

NEW TRENDS IN GREEK CONTEMPORARY CONSTITUTIONAL THEORY: A COMMENT ON THE INTERPLAY BETWEEN REASON AND WILL

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I. INTRODUCTION

The interplay between reason and will as elements of the law illuminates the recent trends in Greek constitutional theory. These trends are related to the quest for objectivity in constitutional interpretation and can be viewed as a first response to the demand for a better balance between reason and will. These developments took place particularly in light of the prevailing political and social circumstances of normalcy in Greece, after the transition from dictatorship to democracy in 1974. Gradually, it has become clear that the constitutional fundamentals of parliamentary democracy and human rights are no longer at stake.¹ In the new era, the Constitution must be applied to controversial political issues even though its text may not directly provide for these issues.

Part II of this Article discusses the roles of reason and will as elements of the law. Part III presents the Greek constitutional tradition, in light of the relation between reason and will. It explores the notion that the Constitution is the supreme law of the land, the fundamental tenet of Greek constitutional law. Then, it presents the prevailing constitutional theory in Greece—that reason and will should coincide at the locus of sovereignty. Moreover, Part III traces the contemporary developments in Greek constitutional theory, where reason and will are considered separate and distinct parts of

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1. See P. Nikiforos Diamandouros, *Regime Change and the Prospects for Democracy in Greece: 1974-1983*, in *TRANSITIONS FROM AUTHORITARIAN RULE PROSPECTS FOR DEMOCRACY* 138, 139. (Guillermo O'Donnell et al. eds., 1986).

constitutional decision-making. Part IV outlines the circumstances that provided the impetus for recent trends in Greek constitutional theory. Part V analyzes the effects of these contemporary developments on the prevailing constitutional theory in Greece, and discusses the basic reactions to the present predicament. Part V also highlights the stabilizing influence of the practice of constitutional law on the sensitive balance between reason and will. Finally, Part VI explores the principle of equality, which provides an excellent example of the practice of constitutional law stabilizing the equilibrium between reason and will.

II. REASON AND WILL AS ELEMENTS OF THE LAW

The interplay between reason and will spans the gap that divides legal thought. This gap separates positive law—norms posited by the law-maker and belonging to an overall effective legal system—from evaluative judgments about the substantive merits of the law as a criterion of legal validity, which falls under the rubric of natural law. Thus, the contrast between voluntaristic and intellectual approaches to natural law reflects whether reason or will is the qualitative feature and motivating factor in the formation of natural law.² A similar tension between reason and will marks legal positivism. Austin's theory of law as the commands of the law-giver³ and H. L. A. Hart's theory of law as a set of norms belonging to a legal system based on the rule of recognition⁴ emphasize, respectively, the voluntaristic and rational elements of positive law. More recently, legal interpretation has been dominated by debate over the application of a jurisprudence of original intent⁵ versus an objectivist interpretation, relying on either the common meaning of legal norms⁶ or a theory based on legal principles embedded in social practice.⁷ This controversy concerns, at least in part, the prevailing notion that law is a product of either reason or will.

2. See GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE 125-26 (2d. ed. 1995).

3. See *id.* at 517.

4. See H. L. A. HART, THE CONCEPT OF LAW 97 (2d ed. 1994).

5. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA—THE POLITICAL SEDUCTION OF THE LAW 143-55 (1990) (contending that democratic legitimacy may only be achieved by applying laws with the meaning they carried at the time of their enactment).

6. See HART, *supra* note 4, at 120-21.

7. See RONALD DWORKIN, LAW'S EMPIRE 1-45 (1986).

In the context of constitutional law, the element of will is linked to authority—the exercise of lawful power. By contrast, reason is related to purpose (the substantive values exemplified in the law) as its rationale (*ratio legis*), internal logic, and coherence.⁸ In other words, reason and will are not by definition antithetical. Rather, they are complementary and interrelated, corresponding to different aspects of decision-making. However, it is still true that in mature constitutional systems, like that of the United States, different institutions are associated primarily with one element or the other. Accordingly, in the United States, both Congress (the representative body of the people) and the President (another bearer of democratic legitimacy) together form the politically responsible organs of the Constitution. Unless they are properly questioned before a competent judicial authority and determined to be unconstitutional or illegal, acts issued under the authority of these institutions are legally valid and binding, independent of their substantive merits. Congress and the President exercise legislative and executive power, respectively; in contrast, the judiciary, headed by the Supreme Court, possesses only the power of persuasion, derived from the sound reasoning of their decisions.⁹ The authority of any court judgment, lacking inherent or direct democratic legitimacy, depends primarily on its legal justification.

III. THE GREEK CONSTITUTIONAL TRADITION IN LIGHT OF THE RELATION BETWEEN REASON AND WILL

The relation between reason and will is important for the understanding of the Greek constitutional tradition. It illuminates the development of that tradition from consolidating reason and will at the locus of sovereignty, to considering them as separate and distinct aspects of constitutional decision-making.

A. The Supremacy of the Constitution as the Fundamental Principle of the Greek Constitutional Tradition

To better understand recent trends in modern Greek constitutional theory, it is necessary to clarify the idea of constitutional supremacy, the fundamental characteristic of Greek public law. Since Greece established its independence in 1830, each

8. See K. N. LLEWELLYN, *THE BRAMBLE BUSH* 189 (1991).

9. See M. H. HART & A. M. SACKS, *THE LEGAL PROCESS* 143-67 (1994).

of its constitutions has been characterized by fairly rigid provisions.¹⁰ The distinction between the Constitution and statutes, formal laws created by parliament, is deeply embedded in Greek public law. In 1897, this dichotomy and the corresponding superiority of the Constitution over statutes led to the recognition of judicial review of the constitutionality of formal laws.¹¹ It is striking that the text of the

10. Several important historical events and phases characterize Greek constitutional history, beginning with Greece's 1821 revolution against the Ottoman Empire. Greece was recognized as an independent state by the Protocol of London in 1830. Between 1833 and 1843, Greece was ruled as an absolute monarchy by King Otho. On September 3, 1843, another revolution ended the absolute monarchy and established a constitutional monarchy governed by King Otho under the Constitution of 1844. However, King Otho and the Wittelsbach Dynasty were expelled from Greece in October 1862, and the Constitution of 1864 established the principle of popular sovereignty. George I became the first King of Greece to rule under this new constitution.

The Constitution of 1864 was amended in 1911, further consolidating the Rule of Law and marking a period of relative normalcy. Constitutionalism was well embedded, the parliamentary principle was further entrenched, and general elections became the focal point in the development of political life. In 1912, the Balkan Wars erupted and, in 1913, the Treaty of London recognized the defeat of Turkey. During the subsequent conflict among the Balkan nations, Greece expanded its territory, liberating Macedonia.

In 1915, Greece encountered its largest crisis of the first half of the twentieth century: the "National Schism." King Constantine sought to keep Greece neutral during World War I, while the prime minister El. Venizelos wanted Greece to join the Entente, revealing an important constitutional division. While the anti-Venizelist forces were in power, Turkish forces defeated the Greek army in the 1922 Asia Minor Campaign. Following these events, the Republic was proclaimed, but the republican Constitution of 1925 did not enter into force due to the brief dictatorship of General Pangalos.

The Constitution of 1927 marked the beginning of the first true republican period. In 1935, the monarchy returned to Greece, and the following year, I. Metaxas, with the support of the King, established a pro-fascist dictatorship. In 1940, Italy declared war on Greece, drawing Greece into World War II. In the aftermath of the war, Greece fought a bitter Civil War from 1944 to 1949.

