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Exploring the Grounds of Greek Supreme Judges' Turn to Militant Democracy

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The Brave New World of Areios Pagos

These are exciting times for Greek constitutionalists. In its capacity as electoral judge, the first section of the Greek Supreme Civil and Criminal Court (Areios Pagos) recently banned the participation of the neo-Nazi Hellenes National Party in the elections of 21 May. The decision applied a legal provision enacted in February in order to impede precisely this party, considered as the political successor of Golden Dawn, from participating in the elections. To do so, the judges had to accept the compatibility of the legislative provision with the Greek Constitution, and this was not an easy task.

In their comment in this blog, Samartzis and Vadivoulis explain that to accept the constitutionality of the legislative ban on Hellenes National Party, Areios Pagos had to depart from a long-established interpretation of Article 29(1) of the Greek Constitution, which until then excluded legislative bans on political parties. While the new interpretation of the constitutional provision allows for such bans, it does not go so far as to imply “an authorisation for the judicial enforcement of militant democracy”, according to the authors. This solution is the result of the judges’ will to uphold the law without affirming their own power to assess the democratic character of political parties. In their view, this “ambivalent” embrace of militant democracy “minimises the implications of the (...) judgment for future cases”.

As I argue, this institutional reading of the decision might miss out its most important implications in terms of constitutional theory and method. Indeed, in order to accept the constitutionality of the legislative ban on Hellenes National Party, Areios Pagos had to provide not only a new interpretation of Greek constitutional provisions, but also a whole new vision of democracy, of the Greek and the European Constitution and of Greek constitutional politics. The brave new world of Areios Pagos is part of a new constitutionalist approach that is likely to affect the application of constitutional provisions in future cases, as the more recent decision concerning the elections of 25 June shows.

Democracy as a constitutional goal

Areios Pagos starts its reasoning with an analysis of Article 29(1), which states that Greek citizens “may freely found and join political parties, the organization and activity of which must serve the free functioning of democratic government.” In the court’s view, the rule established in this provision is “clearly compelling” (p. 10 of the judgment) as it results from the use of the term “must”. This term implies a “tacit” empowerment of the legislator (p. 11) to preclude the participation in the elections of political parties whose organization or activity contradicts the free functioning of democracy, as this is manifested through concrete acts. In this respect, the relevant legislation required that the party’s candidates or leading members have been convicted for certain crimes, including the participation in a criminal organization. This was the case for Kasidiáris, founder and leading member of Hellenes National Party, who had been convicted in 2020 for his role in the neo-Nazi Golden Dawn.

However, while Hellenes National Party was banned from the elections, Kasidiáris himself could still run as candidate, initially at least. What justified this solution was the consideration that the political action of individuals is considerably limited when compared to the action of political parties, which is much more organized, broad and effective. Since political parties by definition aim at influencing public opinion, restrictions on their electoral rights in the name of the free functioning of democratic government do not put pluralism and liberalism at risk. They are “simply means of self-defense of the militant Greek democracy” (p. 14). Much more than simply enabling legislative restrictions on the rights of political parties then, Areios Pagos provides a whole new interpretation of the Greek constitutional order (and of the European – the judges extensively refer to ECHR provisions and case law) as actively establishing militant democracy. This embrace of militant democracy, be it half-hearted or hesitant, has important structural implications in constitutional reasoning. In modern constitutionalism, democracy as a political ideal can be said to be the goal of every constitution. In terms of constitutional doctrine however, it usually translates into procedural requirements, simply setting formal limits on legislative interferences with civil rights. Areios Pagos departs from this orthodoxy and defines democracy as a constitutional goal in itself, as an ideal that guides constitutional interpretation and practice and creates positive obligations of protection upon the legislator.

