Chapter 7
The Role of Case Law and the Prospective Overruling in the Greek Legal System

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Abstract The sources of Greek Civil law are traced back to the Roman-Byzantine Law as enshrined in the *Hexavivlos,* hence linked to the legislation of Justinian, Roman law and fundamental principles as expressed in the Pandects. The sources of Greek law are statutory legislation and customs. The former enjoys a clear quantitative and qualitative superiority. With regard to international law, *dualism* is the prevailing theory, while *acquis communautaire* enjoys undisputed supremacy. *Positivisation* of legal principles may be viewed as a means of convergence between *idealism* and *legal positivism*. The legislator enjoys the *legislative prerogative,* not reaching, though, the point of *legislative monopoly*. Judicial rulings do not qualify as a source of law; by contrast, they are only binding as to the specific case under judicial review (*res judicata*). *Precedent* creates no binding effect to any judge; however, any deviation should be attempted *in a sparing manner* for the sake of legal certainty and foreseeability. Settled case law and particularly that of the Supreme Courts may, though, be regarded as an *indirect* source of law with a *quasi legislative* and superior persuasive power. By way of exemption, case law is recognized as a source of law in the field of administrative law where violation of judge-made rules may give reason for annulment. The notion of prospective overruling is not encountered in the Greek legal system where any judicial ruling may only have a *'retrospective'* effect, while statutory law has almost exclusively prospective effect.

A Short Introduction to the History of Greek Civil Law

The Greek law of contracts belongs to the Roman-Germanic family of law. The sources of Greek civil law back to the time of the Greek Revolution of 1821 were

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Roman-Byzantine Law[1] and customary law, which varied throughout the territory of what would be the Greek state after 1830.[2] Following Liberation, Byzantine-Roman law and customary law came to the forefront. French law also survived through the translation of the French Commercial Code that was in force. As to Civil law, the first important measure to be taken was the Royal Decree of 23rd February 1835, which stipulated the parallel force of the laws of the Byzantine emperors as contained in the *Hexavivlos* of Constantine Armenopoulos and of customs[3]; therefore, modern Greek Civil law was intimately re-linked with the law in force at the time of the fall of the Byzantine Empire and even earlier, with the legislation of Justinian, with the very sources of Roman law and those principles which were regarded as the *raison ecrite* of civilized nations and whose contemporary expression was the law of the Pandects then in force in Germany (Stathopoulos/Karampatzos, Contract Law in Greece, 3rd ed., 2014, pp. 24–25; in detail Papadopoulou-Klamaris, Entwicklungsphasen des griechischen Zivilrechts bis zur Einführung des griechischen BGB, in: Festschrift für R. Stürner, Band II, 2013, pp. 1143–1159). The Roman-Byzantine law was not regarded as extraneous by the social *corpus* (as the founding father of the Greek Civil Code, Professor Georgios Balis, stated in his Report to the Head of the Government and the Minister of Justice accompanying the final draft version of the Civil Code on 17th December 1939) and therefore it was argued that no breach with the Roman legal tradition occurred.

The Greek Civil Code was drawn up in the 1930s among political and economic turbulences, but it came into force only after the end of the Second World War, namely on 23rd February 1946, 111 years after the first Royal Decree regulating Greek Civil law. Georgios Balis, a prominent legal scholar and the head of the drafting committee of the Greek Civil Code (hereinafter: CC), argued that there was no reason for the newly established Civil Code to be a mere reproduction of a foreign Civil Code; on the contrary, this legislation ought to reproduce Civil law as applied by that time in the Greek territory subject to adjustment in line with modern social and economic context (Balis in his speech for the ratification of the Civil Code on 15th March 1940; see also Papadopoulou-Klamaris, supra).

The influence of the approach of the Pandects as incarnated in the German Civil Code (Bürgerliches Gesetzbuch, hereinafter: BGB) is another decisive factor to be mentioned. Pecuniary relations were thoroughly modeled after the relevant provisions of BGB, while previous legal tradition stemming from the Byzantine years could not be ignored. Such a feature was the introduction of a wide scale

[1]That was Roman law as developed throughout the Byzantine Empire and insightfully summarized in the so-called *Hexavivlos* of Constantine Armenopoulos in the fourteenth century AD.

[2]Nonetheless, Ottoman law was still effective in the case of certain legal relations, namely those linked with real estate transactions, while French law also applied to commercial transactions, in which Greek traders and shipmen were intensively involved with due to flourishing trade mainly on the islands.

[3]According to this Decree, where customs had prevailed they would take precedence.

of general clauses into CC based upon the principle of equity (i.e. good faith and common usages). Such general rules, though, had long been a feature of Greek customs. Other examples of general rules or clauses are the civil protection of personality (Art. 57 CC), the prohibition of abusive exercise of a right (Art. 281 CC), the possibility of termination or adjustment of a contract due to an unforeseen change in circumstances (Art. 388 CC) etc. – up until recently such provisions were not encountered in BGB.[4]

The Sources of Greek Law

The sources of Greek law *(sources formelles)*[5] are (i) legislation, that is, statutes enacted by the State, and (ii) customs,[6] whose importance though is extremely limited nowadays. This is explicitly envisaged in Art. 1 CC, pursuant to which

> rules of law are incorporated in laws and customs.

Amongst these two sources there is a de facto quantitative and qualitative superiority of positive statutory law (Stathopoulos/Karampatzos, supra, p. 26) due to clarity and certainty provided by the latter.

Moreover, the generally accepted rules of international law (Art. 28 § 1 of the Greek Constitution, hereinafter: C) are rendered a direct source of domestic law (pursuant to the aforementioned constitutional provision). This category encompasses rules of international customary law as well, even stemming from international conventions not yet ratified. By way of contrast, international treaties do not constitute a separate source, since these treaties become domestic law by virtue of their ratification by a law. *Dualism* is predominant in Greece; therefore, international conventions and treaties have to be incorporated into the national law as described above in order to be legally effective. Art. 28 § 1 C reads, namely, as follows:

> The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any

[4]The Greek Civil Code was also influenced –to a lesser extent, though– by the Swiss Code of Obligations and the French Civil Code. Moreover, the decisive influence of the Greek Orthodox Church upon formulating family relations and the relevant provisions of Family law incorporated in the corpus of the Code shall not be overlooked.

[5]These sources are called so only due to the fact that they are established by the competent authority, which has been granted relevant legislative power; so Tsatsos, The Problem of the Sources of Law (in Greek, *Το πρόβλημα των πηγών του Δικαίου*), 1941, p. 131.

[6]*Opinio necessitatis* shall not be encountered in the whole social corpus in order for a custom to be classified as a source of law. It suffices that a *longus usus* is further classified as having a regulatory character by parties involved in this practice; so Tsatsos, ibidem, p. 191.

> contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

Both aforesaid categories of international law are granted a superior formal force in relation to the ordinary laws (*"they prevail over any contrary provision of the law"*; Art. 28 § 1 C); in the hierarchy, namely, they rank after the Constitution and have precedence over common laws (Stathopoulos/Karampatzos, supra, p. 27).

Last, but currently of utmost significance, is the issue of *supremacy* (interchangeably referred to as *primacy*) of EU law over national law. This fundamental principle was not embodied in the founding Treaties of the EU,[7] but was subsequently established by the case law of the Court of Justice of the European Union (hereinafter: CJEU). Pursuant to this principle, any national law –the Greek Constitution included– that conflicts with EU law must be *ignored* by national courts so that EU law may take effect. National law is neither rescinded nor repealed, but its binding force is suspended.

No matter what theoretical disputes may have arisen in the past, nowadays primacy of EU law is undoubtedly accepted by Greek scholars and courts.[8] The Court of Justice of the European Union has steadily invoked arguments from the point of view of international law, such as the nature of EU law as common and uniformly mandatory for all Member States.[9]

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[7]It is worth mentioning here that in the planned Treaty establishing a Constitution for Europe, an explicit embodiment of this principle was foreseen; see Art. I-6 of the Treaty establishing a Constitution for Europe, which read as follows: *"The Constitution and law adopted by the institutions of the Union in exercising competence conferred on it shall have primacy over the law of the Member States"*. However, the Treaty of Lisbon, namely the Treaty on European Union and the Treaty on the Functioning of the European Union, does not contain any explicit reference to this principle.

[8]Art. 28 §§ 2, 3 C read as follows:

> *2.* Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.
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> *3.* Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, in so far as this is dictated by an important national interest, does not infringe upon the human rights and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.
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> *Interpretative clause: Article 28 constitutes the foundation for the participation of the Country in the European integration process.*

[9]The CJEU enshrined the *precedence principle* in the *Costa v. Enel* case (6/64). In that case, namely, the Court declared that the legislation issued by European institutions are to be integrated into the legal systems of Member States, which are obliged to comply with them. EU law enjoys precedence over national laws; therefore, if a national rule is contrary to an EU law provision, Member States' authorities shall not apply it.

Positivisation of Legal Principles

Antipositivism, namely expressed as an inherent aspect of legal idealism, has been, in the past, the prevailing approach in the Greek legal system [Tsatsos, The Issue of the Interpretation of Law (in Greek, *Το πρόβλημα της ερμηνείας του δικαίου*), 2nd ed., 1978, p. 15, Mitsopoulos, Problems of Validity of Law (in Greek, *Προβλήματα ισχύος του δικαίου*), Nomiko Vima 1976, p. 1 and Despotopoulos, Philosophy of Law (in Greek, *Φιλοσοφία του Δικαίου*), 2000, 2nd ed., p. 136, are the main representatives of this opinion. On the contrary, Manesis, Critical Considerations on the Notion and Importance of Law (in Greek, *Κριτικές σκέψεις για την έννοια και τη σημασία του Δικαίου*), in: In memoriam of Konstantinos Tsatsos, 1980, pp. 365, 384, has steadily supported the introduction of positivism into the Greek legal system]. Tsatsos suggested that natural law with an alterable content does not have the validity of law; it may operate however –being the most suitable incarnation of the idea of justice itself– as a *guideline* for the establishment of positive law. Tsatsos further supported the view that the principal source of law is the idea of the justice itself, that is, *social freedom*, while Despotopoulos traced the fundaments of law in *ethics,* mentioning that anyone who establishes positive law has to be inspired from natural law – in other words, one has to establish law according to justice [Despotopoulos, The System of Law from a Philosophical Aspect (in Greek, *Το σύστημα του δικαίου από τη σκοπιά της φιλοσοφίας*), in: Minutes of the Academy of Athens, meeting on 18.04.2000, p. 235].

Nonetheless, antipositivism has been steadily criticized. Stathopoulos [Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays (in Greek, *Νομικός θετικισμός και ιδεαλισμός στη σοφιστική διδασκαλία και τον πλατωνισμό – Η σημερινή θετικοποίηση του ιδεαλισμού*), Elliniki Dikaiosini 2013, pp. 1–29] emphasizes on the main weakness of antipositivism, namely the inherent difficulty in concretizing the exact content of the idea of justice, as envisaged above, and the source of the supra-positive rules deriving therefrom. This approach entails a high degree of subjectivism that leads to legal uncertainty, which, in turn, renders the law vulnerable and subject to ideological and political manipulation. Stathopoulos suggests that the only way to secure both legal certainty and justice is through positivisation of abstract legal principles; therefore, any supra-positive principles that demand to be applied, so that the drawbacks of pure positivism are eliminated, shall be incorporated into statutory law either in the Constitution or in ordinary law of a lower hierarchical scale.[10]

One will gratefully accept today that the positivisation of abstract legal principles has been the main step towards convergence between legal positivism and idealism.

[10]Stathopoulos highlights further the fact that the absolute power granted to the legislator within the framework of pure legal positivism is the main effect to be mitigated (*'der eigentliche Sündenfall'* of pure positivism, according to Welzel in Naturrecht oder Rechtspositivismus?, 1962, p. 334).

Through this procedure, that is, the incorporation of abstract legal principles into positive law, most frequently in form of constitutional provisions, these legal principles turn into statutory rules; therefore, as such, they are rendered legally valid and binding.

Nonetheless, there has been an issue with regard to the legal validity of principles *that may not have been positivised*. However, this issue may be of no relevance when considering that there is no fundamental legal principle that has not been positivised [Stathopoulos, supra, p. 22]. Even the abstract idea of justice, characterized as *'self-established'* by Mitsopoulos [Problems of Validity of Law (in Greek), Nomiko Vima 1976, p. 14], due to its acclaimed generality that does not allow its incorporation into a single statutory provision of general validity, has been positivised in the Greek Constitution, namely through the establishment of constitutional provisions not subject to revision. The constitutional legislator, recognizing the paramount significance of principles that lie in the heart of our legal culture and democratic system, has exempted them from any eventual constitutional amendment. According to Art. 110 § 1 C:

> The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of Art. 2 § 1 ("Respect and protection of the value of human being constitute the primary obligation of the State."), Art. 4 § 1 ("All Greeks are equal before the law."), § 4 ("Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws.") and § 7 ("Titles of nobility or distinction are neither conferred upon nor recognized to Greek citizens."), Art. 5 § 1 ("All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of the others or violate the Constitution and the good usages.") and § 3 ("Personal liberty is inviolable. No one shall be prosecuted, arrested, imprisoned or otherwise confined except when and as the law provides."), Art. 13 § 1 ("Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.") and Art. 26 ("1. The legislative powers shall be exercised by the Parliament and the President of the Republic. 2. The executive powers shall be exercised by the President of the Republic and the Government. 3. The judicial powers shall be exercised by courts of law, the decisions of which shall be executed in the name of the Greek people.").

