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Research Article

The adoption of foreign case law by the Greek courts and the emergence of the *Existenzminimum* doctrine by numbers - Between constitutional interpretation and legitimacy

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Abstract

The study is divided in two major parts. First, a presentation of the history of the Greek legal order and the organization of the judicial system with a focus on the judicial system of control of constitutionality highlights the legal culture regarding the use of foreign precedents in constitutional cases, describes the complexities regarding the exercise of control of constitutionality, and justifies the reasons that the constitutional case law of the Council of State (CoS) is selected for quantitative measurement. Second, the study analyses from a quantitative and qualitative perspective the results of the measurement of the number of explicit citations in foreign precedents in the constitutional cases of the CoS. It is worth noting that the majority of the citations in German case law refer to the case law of the *Existenzminimum*, a finding that is being approached from a qualitative perspective too.

Keywords: decent living, control of constitutionality, foreign precedents.

I. Introduction

Quantitative measurement follows strict rules regarding the methodology. Gathering and processing data has as a prerequisite the previous clarification of what exactly is going to be measured. In the context of diffuse system of control of constitutionality, this could be considered as a real challenge, because first of all, it is the court that must be selected for the measurement and, secondly, the decisions that should be considered as constitutional cases. Given that the purpose of the research is to seek the evolution of cross-judicial fertilization, the second most significant challenge is to define the way that is going to be adopted for the research as for citations to foreign precedents which must be measurable.

In the Greek judicial system, there is no Constitutional Court, but there are three Supreme Courts, the Council of State (*Symvoulio tis Epikrateias*) (hereinafter CoS),

which is the Supreme Administrative Court, the *Areios Pagos*, i.e. the Supreme Court for Civil and Penal cases, and the Court of Audit. For the purposes of the present research, as constitutional cases defined the cases that claims regarding the violation of the Constitution are included in the applications before the Court. Since an application is considered admissible, the Court must proceed to constitutional interpretation examining the claim of violation of the Constitution, which claim always is examined first, -if other claims are included too-. Taking into consideration the evolution of the constitutional case law in the Greek legal order, the study focuses on the constitutional cases of the CoS. The time period that is examined, between 1rst January 2011 to 1rst January 2021 corresponds to the financial crisis in Greece. During this decade, constitutional cases had to deal with the austerity measures that put at risk the protection of social rights. These cases belong to the jurisdiction of the CoS.
Regarding the citations to foreign precedents, the study focuses on explicit citations which means that within the text of the decision must be cited the court and a full reference to the case law. It is worth noting that the majority of the citations in German case law refer to the case law of the *Existenzminimum* (right to minimum level of subsistence) of the German Federal Constitutional Court. The right to a minimum level of subsistence is processed systematically during the financial crisis for the first time and the impact of the CoS's case law is so great that finally leads to the constitutional recognition of the right during the fourth amendment of the Constitution in 2019.
The study is divided into two major parts. First, a presentation of the history of the Greek legal order and the organization of the judicial system with a focus on the judicial system of control of constitutionality highlights the legal culture regarding the use of foreign precedents in constitutional cases, describes the complexities regarding the exercise of control of constitutionality, and justifies the reasons that the constitutional case law of the CoS is selected for quantitative measurement. Second, the study analyses from a quantitative and qualitative perspective the results of the measurement of the number of explicit citations in foreign precedents in the constitutional cases of the CoS.

II. Greek constitutionalism in context

1. The judicial system

During the setting up of the justice and the legal order, there followed civil law and, specifically, the two-tier system[1] with private disputes belonging to civil courts and the *Areios Pagos* and the administrative disputes coming under the Council of State, which has the general competence of cassation,[2] and the ordinary administrative

[1] According to Article 93(1) of the Greek Constitution (hereinafter Gr Const) 'Courts are separated into administrative, civil and criminal courts, and they are organised by special statutes'.
[2] See Article 95(1 and 3) of the Greek Constitution '1. The jurisdiction of the Supreme Administrative Court pertains mainly to: a. The annulment upon petition of enforceable acts of the administrative authorities for excess of power or violation of the law. b. The reversal upon petition of final judgements of ordinary administrative

courts.[3] In special cases and so as to achieve a unified application of the legislation, categories of private disputes may be assigned by law to administrative courts while categories of substantive administrative disputes may be heard in civil courts.[4]

2. The Special Highest Court

This complex distribution of jurisdictions creates the need for conflicts of positive and derogatory jurisdiction between the courts to be resolved. For this reason, in Article 100 of the Greek Constitution, the Special Highest Court is established.[5] The Special Highest Court is the only court that has the jurisdiction to abolish a legal provision for unconstitutionality *erga omnes*. According to the Article 100 (4), provisions of a statute declared unconstitutional are invalid as of the date of publication of the respective judgment, or as of the date specified by the ruling. Additionally, according to the same provision, the judgments of this Court are irrevocable.

Still, the Special Highest Court should not be seen as a Constitutional Court (Iliopoulos-Strangas & Georgitsi, 2012). Though it is the only court in the Greek judicial system which has jurisdiction to abolish a legal provision as being contrary to the Constitution, its authority is in practice limited, since it rules on constitutionality only when there are conflicting court decisions on the agreement of the substantive content of the same law with the Constitution previously issued by two of the three supreme courts (Iliopoulos-Strangas, 2007) - not a common event. Conflicting court rulings on the constitutionality of the same legal provision by lower courts, for instance between the Administrative Court of Appeal and the Civil Court of First

courts, as specified by law. c. The trial of substantive administrative disputes submitted thereto as provided by the Constitution and the statutes. d. The elaboration of all decrees of a general regulatory nature. […] 3. The trial of categories of cases that come under the Supreme Administrative Court's jurisdiction for annulment may by law come under ordinary administrative courts, depending on their nature or importance. The Supreme administrative Court has the second instance jurisdiction, as specified by law'.

[3] See Article 94 (1 and 2) of the Greek Constitution '1. The Supreme Administrative Court and ordinary administrative courts shall have jurisdiction on administrative disputes, as specified by law, without prejudice to the competence of the Court of Audit. 2.Civil courts shall have jurisdiction on private disputes, as well as on cases of non-contentious jurisdiction, as specified by law'.

