LAUDATIO IN HONOUR OF SIR BASIL MARKESINIS*

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I. WHEN one is called to pronounce the *laudatio* of an "omniscient" jurist, who has an enormous authoring work, the most important among the speaker's duties, and perhaps the most tormenting, is not to attempt to justify this characterisation, but to select those points among the fruitful work of the honoured person on which he will focus, so that the appropriate honour will be completely awarded at the end.

This evening the Faculty of Law of the University of Athens honours our own Basil Markesinis, a personality who belongs to the generation of those eminent Greeks, who - being endowed with all the intellectual virtues that nature can endow to a man - have been, one might say, destined - they themselves believe in that mission - to break the borders, to move the wheel of science, to go beyond, bearing a high vision and being motivated by high ideals.

Basil Markesinis is a leading authority in Civil Law, and also a theoretician of Public Law. Furthermore, he has profoundly studied the Methodology and Philosophy of Law and has closely dealt with Literature and Art as sources of legal inspiration. He has, however, mainly devoted himself to the comparison of laws, thus justifiably being regarded today as one of the most important, through time, comparatists all over the world. His spirit, uneasy as Faust's[1] and fertile as Dionysus', expands in every aspect of legal science, but also beyond it, seeking to embrace other aspects of science and art as well.

His work, comprised of 31 books and of approximately 120 articles - published in various legal journals around the world and in different lan-

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* This is a translation of the original Greek text.

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[1] It is a characteristic trait of his personality that on the escutcheon awarded to him by the Queen of England, on the occasion of his Sir investiture ceremony, there are written the words of *Faust* by GOETHE (verse 1759): "*Nur rastlos betätigt sich der Mann*".

guages - inspires awe and admiration, revealing the erudition of the author, the ecumenism of his spirit, his open theoretical horizons, the insight of his research approach and his multifarious way of thinking. His international acknowledgement is such, that - as it is going to be demonstrated below - it would not be exaggerating to state that, apart from the numerous references to his work - and indeed not only in the decisions of the English-speaking courts, from England up to Australia and to South Africa, but also by the academics of the entire world[2] - there is rarely one university in the world that would not wish to cooperate with him on the scientific level.

II. Basil Markesinis was born in Athens on 10th June 1944, in a family that on his father's side had an important presence for many generations in the political and scientific life of Venice initially and of Greece later on. Basil Markesinis studied law at the Faculty of Law of our University, from which he graduated in 1965, first among the best students, with the highest grade (10); a grade that has never been granted since then. He is awarded his first Ph.D. in Athens in 1968, at the age of only 24, also with the highest grade, on the basis of his dissertation on the theme *The mother's right to guardianship according to the Greek Civil Code*[3].

Then he will open his wings to cross the "golden" threshold of Cambridge and Oxford. When he arrives there, in 1968, he will not have to show a banknote of one million pounds - inherited by his family -, like the one of Marc Twain's; yet, he will have to strive hard for being accepted by the English university community, based exclusively on his own wits. He is passionate, however, for science, and being endowed with an unquenched passion for research and creation, he will succeed outstandingly. In 1970, he will be awarded his second Ph.D. from the University of Cambridge[4], while later, in 1995, he will be awarded the Oxford DCL as well, a title equivalent to lectureship which is conferred only in exceptional circumstances.

Many great universities of the world such as Paris I (Sorbonne), Ghent and Munich, will honour him with the title of Honorary Doctor.

As an academic teacher Basil Markesinis will excel, holding successively the chairs of European and then of Comparative Law at the University of Oxford, where he will found, in 1995, the universally renown Institute of European and Comparative Law. Later on, he will go to the Uni-

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[2] The frequency of the references to his work is shown by the author in his book *Comparative Law in the Courtroom and Classroom*, 2003, p. 86 *et seq*.

[3] Supervisor Professor was Georgios Michailidis-Nouaros.

