

The Council of State and Places of Worship during the Pandemic in Greece

Alexandros Kyriakidis¹, Nadia Tsinafornioti²,

Introduction

It is a fact that the SARS-CoV-2 pandemic and the associated COVID-19 disease has resulted in global restrictions on constitutionally guaranteed rights, with the aim of limiting the transmission of the virus and protecting public health. Greece has been no exception, placing strict restrictions on citizens' rights of free movement (Art. 5 of the Greek Constitution), gatherings of people (Art. 11 of the Greek Constitution), etc. One activity on which strict restrictions have also been imposed is religious worship. These restrictions have been challenged before the Supreme Administrative Court of Greece, the Council of State (CoS).

Legislative Framework

In Greece, the possibility of imposing a temporary ban on the operation of places of religious worship was provided for in February 2020 under Article 1(2)(vi) of the Act of Legislative Content³ (ALC) of 25.02.2020, as a measure intended to effect the “prevention, health monitoring, as well as restriction of the spread of the disease.” The article (par. 4) further authorized the Ministers of Education and Religious Affairs, and Health to issue a relevant joint Ministerial Decision (MD) to implement such a ban and determine the specifics.

Almost a month later, the first MD (no. 2867/Y1/16.03.2020) was issued, which provided for the “temporary ban of all kinds of functions and ceremonies in all places of religious worship... of every doctrine and religion ... for reasons of public health” until 30.03.2020. Only attendance for individual prayer for a short amount of time, and with a restriction of 1 person per 10 square meters (sq.m.), was allowed. The expiry date of the period specified by this MD was extended on a total of five consecutive

¹ PhD candidate and Head of Operations & Research, Centre for Research on Democracy and Law (CEDLAW), Department of International and European Studies, University of Macedonia.

² Law Student, Aristotle University of Thessaloniki, and member of the Department of Administrative Support & Events, CEDLAW.

³ ALCs are constitutionally provisioned, executive acts by the government to address a specific emergency and unforeseen situation. They are equivalent to a law, but must be ratified by Parliament within temporal limits. This particular ALC was ratified within those limits under Article 1 of Law 4682/2020, almost 1 month after it was issued on 03.04.2020.

occasions until the following dates: 11.04.2020, 20.04.2020, 28.04.2020, 03.05.2020, and finally 16.05.2020, covering a total period of 2 months⁴.

A few days before the last of the above extensions expired, a new MD ([D1a/GP.oik.29519/12.05.2020](#)) was issued, permitting, from 17.05.2020 onwards, religious ceremonies in religious places with the restriction of 1 person per 10 sq.m. and with a distance of 1.5 meters between persons, with up to 50 persons for religious sites with a floor area of over 500 sq.m., and on the condition that all relevant health protocols (hand sanitizers, masks, ventilation etc.) were complied with.

Challenges before the CoS

The above MDs were challenged before the CoS through the application for preliminary injunctive relief and stay of 18.03.2020, following which the CoS (Injunctions Section) issued decision no. 49/2020, and also through the application for annulment of 30.03.2020, following which the CoS (4th Section) issued decision no. 1294/2020. It is worth noting that Art. 1(5) of the ALC provides for the possibility for any individual to challenge the ALC's measures before the Chair of the Administrative Court of 1st Instance of their respective region, but the CoS ruled that this concerned ALC-based acts issued for individual cases, and not the direct challenging of the executive acts implementing the ALC's measures, the judicial review of which was ruled to belong to the CoS (CoS decision no. 1294/2020, par. 4).

With regard to the application for preliminary injunctive relief and stay of the MDs, in accordance with Article 52(6) of Presidential Decree [18/1989](#) (as currently in force), in order for such an application to be granted by the CoS, it must be likely to succeed (i.e. based on solid judicial precedence, and not merely presumed successful) and/or it must demonstrate irreparable damage or damage that is difficult to reverse in the event that the application for annulment is, eventually, successful. Conversely, even in this case of damage, the application for injunction is rejected if it is ruled that the adverse consequences on third parties and the public interest (of potentially granting the injunction) are more serious and outweigh the benefit of the applicant. The CoS Injunctions Section dismissed the request for preliminary injunctive relief and stay,

⁴ MD nos. [D1a/GP.oik.21285/29.03.2020](#), [Δ1α/ΤΠ.οικ.23093/06.04.2020](#), [D1a/GP.oik.25763/16.04.2020](#), [D1a/GP.oik.27283/28.04.2020](#), [D1a/GP.oik.27807/02.05.2020](#), the last of which reinstated the possibility for individual prayer for 1 person per 10 sq.m., and up to 50 people in cases of religious places with a floor area of over 500 sq.m., observing health protocols (distances of 1.5 meters, hand sanitizers, masks, ventilation, etc.).

ruling that the restrictive measures were taken “for exceptional reasons of public health protection...,” were temporary, and that current knowledge did not allow the possibility of assuming different measures with the same protective effect for public health; the application was also found to not be likely to succeed (CoS decision no. 49/2020, par. 6).