[4] Article 94 paragraph 3 Gr Const.

[5] According to Article 100 the jurisdiction of the Special Highest Court comprises: a. The trial of objections in accordance with Article 58 Gr Const; b. Verification of the validity and returns of a referendum held in accordance with Article 44 paragraph 2 Gr Const; c. Judgment in cases involving the incompatibility or the forfeiture of office by a Member of Parliament, in accordance with Article 55 paragraph 2 and Article 57 Gr Const; d. Settlement of any conflict between the courts and the administrative authorities, or between the Supreme Administrative Court and the ordinary administrative courts on the one hand and the civil and criminal courts on the other, or between the Court of Audit and any other court, e. Settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Audit, f. The settlement of controversies related to the designation of rules of international law as generally acknowledged in accordance with Article 28 paragraph 1 Gr Const.

The Court is composed of the President of the Supreme Administrative Court (Council of State), the President of the Supreme Civil and Criminal Court (Areios Pagos) and the President of the Court of Audit, four Councillors of the Supreme Administrative Court and four members of the Supreme Civil and Criminal Court chosen by lot for a two-year term. The Court is presided over by the President of the Supreme Administrative Court or the President of the Supreme Civil and Criminal Court, according to seniority. In the cases specified under sections (d) and (e) of the preceding paragraph, the composition of the Court is expanded to include two law professors at the law schools of the country's universities, chosen by lot.

Instance are not referred to the Special Highest Court. Also, citizens, citing a breach of the Constitution, cannot appeal directly to the Special Highest Court. Given that its main purpose is the resolution of conflicts between the courts, the competence of abolishment of a legal provision as unconstitutional must be seen as a form of conflict resolution between the Supreme Courts that have adopted contradictory opinions on the same legal provision and its conformity with the Constitution in the light of the security of law principle (Venizelos, 2022). This Court issues a very small number of decisions annually, mainly to resolve issues concerning competency between courts with different jurisdictions (administrative - civil).

3. The evolution of the constitutional case law

The judicial control of constitutionality was first set out as case law by the Supreme Court and thereafter recognized in the Constitution.[6] Specifically, *Areios Pagos* in 1848, under the influence of the USA Supreme Court,[7] proceeded to review the elements of the existence of the law, exercising for the first time a review of constitutionality based on the formal precedence of the constitutional text.[8] This further means that the *Areios Pagos* has a long tradition over the control of constitutionality (Manitakis, 1988).

Under the Constitution of 1975,[9] which is in force today,[10] there are three major waves regarding constitutional cases. Up until the 1990s and perhaps a little later, questions around unconstitutionality belonged to disputes that had been resolved essentially by the *Areios Pagos*, because referred mostly to interpersonal relations. For example, the prior marriage permission for the policemen, legal impediments to divorce, issues of a religious nature, and other restrictions on the liberty of personal development fell within the jurisdiction of civil and penal courts and were consequently covered by the *Areios Pagos*. Many fields of law that regulated relations among private individuals were liberalized at the beginning of the 1980s and thereafter. Thus, constitutional matters fall under the competence of the *Areios Pagos* gradually minimized and resolved by the law itself.[11]

From the 1990s, constitutional interest at a judicial level had shifted to environmental protection. The CoS undertook an extremely active role in the constitutional protection of the environment. Indeed, environmental disputes increased at such a rate that environmental cases were assigned to a separate chamber of the CoS, the Fifth Chamber[12]. In parallel with environmental protection, during the first decade of the new century (or 'noughties'), the Greek legal order faced constitutional issues in

[6] The judicial review of constitutionality was first established in the Constitution of 1927 (Vlachopoulos, 2019).
[7] *Marbury v Madison*, 5 U.S. 137 (1803), available at: supreme.justia.com/cases/federal/us/5/137
[8] For a general historical overview, see (Kaidatzis, 2016).
[9] In particular, it was adopted after the end of the military regime (1967-1974) (Papacosma 2023).
[10] The Constitution of 1975 has already been amended four times, in 1986, 2001, 2008, and 2019. It is worth noting that all the constitutions which have been in force from the forming of the Greek state to today, including revolutionary constitutions, retained a list of human rights.
[11] On the evolution of these cases, Chrysogonos & Vlachopoulos, 2017.
[12] See in general Sarmas, 1994.

terms of its relations with the EU's legal order and the primacy of EU law.[13]
The third wave of constitutional cases started in the early 2010s, the exact period in which the empirical research to be analyzed below covers. The reason for this is because from the very start of this decade, the country found itself in the grip of a massive economic storm, was facing a sovereign default, and had to be bailed out by the EFSF, the ESM, and the IMF[14]. It was a period when Greece adopted a series of austerity measures, taxes increased, salaries and pensions decreased, and rights such as the right to education and health were under because of the state's lack of financial liquidity. So, it is a period in which constitutional cases engage in the protection of social rights. The adoption and implementation of austerity measures engendered numerous judicial disputes regarding the violation of the Constitution, the vast majority of which came under the jurisdiction of the CoS (Venizelos, 2020a). This is also the reason why, for the quantitative research, the study focuses on the case law of the CoS. During this period, there were very few rulings of constitutional cases issued by the *Areios Pagos*, while the Court of Audit, which took up some cases related to the austerity measures, in essence, adopted the case law of the CoS.
During this period, informally, the profile of the Greek constitutional adjudication changes, becomes massive and obtains informally a popular basis. Hundreds of applications -by thousands of applicants- before the administrative courts and the CoS challenge the constitutionality of the austerity measures. Constitutional matters arise without case law precedents, in a socio-political and legal context of emergency (Venizelos, 2020b). In this situation, a window opened through the foreign precedents for the judges to deal with the new constitutional issues. Until that moment, Greek jurisprudence had interacted only to a very minor degree with the case law of the national courts of foreign legal orders, at least in the form of explicit reference,[15] for constitutional purposes. The previous years, Greek jurisprudence was skeptical even in front of the supranational courts' case law (ECtHR, CJEU), whose case law is binding for the Greek legal order.[16]

4. The diffuse system of control of unconstitutionality - Substantial aspects of the system

Under Article 93(4) of the Constitution, the courts are obliged to not apply a law

[13] A typical example is the 'main shareholder' case. See V Kosta, *case note on ECJ, Case C-213/07, Michaniki AE v. Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias*, 5 European Constitutional Law Review 501–516 (2009). See also CoS [GC] 3670/2006.

