

Comment

REASON AND WILL: A COMMENT

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The importance of Ioannis Tassopoulos' theme, "reason and will"¹ in the context of the Greek Constitution, cannot be overemphasized. As Tassopoulos has reminded us, the turbulent social and political history of modern Greece over the last 60 years—featuring foreign invasions during the Second World War, followed by a bitter and brutal civil war, then by a parliamentary democracy haunted by a fear of the reemergence of the communist threat, and eventually, by a repressive military dictatorship that only ended in 1974—has guaranteed that the modern constitutional history of Greece would differ greatly from that of the United States. Furthermore, the turbulence of the last 60 years did not follow a period of relative tranquillity. From the very beginning of its emergence as a modern state following the revolution of 1821, Greece has had a tumultuous political history.²

For these reasons, it is only now, when Greece has at last become a proud member of the European Community and a truly democratic republic with stable institutions, that any meaningful comparisons between Greek and American constitutional practice can be made. However, any such comparisons must still be made in light of Greece's very distinctive history. Greece's turbulent past explains why the constitutional protections afforded by the Greek Constitution and interpreted by the Greek courts take on such great importance in the Greek context. Moreover, in addition to these historical considerations, structural reasons explain why the inquiry into the interplay between reason and will takes on added significance in the Greek context. It is these structural reasons that I wish to discuss briefly in this comment.

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1. Ioannis A. Tassopoulos, *New Trends in Greek Contemporary Constitutional Theory: A Comment on the Interplay Between Reason and Will*, 10 DUKE J. COMP. & INT'L L. 223 (1999).

2. See generally Christopher M. Woodhouse, *The Story of Modern Greece* (1968).

The most obvious difference between the constitutions of the United States and Greece is the considerably greater length of the Greek Constitution. The American Constitution has only seven articles—of which the longest by far is Article 1, which deals with the legislative power—and twenty-seven amendments (many of which consist only of one or two sentences) that have been adopted in the 210 years that this Constitution has endured. This comparative brevity has permitted many provisions of the American Constitution, such as the First Amendment, to enter into the popular consciousness and, combined with its antiquity, has given the American Constitution something of a sacred aura. Indeed, it is hard to imagine the United States of America apart from its Constitution.

By contrast, it is very easy to imagine Greece apart from any particular constitutional form. After all, modern Greece has undergone frequent constitutional changes since its emergence from Ottoman rule following the revolution of 1821 and the Great Powers' formal recognition of Greece as an independent state in 1832. Moreover, like many other twentieth century constitutions, the Greek Constitution of 1975 is very lengthy. It has 120 articles and covers a wide variety of subjects ranging from detailed provisions on parliamentary procedure,³ to the retirement age of university professors,⁴ to the outright prohibition of private universities.⁵ Like other modern constitutions,⁶ among the rights the Greek Constitution guarantees to its citizens are what Americans would call "welfare rights," a concept largely absent from the U.S. Constitution. For example, the Greek Constitution provides that "[w]ork constitutes a right and shall enjoy the protection of the State."⁷ The State is likewise required under the Greek Constitution to "care for the social security of working people,"⁸ to "care for the health of citizens,"⁹ and to "adopt special measures for the protection of youth, old age, [the] disabled and for the relief of the needy."¹⁰

We must also note that there are significant philosophical differences between the structures of the Greek and American

3. See ΣΥΝΤΑΓΜΑ [Gr. Constitution] arts. 51-80.

4. See *id.* art. 16, para. 6.

5. See *id.* art. 16, para. 8.

6. See, e.g., CONSTITUZIONE [Constitution] arts. 35-38 (Italy); KONSTYTUCJA [Constitution] arts. 64-72 (Pol.).

7. ΣΥΝΤΑΓΜΑ [Gr. Constitution] art. 22, para. 1.

8. *Id.* art. 22, para. 4.

9. *Id.* art. 21, para. 3.