In light of the above, there can be no doubt that the contribution of natural law, as a means of mitigating any unfair outcome resulting from the strict application of legal positivism –following Aristotle's demand for *'individualized justice'*–,[11] to the whole shaping and structure of the Greek legal system is more than evident.[12]

[11] Riezler does not accept strict criticism on legal positivism mentioning that even within the framework of this approach law has to be applied in accordance with its scope, while the judge has to search for and take into serious consideration the context of conflicting interests that led to the adoption of the statutory provision under scrutiny, but also the state of power at the time of the establishment of the relevant law (Der totgesagte Positivismus, in: Naturrecht oder Rechtspositivismus, 1962, pp. 239–240). Riezler appears further to deny any link to pure formalistic positivism as envisaged by Kelsen.

[12] Nevertheless, there is a dissenting opinion in Greek literature, pursuant to which "human rights stemming from natural law did not preexist, so there were not positivised, but rather established";

Nowadays, abstract legal principles have been positivised either in the Constitution or in international conventions or in ordinary law such as general clauses (e.g. Art. 288 CC, good faith etc.).

> The positivisation of abstract legal principles intimately linked with justice has been overall acclaimed even by scholars with an idealistic background; see Beys, Legal Principles in Theory and Practice (in Greek, *Οι δικαιικές αρχές στη θεωρία και στην πράξη*), Dike 2006, p. 1106, who regards the positivisation of the principle of proportionality as the utmost culmination of this procedure; also Doris, Introduction to Civil Law (in Greek, *Εισαγωγή στο Αστικό Δίκαιο*), Vol. A', 1991, p. 33 (*"positivisation of objectified principles binding for the legislator and the judge"*). Furthermore, supporters of the so-called *'soft'* or *'inclusive positivism'* such as Coleman, Saper, Lyons and Waluchow accept the positivisation of moral considerations that "*become part of the law because the sources make it so"*; see further in Leslie Green, Legal Positivism, Stanford Encyclopedia of Philosophy, 2003.

At any rate, any invocation of principles that do not fall under statutory law may be regarded either as redundant or even threatening for the integrity of positive law (Stathopoulos, Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays, Elliniki Dikaiosini 2013, p. 22), since it may even lead to its distortion.[13]

The Primacy of the Legislator and the Stance Adopted by Case Law

The primacy of the legislator is a fundamental characteristic of the Greek legal system. The judge, whose functional and personal independence is provided for by the Constitution (Art. 87 C), guarantees the observance of the laws and the protection of the citizen from illegalities.

On the other hand, agreement can easily be reached that judicial rulings, in principle, do not qualify as a source of law. The judge remains subject to the law deriving from the aforesaid sources and has no competence to make law. According to Art. 87 § 2 C:

> While fulfilling their duties, judges shall be subject only to the Constitution and the laws.

Manesis, Critical Considerations on the Notion and Importance of Law, in: In memoriam of Konstantinos Tsatsos, 1980, p. 402.

[13]By way of contrast, Supreme Federal Courts in Germany have often reasoned their decision on generally recognized principles of law or argued on legal certainty or on the social consequences of their judgment *(consequentialist approach)*; nonetheless, it remains unclear if these principles are regarded as principles standing above positive law or if they have been positivised through the establishment of constitutional provisions; see further Neumann, Positivistische Rechtsquellenlehre und naturrechtliche Methode – Zum Alltagsnaturrecht in der juristischen Argumentation, in: Rechtspositivismus und Wertbezug des Rechts, 1990, pp. 141, 151.

Pursuant to the relevant strict provision of the Greek Constitution (Art. 26), faithfully adhering to the principles expressed by Montesquieu, the three functions of the state, that is, the legislative, the executive and the judicial, are clearly separated.[14] In the Greek legal system, the legislator enjoys the so-called *legislative prerogative (Rechtsetzungsprärogative des Gesetzgebers),* though this prerogative does not reach the point of *legislative monopoly (Rechtsetzungsmonopol).*[15] In practice, additional sources of law appear; therefore, legal pluralism, a basic consideration encountered in sociology of law, is still present – though significantly restricted.

The above mentioned framework, even if not obvious at once, provides, though, the judge with a really active and 'creative' role regarding the implementation of law. Mainly due to the introduction of ambiguous provisions and general clauses whose abstract and impersonal stipulations need to be further concretized, the role of the judge is crucial and it may even be maintained that in these cases the judge somehow 'creates' law; this 'creative' role of the judge emerges especially in the so-called *'hard cases'* [see Posner, How Judges Think, 2008, passim; also the same, in: The New York Review of Books, The Court: A Talk with Judge Richard Posner (an interview-discussion with Eric Segall), 29.09.2011]. In the words of Judge Posner (in: The New York Review of Books, supra):

> if a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall back on whatever resources he has to come up with a decision that is reasonable, that other judges would also find reasonable, and ideally that he could explain to a layperson so that the latter would also think it a reasonable policy choice. To do this, the judge may fall back on some strong moral or even religious feeling. Of course, some judges fool themselves into thinking there is a correct answer, generated by a precedent or other authoritative text, to every legal question.

Such cases actually reveal how below any shining veneer of strict separation of powers there often seems to lurk somewhere the reality of 'judge-made law'. However, a serious caveat must be entered here: in civil law systems –such as the Greek one– such judicial decisions are only binding as to the specific cases under judicial review (*res judicata)*; there is no further commitment to those particular rulings for anyone else not involved in the cases considered. Therefore, the next judge called upon to issue a decision in a similar case is not bound to follow it, even if it may have come from a superior court or any of the Supreme Courts; the next

[14]This is not always the case, though it is the rule.

[15]The legal phenomenon of legislative monopoly *(Rechtsetzungsmonopol)* was particularly eminent when extended codifications took place and was based upon the assumption of the completeness of these ventures. According to the relevant German doctrine, the main prerequisites so that this monopoly is granted to the legislator are the following: an extended codification without any gaps *(lückenlos)*, of a permanent character *(dauerhaft)* –even if social context alters– and including clear and explicit provisions *(klar und eindeutig)*; so Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 60.

judge is, namely, free to interpret it applying her own considerations, thus following her own interpretation no matter what settled case law might order.[16]

It is rather self-evident that the aforementioned primacy of the legislator does not entail that she may act in an arbitrary manner. For she is bound to the Constitution and the constitutionality of laws may be reviewed by any Greek court –there exists, therefore, a so-called *'dispersed constitutionality control'*–, though only as to the specific case brought to them; and if a certain statutory provision is deemed 'unconstitutional', then the court shall not apply said provision. For, as provided for in Art. 93 § 4 C

> The courts shall be bound not to apply a statute whose content is contrary to the Constitution.

Though, a statutory provision, even if assessed as running contrary to the Constitution, may not be nullified, in principle, with an *erga omnes* binding effect.