[14] For a detailed account of the financial crisis in Greece, see Pagoulatos, 2018.

[15] It is worth pointing out that there have been a few occasions when it was plain to see that the court had adopted the foreign precedent, but this was not explicitly referred to in the court's reasoning. A typical example of this is the decision of the CoS [GC] 2193/2014, which ruled that cuts in salaries and pensions constitute financial burdens, to achieve Greece's budgetary adjustment, and as such had to be allocated fairly among citizens based on the principles of fiscal equality. This is in fact a position initially taken up by the Portuguese Constitutional Court, without there being a single reference in the reasoning of the decision of the CoS to the decision of the Portuguese Constitutional Court. Constitutional Court (Portugal) decision no 353/2012 Case 40/12, comments Ch Akrivopoulou, 5 EfimDD (Journal of Administrative Law, Greek only) 628-657 (2012). For this decision, see and, Ch Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, 25 EUI Working Paper MWP 25-28 (2014).

[16] For a critical analysis on the dialogue between the judges, Yannakopoulos, 2017 and Yannakopoulos, 2012.

whose content is contrary to the Constitution.[17] The wording of the provision means that courts cannot abolish a legal provision that is contrary to the Constitution, -the only exception being in the case of the aforementioned Special Highest Court-, but only may not apply it to resolve a specific dispute. This in practice means that the declaration of unconstitutionality does not lead to the non-application of a legal provision by the other courts, but that this provision continues to be binding. On the basis of the above, it is accepted that in Greece the system for review of constitutionality is diffuse, incidental, concrete, and declaratory (Venizelos, 2022; Vlachopoulos, 2019). Legal precedent is not binding, and we may have the issuing of opposing rulings on the same legislative provision between courts of the same jurisdiction or even different jurisdictions, with the only exception being where the decisions issued belong to the Supreme Courts. In other words, the American system of *stare decisis* is not followed.[18] It can also be deduced from the aforementioned Article that being contrary to the Constitution refers exclusively to the substantive content of the law and therefore cannot be extended to formal defects, such as in the observance of the envisaged parliamentary procedure for the passage and adoption of law (Skouris, 1989). This means that the judicial control of constitutionality is extended only to the protection of civil and social rights, and not to institutional matters.

Issues concerning the law-making procedure and the legislative work of the Parliament, in general, are seen as belonging to the *interna corporis* of Parliament, which enjoys autonomy and is not controlled judicially, since that would be considered interference of the judicial function into legislative work in breach of the principle of the separation of powers under Article 26 of the Constitution.[19]As is consistently held, Article 93 paragraph 4 of the Constitution stipulates that if it is a law that always has the external elements required for its existence, the courts have the power to review solely the conformity of the content of the law with the Constitution, not however also the observance of the procedural provisions which are established by the Constitution for the adoption of laws (as are also the provisions of Articles 73 paragraph 3 and 74), where control for maintaining these provisions is in the hands of the Legislative Body.[20]

Theoretically, however, special provisions in the constitutional text, such as the requirement for a bill submitted to be voted on in certain cases to be accompanied by a special report,[21] could be the subject of judicial review (Gerapetritis, 2012). Such a check in practice however does not take place. The only matters subject to judicial review are if the law has been published correctly in the Government Gazette and if

[17] See Article 93(4) of the Gr Const 'The courts shall be bound not to apply a statute whose content is contrary to the Constitution'.

[18] See for another perspective, Vlachopoulos, 2019.

[19] CoS [GC] 71/1929, 27/1931, 380 /1932, 543/1934, 611/1945, 1778/1963, 1270/1977, 1852/1977, 4129/1980, 3086/2012; Venizelos, supra note 8, 139-143.

[20] See, *inter alia*, CoS 1852/1977, 665/1978, 3845/1980, 4129/1980, 902-3/1981, 1721/1991, 2185, 2927/2004, 444/1995, 1686, 1913/2003, 309/2010.

[21] See, for example, Article 75 para 5: A Bill which entails expense or a reduction in revenues is not introduced for discussion if it is not accompanied by a special report on the manner in which these costs will be covered, and signed by the competent minister and the Finance Minister.

it bears the signature of the President of the Hellenic Republic. For every other form of control that may be related to formal defects of the law, that is to say, defects in the legislative procedure, it is accepted that it may be undertaken by the President of the Republic according to Article 42 paragraph 1 of the Constitution, who may refuse to issue and publish a bill that has been voted for and refer the draft back to Parliament (Chrysogonos, 2022). Such an event has, however, yet to occur.

The exception to the rule of being judicially immune from review, that of the so-called *interna corporis* of Parliament, are qualified majorities provided for by the Constitution for the adoption of a law. For example, Article 28(2) stipulates that '*Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organisations when this serves an important national interest and promotes cooperation with other states. A majority of three-fifths of the total Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement*. With regard to the constitutional provision in question, it has been accepted by the Plenum of the Council of State[22] that the court may review if the text in question is an international treaty that assigns powers to international organisations and thus, if, in this case, the qualified majority required for its passage under the Constitution has been observed. That said, there is also contrary case law according to which qualified majorities envisaged by the Constitution for the passage of a law are not judicially reviewed since they are a part of the parliamentary procedure which is maintained for the passage of a law.[23] Taking the above under consideration, it must be concluded that institutional issues are not the subject of judicial review. Case law often adopts the theory of governmental practices in order to refrain from such a control.[24] Even for a referendum, the force and results of which are reviewed under Article 100 of the Constitution by the Special Highest Court, as already examined, the review is restricted to observing the procedures set out in law and ensuring that the results are not compromised.[25]

III. Procedural aspects

1. The admissibility of the application

Given that the system of judicial review of constitutionality that applies in Greece is, as mentioned above, concrete, incident, and diffuse, the claim of breach of the Constitution may not be the only one, but also other claims on matters of the legality of the administrative act and observance of the administrative procedure may be made in the same application. For this research, however, the claim of infringement of the Constitution suffices for the decision to be considered a constitutional case. It should be noted also that even if the claim concerns the provision of a formal law which is contrary to the Constitution, it is advanced with the request for annulment of the administrative act which was issued in application of the unconstitutional law (Venizelos, 2022). In other words, the applicant's request is for the annulment of the