As such, militant democracy gives strong powers to Parliament and can justify extensive interferences with constitutional rights. Hence, Areios Pagos underlines that the Constitution and the ECHR impose a positive obligation upon the Greek State to prevent the abuse of political parties’ rights and their use to the detriment of liberal democratic institutions (p. 12-13). In the same vein, Areios Pagos rejected any possibility to invoke the presumption of innocence by Kasidiáris as abusive. According to the court, a different solution would “render militant democracy completely powerless”, and would turn the presumption of innocence from a democratic *acquis* to a “Trojan horse” (p. 20). The interference with fair trial rights and civil liberties then, is not simply a necessary evil resulting from Areios Pagos’s strategic choices. It is a structural implication of militant democracy itself. Indeed, the establishment of

democracy as a goal of the domestic and the European constitutional order implies that other constitutional rights and liberties are protected only insofar as they are not abused and turned against democracy itself.

This reading is confirmed by the decision of 8 June, in which the court applied the same reasoning to ban the participation in the elections of Kasidiáris and other members of Hellenes National Party as a coalition of independent candidates. The restriction on individual election rights this time was justified by reference to the constitutional prohibition of abuse of right, which not only imposes positive obligations upon State authorities but also directly limits individual rights and freedoms.

Constitutional maximalism

The identification of constitutional goals is an instance of constitutional maximalism that is quite rare in Greek constitutionalism. Constitutional doctrine in this context is traditionally liberal and generally conceives of the Constitution as a politically neutral document setting limits upon the action of Parliament in favor of civil liberties. In order to define democracy as a constitutional goal the judges proceed to a “teleological and systematic” interpretation of the Constitution (p. 10), which accentuates its value-laden content. Along with the constitutional provisions on democracy, the rule of law and the separation of powers, they extensively refer to the fundamental values of human dignity, to the protection of the free development of the personality, to everyone’s right to participate in the social, economic and political life of the country, as well as to the full protection of individuals’ life, honor and liberty, irrespective of nationality, race, language, religion or ideology.

Areios Pagos’s turn to values allowed for a shift from formal limits to the actual effectiveness of constitutional provisions. Hence, the constitutionally required protection of democracy should not only take place *ex post*, through criminal sanctions, but also *ex ante*, through electoral legislation. Criminal repression is insufficient as it occurs only after the party has been given the possibility to attempt the subversion of democratic government. On the contrary, the preventive function of electoral restrictions is understood as maximal, as they “prevent the creation of the conditions that could lead to the subversion of democratic government” (p. 14). In the same vein, the judges concluded that the extension of the legislative ban on parties whose *actual* leader has been convicted for participation in a criminal organization was legal-politically warranted in view of the legislative goal. This provision was enacted following Kasidiáris’s stepdown from Hellenes National Party’s leadership, and aimed at precluding this party from running for the elections under the leadership of a strawman. Areios Pagos considered that a different solution “would render the ban stale and easy to circumvent” (p. 17). Based on similar considerations and on the principle “*fraus omnia corrumpit*”, in its June decision, Areios Pagos extended the application of the ban to a coalition of individual candidates formed by members of Hellenes National Party.

In the new kind of constitutionalism that underlies Areios Pagos's reasoning, the normativity of the Constitution expands not only in terms of effectiveness but also in terms of scope. The court provided guidance as to the criteria that allow establishing actual leadership of a political party, among which a person's previous participation in the party's activities, her previous political action or the way she was chosen to lead the party. Following this reasoning, the extension of the ban was found to be compatible with the "principle of transparency" that guides not only the functioning of the State but also the "functioning of society, especially when it is related to the State and can exert political influence" (p. 17-18). In Areios Pagos's reasoning then, the normative reach of the Constitution appears potentially total: The Constitution postulates to regulate not only the various fields of public action but also the internal organization of political parties, and even the functioning of society as a whole, at least in its politically relevant aspects. In the words used by the Areopagites, the Constitution "is guided by the fundamental principles of democracy and establishes a democratic society" (p. 10). Following this line of reasoning, in its June decision, Areios Pagos provided guidance concerning possible indications of the existence of a latent party structure behind coalitions of individual candidates.