According to Art. 100 C the *Special* Supreme Court of Greece (Art. 100 C)[17] has the sole and *exceptional* competence to render a statutory provision invalid with an *erga omnes* binding effect. More particularly, when controversial decisions over the constitutionality of a statutory provision have been issued by the Supreme Courts of the three jurisdictions present in Greece –i.e. Council of State (Supreme Administrative Court), Areios Pagos (Supreme Civil and Criminal Court) and Court of Audit–, the Special Supreme Court has the final say on this matter. Its judgment has an *erga omnes* effect and, therefore, the statutory provision at dispute is rendered void (Spiliotopoulos, Handbook of Administrative Law (in Greek, *Εγχειρίδιο Διοικητικού Δικαίου*), 9th ed., 2001, p. 450). The judgments of this Court are irrevocable (Art. 100 § 4 C) and the provisions of a statute declared unconstitutional shall be invalid as of the date of publication of the respective judgment (or as of the date specified by the latter).[18]

[16] As mentioned in theory, only if any constant practice of courts creates a sense of a general binding rule (*opinio juris*) in the citizens is a rule of customary law generated, but the reason for the legal force of this rule and therefore the source of production of law is not the court decision itself, but the custom derived from the relevant case law; see Stathopoulos, Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays, Elliniki Dikaiosini 2013, p. 21. Though, in any case, both prerequisites for the establishment of customary law must be present, namely *longus usus* and *opinio necessitatis*. See, however, in more detail below in the text.

[17] Art. 100 § 1 C reads as follows:

> A Special Supreme Court shall be established, the jurisdiction of which shall comprise: [. . .] e) the 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.

[18] Relevant judgments develop their effect as of the date of their publication in the Gazette of the Government (Law no. 345/1976, Art. 21 § 2).

The Role of Case Law in the Greek Legal System

In a jurisdiction where the majority of its rules are of customary origin such as Common law,[19] the role of the courts in formulating the exact content of these rules is paramount. On the contrary, the pendulum swings to other side where positive law prevails, where namely the importance of case law as a source of law is significantly restricted – if even recognized as such.

As already alluded to above, case law of national and international courts is not and has never been recognized as a typical source of law in the Greek legal system [Tsatsos, The Problem of the Sources of Law (in Greek), 1941, p. 234, includes case law in Chap. 7 under the title 'False sources' *(ψευδείς πηγές)*; see also Karampatzos, The Methodological Impact of the Doctrine of the Normative Power of the Factual (in Greek, *Η μεθοδολογική αξία της θεωρίας περί κανονιστικής δύναμης του πραγματικού*), Dike (*Δίκη*) 2008, pp. 8–28]. According to Tsatsos (supra, pp. 131, 238):

> The judge makes law for the specific case brought before him.

Though, moving away from the principles of legal positivism, case law may be viewed as an *indirect* source of law, included in the so-called *sources matérielles*. These sources of law, namely case law and jurisprudence *(Rechtswissenschaft),* are not recognized as typical sources of law because they lack in typical validity [the majority of Greek scholars classify case law as a factor of formative force; in between Doris, Introduction to Civil Law (in Greek, *Εισαγωγή στο αστικό δίκαιο*), Vol. A', 1991, p. 84, Simantiras, General Principles of Civil Law (in Greek, *Γενικές Αρχές Αστικού Δικαίου*), 4th ed., 1988, no. 52]. The procedure through which these sources produce law is not reflected in any statutory provision and therefore this law may not be treated as positive law stricto sensu (Tsatsos, The Problem of the Sources of Law, 1941, p. 131). Pursuant to Tsatsos, though (ibidem, p. 131), case law should not be treated as a mere *cognitive* source of law *(Rechtserkenntnisquelle).* Nowadays, among Civil law legal systems it is yet widely accepted that case law practically –i.e. de facto*, not de jure*– functions as legislator, even if this may run contrary to the classic separation of powers, through the establishment of rights and institutions, which enjoy a *'quasi legislative'* power and,

[19]The first traces of Common law date back to the customary rules of Anglo-Saxon England and the system of the so-called *'rode circuit'* of royal judges. These judges traveled from place to place throughout the country holding trials and deciding cases and then returning back to their basis in Westminster, where they debated on their experiences and their relevant judgments. Given that legislation was scarce at the time, the law that judges applied was usually local customary law. When the judges exchanged their views, it was broadly recognized that local customs they had applied had much in common with local customs of other areas in the country; and those 'common' customary rules are viewed as the fundamental basis upon which the whole structure of Common law was reproduced; see further Smith, A History of England*,* pp. 54–55, Brooke, From Alfred to Henry III, 871–1272, pp. 182–185.

in essence, develop a certain binding force in case law (Tsatsos, ibidem, pp. 240–241; Karampatzos, The Methodological Impact of the Doctrine of the Normative Power of the Factual, Dike 2008, pp. 8–28).

At any rate, case law plays a particularly helpful role as a *declaratory* factor that de facto co-defines the interpretation of a statutory provision. There is no doubt that within the framework of the Greek legal system settled case law and specifically that of Supreme Courts is viewed, at least, as an essential source of cognition of law *(Rechtserkenntnisquelle)* and, moreover, as being equipped with superior persuasive power (see Karampatzos, ibidem). This augmented significance of case law in the course of tracing the exact meaning of statutory provisions has led to the point that case law is granted the character of a *subsidiary* source of law [Meier-Hayoz, Der Richter als Gesetzgeber, 1951, p. 259, stated that there exists indeed a *"limited obligation of compliance"* with previous judgments, while Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 248, introduced the notion of *'presumptive binding force' (präsumtive Verbindlichkeit)* of a court precedent, according to which the court may not deny a precedent but may discuss it in detail and depart from it where this is sufficiently justified].

The Role of the Judge in the Greek Legal System

As already mentioned above, according to the Greek Constitution the judge is exclusively bound to the Constitution and positive law (Art. 87 § 2 C). To return to and reemphasize the critical point: in the Greek legal system the power of a judge to somehow 'create' law may not exceed the boundaries set by positive law. Statutory rules which are subject to interpretation conducted by the judge are the raw (legal) material based upon which the judge shall construct her *computatio.* Therefore, the judge is twofold restricted: she must not ignore statutory rules and she must not cross the boundaries alluded to above. According to Kriele (Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 160):

> Denn das Fundament allen juristischen Denkens sind die Dezisionen des Gesetz- und Verfassungsgebers. Wenn auch die Theorie von Rechtsetzungsmonopol rein postulatorisch und wirklichkeitsfremd ist, so ist doch die Prärogative des Gesetz- und Verfassungsgebers ein Grundsatz, der noch überall anerkannt war, wo immer es Gesetz und Verfassungsgeber gegeben hat, und dem festzuhalten auch heute unausweichliche Voraussetzung jeder Ordnung überhaupt ist. Wo immer der Gesetz- oder Verfassungsgeber Dezisionen getroffen hat, sind diese verbindlich.