10. *Id.*

constitutions. I am not referring to specifics, such as the Greek Constitution's explicit recognition in Article 3 of the Greek Orthodox Church as an autocephalous church with exclusive authority over any official translation of the text of "Holy Scripture . . . into any other form of language."¹¹ Rather, I refer to something more fundamental. Like the American Constitution, the Greek Constitution makes clear that ultimate sovereignty lies with the people. The very first article of the Greek Constitution provides that popular sovereignty is "the foundation of government."¹² However, unlike the American Constitution, the Greek Constitution makes it abundantly clear that it is the function of the State to further the expression of this popular sovereignty in the manner specified by the Constitution.¹³ This helps explain not only the inclusion of welfare rights in the Greek Constitution, but also the prohibition on the establishment of private universities. Other provisions of the Greek Constitution provide that "[g]eneral working conditions shall be determined by law"¹⁴ and that "[t]he master plan restructuring of the country, and the reshaping, development, town planning and expansion of towns and residential areas in general, shall be under the regulatory authority and control of the State."¹⁵ The State is further required to plan and "coordinate economic activity in the Country,"¹⁶ and "[p]rivate economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy."¹⁷

Freedom of expression is guaranteed by the Greek Constitution,¹⁸ which prevents prior restraint but allows the public prosecutor to seize public publications *after* circulation for (1) "an offence against the Christian or any other known religion;" (2) obscenity; (3) "insult against the person of the President of the Republic;" or (4) the disclosure of "information on the composition, equipment and set-up of the armed forces or the fortifications of the country."¹⁹ Publications guilty of three such offenses within a five-year period can be banned, and journalists so convicted can be

11. *Id.* art. 3, para. 3.

12. *Id.* art. 1, para. 2.

13. *See id.* art. 1, para. 3.

14. *Id.* art. 22, para. 2.

15. *Id.* art. 24, para. 2.

16. *Id.* art. 106, para. 1.

17. *Id.* art. 106, para. 2.

18. *See id.* art. 106, para. 2.

19. *Id.* art. 14, para. 3.

prohibited from engaging in their profession.²⁰ The Greek Parliament, however, has never enacted legislation authorizing the exercise of any such powers and, under present conditions, is unlikely to do so. Finally, it should be noted that, unlike the United States, the prohibition of prior restraints does not apply to other media such as motion pictures, radio, and television.²¹

The Greek Constitution's guarantees of civil liberties are worded differently than the guarantees of its American counterpart. Many of the guarantees contained in the U.S. Constitution are worded in absolute terms with no qualifications. The First Amendment to the American Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"²² In similarly absolute terms, the Sixth and Seventh Amendments provide, respectively, for the right to a jury trial in criminal and civil cases. American courts may sometimes feel obliged to read some limits into these rights,²³ but they must do so in the full awareness that their decisions are actions in derogation of the actual text of the American Constitution. Other American constitutional guarantees are expressed in qualified terms, such as the Fourth Amendment safeguards of "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,"²⁴ but, it should be noted, the Fourth Amendment qualification focuses on the unreasonableness of the search and not upon the ultimate social purposes sought to be achieved by the search.

By contrast, the Greek Constitution follows the common civil-law practice of announcing an absolute right and then following that declaration with the authority to derogate the right for certain public

20. *See id.* art. 14, para. 6.

21. *Id.* art. 15, para. 1.

22. U.S. CONST. amend. I.

23. Although the reluctance of American courts to countenance any prior restraints of the press are well known, many Justices have refused to rule out the possibility that an injunction might be available in wartime to restrain publication of the date upon which a convoy would sail. *See, e.g.,* *New York Times Co. v. United States*, 403 U.S. 713, 725 (1971) (Brennan, J., concurring); *id.* at 742 (Marshall, J., concurring). This was the famous Pentagon Papers case.

