

Contemporaneous questions of liberty;

Equality and Access to Justice in Greek legal order

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The values that are considered fundamental and comprise the core of the post war Rule of Law (Rechtsstaat) are encompassed and expressly depicted in the Greek Constitution, as it is the case with the Constitutions of all member-states of European Union.

Thus, the respect of the value of the human being, as an individual and a societal being is unfolded to constitutional provisions (Articles 4-25) protecting human rights such as personal and political freedom, equality in law, free access to justice, free participation of the individual to the social, political and economic life, freedom of religion, freedom of opinion and press, freedom of art, science, research and teaching, protection of property as well as to provisions complying with the welfare state constellation of values such as the right to work, the protection of family, marriage, motherhood, childhood, the protection of the weak and disabled, the homeless and so forth

The mere social and political evolution of each state, as expressed in its on going legislation, in many ways tests the solidity and endurance of the above principles.

The test has become even more complex in the framework of the European Union.

This is because member-states' legislatures are challenged to set aside their own particularities towards a uniform implementation of these values.

It is useful to remember that the Council of Europe, in its founding treaty, had the providence to call these values "the common heritage of the member states".

Recently the impact of the globalisation to the societies of the member-states puts an additional strain to the perseverance of these values.

Hence, the public discussion, which is already at hand, as is demonstrated by the recent adventures of the proposed European Constitution, seems to oscillate between the human rights as a unifying principle towards "*a post nation constellation*" (in the words of the distinguished German professor Jürgen Habermas) and the further protection of human rights under the umbrella of the post war international law-system.

The Courts, however, are not within the scope of the public discussion, but have to deal with a positive law.

The disputes, which the Courts are bound to resolve, normally give the opportunity to Supreme Courts to merely reconfirm the validity of the above values in the law. This day-to-day operation is not to be disregarded at all. As a principle it reinforces and further stabilizes the major social good, which is the safety and consistency of law.

Occasionally, however, Supreme Courts have to deal with either borderline-cases. These sorts of cases, by their abnormal nature demand the interpretation that Supreme Courts are legally vested to give, or in some instances apparently normal cases that require a dissimilar approach than the one adopted by the Courts in the past.

In both instances, the common European heritage as construed on the above essential values and principles and implemented by the European Courts offers a safe compass.

The Greek legal order naturally lives with the above tests and strains.

Various provisions of the Greek Civil and Criminal Procedure, safeguard that the human and societal rights are operative.

The Greek Supreme Court for Civil and Criminal cases is called "Arios Pagos" after a place near Acropolis where the Athenian justices first convened thousands of years ago and which literally means the rock of the Mars, the God of War.

Now, Arios Pagos pursues with its decisions to deflate the polemic developed between individual interests and, at times, the conflict arisen between the Greek legislation, the constitutional principles and the supralegislative provisions of the European Treaties.

There have been a number of decisions that highlight the mark of Arios Pagos on the European legal integration.

On the part of Civil Procedure, Arios Pagos had to deal with the procedural privileges that Greek Law reserves for the State.

The most striking of them was the forbiddance of enforcement of Court decisions against the State. Arios Pagos overruled the relevant stipulation (dating back to 1952) as being straightforwardly opposite to the European Treaty on Human Rights as well as article 4 of the Constitution providing for equality in law (decision 21/2001 in full bench). The Greek Constitution, which was revised the same year, allows expressly the enforcement of Court decisions against the State.

In the same spirit Arios Pagos has severely contained the procedural privileges that state controlled banks enjoyed (decisions 24, 25/2006 in full bench).

Article 8 of the European Treaty on Human Rights as well as the relevant provisions of the Greek Constitution (and mainly article 19, shielding the secrecy of communications) oriented Arios Pagos to decline the use of tapes recording private conversation without consensus of the parties to that conversation (decision 1/2001 in full bench).

On another case, which gave ground to controversy in Greece, the lexicographic registration in a dictionary of a word commonly used by southern Greeks to insult northern Greeks has been allowed on the basis of the constitutional protection of the freedom of science and research (art. 16) and the freedom of opinion (art. 14) (decision 13/1999 in full bench).

On the part of Criminal Procedure, Arios Pagos adjudicated *contra legem* that the cassation (or case) petitioned to the Court by a sentenced person is admissible, even if the person is not under custody at the time of his petition (decisions 14, 16/2001 in full bench).

In the same spirit, Arios Pagos has admitted the cassation disregarding secretarial deficiencies in the statement of the cassation as formalistic (decision 677/2005).

Also, Arios Pagos allowed that the defendant might not be present in the Criminal Courts, as long as an advocate represents him/her (decision 9/2002 in full bench). The Greek legislation adopted this jurisprudence, on first and third cases, and placed it in the corpus of positive law.

Therefore, Arios Pagos proves to be alert to the preservation and further establishment or even expansion of the values comprising the European common heritage, and attempts to keep on contributing to European integration, being mentioned especially to equality in law, access to Justice, fair trial, proportionality and similar principles.

We, Greeks, as Hellenes and Europeans, feel at home as the heirs of this common heritage since we have the privilege to track down its origin in ancient Hellenic texts.

Thus, in the 18th Rhapsody of Iliad, Homer narrates the trial depicted in Achilles' shield; the principles of free access to law, of independence of justice, of the necessity that the Court decision be thoroughly justified and of the public nature of the procedure are already there. In Greek tragedy as well as in the speeches of orators such as Demosthenes, there are again and again met procedural rules that have become the nucleus of the contemporary rule of law.

Last but not least, the principle of proportionality which functions as a normative watchdog in the modern European legal order and has given space for a fertile

debate as to its relation with Aristotle's justitia distributiva (among others between professors Wieacker and Mitsopoulos) can be traced in Plato's "Politikos" ("Statesman") wherein even he introduced the principle of metretics and the terms «μέτριον», «πρέπον» and «δέον», i.e. "moderate", "appropriate" and "necessary" are met, given that these are with Geeignetheit, Notwendigkeit and Verhältnismässigkeit im engeren Sinne, defined in German as precisely the three criteria of Verhältnismässigkeitsgrundsatz.

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