

Greece's Ambivalent Turn to Militant Democracy

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[On 2 May 2023](#), the Greek Court of Cassation (*Areios Pagos*) ruled on the certification of the candidate lists of the political parties that could lawfully participate in the Greek parliamentary elections of 21 May. It refused to certify the participation of the *Hellenes National Party*, which was founded on 4 June 2020 by Ilías Kasidiáris, the former press representative and MP of the neo-Nazi *Chrysí Avgí* party (*Golden Dawn*). Three years earlier, Kasidiáris had been convicted at first instance for participating and running a criminal organisation in view of his role in organising *Golden Dawn's* criminal activities. The first-instance court found these to include the murder of antifa activist Pavlos Fyssas and the attempted murders of migrant workers by centrally organised hit squads. *Hellenes National Party* is widely regarded as *Golden Dawn's* political successor. The refusal to certify the party breaks away from previous case law on political party certification and indicates a tentative, yet incomplete embrace of militant democracy by a jurisdiction that has traditionally been hostile towards its philosophy.

The Judgment

Areios Pagos based its judgment on two legal grounds. The first was a [recent amendment of the electoral law](#), by which a party may not participate in the parliamentary elections if “the party’s President, General Secretary, Managing Committee members, representative, and actual leadership have been convicted at any instance for [participating and managing a criminal organisation]”. Additionally, the amendment provided that a political party’s organisation and activity must serve “the free functioning of democratic government”. It stipulated that this requirement “may only be determined by reference to the conviction at any instance of the party’s candidates or founding members or former Presidents for [crimes that include participating and managing a criminal organisation]”. There can be little doubt from the timing and specificity of the amendment that its introduction was intended to prevent *Hellenes National Party* from participating in the elections. The reference to actual leadership, in particular, was only introduced through a [second amendment on 13 April](#), when Kasidiáris stepped down from the party’s leadership.

The second legal ground was Article 29(1) of the Constitution of Greece, which provides that

“Greek citizens possessing the right to vote may freely found and join political parties, the organization and activity of which must serve the free functioning of democratic government”.

Based on these facts, the case may appear straightforward. The amendment to the electoral law appears to have a *prima facie* grounding on the Constitution. Even if the amendment targeted a particular party and its leader, an unapologetic convicted neo-Nazi hardly deserves any sympathy from civil society for being deprived of a platform to promote his views in Parliament. The judgment is even lenient in one sense, by interpreting the amendment narrowly. Thus, while a party run by Kasidiáris cannot participate in the elections, Kasidiáris himself can still run for office as an independent candidate, in accordance with Article 51(3) of the Constitution, which provides that

The Members of Parliament shall be elected [...] by the citizens who have the right to vote, as specified by law. The law cannot abridge the right to vote except in cases where a minimum age has not been attained or in cases of legal incapacity or as a result of *irrevocable* criminal conviction for certain felonies. (emphasis added)

Despite appearances, however, the judgment constitutes nothing short of a constitutional transformation. Until the controversy regarding the *Hellenes National Party* erupted, there was widespread consensus that Greece's Constitution is not merely silent on legislative party bans, but that it actively prohibits them. This consensus is reflected in the case law of *Areios Pagos*. Thus, as recently as 2014, and even as the prosecution of *Golden Dawn* members had begun, *Areios Pagos* held that *Golden Dawn* could participate in the EU elections. It stated that "in the absence of final conviction and the concomitant deprivation of political rights, it is not possible to deprive the person in question of the right to run for office and to undermine the legal status and institutional activity of the political party, within the Constitution's normative framework, according to Article 29(1) of the Constitution regarding the free functioning of democratic government" (A1 Civil Division Chamber, decision 65 of 8 May 2014).

The Memory of Greece's Shadow Constitution

There are strong historical reasons for this aversion to restrictions on political parties, dating back to the birth of the [modern Greek state](#). Following WWII, Greece experienced a [deep division](#) between liberals and nationalists on one side, and communists on the other, which culminated in a civil war between 1946 and 1949. Following the victory of the anti-communists, and despite the restoration of constitutional order in 1952, emergency measures that had been adopted during the civil war remained in force as specific provisions that trumped constitutional guarantees. This "shadow Constitution" ([Parasyntagma](#)) effectively instituted a dual state against communists. It maintained the ban on the [Greek Communist Party](#) and provided a legal ground for various forms of persecution and discrimination against its members, including forced displacement, citizenship deprivation, and exclusion from the civil service on [grounds of national security](#). Despite interim attempts to reconciliation, communist persecution reached its peak during the dictatorship of 1967-1974, when the perceived communist threat served as a legitimating rhetorical device for the regime.

This background shaped the parliamentary debates around the adoption of the Constitution of 1975. Article 12(3) of the [Draft Constitution](#) introduced by the first elected government provided for outlawing political parties “whose activity leads to the subversion of the liberal democratic order or jeopardises the country’s territorial integrity” by a Constitutional Court. The provision (and, for that matter, the creation of a Constitutional Court) did not make it into the final constitutional text. Authorising a court to outlaw political parties on the basis of such indeterminate terms as “the subversion of the liberal democratic order” was considered open to abuse. It risked bringing back the ghosts of the past (for an overview, see [here](#)).