A new vision of Greek constitutional politics

The decision raises fundamental questions. How are we to know whether a party's action serves democracy or aims at subverting it? How are we to determine whether the invocation of electoral rights is abusive? Areios Pagos's reasoning presumes that we are not only able to answer such questions but also to establish the answers with proofs. Referring to Strasbourg case law, the judges identify concrete criteria that allow establishing that a party's organization or political action is detrimental to the free functioning of democracy. These criteria are the perpetration by the party's members, and under the guidance of the party's leaders, of acts of violence against political opponents or persons of different ethnic origin or race; the stirring of the public to commit such acts, in combination with anti-democratic views held by the party's leading members; the constitution of paramilitary organizations; and the training of the party's members in using arms. According to the judges, it is "self-evident" that democracy will defend itself by impeding such political parties from expanding their organized activity within Parliament (p. 12-13).

One thing is sure, the supreme judges' embrace of militant democracy is not combined with a judicious approach to judicial powers. While restrictions on election rights are imposed by Parliament, they are implemented by Areios Pagos, after examination of the relevant elements of proof. In the end, it is the judges who define and apply the criteria that allow banning a political party or even a coalition of individual candidates from the elections. This is why, further in its reasoning, Areios Pagos dedicates some long paragraphs to the procedural safeguards that guarantee judicial independence, impartiality and fair trial rights in the electoral procedure (p. 20-21).

As other instances of constitutional maximalism, the decision expresses the judges' epistemological optimism, as well as their faith in the institutional checks and balances of Greek democracy. Such epistemological optimism and institutional faith are not always warranted, and can only be justified under precise socio-political conditions. In this respect, the judges describe the evolution of Greek constitutional politics from the fall of the dictatorship preceding the adoption of the Constitution to our days. As they point out, the Greek Constitutional Assembly had already expressed its will to ban anti-democratic parties during the debates on the adoption of the Constitution of 1975. The proposal was then withdrawn following the reaction of the opposition. The socio-political circumstances of the time, in combination with the absence of any constitutionally defined criteria for applying the proposed provision, justified the opposition's "reasonable distrust". While this is not mentioned in the decision, distrust was due to previous bans on the communist party and to the prosecutions against its members that have marked Greek constitutional and political history. In the Areopagites' view, distrust however is no longer justified under the present socio-political circumstances. The smooth functioning of parliamentary democracy in Greece for almost half a century and the existent manifestations of anti-democratic political action allow for the law to determine "completely objective criteria" for banning political parties whose action does not serve the free functioning of democracy (p. 15).

Is it constitutional to doubt?

The supreme judges express a self-confidence that is rare in Greek constitutional writings. While this might indeed be a sign of maturity of Greek constitutionalism and constitutional politics, it also leaves the reader with some doubts. How can the law define "completely objective criteria" for banning political parties when the Constitution still does not provide for such? And if the functioning of Greek democracy over the last fifty years has been so smooth, why do we attest to the rise of neo-Nazi political parties and groups? Will the Greek turn to militant democracy only concern neo-Nazi parties and coalitions or will it lead to the exclusion of groups with other political ideologies? In the end, what precisely guarantees that this empowerment of the legislator will not be abused by parliamentary majorities?

Following Geertz, law describes "a particular course of events and an overall conception of life in such a way that the credibility of each reinforces the credibility of the other" (p. 215). If Areios Pagos's constitutional maximalism is to be viable, the worldview that it depicts must correspond to local knowledge. However, the decision is based on a vision of Greek constitutional politics that is not consensual among Greek constitutionalists and political actors. It is significant in this respect that the parties of the Left have not shared the supreme court's optimism and faith during public debates on the legislative ban on Hellenes National Party. Faith in the smooth functioning of Greek democracy is questionable in light of recent scandals that have shocked Greek political life, including the spying of the telephones of a large number of Greek political and public personalities and the government's efforts to hinder investigations of the matter by independent authorities. Such faith appears even

unwarranted when one considers the important positions that certain members of neo-Nazi political groups have occupied within Greek secret services and armed forces in the past. Faith in Areios Pagos and its impartiality also seems misguided, when one considers that it is a former member of this institution, and a quite important one, that succeeded Kasidiáris in the leadership of Hellenes National Party. In the brave new world of Areios Pagos, where the normativity of the Constitution appears as total, is it still constitutional to doubt?

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