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"a Tale of Love and Darkness"

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Abstract

The paper briefly explores how the Greek legal order receives and reacts *vis-à-vis* the *acquis communautaire* and the European public order. Although the nature, function, intensity and extent of the supranationality developed by the ECHR differs substantially from that of Union law, both regimes aim at producing effective results within the national order. The sources of supranationality stem from the socio-normative teleology of the European integration within a particular historical context, the legitimacy of that objective and the social consensus surrounding it, if not from state will itself. The paper sustains that the inadequacy of positive law, the interpretative relativism, and the systemic inconsistencies that inevitably emerge are to be covered by the *de facto* predominance of the supranational regimes over the Greek legal order, including its constitutional provisions. The integration of supranational law into the municipal order often touches on the most sensitive chords of the constitutional domain. In that context, the consequent formal supremacy that each legal system aims to secure for itself turns out to be not only a legal or even a legalistic question, but rather a "post-positivist" one that involves socio-political aspects to a great extent. In spite of the formalist constraints set by the rigid Greek Constitution that seeks to retain its primacy, the national judge has no choice but to align her/his practice with the case law of her/his supranational colleague. *De facto*, supranationalism dominates the Greek legal order entirely. The case law indicates that the Greek order relinquishes in favour of the supranational norms -thereby confirming their supranational (as well as *de facto* supra-constitutional) effectiveness.Yet the Greek judge only came to face that "meta-positivist" reality recently and is still striving to compromise with it.

Key-words

Union law, European Convention on Human Rights, Greek legal order, European Court of Justice, European Court of Human Rights, supranationalism, *de facto* supremacy, meta-positivism, pluralism, judicial dialogue, harmonisation, conflict of norms, complementarity

In Integration We Trust?
The Reception of Supranational Law in the Greek Legal Order:
"a Tale of Love and Darkness"

Stella-Eirini Vetsika - Vassilis P. Tzevelekos [*]

Summary: 1. 1. In lieu of an Introduction: a Word on the Supranational Phenomenon and the Limits of Legal Positivism -2. The Limits Set by the Greek Constitution- 3. The "Meta-Positivist" Realities - 4. The Scholars- 5. Final Remarks

1. In lieu of an Introduction: a Word on the Supranational Phenomenon and the Limits of Legal Positivism

The European paradigm departs from the standard of classic intergovernmentalism. Although originally it was state will that endowed the two European regimes with their powers and particular characteristics, the emergence of supranationalism led to a gradual erosion of the sovereign foundations of the state. By absorbing an ever-growing part of state powers, exercising legislative functions in the name of the European "demos" (which is armed with a "veto" authority against the will of governments), and finally by being equipped with a specialised and distinct judiciary that is empowered to act as the ultimate interpreter, supranationalism proved to be a far from static phenomenon.

Unlike many federal constitutions, neither the Union law[1] nor the ECHR contain any clause of conflict establishing the primacy of their respective norms over national law. Nevertheless, the supremacy of the supranational regimes is well established both in practice and in case law. Thus, its positivity has to be searched primarily in those sources. The material foundations of

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[1] With interpretative declaration No 17, the Treaty of Lisbon makes reference to primacy as this has been established by the "*well settled case law*" of the ECJ. In the past, primacy was indirectly derived from Article 10 TEC providing for the obligation of "loyal co-operation".

supremacy were nourished both by tolerance (silent consent) of the national orders and by the object and purpose that the supranational regimes pursue, namely the European integration and the establishment of a European *éspace* of public values. Yet the gradual "metamorphosis" of the regimes into what they represent today would never have occurred in the absence of judicial autonomy. For supranationalism to effectively shift beyond (or even against) state will, it has to rely on judicial dynamism, a term that is obviously a euphemism for judicial activism.[2] If it had not been for the supranational judge, the normative specialty of the Union law would never have succeeded in dethroning the premiership of the national order and the ECHR would never have evolved into a European quasi-Constitution.

The pre-eminence of the EU order over the national order constitutes an imperative "existential" necessity. The primacy[3] of the Union law is general and applies against any type of domestic law, including the national constitution.[4] This is how uniformity in the application is secured. Effectiveness in the promotion of EU objectives requires that its norms superpose on domestic law. Furthermore, primacy is inseparably linked to the autonomy of the EU regime. The Union law is directly integrated (direct effect) within the domestic orders and establishes actionable rights.[5] Finally, it enjoys direct enforceability before the national courts and overrides conflicting domestic law, which remains inapplicable.[6]

Considering the contrasting elements of the ECHR regime, it appears at first reading to be a typical multilateral international treaty. Its institutional apparatus constitutes part of an intergovernmental organization, where, as such, the ECHR is the product of international law. The nature, function, intensity and extent of its supranationality differ substantially from that of Union law. The principal difference between these two regimes consists of the fact that rather than establishing an institutional ensemble that acts as a supranational "substitute" to the state in the exercise of executive, legislative and judicial powers over certain policies, the ECHR's objective is to guarantee the compatibility of the practice of the national organs with certain fundamental rights.

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[2] On the positive dimension of judicial activism, *see* Tridimas (1996) 199-210 (placing emphasis on teleological interpretation and the function of the ECJ as a constitutional court) and Christianos (2002) 959-968 and 964-968 (arguing that the role of the ECJ is "corrective").

[3] ECJ, Case C-6/64, *Flaminio Costa v. ENEL*, 15-07-1964.

[4] ECJ, Case C-11/70, *Internationale Handesgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17-12-1970, para. 3.

[5] ECJ, Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 05-02-1963.

[6] ECJ, Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 09-03-1978, para. 17.

Although the *res judicata* of the case law of the ECtHR is deprived of any direct effect within the municipal order,[7] it nevertheless develops a triple international effect.[8] The state that breached the ECHR remains internationally responsible, unless one, it executes[9] the judgment of the ECtHR (formal authority of the case law) and two, it complies[10] more generally with that judgment (substantive authority). The legal basis of these two obligations is Article 46 of the ECHR, entitled "*Binding Force and Execution of Judgments*". At the third level, the case law of the ECtHR develops a broader interpretative effect. This is not addressed exclusively to the respondent state but rather to each state party to the ECHR. The *raison d'être* of the so-called "interpretative authority" is the prevention of breaches. A state that persists with illicit practice and does not adopt the measures that amount to compliance with the case law of Strasbourg continues to be internationally responsible.