Even in case of a *regulatory gap*, analogy of law is used in order to fill this gap; thus, the construction of a *computatio* shall be attempted within the same boundaries without, in principle, any recourse to principles falling outside the scope of statutory law. Any considerations to be attempted by the judge should be in line with the broader considerations already expressed by the legislator as incorporated in the text of the relevant statutory provisions; however the judge is not bound to any formalistic approach rooted in old-fashioned pure positivism that no longer

affects legal reasoning in the Greek legal system [Stathopoulos, Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays, Elliniki Dikaiosini 2013, p. 22; Papanikolaou, Methodology of Private Law and Interpretation of Juridical Acts (in Greek, *Μεθοδολογία του Ιδιωτικού Δικαίου και Ερμηνεία των Δικαιοπραξιών*), 2000, paras. 426 et seq.].

In all circumstances, the role of the judge within the framework of this *'quasi legislative'* power is particularly important when concretizing the content of general clauses or filling regulatory gaps. The issue of classifying case law as a source of law when regulatory gaps emerge has attracted the attention of Greek legal scholars mainly in the early decades of the previous century. Tsatsos rejected any such consideration arguing that even in the case that the system of positive law is not complete, this calls for interpretation of the already existent legal provisions without any recourse to sources or principles or rules not based upon primary legal rules of positive law. Any teleological interpretation is not ventured in vacuum but rather rests upon the considerations already incorporated in statutory provisions of positive law and the ultimate objective to be served by application of the regular provisions. This teleological approach is nothing more than the logical evolution and specification of the primary positive rule. Any recourse to extraneous systems such as an alleged recognition of case law as an additional –formal– source of law is denied [Tsatsos, The Problem of the Sources of Law, 1941, p. 240; see also Karampatzos, The Methodological Impact of the Doctrine of the Normative Power of the Factual, Dike 2008, pp. 8–28].

It might be true that the incorporation of general principles without any concrete content into statutory provisions leaves a margin of legal uncertainty, which is inherent in antipositivism. However, in this case, despite the positivisation of such principles, legal certainty is secured on a higher level, given that it is already known to anybody involved that the source of such binding rule is the relevant statutory provision. The judicial application of general clauses is, surely, not an easy task to fulfill, in particular when taking into account the fact that e.g. in the Greek Civil Code there exist a plethora of statutory provisions that include general clauses to be concretized. Such an example is Art. 388 CC (termination or adjustment of a contract due to an unforeseen change in circumstances) according to which a contract may even be dissolved despite the fundamental principle of *pacta sunt servanda*, following the demands of good faith as further entrenched in the general clause of Art. 288 CC (in detail Karampatzos, Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, European Review of Private Law 2–2005, pp. 105–147). Another example is the concretization of the content of the indeterminate legal notion of 'reasonable compensation' in Art. 932 CC, granted for moral damages in tort cases.

Any court judgment must be specifically and thoroughly reasoned (see Art. 93 § 3 C). The judge is frequently called upon, moving in blur waters, to come up with the best possible solution in particularly complex cases (in such cases Dworkin regards the judge involved as Hercules so as to indicate the extent of effort to be undertaken; so in Law's empire, 1986, p. 239). Nonetheless, even then, the judge is

not entitled to bear the lion skin of the legislator and thus behave like a disguised legislator. She enjoys no other powers than the judicial one as envisaged in the relevant constitutional provisions and therefore she should be restricted to her role moving within the boundaries already set by the legislator. In the Greek legal system any thought of judicial activism leading to the so-called 'state of the judges' is, in principle, undesirable and reprehensible, and above all a dangerous sign for the power equilibrium within the democratic institutions. To put it in a nutshell: the notion of a judge viewed as a super-legislator is not recognized in the Greek legal system.[20]

Notwithstanding the above, Litzeropoulos, a prominent legal scholar of the twentieth century, sustained that the judge does not merely apply the law in a pure mechanic way. The judge is not just the mouth that pronounces the words of the law –as Montesquieu's approach–, not just a mere passive being, incapable of moderating either her force or her rigor; the judge rather supplements legislation. This practice may lead to the establishment of a judge-made law. Under the scope of this broad notion of law falls every rule that cannot be deduced in an immediate and unquestionable way from relevant statutory provisions. Such a rule comes into existence with a concrete content obtained through the interpretation of the law attempted by the courts. Nonetheless, the judge is not totally free to make her own considerations but is rather bound to the law. Pursuant to Litzeropoulos the judge does not create law *ex nihilo*; she only adjudicates the case brought before her and reaches a judgment through a long procedure of reasoning [Litzeropoulos, The Specific Nature of Judge-made Law (in Greek, *Η ιδιαιτέρα φύσις του νομολογιακού δικαίου*), 1935, p. 1]. It is worth mentioning, though, that Litzeropoulos had firmly supported the introduction, into the Greek Civil Code, of a provision similar to Art. 1 of the Swiss Civil Code, according to which, in the absence of a statutory provision or customary law, the judge would be entitled to decide in accordance with the rule that it would establish as legislator; however, no relevant provision was introduced into the Greek Civil Code.

All in all, the 'creative' role of the judiciary is particularly obvious when it comes to settled case law of Supreme Courts or with regard to *hard cases* (see Posner, supra, section "The Primacy of the Legislator and the Stance Adopted by Case Law"), where the present statutory provisions are not capable of providing a satisfying solution to the legal problem that has emerged in practice. The most frequent case where the judge is called upon to become a composer of a music

[20]In Germany a vivid tendency with regard to granting an ever-growing *'quasi legislative'* power to established case law has been thoroughly expressed by prominent scholars. Pursuant to them, a newly emerged *'case law positivism' (Rechtsprechungspositivismus)* may be recognized (see Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 195, who further suggests the introduction of a *presumption of correctness* of judicial precedent, namely that established by Supreme Courts). According to the latter approach, continuation of law and safeguarding trust in an established case law, would be the principal benefits. In any case, overruling would be possible if there were serious reasons to justify such an overruling. See also Alexy, Theorie der juristischen Argumentation, 2nd ed., 1991, p. 334.

play instead of being just a pianist is the case of a 'regulatory gap'. Still within this framework, however, the judge is free *not* to comply with settled case law but follow her own assessment of facts, which is largely safeguarded as a central parameter of her functional independence envisaged in the Greek Constitution itself.

Judge-Made Law in the Field of Greek Administrative Law

Administration, that is, the executive power, is, of course, also subject to the law and the Constitution. The legality of its acts is to be scrutinized by administrative courts, which may annul them if contrary to the law (or the Constitution).