[22] CoS [GC] 668/2012, para 27, 2304/1995, *cf* Special Highest Court 11/2003.
[23] CoS [GC] 1270/1977 and 902, 903/1981, CoS 2185/1994.
[24] See, for example, CoS [GC] 2787/2015.
[25] *cf* Special Highest Court 5/2017.

unlawful administrative act, whose illegality stems from it being issued based on a law that breaches the Constitution (Vegleris, 1961).
In the case that more arguments are put forward, without all concerning an infringement of the Constitution, the principle of procedural economy needs to be factored in. Thus, the court examines the claims and if it views one of them as well-founded it will accept the legal remedy without addressing the rest of them. Under this perspective, the claim of infringement of the Constitution is always examined first. It is always however preceded, in every instance, by the examination of the admissibility of the legal remedy since, as already mentioned, the judicial review of constitutionality is incident and therefore for this claim to be examined, the legal remedies should be admissible, that is, within the deadline, in conformity with the procedural law and with legitimate personal interest (Venizelos, 2022).

2. Forms of concentration in cases of declaration of unconstitutionality - By Constitution

Under Article 100(5) of the Constitution, when a section of the Supreme Administrative Court (CoS) or chamber of the Supreme Civil and Criminal Court (*Areios Pagos*) or the Court of Audit judges a provision of a statute to be contrary to the Constitution, it is bound to refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court under this article. The plenum is assembled into judicial formation and decides definitively, as specified by law. This constitutional obligation to refer a chamber of the Supreme Court to the plenum should the chamber amount to unconstitutionality does restrict the system of diffuse constitutional review, though it does not restrict again, in the future, the section from adopting a contrary position from that of the Plenum on the constitutionality of the same legal statute. Under this framework, in cases where a chamber of the CoS refers to the plenum, only the decision of the Plenum is measured for the research.

3. By the law

Other forms of special procedures that attempted to concentrate the diffuse system of judicial control of constitutionality were adopted by Law 3900/2010. Under Article 1 of said law, any kind of legal remedy or means before any ordinary administrative court may be introduced to the CoS by an act of a three-bench commission comprising its President, the longest-serving Vice President, and the President of the competent relevant chamber, upon application by one of the parties or by the General Commission of administrative courts, when an issue of more general interest appears with consequences for a wider circle of persons. Such issues of more general interest should be considered to essentially be issues pertaining to the unconstitutionality of a legislative provision.
Referring the case to the Supreme Court does not, despite this, alter the authority of

the court, which once again cannot abolish a law on the grounds of it being contrary to the Constitution. It may only be accepted that it may contribute to creating uniform case law, without however explicitly envisaging that, following the ruling by the CoS. The lower courts that take up similar cases are not prohibited from adopting a different opinion on the question of conformity or not with the Constitution (Vlachopoulos, 2019). This is because the judicial review of the constitutionality is concrete and specific and therefore, the particular facts of each case must be taken into consideration when applying the legal provision. The only instance when under the law an administrative court is bound by the ruling of the CoS is when a case is referred subsequent to a preliminary question addressed to the CoS by the same party.

Article 2 of the same law envisages another procedure for the concentration of judicial review of constitutionality. Under the provision, when an administrative court rules that a provision of formal law, i.e. a bill passed by Parliament, and not a regulatory administrative act issued following legislative delegation, breaches the Constitution without however there being previous case law in the CoS covering that issue, the party which disputes the judgment on unconstitutionality may pursue legal remedies before the CoS, without being required to meet the other conditions set out by law for exercising legal remedies against a judicial decision before the CoS. It should be noted that this is not possible when the administrative court dismisses the plea of infringement of the Constitution. This provides the CoS with the opportunity to promptly address the question of whether the law is contrary to the Constitution or not, thus probably avoiding the necessity for second instance jurisdiction. At the same time, it retains the diffuse review of constitutionality, because the administrative court is under no obligation to refer it to the CoS when no precedent in case law exists for this issue of unconstitutionality. On the contrary, the case comes before the CoS following the issuing of a final decision, assuming that the party wishes to avail themselves of this. So, in light of the above, cases before the CoS following the above procedures of concentration, are measured for the purposes of the research.

IV. Foreign precedents by numbers

1. Gathering the data

As already described, in the absence of a Constitutional Court in the Greek judicial system, the CoS case law is selected for the quantitative measurement. The CoS is competent for various disputes which means that not all the decisions concern constitutional cases. At this point, for a case to be categorized as a constitutional case an interpretation of a constitutional provision must be found in the grounds of the decision. In most of the cases, a claim regarding the constitutional breach is included in the application. Even though, in principle, a court may carry out control of the constitutionality of its motion, in practice the courts exercise that control when such an argument has been made previously by the applicant.

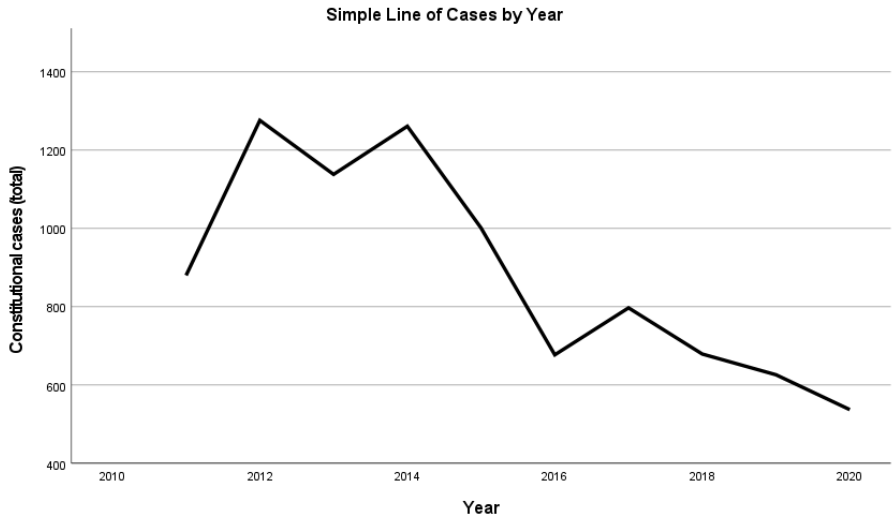
So, the first step for the empirical research that has been made was the gathering of the