Formally, the ECHR develops no other effect. However, this approach must be revisited. More than a typical international treaty, the ECHR corresponds to an idiosyncratic regime that presents the qualitative, both normative and socio-political, characteristics of a *sui generis* "specialty". Though it is an international treaty, the ECHR also serves as a regional "quasi-Constitution",[11] delimiting an increasingly integrated public order[12] that aims at protecting certain common values within a very specific geographic, cultural, historical, social, political and economic *milieu*, *i.e.*, Europe. Thus, the ECHR does not limit its specialty to the *erga omnes partes* normative status of its substantive provisions (a characteristic that is common to all human rights treaties). Beyond this obvious dimension of normative specialty, a thorough appraisal of the ECHR requires taking also into account its teleology, the social context that surrounds it and the transformation of the ECtHR into a Constitutional Court for Europe. While the force of the ECHR stems from international law, its effectiveness moves beyond it. For that reason, outside classic state responsibility, breaching the ECHR involves a stigma, namely the divergence from the European standards of *état de droit*.

Despite the different quality of the EU and the ECHR supranationalism, one common denominator is the role of the judge. Judicial interpretation promotes evolution that allows the

[7] It only has a confirmatory/diagnostic effect, establishing the breach of the ECHR. It has no effect on the domestic act that constitutes the basis of the violation found.

[8] Among others, Koutroulis, Tzevelekos (2005) 1162.

[9] The state must repair the damage caused to the victim in accordance with the judgment. Reparation often takes the form of compensation and, more specifically of a pecuniary "just satisfaction" (Article 41 ECHR).

[10] Compliance requires the adoption of the necessary measures that will put an end to the breach of the ECHR and will prevent its future repetition. If several equally effective measures are available, the state enjoys discretion in choosing the ones it prefers.

[11] ECtHR, *Loizidou v. Turkey*, preliminary objections, 23-03-1995, para. 75.

[12] ECmHR, *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, admissibility, 04-03-1991, para. 20. On the concept of the European public order *see*, among others, Ktistakis (1999) 5-20.

introduction of innovative elements that are, if not always legitimate, at least necessary for the relevant norms to produce their full material and thereby integrational *effet utile*. Since that evolution often takes place outside the usual mechanisms of law making it might be seen as opposing the premises and limitations set by the municipal legal orders and the democratic will of their respective governments. In that context, the shortcomings of legal positivism in fully and accurately comprehending and conceptualizing the dynamism in the relationship between the supranational regimes and the constituent national orders come as no surprise. Legal positivism is static by definition. It is in its systemic nature to recognise only the mature normative change that results from the formal institutional channels. The ideal environment for positivism to flourish is that of well-established legal orders, the interrelation of which is regulated in detail by rules establishing hierarchies and other methods of conflict resolution. Outside that context, positivism often leads to a dead-end.

However, positivism remains pertinent in at least two different occasions. First, it offers an "escape clause". Positive international law allows governments to opt-out of any institutional regime they consider to evolve against their own will and the powers delegated to it. Yet if the state abstains from reacting against that evolution, it is legitimately presumed to tacitly endorse it. Second, legal positivism allows for the formal absorption of the systemic change that emanates from the institutional practice. States are often called upon to "update" the system by negotiating and putting into force new legal frameworks that incorporate the systemic trends that the institutional practice introduces. Nevertheless, outside these few instances that demarcate the outer limits of supranationalism, the usefulness of legal positivism in the case of dynamic interaction between plural orders remains relatively limited. Other intellectual schemes, such as legal pluralism, become pertinent.

The picture that has been outlined here aims to serve as the basis for explaining how the Greek legal order receives and reacts *vis-à-vis* the *acquis communautaire* and the European public order. Given the limited scope of the study, rather than offering an in depth panorama or a detailed historic overview of the responsiveness of Greece to the supranational laws, the aim is to focus on recent and actual evolution. What will be sustained is that the inadequacy of positive law, the interpretative relativism, and the systemic inconsistencies that inevitably emerge are to be covered by the *de facto* predominance of the supranational regimes over the national legal order, including its constitutional provisions. The integration of supranational law into the municipal order often touches on the most sensitive chords of the constitutional domain. In that context, the consequent formal supremacy that each legal system aims to secure for itself turns out to be not only a legal or even a legalistic question, but rather a "post-

positivist" one that involves socio-political aspects to a great extent. Or, as it has been subtly put, at the current moment of evolution it applies a model of inter-constitutional coordination that arises from the preponderance of the supranational objectives over the passivity of the national constitution and the limits this sets.[13] Supranationalism is the result of the legitimacy and the material object and purpose of integration within a particular historical context. If these conditions were to change, the broader material force of supranational law would be questioned and its effectiveness undermined.

Part two of this paper sets the normative premises of legal positivism as point of reference and outlines the normative landscape drawn by the Greek Constitution (GC). Part three moves beyond legal positivism and discusses the "meta-positivist" realities that govern the Hellenic judicial practice. In that context, the study will present a number of recent cases where the Greek legal order relinquishes in favour of the supranational norms, thereby confirming their supranational (as well as *de facto* supra-constitutional) effectiveness. Part four discusses the standing of academia *vis-à-vis* the supranational phenomenon and emphasises the methods suggested by enlightened scholarship for reconciling the inelastic GC with supranational law. The fifth and final part of the study is devoted to its conclusions.

2. The Limits Set by the Greek Constitution

Although the Greek courts recognised the effect of international law within the municipal order[14] as early as the nineteenth century, it was only in 1975 that the constitutional legislator regulated the relationship between domestic and international law. Article 28(1) GC[15] stipulates that both customary and conventional international law "*shall prevail over any contrary provision of the law*". The supra-legislative effect of international law extends over *lex posterior* as well, but not over the Constitution.[16] Paragraphs 2 and 3 of Article 28 regulate the participation of Greece in international institutions:

> "2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement. 3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and

[13] Giannakopoulos (2008) (2) 734.
[14] Without however recognising the supremacy of international law. Tenekides (1975) 185-191.
[15] The official translation in English of the GC is available at www.parliament.gr/english/pdf/001-156%20aggliko.pdf (visited on 15/12/2009).
[16] Roucounas (1982) 61-66.

> the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.".

The enactment of Article 28 coincides with the collapse of the 7-year dictatorship and the efforts of Greece to adhere to the European institutions. Although it was unclear whether it was Paragraph 2 (requiring a majority of 3/5) or Paragraph 3 (requiring an absolute majority) that should serve as the basis for Greece's participation in the Communities, Article 28 was considered to provide sufficient legal ground.[17] The majority of scholars sustained that the solution was to be found in the combination of both Paragraphs 2 and 3, so that next to the formal conditions of vote, respect of human rights and democratic governance would be ensured.[18] However, because of the existence of wide bipartisan consensus in favour of European integration the issue was never raised in practice. In 2001, the constitutional legislator intervened in the debate by adding an interpretative clause under the text of Article 28.[19] Hence, "*Article 28 constitutes the foundation of the participation of the Country in the European integration process*". While the objective of integration found an explicit place within the GC, this reference was also meant to serve as a guide for the interpretation of all other constitutional provisions that might relate with Article 28 concerning European integration.[20]

