Akritas Kaidatzis

GREECE'S THIRD WAY IN PROF. TUSHNET'S DISTINCTION BETWEEN STRONG-FORM AND WEAK-FORM JUDICIAL REVIEW, AND WHAT WE MAY LEARN FROM IT[1]

1. INTRODUCTION: PROF. TUSHNET'S CONTEXTUALISM IN CONSTITUTIONAL LAW

It has been almost a commonplace in comparative constitutional law that there are two fundamental types of systems of judicial review of legislation: systems of concentrated review and systems of diffuse review. Professor Mark Tushnet has worked out a different distinction: that between systems of strong-form review and systems of weak-form review. Roughly speaking, the main question in the traditional distinction is: *who reviews* the constitutionality of legislative acts? In the distinction put forward by Tushnet the question is: *which are the consequences* of this review? In part 2 of this paper I briefly contrast these two distinctions. Then, in part 3, I consider the Greek system of judicial review. Greece has basically an American-style system of diffuse review; however, it lacks a powerful highest court such as the U.S. Supreme Court. The most significant mechanism of concentrating judicial review is the jurisdiction of the Council of State, the highest administrative court.

This paper tries to accommodate the Greek system in the distinction between strong-form and weak-form systems of review. The first aim of the paper is to examine how the distinction strong-form versus weak-form review may be enriched by the experience of Greek constitutionalism. The Greek system can be seen as a mixed system of judicial review, which brings together elements of both weak- and strong-form. In a rather original manner, thus, the Greek system seems to confirm and, at the same time, to refine and develop Tushnet's distinction. The second, and main, aim of the paper is to examine what Greek constitutionalism may learn from Tushnet's distinction. The — seemingly paradoxical — conclusion that I will draw is that the, so to say, constitutional "hesitance" or even "timidity" of Greek courts can be addressed more effectively if we reinforce the elements of weak-form review in the Greek system — rather than the elements of strong-form review, as it is often suggested, by establishing a constitutional court.

Before moving on, a brief account of Tushnet's approach to the constitution and constitutional law is in order, so as to enable a better understanding of his distinction between the different systems of judicial review.

Harvard Law Professor Mark Tushnet is one of the most important constitutional theorists of our times. He is famous in his home country, the U.S.A., despite (or, is it because of?) the fact that one could easily

[1] I thank Alexandros Kioupkiolis for his help in editing this paper, as well as Nikos Nikolakis, Mark Tushnet and the two anonymous reviewers of *Jus Politicum* for comments and insights.

characterize him as unconventional, if not heretical. He is also internationally acknowledged, with a rich body of work on comparative constitutional law and important international collaborations; again, despite the fact that his original analyses remain rather difficult to classify under current schools of thought and trends. He has associated himself with the movement of critical legal studies,[2] which made a breakthrough particularly in the Anglo-American world during the 1980s, but without any considerable follow-up.[3] From the critical analysis of law Tushnet has mainly drawn the emphasis on context, *i.e.* on the broader political, socio-economic and cultural environment, for the understanding of law.[4] What marks his work, however, is the importance that he attributes to the political context, that is, to the functioning of the political system, and of the party system in particular, for understanding constitutional law. That "[t]he study of law and courts is dominated by lawyers not political scientists,"[5] does not excuse constitutional lawyers for ignoring the political conditions and political implications of legal decisions and judgments — that's what Tushnet seems, implicitly, to advise us.

Tushnet's contextualism is already evident in the choice of his scientific fields of interest, each of which reveals an aspect of his broader take on law and the constitution. He is interested in constitutional history and the history of constitutional law; in comparative constitutional law; and in the constitutional law produced in the course of politics, beyond judicial review and "away from the courts."[6] In his way, Tushnet tells us that, if we really want to comprehend the constitution, we need to study it diachronically, comparing it to the past (history), synchronically, comparing it to other constitutional systems (comparative law), and also situating it in the broader operation of the political system (political science).

"In his way" means through examples — or, rather, through his work as an example. In his books and essays, Tushnet avoids theoretical models and he chooses rather to support his arguments by way of examples.[7] More generally, Tushnet has avoided the formulation of any "grand theory" about the constitution and constitutional law.[8] In this respect he seems to follow the great tradition of American legal realism. This is perhaps the reason

---

[2] Particularly in Mark TUSHNET, *Red, White, and Blue: A Critical Analysis of Constitutional Law*, Cambridge, Mass., Harvard University Press, 1988.

[3] See Louis Michael SEIDMAN, "Critical Constitutionalism Now", 75 *Fordham L. Rev.* 575, 2006.

[4] Mark TUSHNET, *The Constitution of the United States of America: A Contextual Analysis*, Oxford & Portland, Hart Publishing, 2009, is a lucid and comprehensive introduction to the U.S. constitutional law from this perspective. See also Louis Michael SEIDMAN, "Acontextual Judicial Review", 32, *Cardozo L. Rev.*, 1143, 2011.

[5] Martin SHAPIRO and Alec STONE SWEET, *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 2002, p. 6. Nevertheless, the insights offered by political scientists could be of tremendous help for lawyers, especially regarding the judicial review of legislation, as Shapiro and Stone Sweet's respective chapters in Part 3 ("Constitutional Judicial Review") of their book show. See also David ROBERTSON, *The Judge as Political Theorist: Contemporary Constitutional Review*, Princeton & Oxford, Princeton University Press, 2010.

[6] His seminal contribution here is Mark TUSHNET, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, 1999.

[7] Most exemplary, in his recent books, intended for the wider public, Mark TUSHNET, *Why the Constitution Matters*, New Haven & London, Yale University Press, 2010 and Mark TUSHNET, *In the Balance: Law and Politics on the Roberts Court*, New York, W. W. Norton & Co., 2013.

[8] See already Frank GOODMAN, "Mark Tushnet on Liberal Constitutional Theory: Mission Impossible", 137, *U. Penn. L. Rev.*, 2259, 1989 (reviewing Tushnet's *Red, White, and Blue*, above fn. 1).

why his influence in Europe is more limited than that of other distinguished American constitutional scholars.[9] But one should be careful here: the fact that he does not formulate a theory does not mean that there is no theory informing his work and underpinning his arguments. In a sense, Tushnet's theory is that, in and of itself, no single theory is adequate to enable us to grasp the meaning of the constitution. The meaning of the constitution is not something "given" that the courts or the doctrine should simply "discover". On the contrary, it is produced and it continuously evolves, that is, it is "constructed", through the implementation of the constitution within the operation of the political system. Consequently, if we want to grasp the *real* meaning of the constitution — not the "true" or the ideal meaning according to a certain theory — we should equip ourselves with the tools that will enable us to comprehend the way in which the functioning of the political system confers, in any given time, *a* meaning on the constitution. Let us note that, in this approach, the courts too form part of the political system,[10] as they interact with the other political actors.

Tushnet is perhaps, in this respect, the most "political" among U.S. constitutional scholars. He grasps the constitution as political law, as a particular kind of law that partakes of both law and politics.[11] He sets out from the simple observation that it is not possible for anyone to comprehend the constitutional system of a country by studying only its written constitution. Beside and beyond the written constitution there is the effective constitution,[12] which bears on the specific way in which constitutional provisions are implemented in practice. However, constitutional provisions are not implemented only by jurists, judges and lawyers. They are implemented by the legislature and the executive as well, as they operate within a particular political and party system, that is, they are also shaped by the political forces and the politicians representing the people. Accordingly, there is not only the constitution as interpreted by the courts — the "legal" constitution, as we could call it. There is also the constitution as interpreted in practice, in and by its implementation by the other branches of government and the political forces lying behind them — the "political" constitution, as we could call it.[13]

With regard to the relation between ordinary law and the constitution, in particular, this approach is related to the notion of popular constitutionalism that has been introduced in recent years in the constitutional theory of the U.S.A. This basically refers to the idea that the

---

[9] Who, for example, is not familiar with Bruce Ackerman's theory of the "constitutional moments"? For a reformulation, see Bruce ACKERMAN, "The Living Constitution", 120, *Harv. L. Rev.*, 1737, 2007 and, for the most recent restatement, Bruce ACKERMAN, *We The People*, Vol. III, *The Civil Rights Revolution*, Cambridge, Mass., Harvard University Press, 2014.