A specific trait of Greek administrative law is its scarce codification. As a result, the role of the courts with regard to cases falling under the scope of administrative law is mostly restricted to interpreting an impersonal and general statutory provision and adjusting it to the particular case brought before court. Moreover, in the field of administrative law it is not a rare case where no relevant statutory provision exists to be applied, but still the judge is obliged to adjudicate the case and issue a decision, even if she may have to issue a new impersonal general rule to be applied.

In this vein and under the strong influence of settled case law of the French Conseil d' Etat, the decisions of the Greek Council of State are viewed as a source of law, though not in the same perception as in Common law jurisdictions. More particularly, settled case law deriving from the judgments of the Council of State may introduce so-called *'case law rules'*. If the administration undertakes a legislative act that runs counter these rules, this may be viewed as a reason for annulment of the administrative act concerned.

As overall accepted, though, by Greek scholars in the field of administrative law, there is no generation of a new rule simply by interpreting a statutory rule, but rather only in cases where in the reasoning of the decision one may trace the application of a non-existent statutory rule that is applied by consequent decisions. In France, decisions of the Conseil d' Etat, in which judge-made law is established for the first time, are broadly known as *arrêts de principe.*

In Greece there is no statutory provision according to which administrative courts are bound to apply such judge-made rules; however, these rules are indeed applied, de facto, by hierarchically lower administrative courts for the sake of legal certainty, foreseeability and protection of founded trust on behalf of the citizens in the consistent conduct of the administration. Therefore, the administration itself acts pursuant to this judge-made law with the firm conviction that it is bound to it, because in case that these judge-made rules are not observed and applied, the relevant legal consequences are, in essence, identical to the case when statutory law is violated. So, if such a judge-made rule is violated through an administrative act, then the latter may be annulled before the competent administrative court.

Compared to France, however, generation of judge-made law in the field of administrative law is in Greece restricted. This may be explained through the fact

that rules established as judge-made law already existed in the French legal system and the Greek legislator incorporated them, to a certain extent, in statutory law. An indicative instance for this is the provision of Art. 48 of the Presidential Decree no. 18/1989, which regulates the function and jurisdiction of the Greek Council of State. All four reasons for annulment that may be invoked in the course of a petition for annulment had already been established by French case law.[21] The Greek legislator transferred these rules in the statute of the supreme administrative court, though the *exact content* of these rules is not statutorily fixed and here comes the judge to play her most essential role.

As a conclusion it may be inferred from the above that, in the field of administrative law, case law is indeed recognized as a source of law. Any violation of these judge-made rules may give a reason for annulment pursuant to the third reason envisaged in Art. 48 of the Presidential Decree no. 18/1989, which provides for a *'violation of law' (violation de la loi)*. According to settled case law of the Council of State and as broadly accepted by Greek scholars as well (see Spiliotopoulos, Handbook of Administrative Law, 9th ed., 2001, p. 518), the notion of 'law' in this provision encompasses not only positive law (Constitution, EU law, legislative and administrative acts) and general principles of administrative law, but also the so-called *'detailed judge-made rules'*. These rules have been judicially established as explanatory of the exact content of impersonal statutory provisions. The fact that these rules are part of settled case law veiled with the de facto status of law means that any violation of them may entail a reason for annulment.

In all circumstances, the judicial activism often shown by the Council of State, on various critical socio-economic matters, sometimes crosses the line drawn by the sacred principle of the separation of powers (mainly Art. 26 C) and becomes intolerable in a democratic society, whereby the legislator enjoys the primacy of enacting legal rules.

The Status of Stare Decisis (or Precedent) in the Greek Legal System

One should not lose sight of the fact that one of the most evident arguments in favor of recognizing binding force to precedent is *legal certainty*. Pursuant to consistent

[21] For instance, 'acts of legislative content' issued by the Government (according to Art. 44 C) that lie in the core of enactment of political power are exempted from judicial review. This statutory rule is envisaged in Art. 45 § 6 of the Presidential Decree no. 18/1989, but it had already been established as judge-made law through the pertinent settled case law of the Conseil d' Etat in France.

case law, people adapt their transactional conduct in accordance with precedent, expecting that conflicts arising from similar cases will be adjudicated in line with precedent.[22]

In the Greek legal system precedent creates no binding effect to any judge. As already explained above, this well-founded approach is firmly grounded upon the principles of separation of powers, namely between judicial and legislative power, and that of independence of the judge, as entrenched in Art. 87 § 1 C. The judge is endowed with functional and personal independence and is exclusively bound to the Constitution and to statutory or customary law, as mentioned above; thus, she is not bound to previously issued court decisions, even if issued by hierarchically superior courts. Moreover, according to Art. 77 § 1 C:

> The authentic interpretation of the statutes shall rest with the legislative power.[23]

Papanikolaou, a legal scholar specialized in the field of Methodology of Private Law, recurs to the separation of powers, as provided for in the Constitution, to further justify his position that case law is not recognized as source of law in the Greek legal system *in the sense that judges are not equipped with the authority to 'create' primary legal rules* [see indicatively Papanikolaou, (in Greek, *Μεθοδολογία του Ιδιωτικού Δικαιου και Ερμηνεία Δικαιοπραξιών*), 2000, para. 88; see also the same, Constitution and the autonomy of Civil law (in Greek, *Σύνταγμα και αυτοτέλεια του Αστικού Δικαίου*), 2006, passim]. This power is granted to the legislator, who is believed to possess a more insightful knowledge of facts and consequences of a legislative act not only upon society but also upon other fields of law, while she is expected to largely contribute to legal certainty. The legislator further enjoys democratic legalization that stems from the electoral procedure, according to the *'democratic principle'* (see further Wank, Grenzen richterlichter Rechtsfortbildung, 1978, p. 119). Pursuant to Papanikolaou, the judge has to provide the fairest decision for the case brought before her in line with what law commands, so that this judgment may serve as a useful basis for similar considerations to be assessed in the course of prospective decisions for

[22] The introduction of a lenient version of precedent into the Greek legal system had already been proposed by Litzeropoulos during the debate on the drafting of the Greek Civil Code. Litzeropoulos proposed, namely, that judgments of the Plenum of Areios Pagos (Supreme Civil and Criminal Court) on ambiguous legal issues should be veiled with binding force – however this suggestion was not adopted. Litzeropoulos was struggling to find a balance between legal certainty, an indispensable feature for any legal order, and flexibility of law. Towards this direction, he proposed that only decisions of the Sections and the Plenum of Areios Pagos should develop an *erga omnes* binding effect, contrary to Common law legal systems where precedent –even theoretically– may be established by hierarchically inferior courts. For the decisions of the Supreme Court should be considered as being equipped with a reinforced power of persuasion (see Litzeropoulos, The Specific Nature of Judge-made Law, 1935, pp. 1–29).