Articles 87(2) and 93(4) GC provide for a system of diffuse and incidental control of constitutionality of the legislative acts. Although national courts are all equally competent to review constitutionality, such a control cannot be exercised *in abstracto* or on the basis of individual complaints. Unconstitutional statutes remain formally in effect,[21] but become inoperative for the purposes of the case that declared the unconstitutionality. *Mutatis mutandis*, the supra-legislative effect that Article 28 GC grants to international law allows courts to control the compatibility of domestic acts with Greece's international obligations.[22]

Outside Article 28 and its effect, what is important to underline is that the GC is a traditionally "rigid"[23] constitution. Article 110(1) explicitly prohibits the revision of a number of its provisions that concern the model of governance (Parliamentary Republic), as well as certain fundamental rights. Furthermore, Article 110(2) and (3) set a rather complex, inflexible,

[17] Papadimitriou (1982) 144, Drosos (1987) 89, Iliopoulos-Strangas (1996) 32, Mavrias (2004) 259-263.
[18] *See* the list with the authors (such as Evrigenis, Manesis and Ioannou) supporting that approach at Scandamis (1997) 340.
[19] A similar interpretative clause concerning the participation of Greece in the European Monetary Union has been added under Article 80 GC.
[20] Venizelos (2002) 234-235.
[21] As opposed to the unconstitutional administrative acts, which are annulled (Article 95(1)(a) GC).
[22] Chrysogonos (2001) 225. Courts have the power to review the compatibility of domestic acts with the ECHR *proprio motu*.
[23] Mavrias (2004) 239-240, Pantelis (2005) 167-168.

and slow-moving procedure for the amendment of the provisions of the Constitution that are susceptible to revision. The Parliament is allowed to revise the Constitution only if the previous Parliament provided authorisation. The process concerns only these provisions that have been defined (by a majority of 3/5 vote) as amendable.

Given these remarks, making an overall assessment of the way the GC regards the supranational regimes is not an easy task. On one hand, the fact that the Greek polity broadly endorses (albeit through a simple interpretative clause) the European integration as a superior socio-legal goal gives the GC an accent of openness and legitimises its interpretation according to the *tempo* given by the European integration itself. On the other hand, the text of the GC ranks the Union law and the ECHR as hierarchically supra-legal and under-constitutional. Finally, although not entirely entrenched, the GC is still significantly rigid in its revision. This allows for the presumption that it is rather inflexible in accommodating the evolution stemming from the European institutions and in fast and effectively adapting its text to the exigencies of integration. If this hypothesis is true, then one may legitimately accuse the constitutional legislator of timidity in the revision of Article 28 GC.

3. The "Meta-Positivist" Realities

The conclusion to be reached from the analysis so far is that while the Greek legal order seeks to preserve the supremacy of its Constitution, the supranational regimes offer a number of strong and pragmatic arguments in favour of the primacy of their own norms. It is Kelsen's view that the conflict between two methodological "monisms" cannot be resolved on the basis of positivist arguments.[24] *De facto*, positivism relinquishes in favour of the meta-positivist solutions that the political context and the sociological reality prevailing at each time impose. Failure to allow this to happen equates to a weakness to face the socio-normative reality of Europe today. The section that follows will attempt to evaluate how much the Greek judge is adapted to that reality.

a. When the "Tectonic Plates" of the Greek Constitution and the EU Order Collide

Although the Greek legal world apprehends the significance of the Union law, both as a means for securing Greece's effective integration in the EU as well as a normative ensemble

[24] Kelsen (1994) 345.

formally carrying a special weight, it is careful that its everyday life remains immune to it.[25] Almost 30 years after acceding to the Communities, the Union law is still seen as a rather technical and "exotic" body of law, which is more addressed to experts than to the mainstream lawyer. The "osmosis" between the Greek order and the Union law remains imperfect. Despite that, the normative qualities of the Union law are not challenged and overall the national judge tends to comply with the case law of the ECJ.[26] Rather than defiance to the primacy of the Union law, malfunctions in its effective application occur in most instances as a result either of lack of familiarity or of a strategy to avoid resorting to the ECJ for preliminary rulings.[27]

However, these remarks concern only the supra-legislative effect of the Union law.[28] Some early "heretic" case law[29] challenging the "orthodoxy" of the primacy of the GC never succeeded in finding imitators. During the last few years, the question of the conflict between the GC and the Union law was openly brought to the fore by judicial practice. In all relevant occasions the Union law *de facto* prevailed.

i. *De Facto* Supremacy of the Union Law over the Greek Constitution Through Harmonisation

One of the most commonly cited examples of conflict between EC law and the GC concerns the free movement of workers. In terms of Article 4(4) GC, "*only Greek citizens shall be eligible for public service, except as otherwise provided by special laws*". Article 110(1) GC includes Article 4(4) in the constitutional "core" of the non-amendable provisions. According to the ECJ's case law the exemption of employment in the public service from the freedom of movement for persons must be interpreted narrowly.[30] Thus, for the Greek order to comply with EC law it either had to recognise that the latter takes precedence over its Constitution[31] or

[25] *See* e.g. StE (*plenum*), *3088/2007*, 02-11-2007. The case concerned the question of gender equality in the matter of different treatment with regard to retirement age. The conclusions reached by the Greek Council of State were similar to the later *dictum* by ECJ (Case C-559/07, *Commission of the European Communities v. Hellenic Republic*, 26-03-2009). However, the national court founded its decision on exclusively the GC.

[26] *See* e.g. StE (4th chamber), *2144/2009*, 29-06-2009 [compliance with the judgment of the ECJ in Case C-65/05 (*Commission of the European Communities v. Hellenic Republic*, 26-10-2006) concerning the prohibition of the operation of electronic games in Greece].

[27] For a number of examples of cases where the Greek courts deliberately avoided seeking a preliminary ruling *see* Papadopoulos (2009) 474-480.

[28] *Ibid.*, 482-484 (presenting early case law on the primacy of the GC over EC law).

[29] Court of Appeals of Athens, *9162/92*, 25-10-1992. *See* also the decisions *3502/94* (22-11-1994, para. 6) and *249/97* (28-01-1997, para. 6) of the 4th chamber of the StE, recognising the supra-constitutional force of both EC law and the ECHR (as part of EC primary law).

[30] The exemption from public service (Articles 45(4) Treaty of Lisbon and 48(4) EEC Treaty) covers only posts that "involve *direct or indirect participation in the exercise of* [...] *duties designed to safeguard the general interests of the state*". *See* e.g. ECJ, Case C-290/94, *Commission of the European Communities v. Hellenic Republic*, 02-07-1996, para. 2.

