Constitutional Mithridatism: Fundamental Rights in Times of a Pandemic

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Measures to combat the coronavirus pandemic have limited a number of fundamental rights to an unprecedented extent. The rights of economic activity, movement, assembly and religious worship have been subjected to the most severe restrictions.

Here, however, lies the great danger of the gradual consolidation of a constitutional mithridatism, which will make us addicted to the idea of losing our fundamental rights for the sake of protecting superior legally protected rights. Mithridatism is the practice of protecting oneself against a poison by gradually self-administering non-lethal amounts. The word is derived from Mithridates VI, the King of Pontus, who so feared being poisoned that he regularly ingested small doses, aiming to develop immunity. Recently, however, the term has resurfaced in the context of the coronavirus pandemic and the adoption of emergency measures restricting fundamental rights. In this context, two points should be stressed: first, the recent measures are justified to protect the health of a large number of our fellow citizens, but they are an exceptional case that cannot be repeated in the face of any other 'enemy'. And, second, even in dealing with the coronavirus pandemic, the rule of law sets inviolable limits. It would be, for example, obviously unconstitutional in European liberal democracies to place cameras in public places and create a new Big Brother.

The issue is similar (without, of course, being the same) to that resulting from modern terrorism, especially after the attacks of 11 September 2001. At that time, there were many who were in favor of a super right to security and of the complete abolition of a series of individual rights, like the right not to be tortured, to human dignity, to communications confidentiality, and the right to a fair trial, in order to protect humanity from terrorism. But the European legal order resisted these attempts. The European Court of Human Rights (ECtHR) declared (Gäfgen v. Germany, 22978/05, 2010) that torture was not justified even for the disclosure of the most heinous crimes, while the German Federal Constitutional Court (1BvR 357/05, 2006) ruled as unconstitutional (contrary to human dignity) a provision of the German Aviation Security Act allowing the armed forces to shoot down aircraft intended for use in acts of

terrorism (this specific case involved an aircraft with crew and passengers that had been hijacked and flown to a residential area).

This paper intends to deal with the following questions: Can the suspension of fundamental rights in order to tackle the coronavirus pandemic threaten the health of democracy? Constitutional mithridatism refers to the danger of tolerating any restrictions on our rights, even after the end of extraordinary circumstances. Because even after their end, there is a risk that these restrictions on individual freedoms, such as our privacy, will continue or intensify with the use of new technological applications. How do we defend our legal culture?

Key words: mithridatism, pandemic, restrictions, human freedoms, fundamental rights, coronavirus.

I. What does Mithridates have to do with Modern Constitutional Law?

As was often the case with Kings, Mithridates VI (120-63 B.C.),the last King of Pontus in Hellenistic times, feared that his enemies would poison him. For this reason, he gradually administered to himself an increasing non-lethal dose of poison, aiming for his body to become addicted and slowly develop immunity against the poison. It is said that after his defeat by Pompey, when Mithridates wished to commit suicide with poison, he failed, because he had acquired full immunity (World History Encyclopedia, 2017). Thus, he begged a mercenary (in a different version of the story it is one of his servants) to kill him with a sword. In another version, he was unable to kill himself with poison, because he had used at least half of the poison he always had with him to kill his two daughters, with the further consequence that the rest was not sufficient for his suicide. The strategy Mithridates used not to be poisoned by enemies led him to not be able to choose the way he wished to die (Mayor, 2010; Tsatsakis et al., 2018).

The method of Mithridates went down in history and is known by the term 'mithridatism'. This term is used metaphorically to denote those cases when a person gradually becomes addicted to something negative, so that he accepts it and does not perceive its negative character. That is, in other words, the gradual habituation and acceptance of dangerous and negative situations and qualities. The term 'mithridatism' is used very often, with various reasons and in different relevance each time, not only in political vocabulary and in media articles, but also in legal theory. Most recently, in 2020, this term was revisited in the context of the COVID-19 pandemic and the adoption of emergency measures limiting fundamental rights. It was specifically written that there is "the great danger of the gradual consolidation of a 'constitutional mithridatism', which will make us addicted to the idea of losing our fundamental rights for the protection of superior legal goods ..." (Vlachopoulos, 2020a).