Areios Pagos’ Novel Approach to Article 29(1): Transformation into Militant Democracy?

Based on this background, the decision to prohibit the participation to *Hellenes National Party* in the elections appears to be unconstitutional. *Areios Pagos* remained faithful to this orthodoxy until 2 May 2023. It consistently interpreted the requirement of Article 29(1) that a political party should “serve the free functioning of democratic government” as a formal requirement that a party could fulfill merely by stating as much when submitting its list of candidates prior to the elections. In this case, however, it interpreted Article 29(1) to “provide the legislator the possibility but also the duty to establish [...] restrictions in electoral law, by which to prohibit the participation of parties or party coalitions in the elections, when their organisation or their previous or current activity, as it unfolds through particular acts, is mounted against the free functioning of democratic government” (p. 11). It also interpreted Article 51(3) narrowly, so that it applies only to the right of a citizen to run for office as an independent candidate or as a party member, but not as part of a party’s leadership.

Areios Pagos’s departure from the orthodox view is arguably best understood not as a failure to uphold the Constitution but rather as a constitutional transformation. [As Michael Ioannides has argued in a different context](#), a constitutional transformation occurs when critical interpretive communities, such as the legislature and the courts, opt for a reading of the Constitution that fundamentally deviates from previous understandings of its content. The legitimacy of the new reading is then based on the change in socio-political context. In this regard, the text of Article 29(1) of the Constitution was always flexible enough to allow for restrictions to political parties that seek to subvert liberal democracy. It is open to both interpretations, despite previous consensus on only one of them. Its reinterpretation constitutes a constitutional transformation insofar as it provides the means by which liberal democracy can defend itself against the lived experience of how *Golden Dawn* rose to prominence by using elections to increase its power and visibility, and ultimately to subvert them.

Areios Pagos thus substantiates how *Hellenes National Party* is a threat to liberal democracy by confirming its status as *Golden Dawn*’s political successor (pp. 61-85). It highlights the instances in which Kasidiáris used hate speech and incited his followers to violence against minority groups and political opponents (pp.

66-74). It also emphasises the undisputable acts of violence that match these exhortations (pp. 63-65). It refers to Kasidiáris's political activity to demonstrate the persistence of his political aims and argues that *Golden Dawn's* acts should bear on the assessment of the *Hellenes National Party's* sincere commitment to the free functioning of democracy.

Trading Fair Trial Rights for Democracy?

While *Areios Pagos* thus accepted the idea of militant democracy, it only embraced a limited version thereof. Accordingly, it held that the amendment to the electoral law may limit its jurisdiction to determine whether the requirements of Article 29(1) are satisfied. This move minimises the implications of the present judgment for future cases. *Areios Pagos* is not likely to prohibit the participation of political parties in elections based on its own assessment of whether or not a party serves the free functioning of democratic government.

In the case at issue, however, the reliance on the amendment creates a major problem. It requires *Areios Pagos* to automatically prohibit the participation of a political party if its leadership has been convicted at any instance. The amendment may thus appear to violate Kasidiáris's presumption of innocence under Article 6(2) of the European Convention on Human Rights, which the European Court of Human Rights has held to [apply when appellate proceedings are pending](#). Support for this wider application of the presumption of innocence can also be drawn, with respect to Greek constitutional law, from Article 51(3) of the Constitution.

The presumption is also potentially violated by certain comments in the judgment that seem to prejudge the outcome of the appellate proceedings. *Areios Pagos's* response to the objection raised when discussing the presumption is indicative:

The presumption of innocence is a democratic *acquis* and its invocation proves abusive when the leader of a political party has been convicted, even at first instance, for one of the crimes that turn against the constitutional order itself, especially when the sentence that was imposed for these crimes is already being executed. A different assessment would render militant democracy completely powerless and the invocation of the presumption of innocence by [the leader of this political party] would constitute the Trojan horse by which its subversion would be realised (p. 20).

This statement implies that the presumption of innocence is inapplicable when a person has been convicted at first instance for political crimes. Despite *Areios Pagos's* insistence to the contrary in other parts of the judgment, it also seems to deprive the appellate proceedings of purpose.

Militant Democracy Light

In one sense, *Areios Pagos* has found itself between a rock and a hard place. To avoid interfering with the presumption of innocence, it would have to ground its judgment exclusively on Article 29(1), and read it as an authorisation for the judicial enforcement of militant democracy that should, of course, be used judiciously. This choice would be deeply controversial. It is illuminating that, on the Greek left, both [Syriza](#) and [Yanis Varoufakis's Mera25](#) have opposed the prohibition. At the same time, the majority of judges (nine to one) in *Areios Pagos*'s chamber were evidently unwilling to uphold its earlier case law and declare the amendment unconstitutional. The result is an ambivalent embrace of militant democracy that, in the particular case it occurred, stands in clear tension with respect for the presumption of innocence.