[10] See, among many others, Robert Dahl's classical article, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker", 6, *J. Pub. L.*, 279, 1957.

[11] See, *e.g.*, Mark TUSHNET, "Popular Constitutionalism as Political Law", 81 *Chicago-Kent L. Rev.*, 2006, 991.

[12] See TUSHNET (fn. 3), p. 1 and *passim*.

[13] It should be emphasized that Prof. Tushnet himself avoids using these terms as opposite. However, the distinction between "legal" and "political" constitution is partly endorsed in British theory. See, *e.g.*, Graham GEE and Gregoire WEBBER, "What Is a Political Constitution?", 30, *Oxf. J. Leg. Stud.* 273, 2010; Tom HICKMAN, "In Defence of the Legal Constitution", 55, *Univ. Toronto L. J.*, 981, 2005, and, particularly, Richard BELLAMY, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Oxford, Oxford University Press, 2007. Although there are no apparent influences, I think that the relatively inchoate yet, and mainly British, current of political constitutionalism has some affinities with the, mainly American, conception of popular constitutionalism, about which see the next footnote.

authority to interpret the constitution is not vested only in the courts, but also in political branches, in the legislature and the executive, and through them, in the people themselves.[14] Tushnet is one of the staunchest supporters of this idea.[15]

2. SYSTEMS OF JUDICIAL REVIEW OF LEGISLATION FROM A CONTEXTUAL PERSPECTIVE

Prof. Mark Tushnet has worked out extensively his approach to the comparative study of the different systems of judicial review of legislation in his book, published in 2008, *Weak Courts, Strong Rights*, subtitled *Judicial Review and Social Welfare Rights in Comparative Constitutional Law*.[16] The book is divided in three parts. In the first part, which lays down the theoretical foundations for the next two, Tushnet puts forward a new division of the systems of judicial review of legislation into strong-form type and weak-form type.[17] The second part consists in a study, based mainly on legislative material, of the ways in which legislatures contribute to the interpretation and enforcement of the constitution.[18] The third part is a study, based mainly on the jurisprudence, of the ways in which courts apply social and economic rights.[19]

In this work, Tushnet is using the tools of comparative law to propose an original distinction of the systems of judicial review of legislation. He does not question the traditional distinction between centralized and diffuse review that we are familiar with; he just introduces a new one, between strong-form and weak-form review, based on a criterion that operates on a different level.

2.1. The traditional distinction between centralized and diffuse review

Till now, we used to know that, in relation to judicial review of legislation, the fundamental distinction is between systems of centralized and diffuse review; this is almost a commonplace in constitutional theory.[20] The criterion for the distinction is laid down by the question: *Who reviews* the constitutionality of laws? Wherever the constitutionality of laws is

---

[14] See, *e.g.*, Robert POST and Reva SIEGEL, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy", 92, *Calif. L. Rev.* 1027, 2004, and, particularly, Larry KRAMER, *The People Themselves: Popular Constitutionalism and Judicial Review*, New York, Oxford University Press, 2004.

[15] Prof. Tushnet had originally proposed the term populist constitutionalism. See TUSHNET (fn. 5), ch. 8. However, he soon abandoned it and he adopted, too, the term popular constitutionalism, whose use had expanded meanwhile. See, *e.g.*, TUSHNET (fn. 10).

[16] Mark TUSHNET, "Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights", in *Comparative Constitutional Law*, Princeton & Oxford: Princeton University Press, 2008.

[17] *Ibid.*, Part I ("Strong-Form and Weak-Form Judicial Review"). See here below, section 2.2.

[18] *Ibid.*, Part II ("Legislative Responsibility for Enforcing the Constitution").

[19] *Ibid.*, Part III ("Judicial Enforcement of Social and Economic Rights").

[20] On this distinction see, *e.g.*, Victor FERRERES COMELLA, *Constitutional Courts and Democratic Values*, New Haven & London, Yale University Press, 2009.

reviewed exclusively by a special judicial body, which is usually called constitutional court, we have a system of *centralized* review — or Kelsenian, as it is often called in tribute to Hans Kelsen, the great Austrian jurist who introduced the idea. When the constitutional court declares a law unconstitutional, it has the power to annul it. It acts then as a negative, abolishing legislator. Its decisions are binding on all — not only all other courts but also all public authorities and every citizen. Wherever, by contrast, the constitutionality of laws is not reviewed by a special court but by the ordinary courts, wherever, that is, any court, in any case that a particular law is being evoked before it, can review the constitutionality of that law, we have a system of *diffuse* review. In this system, the court that declares the law unconstitutional does not annul it but sets it aside; the court just declines to apply the law in the particular case. Formally, its decision is binding only on the parties in the case; not on other courts or state authorities or the citizens. Generally, centralized review systems tend to, although they need not, be associated with direct and abstract review; the constitutional court usually reviews a law independently of the circumstances of a given case. On the other hand, diffuse review systems tend to, but again need not, be associated with incidental and *in concreto* review; ordinary courts usually review a law within the context, and only for the purposes, of a given case.

The system of centralized review is associated with Europe, because it was introduced there, but also because most European countries have a version of it. The system of diffuse review is considered American, because the U.S.A. is its birthplace. In our times, the European system of centralized review has a greater global expansion, as various — and quite different — versions of it have been adopted by many of the new democracies in Eastern Europe,[21] Asia,[22] Latin America and Africa. Much fewer countries have chosen some version of the American model of diffuse review; Greece is one among them.

The reality is, of course, much more complex than the ideal-typical distinction of the two models implies. The refinements and particularities of the specific versions of this or that model render real differences much more acute than we tend to think, to the effect that occasionally we come across unexpected convergences.[23] For instance, highest courts in systems of diffuse review, like the U.S. Supreme Court, are often regarded as constitutional courts.[24] Generally, the very existence of highest courts of the ordinary jurisdiction at the apex of systems of diffuse review seems to introduce *elements of concentrated review*, that is, of centripetal tendencies, in these systems.[25] On the other hand, at least in European countries, both

---

[21] See Wojciech SADURSKI, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht, Springer, 2005.

[22] See Tom GINSBURG, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, New York, Cambridge University Press, 2003.

[23] See Michel ROSENFELD, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts", 2 Int'l *J. Const. L.* 633, 2004; Wojciech SADURSKI, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence*, Sydney Law School, Legal Studies Research Paper No. 11/15, 2011; Alec STONE SWEET, "Why Europe Rejected American Judicial Review — and Why It May Not Matter", 101, *Mich. L. Rev.* 2744, 2003.

[24] See Ralf ROGOWSKI and Thomas GAWRON (eds), *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*, New York & Oxford, Berghahn Books, 2002.

[25] See Lech GARLICKI, "Constitutional Courts versus Supreme Courts", 5 Int'l, *J. Const. L.* 44, 2007.