[23] See also Art. 77 § 2 C, which reads as follows

> A statute which is not truly interpretative shall enter into force only as of its publication.

substantially similar future cases *(Rechtseinheit*) [Papanikolaou, Methodology of Private Law and Interpretation of Juridical Acts, 2000, para. 82]. As the argument goes, the continuity of case law is of utmost significance for legal certainty *(Rechtssicherheit)* and foreseeability *(Vorhersehbarkeit)* of judicial judgments, but also for the fundamental principle of justice itself, which calls for equal treatment of substantially similar cases *(Gleichbehandlungsgrundsatz).*

As regards the margin left to any judge to deviate from settled case law without any recourse to specific reasons why doing so, this is regarded as indispensable for the further development of the law maintaining its plasticity and flexibility, so that the so-called *'risk of law cementation' (Rechtszementierungsgefahr)* is avoided (Litzeropoulos*,* The Specific Nature of Judge-made Law*,* 1935, p. 17, stands for a combination of certainty and flexibility, which have to be features of every legal system; the *'risk of law cementation'* that results from the recognition of a *quasi* binding effect of judge-made law is highlighted by Esser, Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht, in: Festschrift für F.v.Hippel*,* 1967, pp. 113 et seq.; see also the same, Vorverständnis und Methodenwahl in der Rechtsfindung*,* 1970, pp. 192–193). The judge is entitled to follow her own considerations no matter if these coincide with other expressed in previous settled case law.[24] This practice avoids any stagnation in case the legislative and social context alters in the meantime (Litzeropoulos, supra, p. 10; see also Gerland, Die Einwirkung des Richters auf die Rechtsentwicklung in England, 1910, who was particularly hostile against the Common law system of precedent). Law interpretation, such as the law itself, entails, in general, a strong element of temporality *(Zeitlichkeit).* Newly emerging social needs and considerations, particularly when these have already been incorporated into recent statutory provisions, may even justify any deviation from any settled case law. This deviation calls for an updated consideration of the *normative content* of the law, above all on the basis of concrete legal arguments (Papanikolaou, Methodology of Private Law and Interpretation of Juridical Acts, 2000, paras. 85 et seq.).

Nonetheless, legal certainty and foreseeability demand that any deviation from consistent case law should be attempted *in a sparing manner* (see once more Papanikolaou, supra, para. 86). This may be viewed as an encouragement to courts, and namely those following cassation procedures, to apply settled case law in order to further safeguard the principle of legal certainty. Where, namely, the judge is encouraged to interpret the law, she is subject to the previous interpretation already attempted by other judges [Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 243, who establishes a burden of proof for anyone arguing (*Argumentationslast*) in favor of a departure from settled case law (*Vermutung zugunsten der Präjudizien*)]. According to Tsatsos, the judge accepts this interpretation due to its intellectual and

[24]Nevertheless, Areios Pagos, in a notorious decision that dates back to 1930 (decision no. 227/1930), quoted that settled and uniformly applied precedent has the validity of law; however, this mindset was not since then reiterated by the same or other courts and remained just an isolated *dictum* without any further serious impact.

ethical authority (Tsatsos, The Problem of the Sources of Law, 1941, p. 241), though this authority does not suffice to consider case law as a source of law.

Papanikolaou further maintains that, within the framework of the Greek legal system, legal certainty and foreseeability of law, based upon settled case law –in particular Areios Pagos' case law–, do not suffice themselves so that such consistent case law remains unaltered in the light of new considerations or a substantial change in the socioeconomic context (so also Larenz/Canaris, Methodenlehre der Rechtswissenschaft, 3rd ed., 1995, p. 259). Additionally, no claimant who attempts to initiate proceedings pursuant to Art. 20 § 1 C,[25] with the intention to alter settled case law, shall be obstructed from doing so and having his case being adjudicated according to the content of statutory law to be applied in his case on the basis of specific, 'individualized' considerations, without these considerations being restrained by settled case law.

The Problem of Prospective Overruling

General Remarks on the Practical Function and First Appearance of Prospective Overruling

Before proceeding to an analysis of the role of prospective overruling in the Greek legal system, it may be useful to first state, in brief, the practical function and first appearance of said doctrine.

Prospective overruling is a jurisprudential device whereby an appellate court overrules one of its earlier decisions, but in a manner that purports to operate only in relation to subsequent transactions (*prospective*, *ex nunc* effect). As Thomas E. Fairchild suggests (Limitation of new judge-made law to prospective effect only: "Prospective overruling" or sunbursting, Marquette Law Review, Vol. 51, Issue 3 Winter 1967–1968, p. 254):

> Prospective overruling is a device whereby a court limits the effect of a new rule to future transactions only, or, more commonly, to future transactions plus the case before the court which presents the opportunity for the announcement of the change.

In other words, prospective overruling is not to declare the law as it has always been, but to change it for the future.[26] The basic meaning of prospective overruling is

[25] According to Art. 20 § 1 C:

> Every person shall be entitled to receive legal protection by the courts and may plead before them her/his views concerning her/his rights or interests, as specified by law.

[26] On the contrary, the CJEU, when acting in its jurisdiction as envisaged in Art. 267 of the Treaty on the Functioning of European Union (TFEU), repeatedly quotes that it gives to a rule of EU law the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force; see *inter alia* C-209/03, *R (Bidar) v. London Borough of Ealing* (2005), para. 66.

to construe an earlier decision in a way as to suit the present day needs and demands. And its most distinctive feature is the temporal limitation of overruling denying any retrospective application of a judicial judgment, which is deemed to be the rule in Common law jurisdictions.

Nevertheless, in Common law jurisdictions, a judicial declaration that a *statute* is invalid means that the statute was invalid ab initio. This may expose a person to civil or criminal liability for actions believed lawful when committed. People generally conduct their affairs on the basis of what they understand the law to be. This retrospective effect of a change in the law of this nature may have unfair consequences. The law as 'reformulated' will be applied to the parties and other litigants even though the 'old law' was current when they entered into the transaction in question. What is acclaimed to be achieved through the application of prospective overruling is precisely a soother, regular passing from the starting point of the formerly valid ruling, which had been established either statutorily or judicially, to the new ruling, without causing severe disruption to this sequence of rulings. Prospective overruling is a judicial tool fashioned to mitigate such adverse consequences.

Prospective overruling, although not under this label, first appeared in the mid-nineteenth century in the Ohio case *Birngham v. Miller* (1848).[27] Nonetheless, a primary appearance of prospective overruling was attempted by Sir William Blackstone, who attempted to rationalize the judicial function of overruling previous Common law decisions through his so-called *declaratory* theory (Commentaries on the Laws of England, 1st ed., 1765, vol. 1, p. 70):

> If it be found that the former decision is manifestly absurd of unjust, it is declared not that such a sentence was bad law, but that it was not law.