Things became slightly more complicated in the case of the application for annulment. The application was lodged on 30.03.2020, challenging the first extension of the first MD (issued on 29.03.2020). However, the 4th Section of the CoS held the hearing on 26.05.2020, close to two months after the issuance of the challenged MD; in fact, when the CoS convened, all five extensions of the first MD had ended, and the new MD, permitting the operation of places of religious worship, had already been issued. According to Art. 33 of Presidential Decree 18/1989 (as currently in force), proceedings before the CoS are abolished if, after the application has been lodged, the challenged act has, in the meantime, been recalled, repealed, or has ceased to apply for any reason, unless: a) the applicants claim “a particular legitimate interest justifying the continuation of the proceedings”; b) the act, due to a limited duration, expired and a new act with similar content was issued after its expiry, or c) the act “was amended or replaced with an act that continues to cause harm to the applicants.”

Based on the above, the applicants lodged two additional filings on 06.05.2020, for the fifth (and final) extension of the first MD, and on 14.05.2020, for the new MD that permitted, with limitations, the operation of places of religious worship. The applicants claimed that, with regard to the first MD (and the MDs extending it), there were grounds for continuing the proceedings because they had suffered moral damage “caused by the intense mental and emotional distress they had suffered as a result of their having been cut off from the worship community and restitution [for the moral damage] could not be made by the government or in the context of another trial.” Regarding the new MD, they argued that the proceedings should continue since the MD in question had, in essence, similar content to the first MD and was still damaging to them (CoS decision no. 1294/2020, para. 7).

The 4th Section of the CoS, although accepting the arguments relating to the first additional filing (continuing the trial on the fifth extension of the first MD), simultaneously rejected (in part, by majority) the arguments of the second additional

filing (relating to the new MD), thus effectively dismissing the case and ending the proceedings. The Section dismissed the argument that material or moral damage, or preventing such damage that may be caused by a future similar act, constituted a particular legitimate interest, finding that remedy was possible through the court system. The Section also found that, due to their executive character, the MDs did not cause moral harm to the applicants (CoS decision no. 1294/2020, para. 7-8).

With regard to the applicants' arguments in respect of the new MD, the Section, in this case by majority, rejected that it was essentially the same as the first MD (and the MDs extending it), ruling that it was different in that it did not ban the operation of places of religious worship, but rather permitted it, under certain conditions. Hence "the subject of the trial becomes substantially different compared to the original (i.e. the subject of the original trial), in terms of legal and factual conditions." However, on this particular point there was a dissenting minority opinion by two members of the Section who argued that, since the ALC upon which all the MDs were based, provided for a set of measures that were being further reviewed and specified in terms of their duration and intensity, in accordance with the continuously changing epidemiological situation, and since the measures of the new MD "even if milder, continue to be unfavorable to the applicants," the proceedings should continue because the new MD "is issued in place of the previous one that expired" (CoS decision no. 1294/2020, par. 10).

Comments

The CoS did not examine the ban on the operation of places of religious worship on its merits (unlike the corresponding courts in other countries, such as [the US Supreme Court](#)). Rather, it dismissed the application for preliminary injunctive relief and stay on the grounds of public health and the impossibility of implementing different measures to ensure public health. It also dismissed the application for annulment on the grounds that there was no particular legitimate interest and that the challenged act had expired.

It is worth noting that in the first MD and in a further three of the MDs extending its time limit, although religious services and ceremonies were prohibited, people were allowed to attend for individual prayer, subject to specific limitations. Accordingly, the new MD permitted the operation of places of religious worship but under these same limitations. As such, there are considerable similarities between the two MDs,

something that seems to reinforce the dissenting minority opinion relating to the continuation of proceedings.

It is also interesting that the ALC itself provides for authorization to implement only a temporary ban on the operation of places of religious worship, and not for the possibility of milder restrictions (e.g. the operation of the said places but under strict limitations, as was provisioned under the new MD). In fact, in other measures, the ALC clearly provides for the possibility of implementing a variety of restrictions (ranging from harsh to mild), where discretion is permitted; this is explicitly mentioned, such as in the restrictions on the movement of means of public transportation specified in Art. 1(2(viii)) of the ALC. The legislative authorization for issuing the new MD, therefore, becomes questionable, given the lack of authorization for assuming other (milder) measures than a ban.

Finally, the epidemiological situation that prevailed when the new MD, allowing the operation of places of religious worship, was issued on [12.05.2020](#) (18 new COVID-19 cases and a total of 2,744 cases in Greece as a whole), was comparatively worse than when the MD including the last extension of the first MD, banning the operation of places of religious worship, was issued on [02.05.2020](#) (8 new COVID-19 cases and a total of 2,620 cases in Greece as a whole). The line of argumentation in favour of public health, therefore, also becomes questionable, at least from a purely epidemiological perspective, since the situation was worse when the ban was lifted than when it was extended. In any case, the judgement of the case on its merits by the CoS would have had great legal interest, especially in respect of the balance between the right of religious worship and the right to public health, as well as in relation to the limitations that may be imposed on either of those rights by the government.