EU law and the European Convention on Human Rights (ECHR) seem to introduce *elements of diffuse review* and, thus, of centrifugal tendencies in the concentrated systems of member states. This occurs because they introduce an additional level of judicial review of legislation, the review of its compatibility with European law, which normally lies outside the jurisdiction of constitutional courts.[26]

However, the distinction between the European and the American model of judicial review not only remains prevalent, it is also widely accepted, on account of its evident advantages: on the one hand, it provides us with a very clear fundamental criterion of the distinction (*one* constitutional court or *all* ordinary courts) and, on the other, it allows for mixed systems which combine elements of both concentrated and diffuse review. In reality, most systems of judicial review of legislation can be considered as (to varying degrees) mixed.[27] The distinction of the two models operated in an entirely satisfactory way for as long as it could exclude from its scope a third, completely different model: the sovereignty of parliament model, as exemplified historically by the English constitutionalism. It is clear that the English system is a system neither of concentrated nor of diffuse review, and it is not a mixed system either. To the question "To which model of constitutional review does the English system belong?" the answer has traditionally been: "To none." In a system of parliamentary sovereignty, statutes, by definition, are not subjected to review by the courts and, accordingly, *there is no review of constitutionality*. We know, of course, that in reality this was never absolutely true and that, at the very least, the introduction of European law in the United Kingdom has entailed a considerable moderation to parliamentary sovereignty.[28]

The way we see things changed crucially with the enactment, in 1998, of the UK Human Rights Act.[29] Thus we recognised, for the first time with such clarity, that some form of judicial review of legislation is exercised in the United Kingdom *as well*, since the Human Rights Act allows British courts to review the compatibility of legislation with the rights of ECHR. Similar developments have been made earlier, already in the 1980s, in other countries of the parliamentary sovereignty model, specifically in Canada and New Zealand — also countries of the British Commonwealth. This small,

---

[26] See Victor FERRERES COMELLA, "The European Model of Constitutional Review of Legislation: Towards Decentralization?", 2 Int'l, *J. Const. L.* 461, 2004. The reason why constitutional courts cannot review the compatibility of legislation with European law is that the latter is interpreted bindingly by its respective (highest) courts, that is, EU law by the Court of Justice of the European Union in Luxemburg and ECHR by the European Court of Human Rights in Strasbourg. By the same token, it is easier for countries with systems of diffuse review, such as Greece, to incorporate review of the compatibility of legislation with European law, by simply extending in this direction the power that each court already has to review the constitutionality of legislation.

[27] For example, the Highest Special Court of article 100 of the Greek constitution of 1975 operates as one — but not the sole — concentrating mechanism in the otherwise diffuse Greek system, which could be considered, on these grounds, as mixed. See Prodromos DAGTOGLOU, "Die Verfassungsgerichtsbarkeit in Griechenland", in Christian STARCK & Albrecht WEBER (Hrsg.), *Verfassungsgerichtsbarkeit in Westeuropa*, Teilband I, Berichte, Baden-Baden, Nomos Verlagsgesellschaft, 1986, p. 363 *et sq.* See also here below, sub-section 3.1.(b).

[28] See N. W. BARBER, "The Afterlife of Parliamentary Sovereignty", 9 Int'l, J. *Const. L.* 144, 2011; Pavlos ELEFTHERIADIS, "Parliamentary Sovereignty and the Constitution", 22, *Can. J. L. & Jurispr.*, 267, 2009; see Jeffrey GOLDSWORTHY, "Legislative Sovereignty and the Rule of Law", in Tom CAMPBELL, Keith EWING and Adam TOMKINS (eds), *Sceptical Essays in Human Rights*, Oxford, Oxford University Press, 2001, p. 61 *et sq.*

[29] See Alison L. YOUNG, *Parliamentary Sovereignty and the Human Rights Act*, Oxford & Portland, Hart Publishing, 2009.

perhaps, but interesting family of systems became known as the "new Commonwealth model"[30]; this is specified, roughly, by the introduction of some form of constitutional review into a system of parliamentary sovereignty.

2.2. Prof. Tushnet's distinction between strong-form and weak-form review

There are, accordingly, two problems which moderate the analytical value of the distinction between the models of concentrated and diffuse review. The first is that, within the scope of the distinction, too many systems can be regarded as mixed, especially where a powerful highest court exists or, for European countries, in light of the interplay between national and European law. The second is that the systems of the new Commonwealth model remain outside the distinction's range.

In view of the above, Prof. Tushnet puts forward a different distinction on the basis of another criterion. The question he poses does not bear on the agents of the review ("who reviews?") but on their action: *What is the effect of the review* of legislation? Of course, this question is also posed in the traditional distinction as well. In systems of concentrated review, the constitutional court can annul the law it deems unconstitutional, whereas in systems of diffuse review courts simply set aside the law by not applying it in the particular case at hand. However, this distinction of the effects is somewhat formal and, in a sense, static. It is formal in that it disregards the effective binding force that the constitutional decisions of highest courts develop in systems of diffuse review. Particularly where their decisions have the force of binding precedent, as in the U.S. system (*stare decisis*), highest courts can effectively abolish a law that they find unconstitutional, although they do not formally annul it.[31] The distinction is also static in that it disregards the further effects that a court decision may have on the legislative process and, more broadly, on the political system. At best, it gives us a snapshot of the situation as it stands after the decision of the court, although this can trigger a sequence of events, whose movement can only be caught in a motion picture. For example, the highest court in a system of diffuse review may formally (that is, legally) not abolish but simply decline to apply a particular law that it deems unconstitutional, although its judgement may effectively (that is, politically) "kill" the law, either in the sense that the government feels obliged henceforth (although not legally bound) to quit enforcement of the law, or in the sense that the legislature feels obliged (although, similarly, not legally bound) to repeal or amend the law.[32] Conversely, a constitutional court may annul a law that it

---

[30] See Stephen GARDBAUM, "The New Commonwealth Model of Constitutionalism", 49, *Am. J. Comp. L.*, 707, 2001; Stephen GARDBAUM, "Reassessing the New Commonwealth Model of Constitutionalism", 8 Int'l, *J. Const. L.*, 167, 2010. See also Jeffrey GOLDSWORTHY, "Homogenizing Constitutions", 23, *Oxf. J. Leg. Stud.*, 483, 2003.

[31] This explains in part why the U.S. Supreme Court is often regarded as a constitutional court, see above, fn. 23. What makes this issue here a bit more complex is the established, although somewhat unclear, distinction between so called "facial challenges" and "as-applied challenges", which result in reviewing the challenged statute either in the abstract or in a particular application thereof, respectively. See, *e.g.*, Richard H. FALLON Jr, "Fact and Fiction about Facial Challenges", 99, *Calif. L. Rev.* 915, 2011.

[32] This is certainly true for, at least some, decisions of the U.S. Supreme Court. To a certain extent, it is also true for some decisions of the Greek Council of State, especially when it annuls administrative regulations which are necessary for the implementation of a statute, on the grounds that it finds the statute itself unconstitutional. In this respect, the annulling

deems unconstitutional. What if, however, the legislature decides to re-enact the same law as it stands or more or less amended?

So, if one examines the practice of judicial review of legislation within its political context, it becomes apparent that the political implications of judicial decisions may greatly differ among systems of the same type. To give an obvious example: both the U.S. and the Greek system are basically systems of diffuse review; however, as we will see in part 3, no Greek court is even remotely as influential as the U.S. Supreme Court, whereas the latter is easily comparable to a constitutional court. From that perspective, the traditional distinction between concentrated and diffuse review appears somewhat unsatisfactory. On top of that, the institutional design in the countries of the new Commonwealth model has showed that the spectrum of the political implications of judicial review is more wide-ranging than the traditional distinction thought. The various versions of this model open up new possibilities with regard to the result of the review,[33] beyond the alternatives of an *erga omnes* abolition of the law or its non-application in a particular case. One such possibility is the interpretative re-conception — or, rather, reconstruction — of the law by the court, in order to *render* it compatible with the constitution.[34] The judiciary intervenes here in an apparently modest way, since it does not appear to directly contradict the legislature, but this is also, at the same time, a quite effective way, since it eventually leaves us with a law that is different from the one intended by the legislature. Another possibility is that the court issues a simple declaration of the unconstitutionality of the law, which has no legally binding effect and allows the political branches (in parliamentary systems, the executive that has the legislative initiative and the legislature that votes the initiative into statute) to keep the law in force. This mode of intervention is equally modest, since it does not appear to legally bind the political branches, although its political effectiveness is considerable, since no politician wants to appear to violate the constitution in the eyes of its electorate.

