

# Effective but Constitutionally Dubious

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2020-04-23T11:25:07

Although the pandemic is far from over, Greece [has been praised](#) so far for its fast and firm response to the crisis. The country's efforts to contain the dissemination of the virus seem to [have achieved # flattening of the curve](#), i.e. the slowing of the spread so that fewer people need to seek treatment at any given time. Greece owes much of its – to date – accomplishment to a number of dubious applications of the rules laid down in the Constitution.

## Fast Response and Fast-Track Legislation

Following the confirmation of the first case of the new coronavirus in Greece on 26 February 2020, the Greek government has enacted and gradually intensified restrictive measures affecting multiple rights and freedoms of everyone under its jurisdiction. The freedoms of movement, assembly, economic activity, and the freedom of religion, which includes the freedom of exercise of religion through worship, have been subjected to the most severe restrictions by the relevant legislation.

The Greek Constitution does not provide for a state of emergency that allows for suspension of rights and obligations in a time of crisis, as Constitutions of many other countries do. The only relevant provision would be article 48, which stipulates that Parliament can declare a state of siege in cases of war or other imminent threats against national security and the democratic regime. However, this provision is narrowly interpreted as exclusively referring to matters of war and could by no means be activated in the case of an epidemic or pandemic.

The Constitution, however, does provide for emergency legislation. [Article 44\(1\)](#) stipulates that

'[u]nder extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, [...] within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force.'

As of 16 April, Greece has issued 5 Acts of Legislative Content (ALC) and 136 Ministerial Decisions concerning the Covid-19 pandemic. Essentially, all the measures taken by the Greek government to deal with the Covid-19 situation emanate from ALCs pursuant to article 44(1). This kind of emergency legislation has been strongly criticised in the past, especially during the Greek sovereign debt

crisis, as a ‘fast-track’ way to circumvent parliamentary debates. The submission of the act for ratification by Parliament within 40 days is the safety valve of the system; nonetheless the heavy reliance of governments on article 44 should be strongly discouraged.

## The Choice of Ministerial Decisions

All the ALCs have now been ratified by the Parliament and as such continue to be in effect. The ALCs have so far worked as umbrella-acts that delegate powers to the executive to take measures and to impose restrictions. The measures have so far been taken through ministerial decisions, which invoke the general provisions of the ALCs. Ministerial decisions are decisions of the executive. According to the Constitution, article 43 paragraph 2,

‘delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of **more specific matters or matters of local interest or of a technical and detailed nature**’.

The practice of the government to impose extensive restrictive measures through ministerial decisions goes beyond the institutional role of these decrees. Presidential decrees of article 43 paragraph 1 would be a sounder option. Such Presidential decrees would further be subject to preliminary (*ex ante*) review by the Supreme Administrative Court. Pursuant to article 95(1) (d) of the Constitution, all decrees of a general regulatory nature are reviewed by the Court before signed by the President of the Republic. To bypass the Court’s *ex ante* review of constitutionality is rather problematic, taking into consideration that these are temporary measures and their retrospective judicial review would likely be meaningless (although it depends on how long they last!).

## Limiting the Freedom of Movement

A nation-wide lockdown was imposed on 22 March entailing restrictions on all non-essential movement throughout the country. Limitations of rights and freedoms are allowed by article 25 of the Constitution, which stipulates however that

‘[r]estrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be **provided either directly by the Constitution or by Statute**, should a reservation exist in the latter’s favour, and should respect the **principle of proportionality**’.

The freedom of movement (part of the protection of personal liberty) enshrined in article 5 paragraph 3 of the Constitution belongs to those freedoms that cannot be suspended in a state of siege under article 48. Also, the Constitution provides that individual administrative measures restricting the freedom of movement are prohibited (article 5 par 4). Nonetheless, an interpretative clause to paragraph 4 clarifies that this prohibition does not preclude the ‘imposition of measures necessary

for the protection of public health or the health of sick persons, as specified by law'. The Joint Ministerial Decisions (JMD) that restrict the freedom of movement invoke, *inter alia*, this interpretative clause of article 5 as their basis.

Nevertheless, a closer look at the constitutional provisions shows that paragraph 4 refers to *individual administrative measures*. These measures, according to the prevailing interpretation, refer to individual limitations on the movement of people for whom there are indications that they are infected by a contagious disease. What is more, it is accepted that the legislator must set out the requirements for the issuance of the administrative acts in a general but definite, clear, and objective manner. Therefore, it does not seem plausible to argue that the overall restriction of movement for the entire population throughout the country falls under the rubric of individual administrative measures. Further, the obligation to make a declaration of the purpose of movement can hardly be seen as constitutional, as such a limitation would violate the core of the freedom enshrined in article 5 par 3. Hence, the government has stretched the reach of article 5 paragraph 4 and its interpretative clause, turning a blind eye to paragraph 3.

## **Necessity and Proportionality**

The test of necessity and proportionality as imposed by the Constitution and international human rights law requires a complex reasoning process but is crucial for the assessment of the measures. In light of the urgency and unfamiliarity with the situation, the Greek measures have often been viewed as necessary and proportionate. This position is reinforced by the fact that the measures are taken for a definite time (currently extended until 30 April). However, as the situation evolves, the necessity and proportionality of the restrictions must be put under stricter scrutiny.

Great controversy has been caused for example due to the limitations on the right to worship in a country where religion still plays a large role in the society, and especially during the time of the most popular religious celebration – the Orthodox Easter. Access to places of worship of any religion or dogma is currently prohibited and only TV or radio broadcasting of the services is permitted. An argument that can be advanced here is that measures of social distancing in churches (e.g. queuing in the church yard as one does outside of super markets) – an option followed by [Bulgaria](#) and [Russia](#) – would have been equally adequate and thus, a total lockdown is unnecessary. Along similar lines, the prohibition of the use of loudspeakers in churches, common practice in Greece that allows the mass to be heard in the street, does not seem to serve any purpose in combating the pandemic.

In general, expanding and intensifying the testing of the general population or imposing tailored limitations of movement only on affected or vulnerable groups would appear to be more appropriate measures available to the government to deal with the crisis. Further, strengthening the public health system and putting private hospitals and clinics to the use of the State would allow further relaxation of the measures.

## Scrutinizing the Executive

The constant monitoring of current and future measures is of the utmost importance so as to ensure that they remain [as limited as possible](#) in material, temporal, and geographical terms. Also, questioning the measures should not be seen as a taboo; rather, this is the only way to subject executive power to control on a continuous basis. This, in turn, will require the government to be more meticulous and vigilant in adopting measures in the first place.

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