II. The Modern Dimension: 'mithridatism' and the measures to tackle the COVID-19 pandemic.

A. Health Protection as the Foundation of Restrictive Measures.

The Greek Constitution enshrines the right to health and to life in more than one of its provisions. Article 5, Paragraph 2 states emphatically that those residing on Greek territory enjoy the absolute protection of their lives. Furthermore, and in relation to the right to health, Article 21, Paragraph 3 provides that the "state cares for the health of citizens", while Article 5, Paragraph 5 states that everyone "has the right to health protection". Therefore, the adoption of positive measures on the part of the state to protect the health of citizens is an explicit constitutional imperative. By invoking the abovementioned constitutional provisions, it is justified in principle to temporarily restrict certain individual rights in the interest of curbing the spread of acute contagious diseases (Vlachopoulos, 2020b; Kontiadis, 2020, Papatolias, 2020). Thus, in order to address the COVID-19 pandemic, the economic freedom (Article 5, Paragraph 1), the freedom of movement (Article 5, Paragraphs 3 and 4), the right to privacy (Article 9A), the right to assembly (Article 11) and the freedom of the religious worship (Article 13, Paragraph 2) were, in principle, restricted permissively, as is the absolutely held view in theory (Doudonis, 2020; Karavokiris, 2020). Let us not forget that the existence of life is a prerequisite for the exercise of all human rights and furthermore that the state "is entitled to claim from all citizens the fulfillment of the debt of social and national solidarity" (Article 25, Paragraph 4). The temporary restriction of some fundamental freedoms is a preeminent manifestation of social and national solidarity in order to deal with a pandemic and save the lives of our fellow human beings.

B. Limitations of Restrictions. Human Dignity, Equality Before the Law, Proportionality and the Core of Human Rights.

However, the above does not mean in any way that the invocation of coronavirus justifies the adoption of any restrictive measures. In fact, there is the danger of gradual consolidation of a constitutional mithridatism which will make us addicted to the idea of losing our fundamental rights for the protection of superior legal goods. Three points should therefore be highlighted. First, the recent measures may be an exceptional case of a temporary nature. And here is what has been stated on a more general level: "[T]oxic treatments are necessary in some cases, but they should not go on for long as if it were a dogma" (Council of Europe, 2020). Second, no other legal good and no other danger, either political or economic or of any other character, can justify such measures. And, third, even in dealing with the coronavirus pandemic, the rule of law, as it is signified by the principles of human dignity, equality before the law, proportionality, and the obligation to respect human rights, sets inviolable limits. It would be, for instance, unconstitutional in Greece to place cameras in public places and create a new "Big Brother" with an intent to ensure that those who violate the quarantine are caught and punished. It would be

similarly unconstitutional to allow mass surveillance of telephone and electronic communications of citizens. It is one thing to prosecute and punish those who violate the restrictive measures to curb the spread of COVID-19 by revoking the confidentiality of communications in individual cases with judicial approval (as defined in the provisions of Article 19 of the Greek Constitution and the criminal law in Greece), but it is a completely different issue to revoke the confidentiality of communication for the whole society or for some groups of citizens.

In Germany, Lepsius (2020) argues it would be unconstitutional to make exercise of individual freedom of movement conditional on the prior permission of the administration. Oliver Lepsius also questions the logic of closing bookstores and flower shops, and strongly objects to the ban introduced in Bavaria, a federal state of Germany, on the use of public benches. To him, these measures are not only an "insult to reason" (Ger. "Beleidigung des Verstandes") but also a "loss of legal logic" (Ger. "hat den juristischen Verstand verloren").

A joint statement on the principles of the rule of law in times of COVID-19 from 2 April 2020 by sixteen member states of the European Union (Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Spain, and Sweden) argues for the legality of the extraordinary measures to protect their citizens and overcome the crisis. However, they also express concern about violations of the principles of rule of law, democracy and fundamental rights that may result from these emergency measures. As stressed, urgent measures should be limited to what is strictly necessary, they should be proportionate, temporary in nature, be regularly reviewed, not restrict freedom of expression, and respect obligations under international law.

It is unquestionable at this point that the effort to tackle the coronavirus pandemic will feed the constitutional dialogue on human rights for a long time. The issues that may arise are many and of different natures. For example, is compulsory medical examination or compulsory vaccination consistent with national Constitutions worldwide, e.g., in Greece, USA and Brazil (Mariner, Annas and Parmet, 2009; Papaspyrou, 2019; Pierik, 2018; Chemerinsky and Goodwin, 2016; Holland, 2012; Bustamante, Meyer and Tirado, 2020)? Is an employer legally allowed to require the employee to have medical exams or to produce a certificate showing that she is not a carrier of the coronavirus? Can an employer disclose medical information about his employee (e.g., that she is/was infected with COVID-19 or that there is such an incident in her family) to other employees or clients of the company? Is it legally allowed to ask anyone entering a country for a medical certificate, even if it is for travel within the European Union? This study does not aim to answer all these questions and many similar ones that will arise in the future. Instead, its main focus is the starting point from which we can begin addressing them. Will it be decided in the name of the protection of public health that any restriction of individual rights

and freedoms is permitted or, on the contrary, will it be accepted that the legal order sets inviolable limits, as they arise mainly from human dignity, equality before the law, proportionality of measures, and respect for human rights? The answer to this dilemma will determine the resilience of fundamental rights and the rule of law in emergency situations. As the Council of Europe (2020) points out: "The virus is destroying many lives and much else of what is very dear to us. We should not let it destroy our core values and free societies".