Situating the criterion of the distinction ("what is the result of the review?") in its political context leads to its reformulation. The question is better posed in the following terms: *Which is the binding effect of the review* of legislation on the political branches, the executive and the legislature? Based on this criterion, Tushnet suggests a new dichotomy in the systems of judicial review of legislation. We have *strong-form* review, when the decisions of the courts are binding on the political branches, to the effect that a law that has been found unconstitutional disappears, either because it is no longer in force after its formal annulment by a constitutional court or because it is no longer applied after its effective invalidation by a binding decision of a highest court in a diffuse system. By contrast, we have *weak-form* review, when the political branches can react

---

jurisdiction of the Council of State according to article 95 of the Greek constitution is a second — next to the creation of the Special Highest Court, see here above, fn. 26 — concentrating mechanism in the diffuse Greek system and, thus, a further element of its mixed nature. See also here below, sub-section 3.1. (b).

[33] TUSHNET (fn. 15), Ch. 2, offers a detailed account of the relevant techniques of judicial review.

[34] This possibility seems to imply something that goes beyond what is known in Europe as an interpretation "in conformity with the constitution" (verfassungskonforme Auslegung); it appears to vest the judge with greater discretion, potentially beyond the limits set by traditional methods of interpretation. No doubt, the limits between interpretation of the law and "construction" of its meaning are very fuzzy. See, *e.g.*, Lawrence B. SOLUM, "The Interpretation - Construction Distinction", 27, *Const. Comment.*, 95, 2010.

to court decisions in order to keep the law in force and continue applying it even if it has been found unconstitutional.[35]

The essential difference between the two systems is this: In strong-form review the question of the constitutionality of a particular law is considered to be definitively resolved by the decision of the court, whereas in weak-form review the question remains open, institutionalizing a dialogue between courts and the political branches — whereby the legislature or the executive can react to the court's decision, and this can lead to a new decision by the court, and so on. Weak-form systems of review represent, thus, a dialogic conception of the constitution.[36] And their philosophical foundation must be traced to the idea that reasonable and well-meaning people may disagree and suggest different, yet equally defensible, interpretations of the constitution and, especially, of the rights enshrined in it.[37] Hence, there is no particular reason why we should by definition give preference to the interpretations of the courts over the interpretations produced by the functioning of the political system.[38]

From this perspective, both the German system with its *Bundesverfassungsgericht* and the U.S. system with its powerful Supreme Court at the apex of the ordinary jurisdiction lie on the same side of the division, as different versions of the strong-form review model. Through different pathways, the decisions of both the *Bundesverfassungsgericht* and the U.S. Supreme Court seem to lead to the same result: they appear to resolve definitively the question of constitutionality and to bind both legislature and executive. We can assume, thus, that most or even all systems of concentrated review on the traditional distinction belong to the model of strong-form review, as well as those systems of diffuse review where a powerful highest court exists. By contrast, a rather limited number of systems, mainly those of the new Commonwealth model, such as the systems of the U.K., Canada and New Zealand which Tushnet considers, belong to the model of weak-form review.[39] Rather unsurprisingly, it is mostly in these countries, and particularly in Canada, that the academic discussion on the dialogic conception of the constitution has been developed.[40] We can also assume — although Tushnet does not consider any

---

[35] There is, I think, an important reason why Prof. Tushnet qualifies his models as systems of weak- and strong-form review rather than simply as systems of weak and strong review. The distinction between weak and strong review implies the intensity of judicial review as it is carried out in practice; in other words, it refers to how restrictively or intensively the courts of a particular system actually review legislation. On the contrary, the distinction between strong-form review and weak-form review bears on the institutional arrangements of judicial review in a particular system, that is, on the scope for reaction that the system itself affords to the legislature and the executive vis-à-vis constitutional decisions of the courts. No doubt, these two different levels of distinction could be interrelated. (See here below, in the text above footnotes 40-42).

[36] For an informative account of the dialogic conception of the constitution, see Christine BATEUP, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue", 71, *Brooklyn L. Rev.*, 1109, 2006. Of course, the political branches can react to the court's judgement in strong-form systems of review as well; they can either refuse to implement a particular decision or, more often, they can try to circumvent it, *e.g.* by re-enacting a law that is effectively similar to the one found unconstitutional. The difference is that such reactions are perceived rather as deviations from the political branches' obligation to implement the constitutional decisions of the courts and, therefore, they do not represent a form of institutionalized dialogue.

[37] See Jeremy WALDRON, *Law and disagreement*, New York, Oxford University Press, 1999.

[38] This is a basic thesis that informs Prof. Tushnet's work. See, *e.g.*, TUSHNET (fn. 5).

[39] See TUSHNET (fn. 15), Ch. 2.

[40] For the beginnings of this discussion in Canada, see Peter W. HOGG and Allison A. BUSHELL, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)", 35, *Osgoode Hall L. J.* 75, 1997, and,

relevant system — that systems of diffuse review that are not marked by the presence of a powerful highest court most likely belong to the model of weak-form review.

No doubt, Tushnet himself is the first to recognise that the distinction he puts forward is rather unstable.[41] Depending on how it is implemented in practice, a system of weak-form review can be effectively assimilated into a system of strong-form review, if the political branches most times tend to accept the interpretations of the courts and do not make use of the possibilities to respond that the system affords them; or into a system of parliamentary sovereignty, that is, of no judicial review, if the political branches most times tend to set aside the interpretations of the courts and keep in force laws that were found unconstitutional. This peculiar mobility of the categories introduced by Tushnet has been recognised by other scholars, who have adopted and developed his distinction, with certain refinements and divergences.[42]

Seen through the lenses of this distinction, the Greek system of judicial review of legislation can provide the stimulus for a further refinement of the distinction between strong-form and weak-form review.

3. THE DISTINCTIVE POSITION OF THE GREEK SYSTEM OF JUDICIAL REVIEW OF LEGISLATION

There is a certain asymmetry in Prof. Tushnet's scheme. Beyond its basic distinction, Tushnet admits the possibilities that: (a) a system of judicial review of legislation that has been designed as weak-form may end up becoming a system of strong-form review[43] (or, conversely, it may return to a system of parliamentary sovereignty); (b) a system designed as strong-form may, at least in principle, turn into a weak-form review system[44]; or (c) a system designed as either strong-form or weak-form may end up in a mixed form which combines elements of both models. There is, however, a further possibility which seems to escape the alternatives above: a system of judicial review which has been *designed as a mixed system* combining elements of both strong- and weak-form review.

No doubt, this absence seems justified. Tushnet grounds his account of the weak-form model of judicial review in the systems of countries within the parliamentary sovereignty model (the U.K., Canada, and New Zealand) which at some point acquired a Bill of Rights allowing courts to oversee, in

---

particularly, Kent ROACH, "Dialogic Judicial Review and its Critics", 23, *S.C.L.R.* (2d) 49, 2004. For a related discussion in Britain, see Tom HICKMAN, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998", *Public Law*, 2005, p. 306 *et sq.*, as well as the debate between Danny NICOL, "Law and Politics after the Human Rights Act", *Public Law*, 2006, p. 722 *et sq.*, and Tom HICKMAN, "The Courts and Politics after the Human Rights Act: A Comment", *Public Law*, 2008, p. 84 *et sq.* For the U.S.A., see Barry FRIEDMAN's contribution, "Dialogue and Judicial Review", 91, *Mich. L. Rev.*, 577, 1993.

[41] See TUSHNET (fn. 15), Ch. 3.

[42] See, especially, Rosalind DIXON, "Weak-Form Judicial Review and American Exceptionalism", 32, *Oxf. J. Leg. Stud.* 487, 2012; also Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited", 5, *Int. J. Const. L.* 391, 2007.

[43] See TUSHNET (fn. 15), Ch. 3.