A new constitution took effect in 1952. The Constitution of 1952 was similar to but more conservative than the Constitution of 1864. In the international context of the Cold War and the post-Civil War Greek environment, an exclusive political system emerged, based on a distinction between citizens who were nationally minded and citizens who were disloyal. There was a dominant anti-communism ideology.

During the 1960s, social pressure led to the liberalization of the political system. After the 1967 military coup, however, the country was ruled by dictatorship until 1974, when the dictatorship collapsed following a national crisis in Cyprus. In the referendum of 1974, the people voted in favor of the republican form of government. The new democratic and republican Constitution was enacted in 1975. The constitutional amendment of 1986 abolished the important political powers of the President of the Republic. For a further elaboration on the constitutional history of Greece, see generally RICHARD CLOGG, *A SHORT HISTORY OF MODERN GREECE* (1979).

11. See, e.g., VASILIOS SKOURIS & EVAGELOS VENIZELOS, *Ο ΔΙΚΑΣΤΙΚΟΣ ΕΛΕΓΧΟΣ ΤΗΣ ΣΥΝΤΑΓΜΑΤΙΚΟΤΗΤΑΣ ΤΩΝ ΝΟΜΩΝ* 25 [JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF THE LAWS] (1985) (discussing decision 23/1897 of the Greek Constitutional Court (Areios Pagos)).

Constitution of 1864 does not explicitly grant this power to the courts. Rather, judicial review follows as a logical consequence of the very concept of the Constitution, and it is derived from a construction of the document as a whole.¹² Until 1927, judicial review of the constitutionality of the laws was exercised as a custom; the Constitution of 1927 offered the first explicit guarantee of the institution of judicial review.¹³ The present Greek Constitution, adopted in 1975, provides that judges must not enforce any law that is contrary to the Constitution.¹⁴ As a consequence, every judge is empowered to control the constitutionality of the laws and render judgment over their validity. However, declaring a law unconstitutional does not annul that law; it only renders the law inapplicable to the pending case.¹⁵ Moreover, the current Greek Constitution only permits substantive judicial review. The procedural vices of the law are not subject to control. This is a decentralized and diffused system of judicial review, exercised on the occasion of a pending case or controversy. As such, it is similar to the American system of judicial review.

B. The Locus of Sovereignty as the Bedrock of Reason and Will

The Constitution of 1864 guaranteed popular sovereignty in Greece for the first time.¹⁶ Yet its implications and consequences did not easily prevail in Greek political life, since it met resistance from the Greek throne. In 1915, King Constantine tried to maintain a politically decisive role, dissolving parliament in abuse of the royal

See also Epaminondas Spiliotopoulos, *Judicial Review of Legislative Acts in Greece*, 56 *TEMP. L.Q.* 463, 463 (1983).

12. *See* SKOURIS & VENIZELOS, *supra* note 11, at 24.

13. *See* Σύνταγμα 1927 [Constitution 1927] art. 5. “The judicial function is exercised by independent courts, subject only to the laws... Interpretive Clause on art. 5: The true meaning of the provision is that the courts are obliged not to apply a law the content of which is contrary to the Constitution.” *Id.*

14. *See* Σύνταγμα 1975, art. 93, para. 4 (amended 1986) [hereinafter Σύνταγμα Constitution]. “The courts are obliged not to apply a law the content of which is contrary to the Constitution.” *Id.*

15. *But see* ΣΥΝΤΑΓΜΑ [Constitution] art. 100, paras. 1(e), 4. The two paragraphs provide, respectively, that a Special Highest Court has jurisdiction over cases concerning specific provisions of law (on which the highest courts of Greece have rendered conflicting judgments regarding constitutionality) and that the provisions of law declared unconstitutional by the Special Highest Court are invalid as of the date of publication of the respective judgement. This possibility is rare in the Greek system of judicial review.

16. *See* NIKOS K. ALIVIZATOS, ΕΙΣΑΓΩΓΗ ΣΤΗΝ ΕΛΛΗΝΙΚΗ ΣΥΝΤΑΓΜΑΤΙΚΗ ΙΣΤΟΡΙΑ [INTRODUCTION TO GREEK CONSTITUTIONAL HISTORY] 83 (1981).

prerogative.¹⁷ Moreover, the throne's interpretation and use of constitutional provisions, such as Article 31 of the Constitution of 1952 (stating that "the king appoints and dismisses his ministers"), contradicted the spirit of a democratic regime.¹⁸ In 1965, the king directly questioned the right of the prime minister to choose his ministers.¹⁹ The royal reading of the Constitution often deviated from the spirit of democratic government, indicating that ultimately, the locus of sovereignty was at stake.²⁰

Under these circumstances, the primary issue for Greek constitutional theory was the establishment of the view that, in a democracy, the people have the power (within the limits of the Constitution) to make substantive political choices and decisions, no matter how detrimental or unwise they may appear to the king. In other words, the objective at this time was to establish, as a matter of principle, that both reason and will reside in the sovereign. Any effort to remove either of these elements from the locus of sovereignty would constitute a grossly undemocratic mistrust of the judgment of the people, eventually leading to a depletion of their power.

From 1915 onward,²¹ the polarized political atmosphere gradually led to severe restrictions on the free expression of political opinion.²² After the Greek Civil War of the 1940s, the defeat of the Communist Party, and the rise of the Cold War, an ethnocentric and anti-communist state emerged in Greece, perpetuating repressive measures against the political left for many years after internal strife ended.²³ As a consequence, in the area of fundamental rights, during the 1960s, Greek constitutional theory criticized the authoritarian inclinations of the state, which excluded those who were stigmatized

17. *See id.* at 110.

18. ARISTOVoulos I. MANESSIS, ΑΙ ΕΓΓΥΗΣΕΙΣ ΤΗΡΗΣΕΩΣ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ [GUARANTEES FOR THE OBSERVATION OF THE CONSTITUTION] 155 (1991).

19. *See* J. MEYNAUD, Η ΒΑΣΙΛΙΚΗ ΕΚΤΡΟΠΗ ΑΠΟ ΤΟΝ ΚΟΙΝΟΒΟΥΛΕΥΤΙΣΜΟ ΤΟΥ ΙΟΥΛΙΟΥ ΤΟΥ 1965 [THE ROYAL DEVIATION FROM PARLIAMENTARISM IN JULY 1965] 55, 76 (1967).

20. *See* ALIVIZATOS, *supra* note 16, at 115.

21. *See generally* GEORGE MAVROGORDATOS, STILLBORN REPUBLIC—SOCIAL COALITIONS AND PARTY STRATEGIES IN GREECE, 1922-1936 (1983) (providing contextual information on Greek politics during this era).

22. *See generally* IOANNIS A. TASSOPOULOS, THE CONSTITUTIONAL PROBLEM OF SUBVERSIVE ADVOCACY IN THE UNITED STATES OF AMERICA AND GREECE (1993) (examining problems caused by the efforts to suppress subversive advocacy in Greece during the years of unrest and civil war between 1915 and the end of the 1940s).

23. *See* NIKOS ALIVIZATOS, ΟΙ ΠΟΛΙΤΙΚΟΙ ΘΕΣΜΟΙ ΣΕ ΚΡΙΣΗ 1922-1974 [THE POLITICAL INSTITUTIONS IN CRISIS] (1983).

as politically left-minded from normal integration into social and political life. The demand for liberalization and respect for fundamental rights complemented the demand for democratization of the Greek state and society.