[4] For his treatise *The Theory and Practice of Dissolution of Parliament*, 1972.

versity College London, where he will be appointed to the chair of Common Law and Continental-European Law. He is still holding this chair today, while at the same time he is Professor of Comparative Law at Austin University, in Texas[5].

For several years, as if he was motivated by an apostolic stimulus[6], Basil Markesinis will teach in 25 different Law Schools all over the world. He will be accepted, among others, at Cornell, Michigan, Ghent, Leiden - where he will found in 1987 the Institute of Anglo-American Law -, Munich, Paris I and II, Rome and Siena.

His reputation will thus spread all over the world and his scientific prestige will be universally acknowledged. He has been nominated a Fellow of the British Academy, a Foreign Fellow of the Academy of Rome, the Royal Belgian Academy and the Royal Netherlands Academy. Furthermore, he is a Corresponding Fellow of the French Academy and of the Academy of Athens. He is also a Member of the American Law Institute.

For the quality of his multifarious scientific work and for the research labour that it embodies, primarily, however, for the cultural perception which consciously and with missionary devotion and zeal he tries to promote through his work, Basil Markesinis has been at times awarded exceptional high honours and offices by the Presidents of the Hellenic, French, German and Italian Republics, while since 1998 he has been bearing the exceptionally honourable title of Queen's Counsel.

What else, indeed, one may wish for, if the combination of these honours is for a scientist the way towards the Heavens?

III. His scientific interest is focused, as it has already been mentioned, on the comparison of laws. His greatest dream is the bridge-building between the different legal systems, between the different legal cultures. To this task, both complex and noble, according to Lord Phillips of Worth Matravers in the preface of Basil Markesinis's book *Comparative Law in the Courtroom and Classroom* (2003), Basil Markesinis will devote himself with all his intellectual and physical strength, attempting to "teach all the nations", having an apostolic consciousness of his mission[7].

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[5] At the Jamails Regents chair.

[6] From this point of view, it is of course not accidental the title that he gives to a chapter of his book *Comparative Law in the Courtroom and Classroom* (p. 75 *et seq*.): "Spreading the Gospel (and the Name of the Evangelist)".

[7] He also cares about the more rational organisation of the studies on the Methodology of Comparative Law but also for the founding of a School and for students

He wishes to free the comparative law from its marginal role and to elevate it to a fundamental diagnostic source of the judicial judgment and to an important factor in the shaping of national law. He envisions, however, the rebirth of this field as not based anymore on the action of some gifted heroic figures - among them a central figure is certainly Ernst Rabel - but as an organic consequence of the political and economic reform of the contemporary world and especially of the confidence in the idea of European integration[8].

The principal virtue of Basil Markesinis's work on comparative law is the conscience of the necessity for this material to be steadily approached by the cohesive methodological point of view of the author. In the field of *Methodology* of Comparative Law, he literally achieves great accomplishments[9]. Bound by the methodological chariot of Rabel's school and his successors (mainly Konrad Zweigert, Hein Kötz and Werner Lorenz)[10], he succeeds in perfecting the functional method of comparing laws, as the main addressee of the finding of comparative law is the judge and the weight goes from the classroom to the courtroom, while the field of comparative research is now substantially extended (more states, wider cognitive subject). At the same time, more factors are embodied therein, which influence the finding of correct law, from the socio-economic conditions accompanying the specific problem to the judge's mentality[11]. And all this without his method being deprived of the necessary philosophical basis and the element of theoretical contemplation.

The main motive in his work is his firm belief that the judge of the national state, acting today in new political-economic surroundings, wishes to have at his disposal information about the doctrinal solutions which are given to the same legal problem in other legal systems. Therefore, his constant aim is to draw, through his work, mainly the judge's attention. Because he knows that, if this primary goal is attained, the practitioner will in turn show the same interest, making sure that he finds and presents to the judge the solutions given by the foreign law. During this quest, however, it

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as to ensure its function; on this see BASIL MARKESINIS, *op. cit*. (note 6), p. 12 *et seq.*, 25 *et seq*.