constitutional cases of each year between 2011 and 2020. To undertake the research, the author has relied on the court's digital archive, where all judicial decisions are filed.[26] For this search the keyword *Σύνταγμα* (*Syntagma*) which means Constitution was used. The decisions that resulted from the search included at least one reference to an Article of the Greek Constitution. Subsequently, the author checked the text of these decisions to conclude if they concern constitutional cases according to the above criteria. It should be stressed here that whether each one of these decisions was described as constitutional or not essentially depends on the appraisal of the author. Since a decision was defined as constitutional, there was a final check in the grounds of the text for explicit references to foreign precedents.

2. Results

In the first graph, it can be observed the number of constitutional cases each year between 2011 and 2020.

Graph 1: Constitutional cases of the CoS by year (2011-2020)



Source: By the author

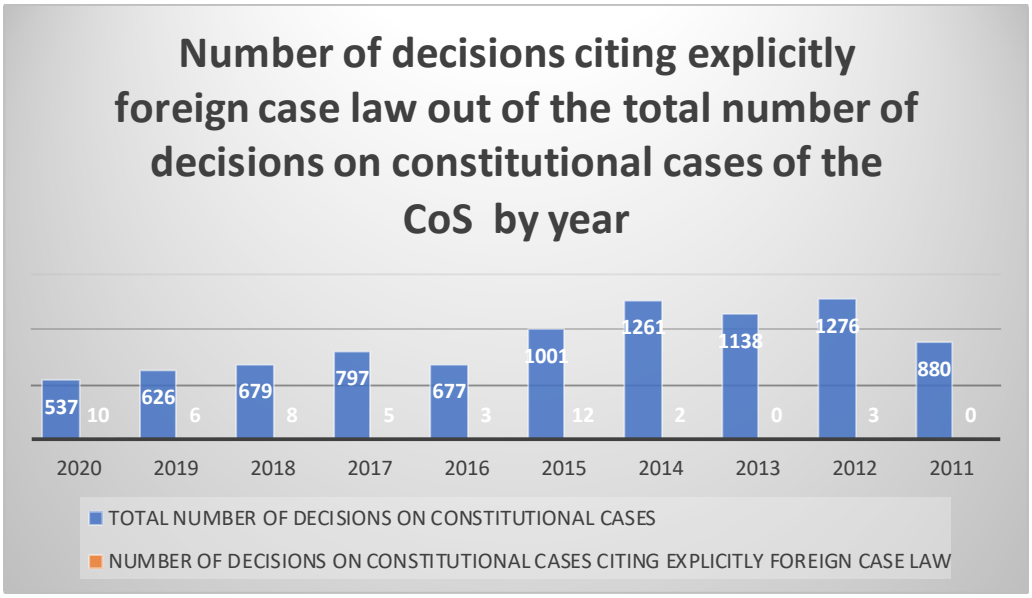
In 2014, constitutional cases were roughly 30% up on those in 2011, while in 2019 cases drop by half. The mechanisms for concentrating control that were set up may have affected the flow in this direction, though they had already been in force in previous years.

The next graph shows the proportion between the decisions with explicit references to foreign case law out of the total number of decisions that resolve constitutional

[26] Official Site of the CoS: https://www.adjustice.gr/

cases. The total number of constitutional decisions that include references to foreign case law is 49 for this period. It must be highlighted that these 49 constitutional decisions include in total numbers 93 citations in foreign case law. In other words, each decision may include more citations to foreign case law.

Graph 2: Number of decisions citing explicitly foreign case law out of the total number of decisions on constitutional cases of the CoS by year

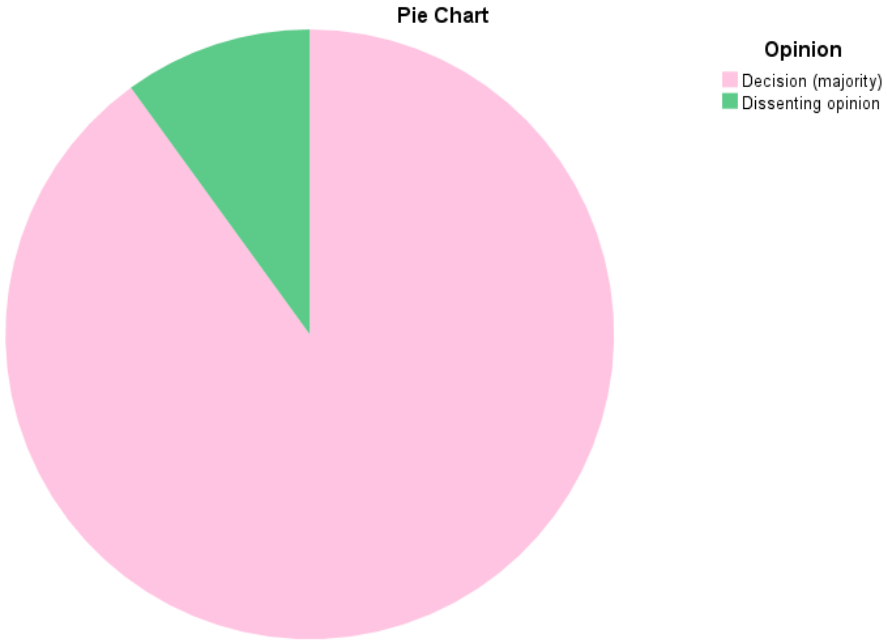


Source: By the author

The proportion of judicial decisions explicitly citing foreign case law as a percentage of the total number of constitutional cases does not exceed 1% in any year. The percentage of such decisions which include an explicit reference to foreign case law is approximately 0.55 %. Very interesting is that in 2014, the year with the most constitutional cases, only two decisions refer to foreign case law. Although, the very next year (2015) the references to foreign case law reached to their peak. Additionally, it is important that the distribution of the references is significantly greater in the last five years compared with the first five years. As can be seen in 2011 there is no reference to foreign case law regarding constitutional issues.[27] In 2020, although the number of constitutional cases has dropped by half, there are 10 judicial decisions citing foreign case law. This shows a clear tendency for the CoS to adopt the practice of referencing foreign case law.