In light of this historical background, Professor Aristovoulos Manassis developed the prevailing paradigm in Greek constitutional theory. Manassis has focused on the importance of the principle of legality and the need for scrupulous application of the rules of the game as specified in the Constitution.²⁴ Closely related to the principle of legality are the demands for legal certainty and a clear delimitation of constitutionally protected liberties.²⁵ In terms of substantive constitutional values, Manassis has persuasively argued for democratization and liberalization of political life through the protection of the right to dissent and full compliance with the Rule of Law, irrespective of the political ideologies of the citizenry.²⁶

Specifically, Manassis' constitutional theory can be broken down into four main points. First, the central issue in constitutional law is the relationship between those who govern and those who are governed (i.e., a relationship between persons of unequal standing).²⁷ Second, the power relationship between the governing and the governed is ultimately grounded in the power of the former to impose their will upon the latter.²⁸ In a realistic spirit, Manassis and other positivists proclaim that "*ex facto oritur jus*," or "from fact is born the law."²⁹ These first two points capture the bare essence of the nature of political authority, without any legitimizing ornament or embellishment. In light of these considerations, the third facet of the theory emphasizes the pivotal role of the formal Constitution (the supreme, rigid, written document) in protecting political liberty.³⁰ Constitution-making provides a strong guarantee for the protection of civil liberties and the sustainment of mutual checks and balances among the various organs of the state, preventing absolutist turns in

24. See ARISTOVOULOS MANESSIS, ΣΥΝΤΑΓΜΑΤΙΚΟ ΔΙΚΑΙΟ [CONSTITUTIONAL LAW] 164 (1980) (emphasizing Sieyes' statement: "Une Constitution est un corps de lois obligatoires, ou ce n'est rien" (a constitution is a body of obligatory laws, otherwise it is nothing)).

25. See Aristovoulos Manassis, *Το Συνταγματικόν Δίκαιον ως τεχνική της πολιτικής ελευθερίας* [The Constitutional Law as a Technique of Political Liberty], 16 ΑΡΜΕΝΟΠΟΥΛΟΣ [ARMENOPOULOS] 535, 541-42 (1962).

26. See MANESSIS, *supra* note 24, at 82.

27. See *id.* at 91, 99.

28. See *id.* at 83, 91.

29. *Id.* at 88-89.

30. See Manassis, *supra* note 25.

the exercise of authority.³¹ As such, constitutional guarantees play a central role in Manassis' work. Constitutional guarantees differ from sanctions for the violation of a law; they primarily aim to prevent the abuse of power by granting mutual political control of the constitutional organs rather than by means of direct legal coercion.³² Finally, Manassis' constitutional theory culminates in the central position accorded to the democratic principle, in conformity with article 1, paragraph 2 of the Greek Constitution of 1975/1986, which provides that popular sovereignty forms the foundation of the regime.³³ Manassis' theory particularly emphasizes the institutional role of the electorate as the final arbiter of any divisive political controversy.³⁴ Within the limits of the republican Constitution and with full respect for the freedom of the dissenter—which is the only true freedom³⁵—the members of society are constitutionally empowered to freely make their substantive choices. Consequently, according to this prevailing paradigm of Greek constitutional theory, the locus of sovereignty is the bedrock of both reason and will.

C. Reason and Will as Distinct Aspects of Constitutional Decision-Making

Manassis' writings have contributed substantially to furthering the concept that the Greek Constitution combines the principles of Rule of Law and democracy. In this sense, his analysis provides a sound basis for further developments in the field of constitutional theory. Gradually, constitutional theorists came to believe that the republican Constitution of 1975 settled all of the fundamental issues of the previous decades. After 1975, principles of democracy, parliamentarianism (the political responsibility of the government before the parliament), or the protection of the Rule of Law and the right to dissent were no longer primary concerns. In this respect, the post-1975 scene differed decisively from the situation that characterized Greek constitutional law of the interwar and postwar years. The power of the sovereign people to express their will ceased to be a contested issue. As the system gained maturity, the interplay

31. See MANASSIS, *supra* note 24, at 131.

32. See *id.*

33. *Id.* at 37.

34. See *id.* at 172.

35. See *id.* at 82.

between reason and will became more flexible, more intense, and more controversial.³⁶

Consequently, scholars discussed constitutional decision-making in light of the distinction between reason and will, where each concept represents distinct aspects of the decision, and, as such, each has to be analyzed and treated independently. In addition, the test for the proportionality of the law made the requirement for reasonableness endemic to Greek constitutional analysis.³⁷ Moreover, theoretical approaches to constitutional decision-making, influenced by the Anglo-Saxon tradition, developed the idea that amongst the constitutional organs, the courts were most associated with the elements of justification and reasoned elaboration of their decisions.³⁸

As a result of these developments, the critical issues emerging in the context of Greek constitutional theory changed. The new issues primarily focused on the quest for objectivity in constitutional interpretation. In this respect, the traditional and prevailing approach, which emphasized legal certainty over constitutional fundamentals, seemed to be of little help. For example, acceptance of the legally binding character of the Constitution could not settle the fundamental issues of how judicial review should be exercised: What are the boundaries of law, beyond which the realm of politics begins? Is it even possible to separate law and politics in a formalist manner? How does a judge interpret the vague and controversial meanings of certain constitutional concepts such as liberty, equality, human value, abuse of rights, and protection of the environment? Is a judge competent to inquire into the moral, historical, economic, and sociological implications of the litigated case? When exploring the meaning of the Constitution, is it legitimate for a judge to navigate such dangerous waters?

36. See discussion *infra* Part IV.

37. See Vassilis Voutsakis, *Η αρχή της αναλογικότητας: Από την ερμηνεία στη διάπλαση του δικαίου*, in *ΟΨΕΙΣ ΤΟΥ ΚΡΑΤΟΥΣ ΔΙΚΑΙΟΥ [The Principle of Proportionality: From the Interpretation to the Formation of the Law, in ASPECTS OF THE RULE OF LAW]* 205 (Kostas Stamatis ed., 1990).

38. See PAVLOS SOURLAS, *Η ΔΙΑΠΛΟΚΗ ΔΙΚΑΙΟΥ ΚΑΙ ΠΟΛΙΤΙΚΗΣ ΚΑΙ Η ΘΕΜΕΛΙΩΣΗ ΤΩΝ ΝΟΜΙΚΩΝ ΚΡΙΣΕΩΝ [THE INTERACTION BETWEEN LAW AND POLITICS AND THE FOUNDING OF LEGAL JUDGMENTS]* 68-69 (1989).

IV. A FERTILE BACKGROUND FOR THE NEW INTERPLAY BETWEEN REASON AND WILL

As so often happens in life, practice first sets the new agenda and then creates the impetus for constitutional theory to provide the relevant answers. Such is the case with Greek constitutional theory in the post-1975 period.

A. The Beginning of the New Era: “Alevras’ Vote”

The 1985 presidential election by the Greek Parliament was a landmark event in the development of the contemporary constitutional debate. The critical question was a rather technical one: when the president of the Voule (the Greek Parliament) is also, *ex constitutione*, acting president of the Republic, can he participate in the parliamentary voting for the election of the president of the Republic? The Constitution merely provided that the office of the president of the Republic is incompatible with any other office or activity.³⁹ Notwithstanding its technical character, the political importance of the answer was indeed immense.