24. U.S. CONST. amend. IV. It should not be forgotten that the Fourth Amendment was adopted against a background of resistance to the British government's use of searches, pursuant to general warrants, to suppress political dissent. *See, e.g.,* *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), *cited with approval in* *Boyd v. United States*, 116 U.S. 616, 626 (1886). That is, the Fourth Amendment was adopted to prevent state interests from being used to justify searches and seizures.

policy reasons.²⁵ For example, Article 19 of the Greek Constitution provides that the

secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable. The guarantees under which the judicial authority shall not be bound by the secrecy for reasons of national security or for the purpose of investigating especially serious crimes, shall be specified by law.²⁶

A similar example is found in Article 14, which declares flatly that “[t]he press is free,”²⁷ but then follows that declaration with authorization for the seizure of newspapers after publication for certain stated reasons.²⁸ In the same constitutional provision, the Greek Parliament is directed to specify “[t]he conditions and qualifications requisite for the practice of the profession of journalist.”²⁹ The Greek Parliament has wisely declined to do so. Even provisions guaranteeing certain rights that do not contain any statements authorizing derogation in certain circumstances are subject to Article 25, which declares that “[t]he abusive exercise of rights is not permitted”³⁰ and that “[t]he State shall have the right to claim of all citizens to fulfill the duty of social and national solidarity.”³¹ These are awesome powers that are given to the executive and legislative branches of the Greek government. In his discussion of “Alevras’ Vote,”³² Tassopoulos reminds us that, if a constitution is to be more than a document that apportions authority among the various branches of government, it must impose upon those who derive their authority from that instrument the obligation to exercise their authority in a principled way. All constitutions inevitably generate what might be called political questions, but the fact that a question of constitutional law is described as a political question does not mean that its resolution must be found in the exercise of power.

To its credit, the Greek Constitution, unlike the American Constitution, specifically provides for judicial review, as noted by

25. For a discussion of the forms of legal argument common in civil-law countries, see George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 698 (1998).

26. ΣΥΝΤΑΓΜΑ [Constitution] at art. 19.

27. *Id.* art. 14, para. 2.

28. *Id.* art. 14, para. 3.

29. *Id.* art. 14, para. 8.

30. *Id.* art. 25, para. 3. See Fletcher, *supra* note 25 (discussing the civil-law use of this style of argument).

31. ΣΥΝΤΑΓΜΑ [Constitution] art. 25, para. 4.

32. Tassopoulos, *supra* note 1, at 232-35.

Tassopoulos.³³ While political questions may escape that review, most constitutional questions are not political ones. Given the greater detail of the Greek Constitution and the interventionist nature of the Greek State, the occasions for the judiciary to grapple with a vast number of constitutional questions can be expected to be much more numerous than would be the case in the United States. Moreover, unlike the United States, where constitutional adjudication proceeds according to the practice of the common law (that is, the case-by-case method in which a vast accretion of case law informs and cabins the discretion of judges), Greece is a civil-law country in which the method of decision focuses not on precedent but on the application of broad general principles to the facts of the pending case. In such a system, the tension between reason and will is particularly acute. Tassopoulos has shown why the resolution of that tension is and will continue to be crucial to the flowering of free and democratic government in Greece.

As Tassopoulos points out, this tension will not be resolved by reference to what he calls the “sometimes sterile black-letter law.”³⁴ Given the structure and language of the Greek Constitution, this can easily lead to routine sustaining of legislative encroachments of fundamental rights on the basis of an “unspecified public or general interest.”³⁵ Nor is “ad hoc pragmatism”³⁶ the solution, even if the constitutionalization of complex social issues might naturally incline courts in this direction. Rather, the structure of the Greek legal system makes it essential to resort to principle. How this is to be done is the question. Appeals to global principles that show the legal, political, and moral history of a society in its best light, as envisaged by Ronald Dworkin,³⁷ are likely to be even less successful in the Greek context than they are in the Anglo-American context.³⁸ Still, as Tassopoulos maintains, something along the more modest lines envisaged by Professor Herbert Wechsler in his call for “neutral principles” of constitutional adjudication,³⁹ seems both possible and desirable.

33. See ΣΥΝΤΑΓΜΑ [Constitution] art. 87, para. 2.

34. Tassopoulos, *supra* note 1, at 235.

35. *Id.* at 238.

36. *Id.* at 240.

37. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

38. See George C. Christie, *The Uneasy Place of Principle in Tort Law*, 49 SMU L. REV. 525 (1996).

39. See Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).