[8] On this, see mainly BASIL MARKESINIS, *op. cit*. (note 6), p. 35 *et seq*.

[9] His Methodology is set out mainly in various articles which compose his two-volume work titled *Essays on Foreign Law and Comparative Methodology*, 1997 and 2001.

[10] He calls himself *neoRabelist*; see *Comparative Law in the Courtroom and Classroom*, p. 16 and 43.

[11] *Op. cit*., p. 41 *et seq*.

is natural that, furthermore, the practitioner asks for the academic jurist's aid. Thus, in a triangular way, Basil Markesinis sees the participation of the factors for law-finding in the knowledge of foreign law to function correctly, a conception that he himself will express by the term "packaging"[12]. Of course, any development from this collaboration will eventually be interesting for the national legislator as well.

A basic feature of the methodology applied by Basil Markesinis to his work on comparative law, is his turn to the judge which constitutes at the same time *a turn to pragmatism*, in other words to the events of today's transaction life, claimed already by Rabel and Max Rheinstein[13]. The comparison of legal systems must give an answer to the new problems that are inevitably raised by the transformation of the socio-economic conditions. European integration, the protection of human rights, the consumer's protection, the information technology, the mass media, the artificial insemination, the intellectual property rights, the social security are new regulatory fields. From them emerge new complex legal problems, for whose uniform solution, the functional (oriented to the functional practicalities) research on comparative law is mainly appropriate.

An element which proves the perfection of the Methodology proposed by Basil Markesinis in the field of Comparative Law is moreover the *practical effectiveness* of the method, which he himself calls *method of functional specificity*[14]. Knowing that the English judge in particular is willing to make use of ideas coming from foreign legal systems, as long as they are offered to him in a familiar systematic way, which in the case law system means that the starting point of the diagnostic effort should constantly be the problem, Basil Markesinis presents systematically the foreign law, taking as a base of his teaching specific problems which have constituted the object of a judicial diagnosis in this law and then referring to wider systematic links. The use of the German model in the case *Greatorex v. Greatorex* before the High Court is a typical example of application of this method[15].

In spite of its British colour and its inevitable fragmented character, this methodological approach is accurate. Basil Markesinis justifiably believes that a legal problem brought before the court in order to be judged, seen from a pragmatist angle, is usually the same in all countries. There are not,

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[12] As for instance in this same work (*op. cit.*), p. 35 *et seq*.

[13] *Op. cit*.

[14] *Op. cit*., p. 45 *et seq*.

[15] MARKESINIS, *op. cit*., p. 161 *et seq*.

indeed, problems which could be characterised as typically English, German or French. This similarity is made obscure from the moment that there is an effort to vest the problem with the doctrinal cloth of each legal system and then insert it into the systemic structures of each legal order.

Basil Markesinis, being conscientious of the difference between foreign law and comparative law Methodology, is not interested in simply describing the law in force in a specific state - which is foreign to the national judge. His constant pursuit is to discover *how*, *why* and *to what extent* the knowledge of foreign law could have a practical utility in the legal system of the state that receives it. The way he proceeds - in his work *The German Law of Contract*[16] - to the comparison with the famous *Bürgschaftsentscheidung* of the German Supreme Civil Court[17] - regarding the problem of the protection of the negotiating weaker party in cases of structural contractual inequality - with the planning of *ratio decidendi* by Lord Nicholls in the case of *Royal Bank of Scotland v. Etridge*[18] and the position of Lord Denning in the case *Lloyds Bank v. Bundy*[19], is here particularly revealing. Thus, the purpose of this approach - which is based on the indisputable acceptance that no legal system, not even the German one which he particularly admires, has a cognitive monopoly - becomes, indisputably, *utilitarian*[20].