The socialist party, the Panhellenic Socialist Movement (PASOK), and its powerful leader, Andreas Papandreou, had led the public and the press to believe that PASOK would support C. Karamanlis, the traditional leader of the conservatives, for a second consecutive term in office. Karamanlis’ major achievement was 1974’s peaceful transition from authoritarian dictatorship to democracy. He is also well known for playing a pivotal role in Greece’s admittance to the European Community in 1981.⁴⁰ However, before the parliamentary vote for the presidential election, Papandreou unexpectedly dropped Karamanlis’ candidacy and named Ch. Sartzetakis, who was a judge of the Areios Pagos (the Greek Supreme Court for Civil and Penal Jurisdiction). President Karamanlis immediately resigned and the president of the Voule, I. Alevras, became *ex constitutione* acting president of the Republic.

39. See ΣΥΝΤΑΓΜΑ 1975 [Constitution 1975] art. 30, para. 2, art. 34, para. 1. Article 30, paragraph 2 provides that “[t]he office of the President shall be incompatible with any other office, position or function,” while art. 34, para. 1 provides that if the president of the Republic should resign, “he shall be temporarily replaced by the Speaker of Parliament.”

40. See generally GEORGE PAPADIMITRIOU, ΤΟ ΣΥΝΤΑΓΜΑ ΚΑΙ Η ΔΙΑΔΙΚΑΣΙΑ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΟΠΟΙΗΣΗΣ [THE CONSTITUTION AND THE PROCESS OF EUROPEAN UNIFICATION] (1982) (discussing the constitutional framework for Greece’s admittance into the European Union).

With the tension building up to an institutional crisis,⁴¹ PASOK needed the vote of the president of the Voule to elect its favored candidate. Indeed, Ch. Sartzetakis became president of the Republic with the bare majority required by the Constitution (180 votes); the last, and most controversial, vote came from Alevras, who was then the president of the Voule and acting president of the Republic. The situation was further complicated by the fact that the Constitution provided no institutional authority, judicial or otherwise, that could finally resolve the dispute over the constitutionality of “Alevras’ vote.”

Within this political context, the issue of constitutional interpretation acquired cardinal importance. Constitutional scholars presented arguments supporting and refuting the right of the president of the Voule to vote in a presidential election when he concurrently held the position of acting president of the Republic.⁴² The debate focused on the following methodological question: in a situation where a number of incompatible opinions are offered to answer a legal problem, can there be one particular opinion that excludes all others?⁴³

Legal scholars were divided on the issue. Those who answered in the negative did so in light of the implicit assumption that the search for the separation between law and politics in the process of constitutional interpretation can never be affirmed in a conclusive, final, and undisputed manner.⁴⁴ Consequently, when there are no clear criteria compelling a certain resolution of a disagreement, the issue is one of authority (that is, institutional competence to settle the matter).⁴⁵ Because Parliament is the only constitutional organ

41. See ARISTOYVOULOS MANESSIS, *Η ΣΥΝΤΑΓΜΑΤΙΚΗ ΑΝΑΘΕΩΡΗΣΗ ΤΟΥ 1986* [THE CONSTITUTIONAL REVISION OF 1986] 8-9 (1989).

42. See generally ΤΟ ΧΡΟΝΙΚΟ ΤΗΣ ΣΥΝΤΑΓΜΑΤΙΚΟ-ΠΟΛΙΤΙΚΗΣ ΕΝΤΑΣΗΣ, ΔΙΚΑΙΟ ΚΑΙ ΠΟΛΙΤΙΚΗ [THE CHRONICLE OF THE CONSTITUTIONAL-POLITICAL TENSION, LAW AND POLITICS] (George Anastasiadis ed., 1985) (providing a detailed chronicle of “Alevras’ vote,” including statements of politicians and constitutional scholars).

43. See Antonis Manidakis, *Η Νομική Φύση και ο Πολιτικός Χαρακτήρας της Ερμηνείας του Συντάγματος*, in ΕΡΜΗΝΕΙΑ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ ΚΑΙ ΛΕΙΤΟΥΡΓΙΑ ΤΟΥ ΠΟΛΙΤΕΥΜΑΤΟΣ [The Legal Nature and the Political Character of the Interpretation of the Constitution, in INTERPRETATION OF THE CONSTITUTION AND FUNCTION OF THE REGIME] 37, 42 (1996).

44. See Evangelos Venizelos, *Η Ερμηνεία του Συντάγματος μεταξύ νομικής δογματικής και επιστημονικής ειλικρίνειας*, in Η ΕΡΜΗΝΕΙΑ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ ΚΑΙ ΤΑ ΟΡΙΑ ΤΟΥ ΔΙΚΑΣΤΙΚΟΥ ΕΛΕΓΧΟΥ ΤΗΣ ΣΥΝΤΑΓΜΑΤΙΚΟΤΗΤΑΣ ΤΩΝ ΝΟΜΩΝ [The Interpretation of the Constitution Between Legal Doctrine and Scientific Frankness, in THE INTERPRETATION OF THE CONSTITUTION AND THE LIMITS OF JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF THE LAWS] 53, 56 (1994).

45. See *id.* at 60.

enjoying direct democratic legitimacy, if the authority approach to “Alevras’ vote” prevails, Parliament should be the institution to decide the constitutional question.⁴⁶ Thus, in the final analysis, reason depends on and succumbs to will. As the maxim goes, *auctoritas non veritas facit legem* (authority, not truth, makes law);⁴⁷ constitutional law may be no exception.

Critics have pointed out that by shifting the center of constitutional analysis from the persuasiveness of the arguments to the determination of who has the greatest authority to resolve constitutional questions, this approach espouses a dangerous constitutional relativism.⁴⁸ As a result, the parliamentary majority would not only have the authority to impose its view over the minority, but it could also present its view as constitutionally legitimate and justified. This relativism effaces the distinction between reason and will as aspects of constitutional decision-making.⁴⁹ Eventually, it undermines the rule of law, which presupposes the possibility of objectively evaluating arguments as more or less persuasive.⁵⁰ By giving up this ideal of objective interpretation, relativism leads to a lack of unity and coherence in legal discourse,⁵¹ thus relegating constitutional debate to a contrived exercise to support the most politically expedient result.

Legal scholars tried to find a response to this predicament concerning the objectivity of legal interpretation. For some, objectivity may be hard to attain; one can hardly find the true meaning of a provision independent of substantive theoretical presuppositions about what a constitution is—its context, purpose, and function. Therefore, the assumption can no longer be that constitutional interpretation is best accomplished by focusing on the document’s formal language in a quest to proceed in a disengaged and neutral manner. However, these presuppositions do not need to be the product of a free-riding and arbitrary subjective will. Excessive voluntarism in the choice of guiding principles can be tamed through a normative reading of political and constitutional

46. See *id.* at 89-90; see also Kostas Mavrias, *Η ερμηνεία του Συντάγματος μεταξύ πολιτικής αξιολόγησης και νομικού δόγματος*, in Η ΕΡΜΗΝΕΙΑ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ [*The Interpretation of the Constitution Between Political Evaluation and Legal Doctrine*, in THE INTERPRETATION OF THE CONSTITUTION] 236, 248 (Demetres Tsatsos ed., 1995).

47. See Venizelos, *supra* note 44, at 60.

48. See Manitakis, *supra* note 43, at 40-43.

49. See *id.* at 41-42; see also SOURLAS, *supra* note 38, at 63, 165-68.

50. See Manitakis, *supra* note 43, at 43.

51. See SOURLAS, *supra* note 38, at 61, 198, 218.

history. From such a reading, the priority of the democratic principle emerges, providing the ultimate criterion of constitutional analysis.⁵² Thus, the correct construction of the document is the one that is most congenial and consistent with democratic principles.