[31] Court of First Instance of Athens, *2228/1992*, 14-04-1992.

to enact, consistent with Article 4(4) GC, a *lex specialis* statute defining the term "public service" in conformity with the ECJ case law.[32]

Another example is the recognition of diplomas awarded by establishments that operate in Greece as branches of educational institutions based in another member-state:[33] Article 16(5) GC reads, "*education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons*". Furthermore, Article 16(8) explicitly prohibits the establishment of university level institutions by private persons. With its early case law[34] the *Symvoulio tis Epikrateias* (StE, the Council of State) recognised that the freedoms of movement of persons and of establishment, Article 126 EC Treaty (educational policy) and Directive 89/48/EC (providing for the recognition of higher-education diplomas) are applicable in that context. Yet it reached the conclusion that according to Article 28 GC, EC law can only develop a supra-legislative effect and not a supra-constitutional effect. The case was referred to the plenary session of the StE,[35] which held that because Article 126 EC Treaty does not harmonise the national legislations in the subject matter, rather it rests upon the states to organise the educational system. Therefore, the EC lacks competence to regulate a field that in substance falls within the *domaine réservé* of the Greek legal order. Finally, since (according to the StE *dictum*) Directive 89/48/EC (secondary EC law of an inferior ranking) does not fall under the subject matter of Article 126 EC Treaty, no reference for a preliminary ruling should be made to the ECJ. The *plenum* thereby avoided addressing the question of hierarchy between the GC and the Union law.

The European Commission's action against Greece for its systematic failure to fulfil its obligations under Directive 89/48/EC enabled the ECJ to exercise jurisdiction.[36] However, regarding the question of hierarchy, Luxemburg remained equally silent. *Inter alia*, it held[37] that the named Directive entitles any applicant who holds a diploma authorising her/him to pursue a regulated profession in one member-state to pursue the same profession in any other member-state. The reason that a diploma is recognised is not for the intrinsic value of the education provided, but because it guarantees professional rights. Furthermore, the system of recognition of diplomas is based on mutual trust, whereas the criteria for qualifying an establishment as of higher education reside exclusively with the state where the establishment

[32] Article 1 of Law 2431/1996 (FEK 175/A, 19-07-1996) reproduces *verbatim* the ECJ definition of public service.
[33] For an overview, *see inter alios* Trovas (2008) 1257-1285 and Papadimitriou (2008) 1287-1304.
[34] StE (4th chamber), *2807/1997*, 08-07-1997.
[35] StE (*plenum*), *3457/1998*, 25-09-1998.
[36] ECJ, Case C-274/05, *Commission of the European Communities v. Hellenic Republic*, 23-10-2008.
[37] *Ibid.*, paras. 29-32 and 37-38.

is based. Finally, the ECJ made clear that the Directive relates solely to professional qualifications and not to academic ones.

The limits set by the ECJ are clear. In absolute harmony with Article 16(5) GC, EC law acknowledges the competence of states to organise their university system. Nevertheless, it requires that states grant professional rights on the basis of mutual recognition. If a conflict were to be found, this could only be qualified as latent. For it to be resolved, it suffices that the national judge shifts *ratione materiae* from the sphere of university education to that of "professional education" and to the fundamental freedoms of the Union law.[38] Admittedly this solution tempers the public character of higher education in Greece. Whereas the unity of professional rights is safeguarded, the system of education giving access to these rights is fragmented. Yet this is a price that the Greek order must pay in order to harmonise the limits set by its Constitution with the aims pursued by the Union law. Nevertheless, harmonisation is not always an easy goal to attain.

ii. When Harmonisation Fails: The Inglorious "Thermopylae" of the Greek Judge

In 2001, Article 14 GC was revised. In an extremely detailed way, Paragraph 9 of that Article provided for the absolute incompatibility between the sectors of public works and media. The incompatibility was extended to all types of intermediaries as well. The purpose of this amendment was to combat corruption and promote transparency in the public works sector.[39] According to Law 3021/2002[40] the presumption of incompatibility with regard to the intermediaries could be rebutted if the tender was proven to be financially independent from its intermediaries. The *Ethniko Symvoulio Radiotileorasis* (ESR, National Council for Radio and Television) was given competence to certify financial independence. *Michaniki*, a corporation that lost a tender, sought annulment of the certificate of financial independence that the ESR issued for its competitor. *Inter alia*, it challenged the constitutionality of Law 3021/2002 to the extent that it was limiting the incompatibility established by Article 14(9) GC. The chamber of

[38] StE made the distinction between academic and professional qualifications before the ECJ delivered its judgment in case C-274/05. *See* e.g. StE (4th chamber), *2076/1999*, 21-06-1999, para. 9. The decision *778/2007* (4th chamber, 13-03-2007) is extremely important because StE seems "complying" with judgment C-274/05 more than a year before its delivery. *See* Giannakopoulos (2007) 140-147. Recently, the Administrative Court of Appeals of Athens (*3216/2009*, 17-12-2009) awarded compensation to an establishment operating in Greece as the branch of a university based on another member-state for the damages it suffered by the denial of the administration to recognise the professional rights of its graduates.

[39] On the objectives pursued by the amendment and its *travaux*, *see* Venizelos (2) (2005) 425-432. *See* also Eleftheriadis (2005) 325-328 (explaining the reasons for the unsuitability of Article 14(9)).

[40] The three implementing laws: 3021/2002 (FEK 143/A, 19-06-2002), 3310/2005 (FEK 30/A, 14-02-2005) and the more conciliatory one 3414/2005 (FEK 279/A, 10-11-2005). For an analysis of these laws, *see* Tzemos (2006) 93-182.

the StE adopted the position that since the force of EC law within the Greek order derives from the GC, the former cannot prevail over the latter and relinquished in favour of the *plenum*.[41] The majority in the plenary session[42] confirmed the absolute nature of the incompatibility established by Article 14(9) GC and held that the owner, partner, major shareholder or managing director of a media undertaking may under no circumstances be a public contractor. The same applies with regard to intermediaries. Contractors who are financially independent of intermediaries (as required by Law 3021/2002) will still have to prove that they act independently and on their own account and interest. According to the StE, this is the only rebuttable presumption allowed by the GC. In the interest of procedural autonomy, the Ste referred the case to the ECJ for a preliminary ruling. Among the three questions that were addressed to Luxemburg, the first concerned Directive 93/37/EEC, and more specifically whether the list with the grounds for excluding a contractor from participating in a public contract (which does not contain any of the grounds provided by Article 14(9) GC) is exhaustive. The second question concerned the compatibility of the national provision at issue with the principles of EC law.

The ECJ answered the first question in the affirmative and sustained that the list of reasons for exclusion contained in the Directive is indeed exclusive. However, as long as the exigencies of proportionality are respected, states enjoy discretion in enacting parallel rules aiming at consolidating transparency and equal treatment.[43] Following a similar reasoning, the ECJ reached the same conclusion with regard to the second question as well.[44] However, the problem with Article 14(9) GC lies in the fact that it fails to respect proportionality.[45] *Inter alia*, by establishing a general and irrebutable incompatibility between the media and public works sectors and precluding proving whether transparency is jeopardised, or competition distorted, the GC goes beyond what is necessary for the purposes of the objectives pursued. Furthermore, the fact that the prohibition of Article 14(9) may be lifted if the contractor proves her/his independence from intermediaries does not alter the automatic and absolute nature of the measure.