[44] This is, at least what I understand to be, the core of Prof. Tushnet's case for "the constitution away from the courts." See Tushnet (fn. 5), passim and, especially, Ch. 1 ("Against Judicial Supremacy") and Ch. 7 ("Against Judicial Review").

one way or another, the compatibility of legislation with the rights enshrined in it. On the other hand, he is particularly familiar with the U.S. system of diffuse review and it is clear to him that this version of the American model belongs, along with the European model of concentrated review, to the systems of strong-form review.

If there is a gap in Tushnet's scheme, this could only be a system of diffuse review which differs from the U.S. system in that it lacks a powerful highest court whose decisions finalize the interpretation of the constitution. The question, then, is whether there exists such a system of judicial review and, in case it does, which is its position along the strong-form/weak-form distinction. I think that the Greek system of judicial review of legislation provides such an example of a system of diffuse review that lacks a powerful highest court.[45]

3.1. Greek constitutionalism in the distinction between strong-form and weak-form review

According to the traditional distinction, the Greek system basically belongs to the American model of diffuse review, enriched with some elements of concentrated review which render the system mixed.[46] The strong association between the Greek and the U.S. system is in part due to their impressive historical parallels. Both in the U.S.A. and in Greece, the constitutional texts did not provide explicitly for the judicial review of legislation, when it was established at the initiative of the courts themselves, at the beginning and the end of the 19th century, respectively.[47] The historical parallels should not overshadow, however, the substantial differences between the two systems.

(a) Differences between the Greek and the U.S. system

To begin with, an obvious difference of the Greek system is that, at certain point, judicial review of legislation was formally enshrined in the constitution. Article 93, paragraph 4 of the, currently in force, Constitution of 1975 stipulates that the courts (in the plural, meaning *every* Greek court) are obliged not to implement a law whose content contradicts the Constitution.[48] This is a compelling confirmation of the adoption of the

---

[45] At the risk of having overlooked something, I have not come across in Tushnet's work any reference which shows that he is familiar with the Greek system of judicial review of legislation. No doubt, this is perfectly explicable, if one considers how limited is the international literature on the Greek system as well as the contribution of its students to the theory of judicial review.

[46] On the following, see DAGTOGLOU (fn. 26), Epaminondas SPILIOTOPOULOS, "Judicial Review of Legislative Acts in Greece", 56, *Temp. L.Q.*, 463, 1983; Wassilios SKOURIS, "Constitutional Disputes and Judicial Review in Greece", in Christine LANDFRIED (Hrsg.), *Constitutional Review and Legislation*, Baden-Baden, Nomos Verlagsgesellschaft, 1989, p. 177 *et sq.*

[47] See the decision of the U.S. Supreme Court in the case Marbury *v.* Madison, 5 U.S. 137 (1 Cranch) (1803), with decision 23/1897 of Areios Pagos, the only then existing Greek highest court. In both cases, earlier decisions had prepared the ground, whereas both decisions illustrate in its classical form — and with impressive similarities in the argumentation — the constitutional foundation of judicial review.

[48] There has been an earlier formal introduction of judicial review in the short-lived republican Constitution of 1927, which only remained in force until 1935.

diffuse review model. However, formalization led, as we will see in the following, to the differentiation of the basic model, which was enriched with some elements of concentrated review. A second difference is that, while Greece initially had only one highest court, *Areios Pagos*, later on a system of distinct jurisdictions was introduced. Highest courts doubled in 1929, when the Council of State was established as the highest administrative court, while Areios Pagos remained the highest court for civil and criminal law cases, and they tripled with the 1952 Constitution, when the Audit Court was upgraded as the highest court for fiscal cases.[49]

A third — and, arguably, the most important — difference which always existed between the two systems is that the legal and political status of the Greek highest courts has never been even remotely comparable to that of the U.S. Supreme Court. Greece belongs to the civil law systems, and this has crucial legal and political implications. Legally, the decisions of the Greek highest courts are not binding in the way that they are in the common law system, where the doctrine of *stare decisis* applies. Politically, Greek highest courts appear to operate in a space isolated from politics. Greek highest courts do not select the cases they try;[50] their jurisdiction is circumscribed by strict legal and constitutional rules. Moreover, the judges who make up these courts are not chosen by the political branches; they are civil functionaries pursuing a career within the internal hierarchy of the judiciary.[51] To sum up, in comparison to the U.S. system, the huge and crucial difference of the Greek system is that there exists no powerful highest court comparable to the U.S. Supreme Court. Paradoxically, this means that the Greek system is more loyal to the American model of diffuse review than the U.S. system itself.[52] The Greek system is more diffuse *in effect,* since it lacks a powerful institution capable of concentrating review in such a way as the U.S. Supreme Court does.

(b) Mechanisms of concentrating review in the Greek system.

On the other hand, the Greek system appears *institutionally* less diffuse than the U.S. system, given that the Greek Constitution of 1975 provides for a distinct institution of concentrated review, the Highest Special Court (HSC), which, however limited its jurisdiction, is quite similar to a

---

[49] For the jurisdiction of the Council of State and the Audit Court, see articles 95 and 98 of the Greek Constitution of 1975, respectively.

[50] A minor, but significant, exception that — rather unsurprisingly — only applies to the Council of State is the procedure of "model" or "pilot trial" for which see here below, fn. 61 and accompanying text.

[51] The only institutional intervention of the political system is that, according to article 90, paragraph 5 of the Greek Constitution of 1975, the Cabinet selects, upon proposal of the Minister of Justice, the highest judges that will be promoted to the posts of president and vice-presidents of the three highest courts, as well as of the public prosecutor of the Areios Pagos (who is also a member of the judiciary). Even here, however, the executive may not select freely, but only among the highest judges that already serve in the respective highest courts (and, in most cases, it choses by seniority). Moreover, the presidents and public prosecutor's tenure is temporary limited, until they reach either the age of 67 or four years in office (whichever comes first).

[52] By "American model" I mean the ideal type of the system of diffuse review as distinct from the European model of concentrated review. In contrast, by "U.S. system" I mean the particular version of this model that has been instituted in the U.S.A. This particular version diverges from the ideal type of the system of diffuse review in that it contains a strong element of concentrated review, the Supreme Court.

constitutional court.[53] The Highest Special Court of article 100 of the Constitution is made up of the presidents of the three highest courts of the country (the Council of State, *Areios Pagos*, and the Audit Court), four judges from the Council of State, and four from *Areios Pagos*. It consists thus of eleven members who are ordinary highest judges, to whom, when the court hears constitutional cases, two more members are added (making up thirteen members in total), who are Law professors. Besides its other jurisdiction,[54] the HSC "settles the controversy" over the constitutionality of statutes, when contradictory decisions have been issued by different highest courts.[55] This means that the HSC only hears a constitutional case when one highest court has found a statute unconstitutional, while another has found the same statute (more precisely, the same provision thereof) compatible with the constitution. Of course, given the distribution of cases to the different jurisdictions, the likelihood that a constitutional case will arise before the HSC is rather restricted[56] and the HSC itself takes good care to circumscribe its jurisdiction very narrowly. However, once a case concerning the constitutionality of a statute is brought before the HSC, the latter acts as a quasi-constitutional court. Its decisions are binding on all, and if it finds the statute (or a provision thereof) unconstitutional, the HSC annuls it.[57] That is why its decisions, unlike those of any other court, are published in the official Government Gazette, as happens with the laws. The decision of the HSC which declares unconstitutionality is a classical "Kelsenian" decision of negative (annulling) legislation. Nevertheless, HSC's effective contribution to constitutional doctrine has been rather poor. It has heard so far only a very small number of constitutional cases, and it has annulled as unconstitutional an even smaller number of statutory provisions.[58] Besides, the drafters of the 1975 Constitution did not intend to establish a quasi-constitutional court, but rather to create a mechanism to deal with what has been considered as the most significant flaw of diffuse review: contradictory decisions on the constitutionality of the same statute by highest courts of different branches — for which decisions we lack the harmonization mechanisms provided within each branch by the use of appeals. In sum, the HSC introduces into the Greek system an element of

---

[53] This proposition does not contradict the foregoing. Indeed, the Greek system appears institutionally more concentrated than the U.S. system in that it has, along with the diffuse review by ordinary courts, a special body of constitutional justice, the HSC. Nevertheless, in reality, the Greek system is effectively less concentrated than the U.S. system, given that, as will be mentioned in the following, the actual functioning of the HSC results in a very low degree of concentration, incomparably lower than the concentration produced by the functioning of the U.S. Supreme Court. See, for the U.S. system, Ronald J. KROTOSZYNSKI Jr., "The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Powers", 89, *Notre Dame L. Rev.*, 1021, 2014.