Other legal scholars approached the issue of objectivity in legal interpretation by focusing on the development of constitutional principles.⁵³ But they did not deem such principles to be neutral values that constrained the unfettered discretion of a judge.⁵⁴ In addition, the quest for principles in Greek constitutional law operated at the level of constitutional text, more so than with adjudication per se. These principles are a source of normative meaning that is derived not so much from the conceptual or literal analysis of the document, but rather from the purpose, values, and ends developed by the interpreter.⁵⁵ The objective answer to constitutional disputes cannot be found in the narrow and pre-existing scheme of the norm's literal meaning; rather, it must be established in a positive way by the most compelling argument.⁵⁶ Thus, principles become flexible criterion, replacing the formal and sometimes sterile black-letter law and proving useful in evaluating the clarity, strength, and persuasiveness of arguments employed in constitutional discourse.⁵⁷ In fact, this turn from literal analysis to elaboration of constitutional principles reflects the increasingly argumentative nature of contemporary Greek constitutional law. In an effort to strike the right balance in the controversial relationship between reason and will as elements of the law, the emergence of principles marks the shift toward a new paradigm.

52. See Demetres Tsatsos, *To πρόβλημα της ερμηνείας του δικαίου*, in *Η ΕΡΜΗΝΕΙΑ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ* [*The Problem of the Interpretation of the Constitution*, in *THE INTERPRETATION OF THE CONSTITUTION*] 13, 47-48 (Demetres Tsatsos ed., 1995).

53. See George Papadimitriou, *Το μεθοδολογικό οικοδόμημα της ερμηνείας του Συντάγματος*, in *Η ΕΡΜΗΝΕΙΑ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ* [*The Methodological Edifice of the Interpretation of the Constitution*, in *THE INTERPRETATION OF THE CONSTITUTION*] 253, 265 (Demetres Tsatsos ed., 1995).

54. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 27 (1961).

55. See Papadimitriou, *supra* note 53, at 265-67.

56. See TASSOPOULOS, *supra* note 22, at 100.

57. See ANTONIS MANITAKIS, *ΚΡΑΤΟΣ ΔΙΚΑΙΟΥ ΚΑΙ ΔΙΚΑΣΤΙΚΟΣ ΕΛΕΓΧΟΣ ΤΗΣ ΣΥΝΤΑΓΜΑΤΙΚΟΤΗΤΑΣ ΤΩΝ ΝΟΜΩΝ* [*THE RULE OF LAW AND JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF THE LAWS*] 170, 441 (1994).

B. The Ever-Expanding Penumbra of Some Constitutional Provisions

Another issue generating theoretical concerns relates to the growing importance of case law. Under the 1975 Constitution, constitutional jurisprudence increased both in size and importance throughout the 1980s and onward.⁵⁸ The penumbra of some constitutional provisions seemed ever-expanding, bringing within reach areas of social life that had previously been beyond the control of constitutional law. This phenomenon has been called the “diffusion” of the Constitution.⁵⁹

From one perspective, the broadening transformation of complex social issues into constitutional cases and controversies is a sign of strength and an affirmation of the Constitution’s efficacy. However, the cost of this increased constitutionalization was a decrease in normative density and a loss of analytical vigor and theoretical insight. Under such conditions, it becomes all the more uncertain whether the facts of a litigated case really fall under the Constitution and what the Constitution might or might not provide. Constitutional balancing of the values implicated in the litigated facts frequently leads (more or less intensely) to the emergence of ad hoc pragmatism,⁶⁰ where constitutional questions turn not on issues of constitutional law, but rather on a judge’s overall assessment of a case’s factual situation.⁶¹ Such a development demonstrates that constitutional law frequently must tackle technical, polycentric (yet politically sensitive) problems, whose significance is highly problematic under the color of law.

Although the expansion of the constitutional penumbra did not occur with regard to every provision, the most drastic results followed the interpretation of article 24 of the Constitution, which makes the protection of the environment a duty of the state.⁶² From the elliptic constitutional language, the Fifth Section of the Council of State (the

58. See IOANNIS D. SARMAS, *Η ΣΥΝΤΑΓΜΑΤΙΚΗ ΚΑΙ ΔΙΟΙΚΗΤΙΚΗ ΝΟΜΟΛΟΓΙΑ ΤΟΥ ΣΥΜΒΟΥΛΙΟΥ ΤΗΣ ΕΠΙΚΡΑΤΕΙΑΣ* [THE CONSTITUTIONAL AND ADMINISTRATIVE JURISPRUDENCE OF THE COUNCIL OF STATE] 541 (1990).

59. See YANNIS DROSSOS, *ΔΟΚΙΜΙΟ ΕΛΛΗΝΙΚΗΣ ΣΥΝΤΑΓΜΑΤΙΚΗΣ ΘΕΩΡΙΑΣ* [AN ESSAY ON GREEK CONSTITUTIONAL THEORY] 493 (1996).

60. See Prokopis Pavlopoulos, *Δικαστικός έλεγχος της συνταγματικότητας των νόμων ή δικαστικός έλεγχος της νομιμότητας του Συντάγματος* [Judicial Review of the Constitutionality of the Laws or Judicial Review of the Legality of the Constitution?], *ΝΟΜΙΚΟ ΒΗΜΑ* [LEGAL PODIUM] 13, 29, 34 (1988).

61. See DROSSOS, *supra* note 59, at 546-50.

62. See ΣΥΝΤΑΓΜΑ [Constitution] art. 24.

Greek Supreme Court for Administrative Jurisdiction) created an impressive jurisprudential structure with twelve basic constitutional principles, including the principle of sustainable development.⁶³ Through determination and bold language, the Council of State substantially affected the prevailing developmental model within the political branches of government. The most notorious example is the diversion of the Acheloos River from the west to the east of Greece. This major project was aimed at increasing production capacity, but because of its environmental consequences, it was cut down by the Council of State.⁶⁴

The principle of equality before the law presents another area where the judiciary confirmed its traditional activism.⁶⁵ Here, notwithstanding the apparently opposite intention of the legislature, the courts (both the Areios Pagos and the Council of State) not only exempted cases which should not fall under the reach of over-inclusive laws, but expanded the scope of other statutory provisions where there were under-inclusive laws. This occurred particularly in cases concerning social security and other aspects of the welfare state and where decisions of the courts had substantial financial and budgetary impacts. The expansion of the scope of provisions through judicial interpretation particularly involved the income of judges. The courts ruled that income-increasing provisions should apply to members of the judiciary, just as they apply to other categories of persons as provided by the law.⁶⁶

The above examples are not exclusive. In those and other situations, the activism of the courts reinvigorated the debate over the legitimacy of judicial review.⁶⁷ In fact, in this area of constitutional law, the interplay between reason and will is at its most sensitive. How does one distinguish between controversial judicial decisions that are the result of judicial voluntarism and those that expound constitutional principle and reason?

63. See MICHAEL DEKLERIS, Ο ΔΩΔΕΚΑΔΕΛΤΟΣ ΤΟΥ ΠΕΡΙΒΑΛΛΟΝΤΟΣ [THE CATALOGUE OF TWELVE PRINCIPLES FOR THE ENVIRONMENT] 141, 142 (1996).