C. Constitutional Case Law on Pandemic Issues. From the Bubonic Plague of 1900 to the COVID-19 of 2020.

The constitutionality of the measures taken to combat pandemics has preoccupied jurisprudence since the first year of the twentieth century. More specifically, in 1900 when bubonic plague occurred in San Francisco, U.S. public health authorities ordered citizens of Asian descent to be vaccinated with an experimental vaccine that caused severe side effects. As this was ruled unconstitutional by a U.S. federal court in *Wong Wai v. Williamson* (103 F. 384, 1900), San Francisco health authorities quarantined the city's Chinese quarter. However, this measure was also ruled unconstitutional by a U.S. federal court in *Jew Ho v. Williamson* (103 F. 10, 1900). In particular, it was declared that this order was in breach of the principle of equality, since it limited quarantine only to the Chinese. The language used by this court was particularly unforgiving, ruling that the quarantine order had been the result of "an evil eye and an unequal hand" (Mariner, Annas and Parmet, 2009). However, five years later, in 1905, a related case was assessed by the U.S. Supreme Court. The court in *Jacobson v. Massachusetts* (197 U.S. 11), ruled that the law providing for the mandatory vaccination of the population to treat smallpox and imposing a fine of $5 (about $149 in 2021 standards) for violations was constitutional. In particular, the Court justified the constitutionality of the restrictions on individual liberty on the grounds that they were reasonable and necessary for the protection of public health. In the same ruling, the Supreme Court recognizes that it would be constitutional to quarantine an American citizen arriving in a U.S. port by ship with cases of yellow fever or Asiatic cholera. This citizen could be constitutionally held in quarantine on board such vessel, or in a quarantine station, until the risk of the disease spreading among the community disappeared.

From the beginning of the 20th century in the United States, let us move to Europe in 2020. The restrictive measures in response to the COVID-19 pandemic have already begun to become the subject of judicial review, particularly at the level of temporary judicial protection. The Greek Council of State (The Supreme Administrative Court in Greece) in its 49/2020, 60/2020 and 2/2021 decisions rejected application of temporary judicial protection concerning restrictions on religious ceremonies in churches and other places of religious worship. These applications were rejected on the grounds that there were overriding reasons of public interest, which consisted of safeguarding human health (Androutsopoulos, 2021). Also, the 263/2020 decision of the Council of State rejected a re-

quest for temporary judicial protection, which was directed against the prohibition of gatherings of more than four persons on the anniversary of the student uprising against the military dictatorship in Greece (17 November 1973). However, those decisions concern remedies for temporary judicial protection and do not constitute the final judgment of the Court on the legality of the measures taken.

In Germany, also in early April 2020, the Federal Constitutional Court (1 BvR 755/20, 2020) rejected an application for temporary judicial protection directed against Bavarian regulatory acts to protect the public from COVID-19. Instead, the Court accepted that the measures taken did indeed drastically interfere with the applicant's individual freedoms, such as his ability to build relationships and to demonstrate or create music with others. Generally speaking, the disputed provisions in Bavaria significantly limited direct physical contact among people. Facilities where citizens gathered were closed and people were prohibited from leaving their residence without a valid reason. The Court weighed the opposing interests and accepted that the applicant's interests were important, but not to such an extent as to outweigh the constitutional obligation of the state to protect human life and health. Finally, the Court took into account that the restrictive measures are of temporary effect and provide for numerous exceptions in their application, and that the imposition of penalties for infringement, which is within the discretion of the administration, takes account of any significant individual interests.

In related decisions, the German Federal Constitutional Court (1 BvQ 28/20, 2020) was asked to decide on a request for temporary judicial protection against the ban on a mass during Easter. The Court accepted the applicant's contentions that church attendance is a fundamental element of the Catholic faith which cannot be replenished in other alternative ways, such as by individual prayer or by broadcasting the mass on the internet. However, the Court accepted that in the context of weighing the opposing interests, the state obligation to protect human life prevails. Most importantly, the concluding remark by the Court is that, due to the intense intervention in the religious worship of believers, strict application of the principle of proportionality is required. This means that the ban on religious gatherings should be continuously reviewed based on new data pertaining to both the spread of the virus and the capacity of the health system in order to determine whether the ban could be replaced by less burdensome measures.