[54] An important jurisdiction of the HSC, unrelated to the review of legislation, is that it acts as the "electoral court" for national elections and referenda, reviewing the validity of the process as well as the qualifications and incompatibilities of the MPs. See article 100, paragraph 1, lit. (a), (b) and (c) of the Greek Constitution of 1975.

[55] Article 100, paragraph 1, lit. (e) of the Greek Constitution of 1975.

[56] These are mostly cases where one of the litigants is the Greek State, because the State falls within the jurisdiction of administrative courts or civil courts, depending on whether it acts as a public authority or by means of private law, respectively. Hence, the same statutes concerning the State may be implemented by highest courts of different branches. It is clear, then, that a large part of the legislation is practically excluded from HSC's jurisdiction, because many statutes are implemented mainly or exclusively by courts of a single branch only. For instance, family law cases, which are tried by civil courts, are rather unlikely to produce constitutional cases before the HSC.

[57] Article 100, paragraph 4 of the Greek Constitution of 1975.

[58] Between 1976, when it was founded, and 2012 the HSC has issued only twenty one decisions for the settlement of a constitutional controversy, and only in ten of them it annulled statutory provisions as unconstitutional.

concentration of very high intensity (since the HSC has the power to annul statutes), but at the same time of very narrow scope (since the jurisdiction of the HSC can only be established in very few cases). It is, thus, a mechanism of rather limited effectiveness.

However, there are other mechanisms of concentrating review in the Greek system, beyond the HSC, which are potentially more effective. An obvious element of concentrating review is the hierarchical structure of the judiciary and particularly the jurisdiction of the highest courts, which may review constitutional judgements of lower courts, thereby harmonizing constitutional doctrine. Although not formally binding, the reasoning of the highest courts decisions exercise nevertheless a significant guiding function. No doubt, the effectiveness of this mechanism is limited, too, due to the fact that there are three highest courts instead of a single one. A more specific mechanism of concentrating review, in this context, lies in the division of labour within the Greek highest courts. Each highest court hears a couple of thousand cases annually, while two of them, the Council of State and the Audit Court, besides their appellate jurisdiction, also have a quite broad original jurisdiction. Cases are originally distributed among the various panels of each court, while the plenary sessions hear cases of greater importance, either directly or when they are referred to them by a panel. The constitutional revision of 2001 provided that, when a panel of a highest court is about to find a statute unconstitutional, then it must refer the constitutional question to the plenary session.[59] In this way, the concentrating element entailed in the jurisdiction of the highest courts has been further reinforced — and constitutionally enshrined, for that matter.

A less obvious, but perhaps the most effective, element of concentrated review is the jurisdiction of the Council of State. Beyond its appellate jurisdiction (reviewing decisions of lower administrative courts), the Council of State also has an original annulling jurisdiction, reviewing certain categories of administrative acts.[60] Administrative acts may only be enacted if based on a law and within its limits (principle of legality). An administrative act that is found to contradict the law, or not to be based on some law, is annulled as illegal. However, Greek administrative courts do not just examine whether an administrative act conforms to the law; they also examine whether the law on which the administrative act is based is compatible with the constitution. If the administrative act, although in conformity to the law, is found to be based on an unconstitutional law, then it is also annulled as illegal. Directly reviewable by Greek administrative courts are both the administration's individual acts for the concrete application of a law (or *stricto sensu* administrative acts) *and* the administration's regulatory acts for the abstract specification of a law (or administrative regulations); the latter are reviewable by the Council of State. Very often, a (parliamentary) statute cannot be implemented before it is specified by administrative regulation. When the Council of State annuls such a regulation *on the grounds* that the statute which the regulation specifies is unconstitutional, it practically renders the statute itself ineffective. The statute cannot be implemented henceforth, which means that, in reality and for all practical purposes, it is effectively annulled.[61] This is an important power of the Council of State. As a result of this power, I think, the courts themselves as well as the citizens acknowledge a prominent

---

[59] Article 100, paragraph 5 of the Greek Constitution of 1975, as amended in 2001.

[60] See article 95, paragraph 1, lit (a) and (b) of the Greek Constitution of 1975, on the appellate and annulling jurisdiction of the State of Council, respectively.

[61] See also here above, fn. 31.

role to the Council of State, seeing it as the court of constitutionality *par excellence* in Greece. Indeed, the constitutional doctrine of the Council of State is incomparably richer than that of any other court. This status of the Council of State as an informal court of constitutionality —but not, of course, as a constitutional court — in an otherwise diffuse system of review has been recently reinforced by a major legislative innovation. Law 3900/2010 establishes the institution of the "model" or "pilot trial" before the Council of State[62]. Any case from any administrative court of the country that raises "a question of general interest bearing on a broader range of persons" may be referred to the Council of State, which then resolves the question. It is rather obvious that, quite frequently, such a question will concern the constitutionality of the law on which an administrative act is based.[63]

(c) The incidental and in concreto character of judicial review in the Greek system

In light of the above, the question is how to classify the Greek system of judicial review of legislation within Prof. Tushnet's scheme, that is, according to the distinction between strong-form and weak-form review. In the traditional distinction, it is quite clear that the Greek system basically belongs to the model of diffuse review combined with some elements of concentrated review, which makes it a mixed system.[64] Regarding the binding effect of the review on the political branches, which, as we have seen, is the criterion for the distinction between strong-form and weak-form,[65] the key element in the Greek system is the incidental and *in concreto* character of the review. Any court can review incidentally, *i.e.* while hearing a particular case and in the context and circumstances thereof, the constitutionality of the law that is being evoked before it. This means, however, that *what is reviewed is not the statute as such*, *i.e.* the statutory provision with all its potential normative contents, the abstract statutory norm. *What is reviewed is the application of the statute* in the particular case at hand, that is, the specific statutory norm produced by the implementation of the statutory provision in that case — and that case only. Hence, even if a court deems a law unconstitutional in light of the circumstances of its application in the case at hand, the law remains

---

[62] Article 1 of Law 3900/2010. An interesting element of this new institution is that the Council of State has certain discretion, even if circumscribed, to select the cases that it will try in a model trial.

[63] Indeed, in all fifteen model trials that the Council of State decided until the end of 2013, the question concerned the constitutionality of some statutory provision. It is also worth mentioning that, out of the fifteen, in only one case the Council of State did find the provision unconstitutional (decision 694/2013). In ten cases it ruled explicitly that the provision under review is not unconstitutional (decisions 690/2013, 2607/2013, 2741/2013, 601/2012, 1619/2012, 2164/2012, 3020/2012 of the Council, and 35/2013, 135/2013 and 496/2011 of its Interim Orders Committee); in one case it resolved the issue by interpreting the provision (decision 1971/2012); and in three cases it declined to decide for procedural reasons (decisions 1841, 1842 and 1843/2013).

[64] However, the mixed nature of the system should not be overstated. From the same perspective, the U.S. system is mixed as well, given that it is likewise basically a system of diffuse review, combined with an element of concentration, the powerful Supreme Court. Moreover, the U.S. system is clearly more concentrated than the Greek one, given that the U.S. Supreme Court is so powerful that it is comparable to a typical constitutional court (see here above, fn. 23). By contrast, no Greek court, not even the Highest Special Court, is really comparable to a constitutional court.