[27] It must be noted that this remark reveals another significant contradiction regarding the cases of the CoS and the adoption of foreign precedents, because, in fact, the Court has all the years plenty of citations to French case law for administrative law issues and mostly in cases that, in this research, has not been characterized as constitutional.

Several factors could explain the scarcity of citations to foreign precedents. Indeed, graduates of law faculties who have passed the written and oral examinations held annually and who have thereafter successfully graduated from the National School of the Judiciary may be appointed as judges. It follows from the combined interpretation of articles 43 and 59 of Law 4938/2022 that neither the appointment nor the promotion of judges requires further postgraduate studies.[28] Career judges though, i.e., the judges that seek a seat on the Supreme Court, may have postgraduate studies abroad and may be familiar with foreign legal orders. However, the scant reference to foreign case law should probably be attributed more to a lack of available time, appropriate infrastructure, and know-how. It is worth noting that for the first time in 2023, assistant positions to the judges for research and documentation were provided by the Law. The next Pie Chart reveals the distribution of the total number of citations (93) between the majority of the court and the dissenting opinions. Only 7 citations to foreign case law can be found in the dissenting opinions.



Source: By the author

At this point has to be explained that each judicial decision must be specific and thoroughly reasoned, while the dissenting opinion must be published, together with the names of the judges who dissented.[29] Concretely, the text of court decisions is

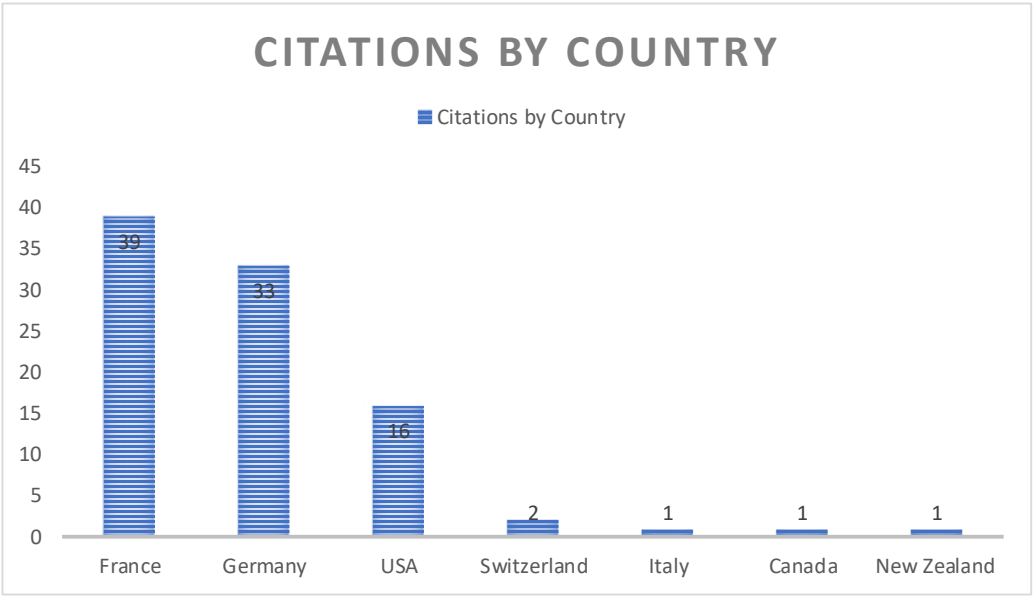
[28] Promotions are carried out following the decisions of the Supreme Judicial Council, according to the Article 90 Gr Const. The Supreme Judicial Council may take scientific training into consideration, mostly for the higher-rank positions (see Article 59 Law 4938/2022), but still familiarity with foreign jurisprudence is not typically necessary.

[29] Article 93 para 3 Gr Const.

separated into the grounds and the operative parts. The grounds contain the major premise and the minor premise in judicial reasoning. The court interprets the law in the major premise, while in the minor premise, the specific facts of the case are applied to the law which has previously been interpreted (Stamatis, 2009). The operative part is plain and pertains to whether the court accepts or dismisses the application without repeating the reasons for its decision which have been analysed in the reasoning part of the grounds for the decision and with no reference to the dissenting opinions. It should be noted that confirmation of the law is contrary to the Constitution is always to be found in the grounds for the decision because the court has no jurisdiction to abolish *erga omnes* a legal provision. In such cases, in the operative part of the decision, the Court annuls the administrative act which derived from the unconstitutional legal provision.

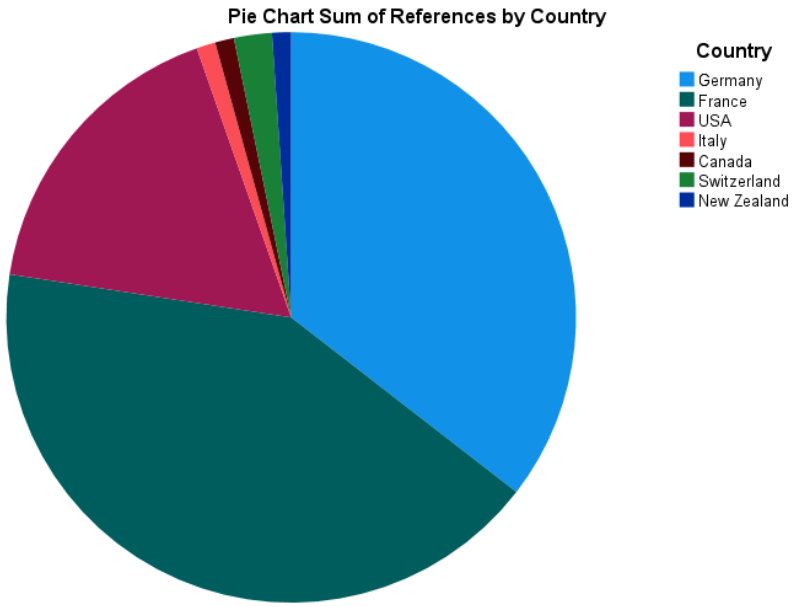
The graphs that follow show the geographical distribution of the references to the foreign case law.