[41] StE (4th chamber), *3242/2004,* 16-11-2004. *Cf.* the minority in the judgment arguing in favour of the supremacy of EU law (including secondary EC law) over the GC, *as long as* [emphasis added] human rights and the foundations of democracy are respected (para. 19).
[42] StE (*plenum*), *3670/2006*, 08-12-2006, para. 14.
[43] ECJ, Case C-213/07, *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias*, 16-12-2008, para. 49.
[44] *Ibid.*, para. 60.
[45] *Ibid.*, paras. 60-69.

What is striking about the ruling of the ECJ is that it completely ignores the constitutional nature of the national norm at issue. Not only does it not "quantify" its special normative quality for the purposes of proportionality, but it also remains entirely silent regarding that aspect.[46] The ECJ could be reproached that in doing so it fails in essence to respect the very same principle that Article 14(9) GC breaks: proportionality. For the purposes of the (silent) confirmation of the primacy of the Union law *vis-à-vis* the GC it suffices that the ECJ submit (as indeed it does) the GC to a test of compatibility (through proportionality) with the Union law. The disregard of the constitutional dimension of the case is by all means "unnecessary", whereas without regard to the conclusions reached by the ECJ, it reveals disrespect towards the constitutional identity of the member-state, its constitutional legislator and the social necessities to which s/he responded by enacting Article 14(9). On the other hand, one cannot but stand critically against the choice of the StE to declare the absolute nature of the incompatibility established by Article 14(9). Thereby, it did nothing more than elevate the conflict to the constitutional level.[47] The door should have been left open so that the GC could be harmoniously aligned with the Union law. Besides, such an interpretation would allow the GC to produce (to the extent that its implementing law would not infringe proportionality) a limited effect. After all, less is better than nothing at all.

b. The Impact of the ECHR on the Greek Legal Order: Rectification Through Complementarity and Conflict

The process of the socio-normative reception of the ECHR in Greece has been long and intermittent. Greece signed the Convention in 1950 and first introduced it into the domestic order in 1953.[48] However, its effectiveness remained limited for several decades, if not nilpotent.[49] The dictatorship of 1967 derogated from the ECHR on the basis of the clause of Article 15. The famous *Greek case* allowed the ECmHR to deliver a report on the merits,

[46] Kosta (2009) 506-507 and 510-514.

[47] Venizelos (3) (2008) 98-99. As the "architect" of Article 14(9), Venizelos would obviously prefer the conflict with EC law to remain isolated in the implementing law and to not to refer to the GC. *See* also Venizelos (2) (2005) 432-433 (where the author argues that Article 14(9) contains a reservation in favour of national, EC and international law, in harmony with which it should produce its results).

[48] Law 2329/1953, FEK A/68, 21-03-1953.

[49] Perrakis (1996) 178. The end of the Greek civil war, in 1949, left the Greek society deeply divided. Despite its obvious incompatibility with the GC of 1952, the "exceptional legislation" against the "communist threat" remained in force also after the end of civil war. As all norms of international law at that time, the ECHR was not given a supra-legislative effect. Moreover, the right to individual application was not recognised. Vegleris' famous quotation summarises in the most accurate way the ineffectiveness of the ECHR. Thus, until 1974, the ECHR remained "*a useless document in the life of our legal order*", that is to say "*an uninhabited islet within an ocean of laws being persistently, systematically and constantly incompatibles with the letter and the spirit of the Convention*". Vegleris (1977) 54-55.

whereby it rejected the grounds for derogating from the ECHR and found several systematic breaches of the most fundamental human rights.[50] The colonels' regime reacted by denouncing the ECHR and quitting the Council of Europe. Greece did not return to Strasbourg and to the ECHR regime[51] until 1974, when democracy was restored. Although the GC of 1975 granted a supra-legislative (but not supra-constitutional) force to the ECHR, until the early 1990s its effectiveness (in spite of its self-executing nature) was limited.

A new era commenced in 1985 when the government recognised the competence of the ECtHR to examine individual applications.[52] Since 1991 when the ECtHR delivered its first judgment against Greece,[53] the Court of Strasbourg has examined over 550 cases on the merits. Although the presentation of the relevant case law does not fall into the scope of the study,[54] what could be generally suggested is that the "first generation" of cases brought the systemic weaknesses of the Greek judicial system to light (length of the procedures, access to justice,[55] reasoning of judgments[56]) as well as the "infantile diseases"[57] of the democratic regime, which were mainly due to the lack of effective implementation of judicial decisions against the state.[58] Next to these systemic problems, the practice of the ECtHR also revealed (in certain instances equally systematic[59]) Greece's violations of members' minority rights.[60] The overall picture of case law against Greece during the last two decades indicates that a significant mass of cases concern the right to property. In that respect, next to the cases where a violation of the right to property has been directly alleged (in most instances due to expropriations for public interest purposes),[61] one should also examine the cases where even though a property claim has not been directly raised, property is indirectly invoked through alternative legal bases.[62]

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[50] ECmHR, *the Greek case (Denmark, Norway, Sweden and the Netherlands v. Greece)*, report, 05-11-1969. Instead of others, *see* Perrakis (2) (1997) 33 *et seq.* and 85 *et seq.*.

[51] Legislative decree 53/1974, FEK A/256, 19-09-974. Greece has signed and ratified Protocols 1, 6, 7, 13 and 14 of the ECHR. It did not sign Protocols 4 and 14bis and, although it did sign, it has not yet ratified Protocol 12.

[52] Declaration by the Minister of Foreign Affairs, 20-11-1985 [published in *Kodikas Nomikou Vimatos* (1985) 1848-1849]. The compulsory jurisdiction of the ECtHR was recognised in 1979.

[53] ECtHR, *Philis. v. Greece*, merits, 27-08-1991.

[54] For a recent overview of the case law of the ECtHR against Greece and its impact, *see* the excellent study by Kaboğlu, Koutnatzis (2008) 473 *et seq.*.

[55] ECtHR, *Canea Catholic Church v. Greece*, merits, 16-12-1997.

[56] ECtHR, *Georgiadis v. Greece*, merits, 29-05-1997.

[57] Voyatzis (2002) 87-91.

[58] Because of either an interference by the legislature in the judiciary (ECtHR, *Greek refineries Stran and Stratis Andreadis v. Greece*, merits, 09-12-1994) or a denial by the executive to comply (ECtHR, *Hornsby v. Greece*, merits, 19-03-1997).

[59] ECtHR, *Manoussakis and others v. Greece*, merits, 26-09-1996.

[60] For an overview of the relevant case law, *see* Tsitselikis (2008) 27-48.

[61] Among hundreds of cases, ECtHR, *Former King of Greece v. Greece*, merits, 28-11-2002.