However, his approach remains strictly scientific. This is because the author knows that there are limits to the use of foreign law as an inspiration, guide and controller of the national judge's thought, and if these limits are surpassed this fatally leads to an erosion of the persuasive strength that this effort aspires to exercise in the process of finding the correct law. Consequently, not on every occasion and not regarding every case is the recourse to the interpretative means of the comparative law approach recommended. It is recommended only in cases of sufficient need. In his work *Judicial Recourse to Foreign Law* (2006) Basil Markesinis will attempt a systematic presentation of the reasons justifying the recourse to this method[21]. However, he bears also in mind the position - resulting from

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[16] B. MARKESINIS / H. UNBERATH / A. JOHNSTON, *The German Law of Contract*, 2nd edition, p. 39 *et seq*. and 254 *et seq*.

[17] BverfGE 89,214 = *NJW* 1994, 36 *et seq*. On this see P.A. PAPANIKOLAOU, *Constitution and Autonomy of Civil Law*, 2006, no. 202.

[18] [2002] 2 A.C. 773.

[19] [1975] QB 326.

[20] In the preface (*in fine*) of his work - with JÖRG FEDTKE - *Judicial Recourse to Foreign Law*, 2006.

[21] See p. 109 *et seq*.

this teaching - of Lord Bingham (in the case *Fairchild v. Glenhaven Funeral Services Ltd*)[22], namely that this is indicated when "the decision that is about to be given in this country offends one's basic sense of justice and consideration demonstrates that foreign laws offer a more lenient solution, consequently the initial version should be reexamined".

Through his work in this cognitive field, the comparison of laws is elevated to an unprecedently high level of scientific accuracy. His methodology has virtues making it suitable to be diffused in every university and courtroom of the world. The grandeur of the Markesinian approach lies mainly in the teleological integration of comparison of laws to a higher purpose, a higher ideal, in other words this of European integration and the convergence of Jurists of the entire world in a "*society of legal civilisation*" similar to, one could say, the "esthetic society" envisioned by Friedrich Schiller[23].

Until this society is created, however, Basil Markesinis himself seems totally satisfied, confirming *e.g.* that in the *Fairchild* case, ruled by the House of Lords, Lords Bingham and Rodger of Earlsfery refer to Palandt and the Motive of the German Civil Code, but also to the regulation of the Greek Civil Code (Art. 926), while in this decision is also mentioned his *German Law of Torts*, that had just been published at the time (in 2002) in its fourth edition[24].

IV. Now, in the field of the applied Methodology of Comparative Law, what is particularly worth praising as an accomplishment of the Honouree is the transposition and the use of the German legal thought, as this is mainly expressed in *The German Law of Torts*, in the field of Anglo-Saxon Civil Law. The Markesinian approach to comparative law is anyway Euro-centered[25], as the unified Europe is today the basic factor of law-shaping in the Member States, and it is deemed in the work of Basil Markesinis as a high cultural value, whose realisation has become, as already mentioned, a strategic goal.

The French and the Italian but possibly also other European laws can be a source of inspiration for new ideas, new doctrinal categories and new suggestions of solutions for the Common Law jurist. This is what Basil

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[22] [2002] 1 A.C. 32.

[23] FR. SCHILLER, *Über die ästhetische Erziehung des Menschen in einer Reihe von Briefen*, 1795.

[24] See MARKESINIS, *Comparative Law…*, p. 212 *et seq.*; also MARKESINIS / FEDTKE (see *supra* note 20), p. 66 *et seq*., 124 *et seq*.

[25] See *e.g.* MARKESINIS, *Comparative Law...*, p. 50 *et seq*.

Markesinis has achieved to a great extent[26]. However, he will correctly choose to focus most of his scientific effort, in order to realise his comparative law project, on the research of German law, and particularly of the field which primarily characterises culturally the German legal order, a legal system which is especially refined and admirably rich in diagnostic means: the Civil Law[27] and more specifically the Law of Torts.