In another decision, the same Court (1 BvR 828/20, 2020) in considering the prohibition of gatherings in the German federal state of Hesse held that the refusal of the Hessian authorities to allow a gathering on the grounds that the relevant legislation prohibited all gatherings without exception was unlawful. As the German Federal Constitutional Court ruled, the legislation of Hesse did not establish an absolute ban but gave the competent bodies –in view of the constitutional protection of the assemblies under Article 8 of the German Constitution – discretion, which was not used in the case in question.

In fact, a little later the same Court (1 BvQ 44/20, 2020) ruled in relation to a decree of the German federal state of Lower Saxony which strictly prohibited gatherings in churches, mosques, synagogues, and other places of religious worship that exceptions should be allowed in individual cases, by request and subject to compliance with the necessary sanitary measures.

In France, the French Council of State on 18 May 2020 adopted a series of decisions (no. 440366, 440380, 440410, 440531, 440550, 440562, 440563, 440590) concerning a total ban on religious ceremonies in relation to the COVID-19 pandemic. The Court, having stressed the need to balance the individual right of religious freedom with the protection of public health, ordered the relevant decree to be amended and the absolute prohibition to be replaced by less stringent measures, taking into account in particular that the same decree in other cases permitted gatherings of less than ten persons.

Finally, in the United States, the Supreme Court in *The Roman Catholic Diocese of Brooklyn, New York, Applicant v. Andrew M. Cuomo, Governor of New York* (20-3590) in proceedings for temporary judicial protection on 25 November 2020, held that restricting the right of believers to assemble in religious ceremonies to a maximum occupancy of either 10 or 25 persons without any further distinctions were not justified.

III. "Mithridatism" and Constitutional Dilemmas.

A. Can the Protection of Human Life justify any Restriction?

It is customary to say that there is no hierarchy among fundamental rights (as well as more generally between constitutional provisions), with further consequence, in the event of their conflict, an attempt to *harmonize* them. But the coronavirus pandemic and the unprecedented restrictions imposed to deal with its spread have raised the question: Is this the case or not? Does human life ultimately constitute a fundamental right which outweighs all the rest?

There is no doubt that human life is the basis of all other fundamental rights of individuals, in the sense that if there is no human being, there is not even a question of exercising the other rights. Moreover, human life is permanently lost, while most other fundamental rights can only be limited temporarily, that is, for a period of time, after which their beneficiary can continue to exercise them. In this sense, when the state's obligation to protect human life collides with its obligation to protect and not restrict other fundamental rights (such as those of economic freedom, freedom of movement, freedom of assembly, and religious freedom), human life does indeed enter with an increased weight into the balancing process. This is even more true in cases of rapidly transmitted diseases that have been classified as a pandemic. In addition, such cases put national health system to the test by requiring a large number of beds in intensive care units.

However, the superiority of human life in the above cases does not mean that in its name any restriction of fundamental rights is justified and that Greek legal order prohibits any type of violation of the right to human life by the state. First, while the Greek Constitution protects human life emphatically (Article 5, Paragraph 2) it also, on the other hand, legalizes the death penalty for felonies committed during war (Article 7, Paragraph 3). Second, although a section of legal theory and jurisprudence accepts that human life begins with the fertilization of the egg or with the implantation of the fertilized egg in the uterus, nevertheless, at the same time it holds that it is not unconstitutional to allow a woman to have an abortion in the first weeks of pregnancy. This position has also been adopted by courts in other countries, such as the German Federal Constitutional Court since the 1990s.

Furthermore, the protection of human life has not been invoked in order to reign in technological developments, even though the most prevalent innovations, such as cars, pose risks to human life. According to the case law of national courts and supranational courts, if there is one constitutional principle that absolutely prevails over all others, it is not human life, but human dignity. For instance, the case law of the ECtHR illustrates that torture by police or other bodies is prohibited, even if it is aimed at revealing the place of detention of a kidnapped child whose life is in danger. As the European Court in Strasbourg noted, the ban on torture and inhumane treatment defined in Article 3 of the European Convention on Human Rights (ECHR) is an absolute value that should not be weighed against any other legal good, even if that good is human life. Human dignity does not allow exceptions, not even in the most difficult and marginal situations, like the fight against terrorism and organized crime, or an emergency that threatens the existence of a nation. As the ECtHR stated in *Gäfgen v. Germany* (22978/05, 2010), "The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned," and arguing that, "The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue".