[62] *See* e.g. ECtHR, *Varnima Corporation International S.A. v. Greece*, merits, 28-05-2009. Interestingly, the aforementioned "infantine diseases" of the democratic regime concerned cases that were all, in one or another way, related with economic claims.

However, if Strasbourg is the *ultimum refugium* for Greeks principally for property and fair trial claims (with certain well-known exceptions[63]), the more recent case law reveals that beyond religious or ethnic minorities, foreigners, immigrants and people belonging to different racial groups suffer other violations more "serious" than the right to property, threatening their life and physical integrity in some cases.[64]

Thus, beyond abuse of power by state organs and failure of the judiciary to provide satisfactory remedies at the domestic level, more broadly, the case law reflects the existence of an intolerant mentality[65] by the Greek society *vis-à-vis* the "other", i.e., people who diverge from the stereotypical Greek-orthodox identity. Yet the ECHR regime limits its function in raising awareness of the problems and in obligating governments to adopt the necessary measures for remedying[66] and avoiding repetition. Strasbourg cannot cure the deeper social roots of these problems.

In that respect, the first and most important victory of the ECHR is that during the last 15 years it succeeded in making its presence tangible within the Greek legal order and in influencing the case law of national courts.[67] Even if all lawyers do not master its system, the ECHR is frequently invoked before domestic courts, which, in addition, often apply it *proprio motu*. Although malfunctions continue to exist and the situation is far from satisfactory, the ECHR occupies an important territory alongside the GC. However, although the GC and the ECHR pursue parallel objectives and, therefore, are meant to complement each other, the case law of Strasbourg also contains a limited number of examples where a "constitutional conflict" occurred.

i. Different Types of Complementarity

[63] *See* e.g. ECtHR, *Rizos and Daskas v. Greece*, merits, 27-05-2004 and *Lionarakis v. Greece*, merits, 05-07-2007 (freedom of expression of journalists).

[64] Many of these cases concern the abuse of power by police against immigrants (ECtHR, *Celniku v. Greece*, merits, 05-07-2007), Roma (ECtHR, *Bekos and Koutropoulos v. Greece*, merits, 13-12-2005) or Greek, former expatriates (ECtHR, *Zelilof v. Greece*, merits, 24-05-2007).

[65] C. Rozakis (1999) 68 *et seq.* (arguing that the two sources of human rights violations in Greece are the abuse of power and intolerance).

[66] With regard to remedies it is interesting to note that the Greek legal order provides for the reopening of proceedings after a condemnatory judgment by the ECtHR only with regard to criminal law issues [Article 525(1)(5) Code of Criminal Procedure].

[67] *See* e.g. StE (*plenum*), *1663/2009*, 13-05-2009 [compliance with the judgment of the ECtHR in *Meidanis v. Greece* (merits, 22-05-2008) concerning the calculation of the default interest owed by public-law entities at rates significantly lower than those applied to individuals] and StE (3rd chamber), *1251/2008*, 10-04-2008 [compliance with the judgment of the ECtHR in *Vassilios Stavropoulos v. Greece* (merits, 27-09-2007) concerning the breach of the presumption of innocence by the administrative courts, ruling in disregard of the acquittal of the applicant by the criminal courts].

Starting with the scenario of complementarity,[68] every time a domestic court proceeds with the synthesis of these two "constitutional tools", the scope of human rights is expanded and their effectiveness is maximised. To give just a few examples, the StE has combined Article 20(1) and (2) GC (access to justice and prior hearing) with Article 6(3) ECHR in order to conclude that civil servants are entitled to representation by an attorney before disciplinary administrative instances, regardless of the gravity of the sanction.[69] By the same token, the StE has ruled that the combination of Articles 20(1) GC and 6(1) ECHR allows applicants to file an appeal in person without being represented by an attorney.[70] On its side, the *Elegktiko Synedrio* (ES, Court of Audit) resorted to the combination of Articles 21(1) GC (family life), 14 ECHR and 1 of the first Protocol ECHR, in order to overrule Article 63(1)(b) of the Greek Code of Civil and Military Pensions, which establishes the acquisition of Greek citizenship as a precondition for a non-citizen to benefit from the pension of her deceased spouse.[71]

In principle, it is impossible for a "true" normative conflict between the human rights provisions of the GC and the ECHR to occur. However, because the national judge insists on narrowly interpreting the GC in some instances, the *ratione materiae* parallel norms of the ECHR come to *pro homine* complement its scopes. Thereby, a second form of complementarity (or of a latent conflict) between the GC and the ECHR is that of the substitution of the narrowly interpreted national constitutional norm by the parallel supranational one. The right to property is the most characteristic example to illustrate this point. Since Article 17(1) GC (property) is traditionally interpreted as covering only titles *in rem*, Article 1 of the first Protocol was initially allowed to produce its (much broader) effect domestically, only to the extent that it did not contradict the GC.[72] Therefore, not only was the relation between these two parallel norms conceived as conflicting, but the ECHR was also "amputated" so that it would concur with the standards established by the interpretation of the GC. In 1998, *Areios Pagos* (AP, Court of Cassation) decided to shift from conflict to complementarity and resorted autonomously to the ECHR as the basis for the protection of all rights of possessive character.[73] Thus, without formally departing from its narrow interpretation of the GC, the Court of Cassation succeeded in expanding the semantic field of the right to property and complied with Strasbourg.

[68] Chrysogonos (2001) 207-210.
[69] StE (*plenum*), *2152/2000*, 23-06-2000, paras. 4-5.
[70] StE (2nd chamber), *193/2009*, 21-01-2009, paras. 4-5.
[71] ES, *194/2001*, 15-2-2001.
[72] ES, *28/1994*, 26-11-1993.
[73] AP (*plenum*), *40/1998*, 17-12-1998. More recently, AP (2nd chamber), *104/2009*, 13-01-2009.