Graph 3: Distribution of the citations in foreign case law by country



Source: By the author

Pie Chart 2: The proportion of citations by country to the total number of citations in foreign case law



Source: By the author

The influence of the French legal order is quite apparent, as the references to this exceed every other one. This is followed by German case law. In any case, the large percentage differences among the countries demonstrate the tendency of the CoS to closely monitor developments in French and German case law in contrast to the paucity of references in the constitutional courts of other countries, which might be seen as incidental. This is most likely because the Greek legal order shares a wealth of characteristics with those two jurisdictions since after all, it has its origins in those. In particular, the Greek state takes its *terminus a quo* as 1821, the year when the Greek Revolution was declared against the Ottoman Empire (Mazower, 2021). The Protocol of London (1830), signed by the three Great Powers (the United Kingdom, France, and Russia), officially recognized Greece as an independent and sovereign state. The arrival of King Otto in Greece on 25 January 1833, introduced a period in which the Regency, comprising Bavarian politicians as well as legal scholars, undertook governing the fledgling Greek state, playing a critical role in formulating Greek law. Georg Ludwig von Maurer, Professor of German Private Law and the History of German and French Law in the Law Faculty of Munich University (1826–1830), first President of the Administrative Region of Upper Bavaria (1830) and Councillor for life of the King of Bavaria (1831) was a particularly important figure who shaped the whole of the Greek legal order, where both German and French influences can be discerned (Kotronis, 2021).

During the early functioning of the newly-established state, certain disputes became apparent, usually called 'cases' or 'administrative cases'. These disputes involved rights that the government enjoyed over the *εθνικά κτήματα*, or national lands, and the revenue from the national income. The resolving of the disputes was the responsibility of the Administration (or judicial boards). The handful of civil courts that operated were responsible for cases involving disputes between private individuals (Symeonidis, 2023). *Areios Pagos* was established by royal decree in 1834, taking its name from the eponymous ancient court. At roughly the same time the Court of Audit and the Council of State were established, which today also are considered as Supreme Courts according to the Constitution.[30] The CoS was structured on the paradigms of the French *Conseil d'État* (Amaral-Garcia 2015), taking on their present form around a century later, as it had been previously abolished under Article 101 of the 1844 Constitution (Vlachopoulos, 2019). Indeed, it is the case that even today the CoS cites the case law of the French Council of State and Constitutional Council to resolve issues in administrative law disputes.

V. The emergence of the Existenzminimum protection in the Greek case law

Among the citations to foreign case law, the most interest is concentrated in German case law. The CoS is targeted to a specific category of the case law of the German Federal Constitutional Court that concerns the protection of minimum level of subsistence (*Existenzminimum*) (Leijten, 2015), or decent living (*axioprepis diaviosi*) as it is attributed in Greek. In other words, the absolute majority of the citations in German case law concerns the same decision.[31] So, even from a quantitative perspective, it can be concluded that the German case law served as a guiding horizon for the CoS to set limits to the restrictions on social rights for budgetary reasons.

The systematic use of a specific foreign decision is a practice that has never been noticed before. The citations to the *Existenzminimum* case law outnumber any other reference (31 out of 33 in German case law, 31 out of 93 in total number of citations in foreign case law). An indicative list would show that the idea of judicial protection of decent living moved from the dissenting opinion of the CoS in the first five years to the majority since then.[32]

It should be pointed out that in the first half of the decade being examined the protection of decent living appears in the case law of the CoS on some occasions with explicit reference to the case law of the ECtHR on Article 3 ECHR and 1 of the First Additional Protocol to the ECHR.[33] When reference to ECtHR case law is made, the CoS ruling does not place the law as being contrary to the Constitution. In contrast, when the CoS adopts the German case law, the law is considered to infringe the

[30] See also Article 100 (1v) Gr Const.

[31] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Febr. 9, 2010, Hartz IV, 1 Bvl 1/09, 1 Bvl 3/09, 1 Bvl 4/09.

[32] See CoS [GC] 668/2012 (dissenting opinion), 1283-86/2012 (dissenting opinion), CoS 3410/2014, 3663/2014, 1031-35/2015 and 3783/2015.

[33] CoS [GC] 668/2012.

Constitution (Christoforidou, 2021). This 'internal' conflict between the members of the CoS is, finally, resolved, and it is German case law's interpretation that prevails, at least during the second half of the time period of examination.

In light of the above, as cornerstone served the 2287-90/2015 decision of the Plenary sitting of the Council of State, which states:

In any event, the reduction of pensions can not infringe that which, according to the above, constitutes the constitutional nucleus of the social-insurance right, to wit, granting the pensioner such benefits as to allow them a decent life, not merely ensuring their physical existence (food, clothing, housing, basic household goods, heating, health and medical care of all levels), but also their participation in social life in a way which does not, in any case, depart essentially from the equivalent conditions of their working life (*Bundesverfassungsgericht of 9.2.2010, 1 Bvl 1/09, 1 Bvl 3/09, 1 Bvl 4/09, especially Rn 135*).[34]

The above decision is the first that recognizes the right to a decent living in a Plenary Session resulting in the violation of the Constitution because of the adoption of the austerity measures. The CoS processed systematically the *Existenzminimum* case law introducing in the Greek constitutional order a new socioeconomic right, its content, and definition. Thus, the adoption of German case law helps to bolster the opinions the CoS sets out while at the same time covering a lacuna in Greece's constitutional case law, which for the first time was called upon to staunchly defend social rights. The German social system is extremely advanced in comparison with its Greek counterpart, and consequently, it is hardly surprising that the Greek judge would look to a system already established to ensure constitutional protection.