What is the conclusion from all of the above? While the protection of human life is given increased weight in contrast with other conflicting legal goods and justifies limitations on fundamental rights that may not be justified in any other way, it nonetheless does not automatically justify any and all restrictive measures. State power, when taking steps to protect human life, must move within a framework that is bound by the rule of law and, in particular, by the principles of proportionality, equality before the law, and human values. It must also respect fundamental rights, even those that have to be temporarily restricted. And that is because the Constitution does not protect human life simply as biological existence, disconnected from any other features. It protects it as an aspect of human

dignity, as signified by the other fundamental rights and constitutional principles.

B. Social Rights as a Necessary Complement to Individual Freedoms.

Social rights, like right of residence, right to health and right to social security, were enshrined in constitutional frameworks at a later time than the classical fundamental rights. They begin to appear with the Weimar Constitution of 1919. In Greece, the first social rights were enshrined in the Constitution of 1927. The current Greek Constitution of 1975 provides legal recognition and protection for many important social rights. Despite this, the normative value and necessity of the constitutional guarantee of social rights was strongly contested during the economic crisis in Greece after 2010. Is it by inclusion of social rights in the Constitution that we create a better state, or do we simply *cover* a less pleasant social reality with them? Furthermore, is it by *constitutionalizing* social rights that we *make it a court's obligation* to distribute the available resources, which is primarily a political rather than an economic choice?

It seems, however, that with the coronavirus pandemic and the restrictive measures taken to deal with it, social rights (in the broad sense of the welfare state) are *taking their revenge*. First, the fight against the pandemic is centered on the public health system, which is a fulfillment of the constitutional requirement for the protection of human life and health (Article 5, Paragraphs 2 and 5, and Article 21, Paragraph 3 of the Greek Constitution). Moreover, in all European countries, the issue of short-term and long-term support, including benefits, has been raised for the professions most affected by the restrictive measures, which have been forced to suspend their activities either by law or due to lack of customers. These findings are immediately visible. But what is less visible, and perhaps even more important, is that both the spread of the virus and the measures to tackle the pandemic have highlighted and, to a large extent, exacerbated existing social inequalities. It was pointed out that some social groups are more vulnerable than others in relation to the threat of communicable diseases. As Mariner, Annas and Parmet (2009) state, "The second lesson is that coercive measures invite abuse and exacerbate social divisions. Measures like quarantine, surveillance, and behavior control have historically been targeted at people who are already disadvantaged, those on the margins of society, especially immigrants, the poor, and people of color". And these variations are not just about age. Of course, the most vulnerable groups are those who have been deprived of their freedom (prisoners, psychiatric inpatients, immigrants held in detention centers, etc.) (Council of Europe, 2020). Vulnerability also has to do with the integration and living conditions of social groups, as the case of the Roma demonstrates. It even has to do with someone's financial situation, the profession they practice, and whether they use public or private transport. It is stated that in Barcelona, residents of the lowest-income neighborhoods are seven times more likely to be infected than those in wealthy neighborhoods (Efimerida ton Syntakton, 2020). Further, the cessation of the same professional activity affects a wealthy individual with savings very differently than another individual with low income and no savings. Self-isolation is also experienced differently by a person who

lives in a suburban detached house with a courtyard than by someone who lives in an apartment complex in the city center, possibly without a nearby park that would allow her to exercise. Remote teaching by telecommunication was certainly one of the most positive strategies for dealing with the pandemic. But it requires a computer for every child in a family.

Of course, constitutional provisions are not the most effective means of mitigating social inequalities. Yet, when the state power enacts exceptionally restrictive measures that mostly affect certain groups within the larger population, it must provide benefits and generally take steps to support these groups. After all, this is the notion of true equality in rights. The need for state and social rights "return".

4. Instead of an Epilogue: the End of Mithridates.

When Mithridates decided to ingest gradually increasing amounts of poison, he did it for a legitimate purpose: to gain immunity and protect himself from any enemies who might try to poison him. He gained nothing, however, since at the end of his life he was in danger, not from conspiracies and poisons, but from his enemies' weapons. What is still striking though, is that this tactic backfired: he wanted to poison himself to death so as not to fall into the hands of his opponents, but his intentionally cultivated immunity stood in the way, and he had to ask to be killed with a sword. It seems that *mithridatism* avenged Mithridates in the most tragic manner possible. Can we take similar lessons from c*onstitutional mithridatism*?

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