However, if finally the logic of harmonisation prevailed with regard to the general semantic field of the right to property, there have been some aspects of that right that the AP resisted endorsing. One thorny relevant question was that of the irrebutable presumption established by the Greek legislation, in terms of which, in the case of a partial expropriation, the adjoining owners were presumed to derive a benefit from improvements to major roads that justified a limitation in their compensation. Although the ECtHR declared the absolute character of the presumption incompatible with the right to property,[74] in its early case law AP ignored that *dictum* and confirmed the compatibility of the presumption at issue with the GC.[75] Even if a few months later the AP *plenum* (albeit tacitly) abandoned the irrebutable character of the presumption, it still insisted regarding the procedural dimension of the issue.[76] With its *Azas* judgment, the ECtHR let its frustration show and made clear that all the procedural aspects of expropriation fall under the right to property and shall be covered by one single procedure addressing all relevant questions in a global way.[77] For AP to align its case law[78] with that of Strasbourg, it had to resort to Article 1 of the first Protocol which, once again, through complementarity displaced the narrow construction of Article 17 GC.

ii. Conflict

While scholars suggest that conflicts between the GC and the ECHR do exist,[79] so far the case law of the ECtHR has dealt with only a marginal number of cases of that kind. Interestingly, not all of these cases concerned the practice of the judiciary.[80]

As has already been demonstrated, a "true" normative conflict between the human rights provisions of the GC and the ECHR is highly unlikely. Thus, the scenario of conflict is confined to either the non-human rights norms of the GC or to its provisions that aim at limiting the effect of human rights. Starting with the second hypothesis, Article 13(3) CG

[74] *See* e.g. ECtHR, *Katikaridis v. Greece*, merits, 15-11-1996, paras. 44-51.
[75] AP (3rd chamber), *577/1998*, 14-04-1998.
[76] AP (*plenum*), *8/1999*, 11-03-1999.
[77] ECtHR, *Azas v. Greece*, merits, 19-09-2002, para. 48.
[78] AP (4th chamber), *598/2001*, 09-03-2001 (holding that the absolute nature of the presumption violates the ECHR) and AP (*plenum*), *10/2004*, 18-03-2004 (suggesting that the questions of the compensation and the rebuttal of the presumption should be merged in one single procedure).
[79] Chrysogonos (2001) 180-184. *See* also the examples offered by Kontiades (2006) 1081-1083 (suggesting that Article 7(3)(b) GC that provides for death penalty for felonies perpetrated in times of war is incompatible with the 13th Protocol ECHR and that Article 19(3) GC that prohibits the use of evidence that has been collected in breach of the secrecy of communications conflicts with Article 6 ECHR).
[80] *See* e.g. ECtHR, *Tsalkitzis v. Greece*, merits, 16-11-2006 and *Syngelidis v. Greece*, merits, 11-02-2010 (in both cases Greece was found liable for the refusal by the Greek Parliament to waive the immunity (Article 62 GC) of members involved in judicial disputes over issues entirely disconnected with their parliamentary activities. The judiciary had no competence to review the practice of the Parliament).

explicitly prohibits religious proselytism. With its old *Kokkinakis*[81] judgment, the ECtHR found that the criminalisation of proselytism fails to respect proportionality with regard to freedom of religion. However, by distinguishing between abusive proselytism, which is prohibited, and the dissemination of religious ideas, Strasbourg enabled the national judge to harmonise her/his practice with the exigencies of the ECHR without breaching the GC (which, although to date remains unrevised in that respect, produces only effects that comply with the *Kokkinakis* case law).

The second scenario concerns a (temporary) conflict between the ECHR and Article 57(1) GC that enlists the parliamentary incompatibilities. During the 2001 constitutional reform a new incompatibility was introduced, the terms of which specified that the members of the Parliament were prohibited from exercising any profession during their tenure in office. With its *Lykoyrezos*[82] judgment, the ECtHR once again demonstrated self-restraint and avoided declaring Article 57 GC as *per se* incompatible with the ECHR. The violation of Article 3 of the 1st Protocol ECHR was based on the immediate validity of the constitutional provision in question, breaching the principle of legitimate expectations. In 2008, Article 57 GC was amended[83] again and the aforementioned incompatibility was utterly lifted.

Yet although the practice of the ECtHR reveals its preoccupation with not showing disrespect for the GC and thus far has always afforded the national judge the necessary space to effectively harmonise the interpretation of the GC with the ECHR, the Greek judge does not always seem to share that concern. The following example is characteristic: In 2005, the Article 88(2) GC Special Court for disputes on remunerations and pensions of magistrates found the preferential treatment afforded to the public sector regarding the 2-year limitation period that applies in cases of claims by civil servants to be incompatible with Articles 4 GC (equality before law), 6(1) ECHR and 1 of the first Protocol ECHR.[84] On its side, AP contradicted with that case law and declared the compatibility of the aforementioned privileges

[81] ECtHR, *Kokkinakis v. Greece*, merits, 25-05-1993, paras. 48-50.
[82] ECtHR, *Lykourezos v. Greece*, merits, 15-06-2006.
[83] The limited scope of the study does not allow discussing the measures adopted by Greece for the purposes of compliance. However, it is important to note that Article 57 is not the only provision of the GC that has been amended. With Article 25(1) GC, proportionality was established as one of the applicable conditions for the restriction of human rights. New Article 94(4) CG provides for the compulsory enforcement of judicial decisions against the public sector and Article 95(5) CG stipulates that the public administration is bound to comply with judicial decisions. Furthermore, the revised Article 93(3) GC requires that courts reason their decisions "*specifically and thoroughly*". Concerning other means of compliance, such as statutory modifications and changes in the interpretation of the national legislation *see* Kaboğlu, Koutnatzis (2008) 488-491. *See* also the Juristras case study report on Greece, assessing compliance on the basis of the Council of Ministers' practice [D. Anagnostou, E. Psychogiopoulou, *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: a Case study of Greece*, 15-28, available at www.juristras.eliamep.gr/wp-content/uploads/2008/09/casestudygreece.pdf (visited on 13/01/2010)].
[84] Special Court of Article 88(2) GC, *1/2005*, 06-12-2005, para. 11.

with the GC and the ECHR.[85] Meanwhile, StE confirmed the findings of the Article 88(2) GC Special Court.[86] Yet StE skillfully avoided examining the question from the perspective of the ECHR and -by limiting its analysis on the GC exclusively- it referred the case to the *Anotato Eidiko Dikastirio* (AED, the Special Highest Court). Pursuant to Article 100(1)(e) and (4) GC, AED is the only competent judicial instance to settle the interpretative controversies in the case law of the high courts over the constitutionality of statutes and has the power to render unconstitutional law invalid *erga omnes*.

However, before the AED decided on the controversy in AP and StE's case law, the ECHR delivered two judgments whereby it declared the privileges of the Greek government with regard to the limitation period (prescription) that applies in its disputes with civil servants and individuals to be incompatible with Articles 6(1) (equality of arms) and Article 1 of the first Protocol ECHR respectively.[87] Yet AED chose to disregard these two *dicta* by the ECtHR. Despite that it was through a marginal majority, AED confirmed the approach by AP and found the privileges of the state to be compatible with the principle of equality of Article 4 GC and justified by significant public interest reasons.[88]

Thus, while the supranational "quasi-constitutional" judge declared the incompatibility of the named privileges with the principle of equality of arms, the national "quasi-constitutional" judge found these very same privileges to be compatible with the principle of equality. The nature of the courts that delivered these judgments attaches to the conflict a quasi-normative dimension that goes beyond mere interpretation. Yet because the conflict does not formally refer to the same norms, it is only a latent one. Although *ratione materiae* the two norms/*dicta* cover parallel territories, the latent nature of their conflict enables StE (before which a similar case is currently pending[89]) both to secure harmony and, consistent with the case law of the ECtHR, reject the privileges of the state. Because in that particular context Article 4 GC has been interpreted as having a permissive effect, the Greek courts will simply have to focus on the *lex specialis* norm of Article 6 ECHR (equality of arms) and its prohibitive effect. That the state privileges at issue are seen by AED as compatible with Article 4 GC does not justify the breach of the ECHR.