[65] See here above, in the text above fn. 34.

otherwise fully in force. If the circumstances of its application are different, another court or even the same court may still find the law constitutional and apply it in any other case. But, if this is the case, then not only courts but also the political branches as well may defend the constitutionality of the law in an application other than the one decided, by arguing that the circumstances of *that* application are different. To the extent that this happens, the Greek system is in effect a weak-form system.

This finding may shed some new light on the distinction between strong-form and weak-form review. In strong-form review, the judgment that a law is unconstitutional is essentially a ruling that no possible application of that law is in accordance with the constitution — *and* a ruling, for that matter, that the political branches are bound to comply with. By contrast, the same judgment in weak-form review may denote one of the following two things: either (a) the same ruling that no application of that law is constitutionally acceptable, whereas, however, the political branches may deviate and apply the law notwithstanding the judgment; or (b) a ruling that a certain application of the law is unconstitutional, whereas other applications thereof, in a different setting, may be constitutionally acceptable. Both accounts are conducive to the development of a constitutional dialogue. The latter, however, allows for the differentiation of the constitutional interpretation according to its particular context, the conditions of the case at hand; it introduces thus a variable in the constitutional interpretation, the so to say *occasio interpretationis*. We can assume, then, that there may be two elements that possibly refine Prof. Tushnet's distinction. Firstly, we cannot exclude the possibility that there may be some weak-form review judgments in an otherwise primarily strong-form review system[66]. Secondly, weak-form review seems to fit well with those diffuse review systems that, absent a single strong voice, leave more space for different context-sensitive interpretations, spread among different ordinary courts. Such is, primarily, the Greek system of judicial review of legislation.

However, we have seen that the Greek system is not reducible to the pure model of diffuse review, as it also contains certain elements of concentrated review. The power of the Highest Special Court to annul unconstitutional statutes is akin to the power of constitutional courts and, in this respect, it clearly constitutes a strong-form review. Moreover, the judicial review carried out by HSC is direct and *in abstracto* — not incidental and *in concreto* — since the issue of constitutionality itself is the "case" brought before the HSC (direct) and the statute itself is reviewed regardless of the context of the case, so that it can be annulled with *erga omnes* effect (abstract). Nevertheless, the opportunities afforded to the HSC to exercise its power are so limited and the cases in which it has indeed exercised it are so few that we could disregard, for the sake of argument, this element of concentration. The position of the Council of State is more complicated, and more interesting. This court formally belongs to the system of diffuse review as any other Greek court; in effect, however, it stands apart from the other courts. It also seems that the Council of State itself sees its role as distinct.[67] Especially when the Council of State annuls an administrative regulation on the grounds that it is based on an

---

[66] A possible example could be the "as-applied" challenges before the U.S. Supreme Court. See here above, fn. 30.

[67] It is quite telling that the initiative for the legislation on the "model trial" originated from the Council of State itself, which, moreover, suggested a draft bill that was adopted basically unamended by the legislature and was enacted as Law 3900/2010.

unconstitutional statute, it essentially reviews the statute itself and not anymore its specific application; what is at stake here is not an individual case with specific features, but the abstract review of a norm (the administrative regulation) which specifies the statutory norm. In these cases, the decisions of the Council of State are regarded as resolving definitely the question of constitutionality and, as a result, they are binding on all. In this respect, thus, a strong-form review is carried out. This shows, then, that there could be some strong-form review judgments in an otherwise primarily weak-form review system.

The answer to the question of how to classify the Greek system in Tushnet's model is that it basically constitutes a system of weak-form review, combined with some elements of strong-form review — which makes it, again, a mixed system. In other words, it is a system which, in light of this distinction, seems to *have been designed as mixed.* I think that this category is lacking in Tushnet's classification, who might consider the Greek system interesting in that respect.

Prof. Tushnet has shown us that systems of weak-form review are inherently unstable. The same seems to hold true of mixed systems. It is particularly interesting to see whether the inherent instability of the Greek system inclines it in one direction or the other.

3.2. What Greek constitutionalism can learn from Prof. Tushnet

For many observers, the most crucial flaw of the Greek system is its polyphony (occasionally denounced as leading to cacophony). In the absence of a single strong voice, such as a constitutional court, we frequently witness different judgments from different courts regarding the constitutionality of the same law. This, according to the critics of the system, leads to uncertainty of law, as the citizens do not know in the end, in light of the contradictory decisions of the courts, whether a law is unconstitutional or not. The institution designed to resolve this problem, the Highest Special Court, has a very limited efficacy, as we have seen. In the 2000s, on the occasion of a constitutional revision which was underway at the time, the suggestion to establish some kind of constitutional court in Greece, that is, to abandon the American model of diffuse control and to adopt some version of the European model of concentrated review, found wide resonance. This proposal eventually failed, not because it lacked political support, but for reasons related to the political circumstances of the constitutional revision of 2008. The same proposal seems to gain some momentum again, as currently many charge the Greek courts, especially the Council of State, with "timidity" in the review of laws that introduce burdensome austerity measures of the fiscal and economic consolidation programme that is underway in the country.

(a) The Council of State: a strong-form court with weak-form political legitimation

Prof. Tushnet teaches us that whether we have a system of strong-form or weak-form review does not depend on how intensively or restrictively courts do indeed review legislation. Strong-form review does not mean that

courts frequently deem laws unconstitutional nor, inversely, weak-form review means that courts avoid such judgments. The criterion of the distinction is the "finality" of the relevant judgments.[68] If the relevant decisions of the courts are considered to resolve definitively the question of the constitutionality and to be binding on the political branches and the citizens, then we have a system of strong-form review, *regardless* of whether the courts tend to exercise intensively their power or, on the contrary, to constrain themselves. We can assume, moreover, that the more strong-form the system is, the more the courts will tend to restrain themselves, exactly because they feel that they bear greater responsibility and that *it is up to the courts themselves* to "close" definitively and bindingly the constitutional disputes — which generally also reflect political disputes.[69] On the other hand, we can likewise assume that a court will tend to review legislation more intensively if it enjoys a stronger political legitimacy, something which bears upon primarily, although not exclusively, on the way in which its members are selected. It is no mere accident, it seems, that powerful courts of constitutional justice are particularly those whose members are selected by the political branches, such as the German *Bundesverfassungsgericht* or the U.S. Supreme Court.

This opens up a different perspective on the question of the judicial review of legislation in Greece. We have seen that the jurisdiction of the Council of State constitutes an important element of concentrated review. In effect, the Council of State tends to evolve into a special court of constitutionality. There are instances (particularly when it annuls an administrative regulation or in the new institution of the "model trial") where the Council can effectively abolish a statute and its judgment is held to be definitive and binding on all. In this respect, the Greek system entails an element — and a rather strong one, for that matter — of strong-form review. However, the Council of State lacks the political legitimacy usually enjoyed by constitutional or highest courts in systems of strong-form review. This seems to account for its cautiousness in carrying out judicial review. Indeed, the Council of State typically tends to uphold the constitutionality of most major political choices of the incumbent governments, with few exceptions which seem to merely confirm the rule. We could say, somewhat schematically, that the Council of State is a strong-form court with weak-form political legitimacy.

This seems to introduce an imbalance in the system. Citizens have high expectations from the Council of State regarding the review of legislation; however their expectations tend to be frustrated, since the Council is very reluctant to deem laws unconstitutional. Hence, the Greek mixed system is marked by an element of instability. This instability can be limited by moving the system in one or the other direction, by enhancing the elements of strong-form or of weak-form review. The first solution is endorsed by those who propose the establishment of a constitutional court, the transition, that is, to a purer system of strong-form review. But a real constitutional court inevitably requires proper political legitimacy. At the very least, the members of such a court need to be selected by the political branches; otherwise, the problem of "timidity" in the judicial review will

---

[68] See also Nicos ALIVIZATOS, "Who decides in last resort? Elected officials and judges", Paper presented at the University of Michigan, 15.9.2011, in http://www.constitutionalism.gr/site/2163-who-decides-in-last-resort-elected-officials-and-j/ (last visited 10.11.2014).