However, it was not until 1932 when the main aspect of prospective overruling as known nowadays was propounded by Justices Cardozo and Lerned Hard, who were strongly in support of the doctrine of prospective overruling. In the notorious case *Great Northern Railway Co v. Sunburst Oil & Refining Co* (1932),[28] Justice Cardozo held that the US Constitution neither prohibits nor requires prospective overruling. Further, he was of the view that the law should keep up with the changes occurring in the society; the law has to be dynamic and not static. If a society is undergoing a change and citizens are bound by an old law, it will lead to grave injustice. Therefore, prospective overruling constitutes an important tool in the hand of judiciary to give fair and timely justice to its citizens.

Prospective overruling was continuously applied by the US Supreme Court in the 1960s and 1970s, in both civil and criminal cases. In *Linkletter v. Walker* (1965)[29] it was stated that

[27] 17 Ohio 45.

[28] 287 US 358; due to this judgment prospective overruling is often referred as *'sunbursting'*.

[29] 381 U.S. 618, 639.

> The accepted rule today is that in appropriate cases the Court may in the interests of justice make the rule prospective.

However, since then the US Supreme Court has retreated. In *Griffith v. Kentucky* (1987),[30] the court abandoned prospective overruling when directly reviewing criminal cases, while some years later prospective overruling was abandoned in civil cases as well.[31]

In the UK prospective overruling has never been adopted as a practice. This traditional approach was stated crisply by Lord Reid in *West Midland Baptist (Trust) Association Inc v. Birmingham Corporation* (1970)[32]:

> We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [scil. the existing rule] is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation.

In *Launchbury v. Morgans* (1973)[33] Lord Wilberforce noted that

> We cannot without yet further innovation, change the law prospectively only.

In more recent years, in *Kleinwort Benson Ltd v Lincoln City Council* (1998),[34] Lord Goff of Chieveley underlined that the system of prospective overruling

> has no place in our legal system.

Apart from the above, there have also been *principled* arguments against prospective overruling. According to the most notable of these arguments, as stated in *National Westminster Bank plc v. Spectrum Plus Limited and others* (2005)[35]:

> Prospective overruling is outside the constitutional limits of the judicial function. The recognition of such a doctrine would amount to judicial usurpation of the legislative function. Power to make rulings having only prospective effect is not inherent in the judicial role. Prospective overruling robs a ruling of its essential authenticity as a judicial act. Courts exist to decide the legal consequences of past events. A court decision which takes the form of a pure prospective overruling does not decide the dispute between the parties according to what the court declares is the present state of law. With a ruling of this character the court gives a binding ruling on a point of law but then does not apply the law as this declared to the parties before the court. The effect of a prospective overruling of this character is that, on the disputed point of the law, the court determines the rights and wrongs of the parties in accordance with an answer which it declares is no longer a correct statement of law. Making such a ruling would not be a proper exercise of judicial power in this country. Making new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges.

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[30] 107 S Ct 708.

[31] *James v. Beam Distilling Co v Georgia* (1991) 501 US 529 and *Harper v. Virginia Department of Taxation* (1992) 509 US 86.

[32] AC 87, 898–899.

[33] AC 127, 137.

[34] 2 AC 349, 379.

[35] *National Westminster Bank plc v. Spectrum Plus Limited and others* (2005) UKHL 41, 28.

At least in the Continental legal systems, the constitutional separation of powers between the legislature and the judiciary orders that the legislature makes the law, the courts administer the law. Parliament makes new law, by enacting statutes having prospective and varying degrees of retrospective effect.[36] Nonetheless, in Common law jurisdictions the boundary between making and administering law is not in all respects quite so clear-cut. It can hardly be doubted that in essence Common law is a judge-made law. Having said that, it should be further noted, though, that judges do not have a free hand to change the Common law. All too often the continental law interpreter rather pays little regard to the fact that judicial development of the Common law comprises the *reasoned* application of established Common law principles to current social conditions. Justice Cardozo, the pioneer of prospective overruling across the Atlantic, expresses this thought in an unsurpassable way (Cardozo, The Nature of the judicial process, 1921, p. 141):

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'.

Prospective Overruling in the Greek Legal System

It rather goes without saying that in the Greek legal system the judge is not entitled to establish law prospectively (Litzeropoulos, The Specific Nature of Judge-made Law, 1935, p. 19). For she adjudicates cases and transactions already concluded; therefore, her judgment may only have a 'retrospective' effect. The judge interprets the law and this interpretation recurs to the past. This is an additional feature that distinguishes judge-made law to positive law system. On the other hand, Art. 77 § 2 C rules that *"a statute which is not truly interpretative shall enter into force only as of its publication"*; according to this fundamental constitutional principle, statutory law –contrary to a judicial judgment– has an exclusively prospective effect.

This negative stance against prospective overruling is endorsed by Greek legal scholars. In particular, Papanikolaou (Methodology of Private Law and Interpretation of Juridical Acts, 2000, paras. 86–87) adopts an openly negative approach against any potential introduction of prospective overruling in the Greek legal system as had been proposed in the past by Litzeropoulos.[37] As already mentioned

[36] See *Wilson v. First County Trust Ltd (No. 2)* [2004] 1 AC 816, 831–832, para. 19.

[37] Litzeropoulos, The Specific Nature of Judge-made Law, 1935, p. 17, supported the view that the only obstacle towards an effective combination of legal certainty and flexibility of law is the peculiar element of retroactivity of judge-made law; therefore, he suggested that precedent should be binding to courts, which should though have the competence to overrule the precedent with an exclusive prospective effect through reaching a new judgment. See further supra note 22.

above, pursuant to Papanikolaou's approach –which nowadays actually reflects the relevant prevailing view in Greece–, legal certainty and foreseeability of law, based upon settled case law, do not preclude themselves consistent case law from being altered in the light of new considerations or substantial changes in the socioeconomic context. Hence once again: no claimant that attempts to initiate proceedings with the intention to alter settled case law shall be obstructed from doing so and having her case being adjudicated according to the content of statutory law to be applied in her case on the basis of specific, new considerations. And, sure enough, in such a case there is no need for having recourse to any 'prospective-overruling idea' whatsoever, since settled case law is not endowed with formally binding force.

In conclusion: the contribution offered here has (it is hoped) confirmed that in so far judge-made law and precedent are not recognized in the Greek legal system as formal sources of law –suggestion which does not tone down the admittedly 'creative' role of the Greek judge, as described above–, while prospective overruling of judicial decisions remains a rather meaningless institution within our legal system. It has further turned out that only the sovereign legislator is entitled to proceed to 'prospective overruling', altering the current legal status with a prospective, *ex nunc* effect. Statutory retrospective effects are, in principle, not excluded, as long as they do not relate to criminal cases[38] or to taxation.[39]

[38] See Art. 7 § 1 C:

> There shall be no crime, nor shall punishment be inflicted unless specified by law in force prior to the perpetration of the act, defining the constitutive elements of the act. In no case shall punishment more severe than that specified at the time of the perpetration of the act be inflicted.

[39] See Art. 78 § 2 C:

> A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax.