos, 2010b: 54 ff.), the teleological interpretation obviously acquires a more principal part.

7. JUDICIAL ACTIVISM IN GREEK JURISPRUDENCE

The clarification of the legitimate jurisdictional boundaries of a court presupposes the distinction of powers, the distribution of competences among the main organs that constitute the legal order, to which the court falls under.

Greek legal order, as it has already been mentioned (ante, I), adapts the principle of the distinction of powers (Montesquieu, 1977, Schefold, 2000: 148 ff., Kingston, 2009)⁷. The strict traditional tripartite distinction of the powers is not, however, apposite to describe precisely the boundaries between ‘benevolent’ and ‘malevolent’ judicial activism within the Greek state.

The democratic principle (Zacher, 1969, Böckenförde, 1991)⁸ sets additional boundaries to the role of the judiciary. The judges, in most modern states, are not democratically elected by the people. They lack democratic legitimation of the sort that the legislative organs of the state enjoy legislative competence. In contemporary democracies directly elected by the people politicians assume the uppermost competence and

⁷ In Greek legal order see Chryssanthakis, 1992, Fortsakis, 2000: 745 ff., Mavrias, 2005: 349 ff., Pantelis, 2007: 134 ff., Venizelos, 2008: 381 ff.

⁸ In Greek legal order see Kassimatis, 1975: 5 ff., 1980: 15 ff., Tsatsos, 1982: 227 ff., Pararas, 1985: 4 ff., 2002: 581 ff., 2004: 79 ff., Chryssogonos, 2003: 221 ff., Contiades, 2003: 621 ff., Dimitropoulos, 2004: 432 ff., Mavrias, 2005: 349 ff., Chryssanthakis, 2007: 53 ff., Pantelis, 2007: 72 ff., Venizelos, 2008: 344 ff.

responsibility of issuing the written rules of law. The democratically elected legislator holds the real competence of competence within a democratic legal order. In that sense pretensions of 'law-creation' on the part of the courts, contradicts the democratic principle.

The principle of the rule of law also plays a significant part in the determination of the jurisdictional boundaries of the judiciary in Greek legal order. The maintenance of the law of the land requires that the judiciary upholds and looks after the positive law in the country as determined by respective acts of Parliament. The rule of law does also suggest an avoidance of expansion of the jurisdictional boundaries of the courts towards the dangerous gates of judicial activism. Otherwise the balancing of the legal order as a whole may be put at risk.

8. THE TEMPTATION OF ACTIVISM

The judicial control of constitutionality of the laws forms a basic structural source of 'judicial activism' (Würtenberger, 1998: 57 ff.). In the Greek judicial system (Spyropoulos and Fortsakis, 2009: 206 ff., Tzemos, 2010a), every court is competent to judge on the conformity of a legal provision with the Constitution. The tradition of so-called 'diffused' control of constitutionality is opposed to the 'concentrated' control that obtains in most European countries with a Supreme Constitutional Court, such as Germany, Spain or even France (Constitutional Council). The lack of such a court in Greece enables all courts of justice to decide upon the constitutionality of a legal provision.

The Supreme Special Court is not a 'regular' or standing court, since it sits only when a case falling within its jurisdiction arises. Its role is then mainly: a) to resolve disputes between the Supreme (Civil and Administrative) Courts or between the courts and the Administration, b) to take an irrevocable decision, when contradictory decisions of the Supreme Courts, concerning the true meaning or the constitutionality of a legal provision, are issued, c) to judge the pleas against the validity of the result of the parliamentary elections. Consequently, it is the only court that can declare an unconstitutional legal provision 'powerless' (not 'null and void') and expel it from the Greek legal system. All

the other courts can only declare it as ‘inapplicable’ for the particular case. The decisions of the Supreme Special Court are binding for all other courts, including the Supreme Courts (Court of Appeal, Conseil d’État, Cour des Comptes).

Consequently, within the Greek judicial practice can be discerned a degree of ‘decentralisation’ and diffusion of the spots of likely judicial activism. That may entail, however, certain legal insecurity, since there is not always a supreme and final constitutional judge. On the other hand, ‘malevolent judicial activism’ of the Supreme Courts may prove to be rarer and less imposing against the democratically legitimised political decisions.

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