[69] This is, I think, the reason why the debate over the so-called judicial self-restraint has been conducted mainly in countries with courts that exercise strong-form review, notably in Germany with its Bundesverfassungsgericht and in the U.S.A with its Supreme Court.

remain. Thus, the establishment of a constitutional court would entail a major rupture in the political system, as it would directly involve one more player in the political game;[70] in other words, it would constitute a radical reform with unpredictable and uncontrollable consequences. I think that this is not an advisable solution, as it would add further instability to an already unstable political system. To put it more straightforwardly: what kind of political legitimacy could be conferred *today* on an entirely new — and, hence, particularly sensitive during the first years of its operation until its consolidation — court of constitutional justice by the severely delegitimized and already collapsing Greek political system?

(b) An (apparent) paradox: Reinforcing the judicial review of legislation by expanding its weak-form elements

On these grounds, I submit that another solution, implied by Prof. Tushnet's analyses, is preferable and more advisable. From this perspective, the polyphony in the Greek system should not be seen as a problem that need to be set aside, but as an advantage. If the Greek courts, and particularly the Council of State, are "released" from the burden of the responsibility to pronounce the "final word" in their constitutional judgements, they could perform their role more actively. If they know that major constitutional controversies over particular laws and, consequently, major political controversies over the policies materialized by those laws are not definitively resolved by their judgements and, accordingly, that no one can accuse them for "blocking" important public policies, then we can reasonably assume that they will not be so reluctant to deem a law unconstitutional.

This is already evident, in a rather straightforward manner, in recent decisions concerning the constitutionality of legislative measures of the fiscal and economic consolidation programme. While there have been many judgements by lower courts, particularly by courts of first instance, which find various provisions unconstitutional, the highest courts seem to be much more reluctant and they tend to uphold the constitutionality of the same provisions. This can be explained, I think, on the grounds that lower courts do not bear, as highest courts do, the burden of responsibility for the "final" judgment regarding the constitutional question; at the very least, they know that their constitutional judgments can be reversed in appellate or the highest courts. "Released" from this burden, lower courts can effectively carry out the judicial review of legislation in a more active manner. By contrast, highest courts and, particularly, the Council of State are more restrained, for obvious reasons, as they know that, as "final", their constitutional judgments will create political facts for which they feel, perhaps, that they lack sufficient legitimation.[71]

---

[70] See Nicos ALIVIZATOS, "Judges as Veto Players", in Herbet DÖRING (ed.), *Parliaments and Majority Rule in Western Europe*, Frankfurt a.M., Campus Verlag, 1995, p. 566 *et sq.*

[71] This reasoning is confirmed by a further argument: When highest courts do not issue judicial decisions but only give non-binding opinions on particular bills before their enactment, when they act, that is, "released" from the burden of the final judgment, then they tend to be more active in reviewing constitutionality. This is particularly true of the Audit Court (which, according to article 73, paragraph 2 of the Greek Constitution of 1975, gives Parliament its opinion on pensions bills) that has in recent years expressed many objections regarding the constitutionality of pensions cuts. To a certain extent, this is true also of the two other highest courts, which occasionally express, in their so called administrative plenary session (*i.e.* not in their judicial capacity), their views on bills regarding the organization of the judiciary.

Hence, the second solution to the problem of constitutional "timidity" would go in the exact opposite direction from the establishment of a constitutional court; it would require expanding the weak-form review elements of the Greek system. More — rather than less — polyphony in the system would enable the Council of State to release itself of, or at least lessen, the burden of being considered as *the* informal court of constitutionality, to which everyone appeals and upon which everyone relies to "resolve" the question of the constitutionality of important public policies. We can tenably assume that, released from this burden, the Council of State will turn out to be much more active in reviewing legislation and much less reluctant in its constitutional judgments; it will know that it thereby "simply" contributes to the constitutional debate a constitutional interpretation of high import and status, which does not act, however, as a catalyst for the political process. I submit that this second solution has two advantages: (a) it is more in accord with the predominantly diffuse character of the Greek system — and thereby avoids the risks involved in any major institutional rupture; and (b) it will also contribute to the improvement of the system, as it seems to effectively deal with the problem of judicial "timidity".

It is beyond the scope of the present essay to propose specific arrangements and regulations which will enable the transition to a system of weak*er*-form review. Ideas in this direction can be drawn from the comparative constitutional law studied by Mark Tushnet, particularly in the experience of Canada and the United Kingdom.[72] The key idea is the development of a dialogical conception of constitutional law. And the aim is to bring the system closer to the political process and the citizens, that is, to take it also "away from the courts."[73] Such ideas, which have the virtue of maintaining the balance of the existing system, could include, very indicatively, the following: to reinforce the parliamentary review of constitutionality, as a right of the opposition; to provide perhaps for a mechanism of constitutional question concerning bills under discussion in the parliament, similar to the (apparently successful) institution of the model trial; potentially, the introduction of some sort of an "override clause", that will enable the political branches to uphold their justified constitutional judgement concerning a certain law, notwithstanding a court's ruling which found that law unconstitutional, *etc.* The responsibility for ensuring respect for the constitution does not lie exclusively, or even primarily, with the courts, but at least equally with the political branches of the state, the political forces and, eventually, with the citizenry.

4. Conclusion

In this essay I have tried to flesh out the key idea of the distinction between strong-form and weak-form systems of judicial review of legislation that has been put forward by Prof. Mark Tushnet, by applying it to the Greek system and examining how this can be classified within the distinction. I have reached two conclusions.

---

[72] See TUSHNET (fn. 15).

[73] See TUSHNET (fn. 5).

The first conclusion is more theoretical and bears on this distinction itself. I think that the Greek system of judicial review of legislation offers an original version of a mixed system that combines elements of both strong-form and weak-form review. The diffuse, incidental and *in concreto* character of the Greek system might be seen as a manifestation of, at least some sort of, weak-form review; when a Greek court decides incidentally, in the context of a particular case, that a law is unconstitutional and thus inapplicable, it does not preclude, at least in principle, the application of this same law in other cases. On the other hand, the formal, even if very narrow in scope, power held by the Highest Special Court to annul statutes, as well as the informal, and much broader, power possessed in certain instances by the Council of State to effectively abolish legislation constitute elements of strong-form review; their decisions then are considered to be binding on the political branches and the citizens, and to "definitively" resolve the constitutional issues at stake.

The second conclusion is more political and suggestive of a constitutional policy proposition. It is exactly when exercising strong-form review powers that Greek courts tend to be most reluctant in reviewing legislation. Although understandable, due to their lack of political legitimation, this, nevertheless, results in a certain imbalance in the Greek system. The public tend to have very high expectations in that respect, especially from the Council of State; these expectations, however, often tend to be frustrated. There are two possible ways to deal with this problem. On the one hand, there are those who propose the introduction of some version of a constitutional court. Thus, the Greek system would turn into a strong-form system of review; this, however, would be a radical institutional change with opaque and unpredictable implications. I think, on the other hand, that it would be more effective to move the system into the exactly opposite direction, by expanding its weak-form review elements, notably its diffuse, incidental and *in concreto* character. We can expect then that, released from the burden of the "finality" of their judgements, the Greek courts, and particularly the Council of State, will be reviewing legislation in a more active, and more sensitive to constitutional limitations, way.

Akritas Kaidatzis is lecturer at the Aristotle University of Thessaloniki Law School, where he teaches Constitutional Law, Constitutional History, and Human Rights.