There are many reasons which justify this choice of research, reasons which stem from the central role that Germany holds in the financial life of the unified Europe and the prospect that this creates for the development of English-German financial relations and also the numerous Institutes and various Comparative Law Centres that this country has, as well as the fact that the most serious efforts for the unification of private law of European states have been assumed by Germans[28]. The main reason, however, for this choice remains the accuracy of the German Civil Code as a codifying work and the prestige of the doctrinal system which was developed on this basis in the light of the tradition and thanks to the thoroughness that characterises the German theoretical thought. From this point of view, it is of course not accidental the high appreciation that Common Law giants like Oliver Wendell Holmes, Roscoe Pound, Karl Llewellyn, Sir Frederick Pollock, William Maitland or Sir William Anson[29] had for the German legal thought.

This attempt of selecting the German Law of Torts as the most appropriate field for testing the correctness of the methodological conception firmly followed by Basil Markesinis in his comparative law work, ambitious in its conception, titanic in its realisation and brilliant in its final results, will be finally materialised on the one hand in *The German Law of Contract*, which in its second edition (2006) is also authored by Hannes Unberath and Angus Johnston, and on the other in *The German Law of Torts*, which is already in its 4th edition (2002) co-authored by Hannes Unberath.

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[26] See *e.g. La Réparation du Préjudice Corporel*, Economica (1985), Le Droit étranger devant le juge américain et le juge français, Institute Webpage and Academia Analecta for 2006, The Enduring Legacy of the Code Napoleon (2005) *LQR* (January edition), Il Ruolo della Giurisprudenza nella Comparazione Giuridica, *Contratto e Impresa*, Vol. VIII (1992), p. 1350 *et seq*., etc.

[27] Compare G. HIRSCH, in the preface of the work of MARKESINIS / UNBERATH / JOHNSTON, *The German Law of Contract*, 2nd edition, 2006.

[28] MARKESINIS / FEDTKE, *Judicial Recourse…*, p. 71 *et seq*.

[29] MARKESINIS, in the foreword of *The German Law of Contract* (see *supra* note 27).

This two-volume work, which impresses with its completeness, its analysis which is closely related to real life (thanks also to the numerous jurisprudential data which are the object of this analysis)[30] and consequently its admirable deduction, which is reinforced by the fact that this analysis is firmly guided by the rigorous methodological thought of the authors, is functionally addressed mainly to the Common Law jurist. This is put also at the service of the need for the realisation of Basil Markesinis's vision for the creation of a high standard of understanding between the Anglo-Saxon and the German jurist - using the English language of course, which has become the *lingua franca* of international transactions - now that the Germanophobia of the English jurist has been abated and the quest of the English judge for new sources of inspiration is enhanced under the pressure of new socio-economic conditions underpinning the European environment.

His main practical purpose is to make German Civil Law, which is rich in ideas and refined criteria of substantial justice, more easily accessible to the judge, the practitioner and also the academic of Common Law. Simultaneously, however, the presentation of German law through the methodological approach of the justice who is familiar with the Common Law thinking, generates, reflectively, beneficial results for the German jurist as well, because he can diagnose now that there is also a different, in comparison to his own, perspective (the one of Common Law), from which the legal problem itself can be viewed and fully lightened. In this connection, the Honorary President of the BGH Professor Walter Odersky will state - in the preface of *The German Law of Torts* - that he is pleased to see the analysis of style, form and content of the BGH decisions ventured in this work, an issue that would difficultly arouse the research interest of the German jurist of Civil Law.

The ultimate ideological purpose of this work as well is to contribute to European integration. For this reason, Basil Markesinis himself does not hesitate to declare *urbi et orbi* that he systematically emphasises the similarities between national regulations rather than their differences[31]. This approach is not self-evident only for Basil Markesinis. This is because the answer to the tormenting question raised by the era of European integration, that is, how this ideal balance can be found between the harmonisa-

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[30] The decisions cited in this work translated into English amount to 121 in *The German Law of Contract* and to 151 in *The German Law of Torts*.