4. The Scholars

[85] AP (*plenum*), *31/2007*, 26-06-2007.
[86] StE (*plenum*), *3654/2008*, 12-12-2008, para 7.
[87] ECtHR, *Varnima*, *op. cit. supra* note 62 and *Zouboulidis v. Greece no. 2*, merits, 25-06-2009.
[88] AED, *9/2009*, 27-05-2009, para 8.
[89] StE (6th chamber), *1513/2009*, 04-05-2009 (referring the case to the *plenum*).

Formally, the ECHR is a typical international treaty. Therefore, its normative supra-legislative and under-constitutional force is unquestioned. This is also due to the fact that judicial practice has only occasionally raised issues of conflict between the ECHR and the GC thus far. Since both these documents obey a common *telos*, legal scholarship puts the accent on complementarity. Thus, the Greek and the European public orders complement each other in that the latter specifies and amplifies the effect of the former.[90]

However, with regard to EU law the picture is not the same. While a consensus on the subject of its special nature exists, when that regime challenges the limits set by the GC and its *domaines réservés*, part of the legal scholarship reacts by calling for respect of the national constitutional identity.[91] Interestingly, this is a point shared by both the scholars who defend a more pluralistic approach[92] and by those who perceive the normative qualities of the Union law as stemming from the national Constitution itself.[93] Under this last perspective, the role of the GC is to set the limits within which the Union law can develop its effects. The cornerstone of that argument is the "constitutional reservation"[94] set by Article 28(3) GC which requires that "*the exercise of national sovereignty*" is only limited "*insofar as this* […] *does not infringe upon the rights of man and the foundations of democratic government*".

However, while it is consistent with the GC, conditionality obstructs harmonisation and fails to explain the reality of the *de facto* supremacy of the Union law over the GC. Rather than conditions of applicability, the Greek legal system is in need of methods of reconciliation between its rigid GC and the Union law. Thus, failing an Article 28 GC that would explicitly embrace all aspects of the European integration and would provide *ad hoc* for the normative primacy of the Union law, it has been suggested that the actual Article 28 should be read as incorporating an implicit clause for the revision of the GC.[95] That contrivance would allow Article 28 to produce an informal effect parallel *in fine* to that of Article 110 GC (process of revision). Thereby, the constitutional norms may -by means of interpretation- be quasi-automatically adapted to the evolution of the Union law so that the two respective orders

[90] Manitakis (2) (1994) 384.
[91] Manitakis (3) 2005.
[92] Venizelos (2) (2005) 440, Katrougkalos (2000) 1014 *et seq.*.
[93] Manitakis (1984) 487-490. *Contra*, *see* the classic arguments in favour of the autonomy and supremacy of the Union law [Scandamis (1997) 138]. Autonomy squarely excludes any type of review of constitutionality of EU law by the national courts. EU law *in globo* takes precedence over the national legal order *in globo* [Koukoulis-Spiliotopoulos (2007) 290-294]. The principles of autonomy and primacy epitomise the deeper institutional substance of the EU [Papadimitriou (3) (2009) 4-9].
[94] Manitakis (1984) 490-495 (arguing that the national judge may refuse to apply EC law that usurps exclusive national competences). *Cf.* Papadopoulos (2009) 430-432 (arguing that Article 28(3) GC does not aim at setting the outer limits of EU competence; it rather establishes the conditions for EU competences to be exercised).
[95] Instead of others, *see* Iliopoulos-Strangas (2) (2000) 1120 *et seq.*.

develop their effects in harmony. The unifying function[96] of Article 28 enables an elastic interpretation of the provisions of the GC, so that the *de facto* predominance of the supranational law is duly justified.[97] Although finally there is nothing to prohibit Article 28(1) from producing a similar effect with regard to the ECHR, legal scholarship resorts to Article 25(1) GC for that purpose, requiring that state agents ensure the unhindered and effective exercise of human rights.[98]

5. Final remarks

This last remark, namely that a requisite condition for both ECHR and the Union law to establish an unreserved primacy within the Greek order is the construction of imaginative interpretations, constitutes the only sign of convergence between these two regimes. Although formally inferior to the GC, the ECHR, reinforced by the legitimacy of its object and purpose, stands next to the Constitution, complements it and gives the *tempo* in human rights protection. By contrast, although identified as the political "family" where Greece belongs, the EU, still imperfect and in a course of evolution, is viewed as overemphasizing economic and market objectives to the detriment of the other constitutional values that are common to its member-states.

Yet what this study sought to prove is that in spite of the conditions set by a Constitution seeking to retain its primacy, the national judge has no choice but to align her/his practice with the case law of her/his supranational colleague. *De facto*, supranationalism dominates the municipal order entirely. The Greek judge only came to face that "meta-positivist" reality recently and is still striving to compromise with it. Beyond the formalist constraints of legal positivism, the sources of supranationality stem from the socio-normative teleology of the European integration, the legitimacy of that objective and the social consensus surrounding it, if not from state will itself. Ultimately, it is the national governments that established the supranational judge as the ultimum and thereby "authentic" interpreter of supranational law.

However, even if (at least at the current historical progression) the "pragmatic" order is to be set in favour of the supranational regimes, what still requires an answer is what the position of the national judge should be in the case of conflict between the Union law and the ECHR. To that question the Greek legal order, as part of the common constitutional traditions of EU, provides an explicit answer: Article 28(3) calls supranational law to produce effects that

[96] Papadimitriou (2) (1993) 18-19.
[97] Yet the question of whether harmonisation on the basis of Article 28 GC may also apply *contra legem* remains open. Katrougkalos (2000) 1112.
[98] Chrysogonos (2001) 197-202.

conform to "*the rights of man and the foundations of democratic government*". Yet what should not be neglected is that the success of *Solange* depends on a number of conditions. First, the reservations raised by the national judge must refer to values that the whole European society considers legitimate and necessary grounds for derogating from the supranational norms. Second, the Union law must indeed ignore these values. Third, the court that will apply conditionality has to bear a certain political weight. Finally, the national judge must be guided by a genuine preoccupation for safeguarding the common values at issue – not to use these values as a pretext for abstaining from the *Habermasian* "constitutional patriotism".[99] For the counterpart of national "legal patriotism" is often "legal provincialism".[100]

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[99] Müler (2007) 26 *et seq.* and 46 *et seq.*.

[100] The Court of Cassation presents itself as the "Hellenic *Supreme Court* of Civil and *Penal* Law" [emphasis added, available at www.areiospagos.gr/en/INDEX.htm (visited on 23/12/2009)].

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