64. See *id.*

65. See THEODORA D. ANTONIOU, Η ΙΣΟΤΗΤΑ ΕΝΤΟΣ ΚΑΙ ΔΙΑ ΤΟΥ ΝΟΜΟΥ [EQUALITY WITHIN AND THROUGH THE LAW] 204 (1998).

66. See *id.*

67. See JOHN HART ELY, DEMOCRACY AND DISTRUST 73 (1980).

C. Judicial Activism by Omission: The Quest for Developing Substantive Reasons in Constitutional Analysis

The bulk of Greek constitutional decisions often remain obscure and lack thorough, persuasive justification, since they do not explain the underlying rationale of constitutional provisions as applied to specific cases.⁶⁸ This style of judicial decisions is similar to that of other civil law countries, such as France, where courts provide dry and sometimes sterile reasoning that merely repeats the rule's language and fails to provide further inquiry into its meaning.⁶⁹ Though there are a few exceptions (mainly in the Council of State's environmental jurisprudence), this sparing style of decision writing remains the general practice.

On many occasions, Greek courts defer to the elected legislature, sustaining limitations of constitutional rights on the basis of a vague and unspecified public or general interest.⁷⁰ If judicial activism does not actually turn on the drastic effects of a court's decision to declare a law unconstitutional, but rather on the lack of persuasiveness and compelling justification of the result, then the aforementioned limitation of fundamental liberties is an example of judicial activism by omission.⁷¹

In fact, the more persuasive the substantive reasons supporting the judicial decision, the less the decision can be criticized as the product of an arbitrary will. Therefore, in the constitutional interplay between reason and will, reason serves as the justification of will and not vice-versa.

68. See Konstantinos Kerameus, *Η αιτιολογία των δικαστικών αποφάσεων*, in Η ΑΙΤΙΟΛΟΓΙΑ ΤΩΝ ΔΙΚΑΣΤΙΚΩΝ ΑΠΟΦΑΣΕΩΝ, Η ΔΙΚΑΣΤΙΚΗ ΜΕΙΟΨΗΦΙΑ, Η ΚΡΙΤΙΚΗ ΤΩΝ ΔΙΚΑΣΤΙΚΩΝ ΑΠΟΦΑΣΕΩΝ [*The Reasoning of Judicial Opinions*, in THE REASONING OF JUDICIAL OPINIONS, THE DISSENTING OPINIONS, THE CRITICISM OF LEGAL OPINIONS] 29, 40-43 (Charoula Apalagaki ed., 1992).

69. See JOHN D. DAWSON, THE ORACLES OF THE LAW 380-85, 407-11 (1968); see also Kerameus, *supra* note 68, at 39.

70. See EVAGELOS VENIZELOS, ΤΟ ΓΕΝΙΚΟ ΣΥΜΦΕΡΟΝ ΚΑΙ ΟΙ ΠΕΡΙΟΡΙΣΜΟΙ ΤΩΝ ΣΥΝΤΑΓΜΑΤΙΚΩΝ ΔΙΚΑΙΩΜΑΤΩΝ [THE GENERAL INTEREST AND THE LIMITATIONS OF CONSTITUTIONAL RIGHTS] 185-87 (1990).

71. See Ioannis A. Tassopoulos, *Ο ρόλος του δικαστή κατά τον έλεγχο της συνταγματικότητας των νόμων: Αυτοπεριορισμός ή ακτιβισμός*, in ΤΟ ΣΥΝΤΑΓΜΑ ΣΥΝΕΔΡΙΟ ΓΙΑ ΤΑ ΕΙΚΟΣΑΧΡΟΝΑ ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ [*The Role of the Judge in the Judicial Review of the Constitutionality of the Laws: Self-Restraint or Activism?*, in THE CONSTITUTION—CONFERENCE ON TWENTY YEARS OF THE CONSTITUTION OF 1975] 339, 373 (1998).

V. LEAVING THE CITADEL OF THE CONSTITUTION'S FORMAL LANGUAGE: THE DEVELOPMENT OF CENTRIFUGAL AND CENTRIPETAL FORCES IN CONSTITUTIONAL LAW

The developments described in the previous Part indicate that Greek constitutional theory could no longer find shelter in the Constitution's formal language, which preserved the fundamentals of democracy: freedom, equality, and parliamentary supremacy, as it was doing throughout the 1960s. In the new political environment, *constitutional fundamentals* are no longer at stake; disagreement concerns *controversial political decisions*. These two categories do not necessarily coincide. In this context, Greek constitutional law must preserve its fundamental tenet, which is the rigid character of the Constitution.

As already noted, the prevailing approach to legal positivism emphasizes the value of legal certainty.⁷² However, as one moves on to the penumbra of legal concepts, where uncertainty prevails regarding the limits of the law, a challenge becomes evident. Once one strays beyond the relatively undisputed core meaning of legal concepts, once the solid legal ground as understood by the positivist doctrine is exhausted, then considerable disagreement arises over the extension of a constitutional provision.⁷³ Such disagreement may engender the development of centrifugal forces in constitutional law. These forces come into play through arguments concerning morality, social science, and other non-legal sources and disciplines. Such methodologies are employed in constitutional discourse and are increasingly considered relevant to the resolution of constitutional controversies. Two opposite tendencies form these centrifugal forces.

The first tendency could be classified as moralist and deontological. In order to answer the apparent need to stretch the legal meaning of the Constitution, it proposes the adoption of a moral ideal. According to a common version of this ideal, every person, living within the state should be treated with equal concern and respect.⁷⁴ Of course, this is hardly surprising. The Constitution is not merely a legal document—it is also an ethical one. It is possible to associate individual rights (such as life, liberty, property, and free

72. See MANESSIS, *supra* note 24, at 101-03.

73. See HART, *supra* note 4, at 118.

74. See MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 192, 203 (1994).

speech) and political rights (such as free formation of political parties and the right to vote), with a certain concept of the person. For example, as a private person, the autonomous human being is the author of his or her own life, while, as a citizen, he or she is a part of the sovereign political body. The next step is to project this view as the philosophical background of the Constitution. In cases of uncertainty and disagreement, the concept of the person comes forward to provide complementary arguments for the resolution of difficult constitutional problems. Although recourse to that concept has been justified by the need to locate the outer boundary of the law, it often has the tendency to expand the normative meaning of the constitutional provision until it is virtually identified with the adopted ideal of the person. In that sense, the moral ideal does not provide the necessary constraint in constitutional adjudication. Rather, it operates as a centrifugal force. This view has had relatively limited impact in Greece, mainly because it was inconsistent with the prevailing theory of legal positivism.⁷⁵

The second tendency could be classified as realistic and pragmatic. As discussed previously, constitutional balancing frequently leads to the emergence of ad hoc pragmatism, where constitutional questions turn not so much on issues of constitutional law, but rather on the overall judgment of the decision-maker on the specific factual situation at issue.⁷⁶ Balancing does not amount to interpretation or aim to clarify the meaning of the Constitution, but rather it is a technique to apply the Constitution in situations involving more than one fundamental value. Eventually, the insufficiency of legal meaning is supplemented by the subjective choices or the hunch of the interpreter.⁷⁷ Compared with the first moralist deontological tendency, the realistic pragmatic tendency leads to the opposite result: it overstates the importance of pragmatic considerations and it diminishes the normative meaning of the Constitution to its undisputed core, thus leading to an impoverished concept of the law.

75. In fact, Manassis effectively criticized it in his writings. See, e.g., MANASSIS, *supra* note 24, at 174-76.

76. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 945 (1987) (suggesting that the totality of the circumstances affects the value accorded to a specific question).

77. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 282 (1929).