On the other hand, the socio-political context in which the judicial struggle to protect decent living takes place should not be overlooked. Within Greek society at that time, poverty was growing, social inequalities were becoming more pronounced and the political pressures for the implementation of the austerity measures were intensifying. Despite that the system of judicial control of constitutionality is declarative, it was considered that decisions that found constitutional infringement of the austerity

[34] Indicatively, this position is repeated in the CoS [GC] 1889-91/2019:
'In any event, the adopting of this new system by the lawmaker, which, according to the foregoing, might also lead to a reduction in the pensions already granted but also to a reduction in future pensions in relation to the previously applicable status, is subject to the limitations arising from special constitutional provisions and the guarantees which these establish (See decisions 1-4/2018 of the Special Court, Article 88 para 2 of the Constitution) and cannot infringe that which constitutes, according to the above, the constitutional bedrock of the right to social insurance, that is to say, the granting to the pensioner of benefits according to their contributions based on total earnings and the number of years insured and which are sufficient to allow them to live with dignity, ensuring those terms not merely of physical existence (food, clothing, housing, basic household goods, heating, health and medical care of all levels), but also their participation in social life in a way that does not essentially differ from the equivalent conditions of their working life (see Gr Const 2287, 2288/2015 (Plenary), decision of the Bundersverfassungsgericht of 9.2.2010, -1 BvL 1/09-, -1 BvL 3/09-, -1 BvL 4/09-, especially Rn. 135), these benefits are always guaranteed by the State'.
The same reference can be found also in other decisions, such as CoS 660/2016: 'In any event, the reductions in pensions cannot infringe that which constitutes, according to the above, the constitutional bedrock of the right to social insurance, that is to say, the granting to the pensioner of such benefits which allow them to live with dignity, ensuring the terms not merely of physical existence (food, clothing, housing, basic household goods, heating, health, and medical care at all levels), but also their participation in social life in a way that does not essentially differ from the equivalent conditions of their working life (decision of the Bundersverfassungsgericht of 9.2.2010, -1 BvL 1/09-, -1 BvL 3/09-, -1 BvL 4/09-, especially Rn. 135)'.

measures would endanger the financial bailout of the country and would lead to disorderly default with catastrophic results. In other words, it was considered that judicial decisions would have a severe political cost (Venizelos, 2022). This would be considered a serious accusation against the CoS, given that the Greek judicial system traditionally and from the point of view of the Greek legal culture is completely separated from the political decision-making.

For example, Article 89(4) explicitly prohibits the participation of judicial offices in the government. The promotion of a judicial officer is a political decision only for the posts of President and Vice President of the three supreme courts (the Supreme Administrative Court (CoS), the Supreme Civil and Criminal Court (*Areios Pagos*), and the Court of Audit) (Iliopoulos-Strangas & Georgitsi)[35]. In any event, the same constitutional provision stipulates that the tenure of the President of the Supreme Administrative Court, the Supreme Civil and Criminal Court, and the Court of Audit, as well as the Public Prosecutor of the Supreme Civil and Criminal Court and the General Commissioners of administrative courts and of the Court of Audit may not exceed four years even if the judicial officer holding this office has not reached the retirement age. Any period remaining until reaching the retirement age is calculated as an actual pensionable service.

In general, under Article 87 of the Constitution, judges enjoy functional and personal independence, which is ensured also through their special remunerative status[36], according to which their remuneration should be commensurate with their office. As set out in the aforementioned provision, in the discharge of their duties, judges are subject only to the Constitution and the laws and under no circumstances whatsoever are they obliged to comply with provisions enacted in violation of the Constitution. Other aspects of functional and personal independence, that safeguard the observance of the Constitution and the real independence from the Government, is the irremovability, the compulsory retirement from the service on the basis of the age limit set out in the Constitution, and the provision that the inspection of judges is carried out by judges of a superior rank and may be dismissed only following a court judgment.

The adoption of German case law, therefore, can be seen as a form of undeclared resistance to these measures as well as a form of judicialization of political life (Kaidatzis, 2021). From this viewpoint, in resorting to the explicit harmonization of German case law, the CoS finds the legitimization in question to juxtapose it with the policies adopted. Thus, it is 'borrowing' the prestige and appeal of the German Federal Constitutional Court, whose gravitas has long been acknowledged among the academic community of Greek constitutional theory. It, meanwhile, implicitly and tacitly attempts to highlight that 'lending' is not only about the implementation of the austerity measures in the Greek legal order as agreed between the country and its lenders with the purpose of the bailout, but also about the respect of constitutional values, rules and principles that European countries share under a common legal

[35] Article 90 paragraph 5 Gr Const.

[36] For the special remunerative treatment see judicial decisions of the Special Court Article 88 Gr Const no 88/2013 and 1/2018.

culture regardless if they are lenders or borrowers.
What succeeded through this practice of the CoS is the actual fertilization of a new right for the Greek constitutional order, the right to a decent living, which finally succeeded in being adopted in the Constitution after the amendment of 2019. The last undoubtedly was a result of the targeted reference to the German case law. Up until the first decision which mentions the *Existenzminimum* case law, CoS [GC] 668/2012 (dissenting opinion), the protection of decent living had gained little serious traction either in constitutional case law or constitutional academia (Sotirelis, 2000). Besides, concerning constitutional theory, up to that point, there were serious reservations about the judicial adjudication of social rights (Manesis, 2007; Papadopoulou, 2022).

VI. Conclusion

There are two major distinctive features of the references to foreign precedents during the period under discussion. The first is the intensification and systematization of the use of foreign case law. The second is that this discourse among judges has moved on different levels, not just on the legal but also on a political level. Through adopting the German case law of the *Existenzminimum*, the CoS has avoided the accusation of judicial activism even though exercised control of constitutionality on austerity measures by using the concept of decent living which is not yet envisaged explicitly in the constitutional text.
The Greek legal culture, both at judicial and academic levels, has not developed systematically the comparative constitutional perspective regarding foreign precedents. Due to previous studies abroad, judges and academic researchers are most familiar with French and German case law. Besides, the Greek legal order was established under the influence of these two foreign legal orders. Still, in constitutional cases, references to foreign precedents, even to French and German case law, are extremely rare. In the time that is examined, what is observed is that, in the constitutional cases of the CoS, citations in foreign case law are increasing as the financial crisis progresses. It seems that the CoS seeks a guiding horizon to deal with the austerity measures and to succeed a balance between the international obligations of the Country to their lenders and the protection of social rights.

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