As already mentioned, both perspectives—the moralistic deontological and the realistic pragmatic—can exert a centrifugal influence on constitutional law. If pushed to the extreme, the perspectives tend to disintegrate the legal universe by over-emphasizing limited and partial aspects. The moralist stresses the ideal element of law—its rational aspect—whereas the realist expresses skepticism concerning constraints on the decision-maker, thereby emphasizing the voluntaristic element of the law.⁷⁸ It is likely that the moralist welcomes the judicial expounding of the Constitution to the extent that the courts are associated primarily with the element of reason.⁷⁹ By contrast, for the pragmatist, the institution of judicial review provides the courts with the power to make law. The principle question is how to balance two essentially political organs: the democratic legislature and the counter-majoritarian judiciary.⁸⁰

78. See WILLIAM VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 14 (1984). Van Alstyne analyzes similar problems in American constitutional law:

For some, the Constitution is only too clear in certain particulars, but the clarity it yields is extremely disappointing. The actual Constitution does not fulfil one's expectations; it does not exalt what one hopes and it is not commensurate with one's notion of a constitution as ideal norm. "The" judicial duty is therefore to adjust the Constitution by degree, to be guided by a meta-Constitution super-imposed upon the inadequate original, to bring it around to normative maturity.

For others, it is quite the opposite point that the Constitution is insufficiently clear in nearly all of its most significant clauses, specifically its most normative clauses such as the due process clause, the equal protection clause, or the ninth amendment virtually in its entirety. Accordingly, "the" judicial duty is to impute some meaning without which the constitutionality of statutes cannot be determined and to impute that meaning according to some notion of what courts might do that neither duplicates legislative processes nor leaves these clauses virtually useless in litigation.

Id.

79. See PERRY, *supra* note 74, at 203.

In constitutional adjudication, the courts represent the political community by testing various policies and practices of the community's governments against the community's fundamental political-moral directives. Moreover and relatedly, the courts represent the political community in constitutional adjudication by specifying constitutional directives in contexts to which they are relevant but in which they are indeterminate—novel contexts that constantly emerge in the ongoing life of the historically extended community In that sense, constitutional adjudication—the judicial specification of indeterminate constitutional principles—is one of the primary institutionalizations of the self-critical rationality of the American political community

Id.; see generally JOHN RAWLS, *POLITICAL LIBERALISM* 231-40 (1993) (considering the role of public reason in constitutional adjudication from a philosophical frame of reference).

80. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 212 (1997).

There is a discursive convention denying that judicial law makers are engaged in an ideological practice. Most members of the intelligentsias (including the judges themselves) believe that there is some truth to the convention, that is, they deny the ideological in adjudication. They consistently exaggerate the difference between what judges do when they decide appellate questions of law in adjudication and what legislatures do when they decide them by deliberating and then voting on statutes.

The tension between reason and will, so prominent in theory, rarely becomes an overt antithesis in everyday legal and political life. In the actual operation of the constitutional system, notwithstanding the occasional judgment of the courts that some acts are unconstitutional and therefore inapplicable, the judiciary does not and cannot fundamentally undermine the power of the political organs to govern. Yet, by losing sight of the complementary and interrelated character of reason and will in the process of decision-making, both centrifugal tendencies question the theoretical underpinnings of that equilibrium. The interplay between reason and will can become menacing when their equilibrium is profoundly distorted.

Confronted with these centrifugal forces, constitutional theory should rediscover some old truisms: legal institutions are embedded in and exist at the societal level with specific social functions. Thus, no matter what moral ideals or skepticism are projected upon the law,⁸¹ constitutional theory retains a basic duty to locate the centripetal forces that have a gravitational effect upon the law, thereby giving the law structure and substance. Obviously, the false dilemma of the centrifugal forces between reason and will should be avoided. For this to be possible, however, one can neither perceive the law as a self-sufficient and closed set of concepts, nor can one regard society as an amorphous clay to be shaped passively by the lawmaker.⁸² The relationship between law and society is a symbiotic one of a potentially constructive and reinforcing interaction. Reason is not exclusively a feature of law; will is not exclusively a feature of politics. Both elements are present in decision-making. Instead of focusing upon one aspect of the dilemma between reason and will, the centripetal forces try to illuminate the nature of the interaction between legal and political decision-making.

Such centripetal forces may be linked to the useful role that *practice* can play in constitutional law. Greek constitutional theory has emphasized the potential contribution of practice to the quest of

Id.; see also Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934) (outlining an attempt to develop a pragmatic approach to the Constitution as expounded by the Court).

81. See generally H. L. A. HART, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123, 124-25 (1983).

82. See H. L. A. HART, *Jhering's Heaven of Concepts and Modern Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265, 269-71 (1983).

objectivity in constitutional analysis.⁸³ Constitutional practice becomes the zone of convergence between the values that are recognized in the constitutional text and the operation of the legal system in society. However, practice can set an objective horizon for the development of legal argumentation only to the extent that practice is *constitutionally justified*.⁸⁴ Specifically, only when practice is consistently interpreted and evaluated in light of constitutional values, can it offer the interpretive paradigms attached to the constitutional rule. These paradigms represent the characteristic occasions of its application, constitute the core meaning of the provision, and define its basic content.⁸⁵ Consequently, constitutional practice may prove pivotal in preserving the necessary equilibrium between reason and will as elements of the law.

VI. THE ROLE OF PRACTICE IN THE INTERPLAY BETWEEN REASON AND WILL: THE CASE OF EQUALITY

The principle of *equality* provides an example of the stabilizing effect of practice in the interplay between reason and will. The principle of equality, as interpreted and applied by the Supreme Court of the United States, involves judgments over the reasonableness of the allegedly discriminatory classifications

83. See Manitakis, *supra* note 43, at 55.

84. See DWORKIN, *supra* note 7, at 70-72 (1986) (identifying an inherent reliance on a concept in any related conceptions regarding its interpretation); see also NICOS STAVROPOULOS, OBJECTIVITY IN LAW 125, 155 (1996).

85. It is suggested that accepting the critical contribution of constitutional practice to the objectivity of constitutional interpretation does not commit one to Dworkin's view of the judge as "Hercules." See DWORKIN, *supra* note 7, at 264. That view may be true of common law countries, but it is alien to the constitutional tradition of continental countries. Moreover, the version of "constructive interpretation" that is "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong," *id.* at 52, associated with the view of the judge as "Hercules," can easily become a centrifugal force in constitutional law of the moralist deontological tendency. Of course, in interpretation, "[v]alue and content have become entangled," *id.* at 48, and "the claims and arguments participants make, licensed and encouraged by the practice, are about what *it* means, not what *they* mean," *id.* at 63. But these features can be preserved and are consistent with a more traditional view of the judge as a person who renders judgments of *reasonableness*, in the process of constitutional interpretation. Clearly, such judgments implicate the deontological element of the Constitution, its purposes and values, from which the *point* of constitutional practice is derived. However, by portraying the judge as one who renders judgments of reasonableness, one avoids the element of institutional activism involved in the "Herculian" vision of judge. For a synthesis of legal values and social reality while emphasizing the dependence of judicial decision-making on the evaluation and differentiation of the various social circumstances, see generally GEORGE C. CHRISTIE, LAW, NORMS AND AUTHORITY 68-69 (1989).

introduced by the law.⁸⁶ One must distinguish three basic elements in this analysis.

First is the category of people whom the law classifies on the basis of some common feature or shared property. Such categories rely on the lawmakers' acceptance of certain classifying criteria.⁸⁷

Second is the class of persons who are either excluded by an under-inclusive classification of law or included by an over-inclusive classification. In both situations, this element is defined according to objective criteria, the factual and legal properties shared by its members. In the specification of this second category, practice sets an objective horizon for constitutional argumentation and thus stabilizes the interplay between reason and will.⁸⁸

Third is the state interest. Ideally, the classification of the law and the classification according to objective properties, both factual and legal, should coincide. If that were the case, the law would be flawless from the point of view of equality. However, the dispute over the law's classification of what is discriminatory implies an insufficient convergence of the two categories. When a party attempts to justify an over- or under-inclusive legal classification by invoking the interest of the state, the decision-maker will need to weigh the reasonableness of the classification's criteria in light of the importance of the state-interest that is promoted by the (over- or under-inclusive) law.⁸⁹

We can see how these elements interact in the various tests developed by the Supreme Court of the United States. With regard to race classifications, the Supreme Court requires a compelling state interest for constitutional justification of a racially discriminatory law.⁹⁰ The state can rarely meet the requirements of this strict-scrutiny test.⁹¹ With regard to classifications based on gender, the Supreme Court requires a substantial relationship to important governmental objectives for the law to be constitutional.⁹² Finally, as

86. See generally G. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV 1 (1972).

87. See Joseph Tusman and James ToenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345 (1949).

88. See *id.* at 347-51.

89. See *id.* at 366-68.

90. See *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

91. *But see Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that classifications based on race can be justified by real military dangers).

92. See *Personnel Administration of Massachusetts v. Feeney*, 422 U.S. 256, 273 (1979); see also *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

to matters of economic regulation, the Court applies what some scholars call the mere-rationality or rational basis test, in which any logical connection between legal classifications and state interest provides the purpose of the law and is usually sufficient to sustain its constitutionality.⁹³

In Greece, the constitutional doctrine of equality leads to an inquiry into the proportionality of the law. The analysis involves the same structure and elements as the principle of equality under the Constitution of the United States.⁹⁴ However, the judgments of both reasonableness (under the U.S. Constitution) and proportionality (under the Greek Constitution) tend to prevent *only the arbitrary and capricious* classifications. In other words, the tests set only a negative limit for statutory classifications.

Consequently, a judge has no authority to require an exact match between the law's classification and the objective category, even though the two should ideally coincide. A judge cannot impose the best possible solution, which would lead to the merging of the constitutional principle of equality with the ideal of substantive justice.⁹⁵ Only specific classifications leading to invidious discrimination, such as race, gender, or religious creed, are per se unconstitutional. Beyond this, neither the U.S. constitution nor the Greek constitution inhibits the priority of the legislator to introduce the classifications that he or she thinks are appropriate. However, reason sets essential limits on legislative voluntarism by prohibiting

93. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

94. See Ioannis A. Tassopoulos, *Η Αρχή της ισότητας και η συνένωση εκλογικών περιφερειών στο ελληνικό και το αμερικανικό συνταγματικό δίκαιο*, IN D. KATSOULIS, N. SOILENTAKIS, I. A. TASSOPOULOS, ΖΗΤΗΜΑΤΑ ΑΠΟ ΤΗ ΝΟΜΟΛΟΓΙΑ ΓΙΑ ΤΙΣ ΠΡΟΣΦΑΤΕΣ ΝΟΜΑΡΧΙΑΚΕΣ ΕΚΛΟΓΕΣ [*The Principle of Equality and the Unification of Electoral Districts in Greek and American Constitutional Law*, in PROBLEMS FROM THE JURISPRUDENCE ON THE RECENT ELECTION OF PREFECTS] 57-127 (1997) (presenting a comparative analysis of the principle of equality in Greece and in the United States of America).

95. See generally Frank I. Michelman, *On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that although some scholars believe that "the poor" should be afforded suspect classification, cases of alleged discrimination against the poor should be given "minimum protection," a less rigorous standard than that given to suspect classifications). Still, this goal, the merging of the constitutional principle of equality with substantive justice, can hardly be achieved through "judicial reason" if the political and social forces of a society are of a different will. See also George Papadimitriou, *Η Αρχή του Κοινωνικού Κράτους στη Μεταπολιτευτική Ελλάδα (1974-1991)* in ΔΙΑΣΤΑΣΕΙΣ ΤΗΣ ΚΟΙΝΩΝΙΚΗΣ ΠΟΛΙΤΙΚΗΣ ΣΗΜΕΡΑ [*The Principle of the Social State in Post-war Greece (1974-1991)*, in DIMENSIONS OF SOCIAL POLICY TODAY] 131 (1993) (discussing the welfare state in Greece).

classifications that, in light of the objective factual and legal properties of the situation at hand, are arbitrary and capricious. In this process, a judge does not substitute his or her own will for the judgment of the lawmaker.

Discussing the objective factual and legal properties of the situation implies that the various aspects of life, subject to legal regulation and judicial review, have an intelligible structure and a certain coherence that enhance specific values and purposes. It is in this respect that practice sets an objective horizon for constitutional argumentation, stabilizing the interplay between reason and will. When judges find classifications arbitrary and capricious or when they evaluate the evidence regarding existence of covert discrimination under a facially-neutral law, they work at the level of the legal system's practical operation. A judge's responses to the arguments of the parties are not themselves legitimate as expressions of his or her own will, but rather as rational analysis and objective interpretation of the situation at hand.⁹⁶

In summary, although the constitutional principle of equality does not oblige the full implementation of the ideal of justice, it does set a negative limit on statutory classifications, thus prohibiting discrimination that, in light of an objective analysis of the situation being scrutinized, turns out to be arbitrary and capricious or invidious. This combination reflects the interplay between reason and will in an area as sensitive as the law of equality. Constitutional practice provides the bedrock to anchor legal arguments in their objectivity and reasonableness, thereby limiting classifications that emerge as groundless, unjustified, and excessively voluntaristic.

VII. CONCLUSION

We have seen how Greek constitutional theory responded to the different phases of Greek political history in an effort to strike the appropriate balance between reason and will. In the post-civil war environment of the 1960s, the priority was to secure the locus of sovereignty as the foundation of both reason and will. However, under the Constitution of 1975/1986, respect for constitutional

96. Of course, only that practice that, at least in principle, is constitutionally justified, can play this stabilizing role. Therefore, the practice of separation between blacks and whites in the South, though institutionally well embedded before *Brown v. Board of Education*, 347 U.S. 483 (1954), could not provide a zone of convergence between the values recognized in the Constitution and the operation of the legal system in social life. It is only constitutionally-validated practice that can contribute to the equilibrium between reason and will.

fundamentals is well established. Political developments of that period necessitated consideration of reason and will as distinct aspects of constitutional decision-making. The interplay between these two elements became more flexible, more intense, and more controversial. According to some analysts, the prevailing element is will.⁹⁷ When there are no clear criteria compelling a certain result, the question is one of authority (i.e., institutional competence to settle the matter). For other analysts, reason serves as the justification of will and not vice-versa. Using the principle of equality as an example, we have seen how the concept of constitutional practice may be useful in maintaining the balance between reason and will as elements of the law.

Whatever the particular situation, Greek constitutional law must tackle the problem of objectivity in constitutional interpretation. The long constitutional tradition of the country, which for over a hundred years has practiced judicial review of the constitutionality of laws, justifies the optimism that Greece will respond to the new exigencies in a constructive and enriching manner.

97. See Venizelos, *supra* note 44.