[31] See *e.g.* his work *The German Law of Contract*, p. 122; or his speech on the occasion of his nomination to a Corresponding Member of the Academy of Athens; see Academy of Athens records, 2003, p. 132.

tion of legal regulations and the maintenance of each state's particular characteristics of its national legislation according to its own tradition, is not similar for all the European jurists. However, for Basil Markesinis, who wants to look further and believes in the superiority of legal civilisation which is produced through the unified for all Member States regulations of Community Law, which is especially sensitive in social protection issues, this dilemma is hardly raised. It is natural, therefore, that also this work promotes the ideal of European integration.

If it was necessary now, from this work, which according to Lord Bingham is already a classic[32] - judging mainly from the extremely favourable impact that its release had both among the greatest theoreticians but also among the top judges of both legal systems[33] - to set an example demonstrating how the English judge could be effectively assisted by German theory and jurisprudence, I would certainly choose the one of Third Party Effect of human rights.

The approach to this question, which is attempted in both volumes of this work[34], is indeed exemplary. Through the sharp-witted critical look of the authors, the theory of indirect Third Party Effect is totally clarified and thus absolutely purified for the English jurist, who just recently - since the Human Rights Act (2000) entered into force - discovered the problem of validity of constitutional provisions in private legal relationships. The English jurist, consequently, does not have the experience of the German jurist, who perfectly knows this issue, at least since the renowned *Lüthurteil* (1958)[35]. From this perspective, it is certainly not accidental that Naomi Campbell's lawyers wanted to use in the trial before the Court of Appeal against *Mirror* newspaper[36], the decisions of the German Supreme Courts concerning the protection of privacy of Princess Caroline of Monaco[37]. This absolutely confirmed the accuracy of the method of comparative law approach suggested by Basil Markesinis.

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[32] Already in the foreword of the third edition of *The German Law of Torts* (1994).

[33] Professor W. ODERSKY in the preface of *The German Law of Torts*, 4th edition, 2002.

[34] In *The German Law of Contract*, p. 37 *et seq*.; in *The German Law of Torts*, p. 28 *et seq*.

[35] BVerfG E 7, 198 *et seq*. On this decision also see P.A. PAPANIKOLAOU, *op. cit*. (note 17), no. 2.

[36] *Campbell v. Mirror Group Newspaper Ltd* [2002] EWCA Civ. 1373.

[37] BGH *NJW* 1995, 861; BVerfG E 101, 361.

The attempt of transposing the German legal thought to the field of English law is not, of course, something new. Basil Markesinis, however, succeeds in bringing it to its most perfect and at the same time most effective form. The German Civil Law is transposed now to Common Law endowed by Basil Markesinis with the possibility of attracting the English judge along with the practitioner and the academic jurist. The fact, furthermore, that in this effort the leading role belongs to a Greek has indisputably a two-fold beneficial result.

Firstly, contrary to renowned German jurists, such as Otto Kahn-Freund, who insisted firmly in the projection of their German self-consciousness[38] -, Basil Markesinis, as a Greek, has the advantage of being more easily accepted in the Eurosceptical environment of English legal science as a bearer of ideas of German origin. No one could ever think that he promotes, through the development of the comparative law method, the interests of the German industry, a suspicion which impeded the previous efforts of the greatest German comparative law jurists, as the promotion of financial interests through the comparison of laws was not regarded as quite compatible with the academic Oxbridge ethos.

Secondly, the transposition of German legal thought, because it is indeed made by a Greek, is inevitably accompanied by elements of the Greek language and of the Greek civilisation. It is characteristic, for instance, from this perspective, the example of the transition from the decayed Roman law to the contemporary European law with the renowned answer given by the Delphi to Julian the Apostate that "*The stream is dry that had so much to say*"[39]. In addition to this, I will refer to something specifically characteristic. When he writes the foreword of his book *Judicial Recourse to Foreign Law* on 3rd October 2005, he does not forget to make universally known that this is the celebration day of Saint Dionysus the Areopagite, the first Athenian to have converted to Christianity on the site where the ancient Areopagus used to be.

My fellow, Mr. Markesinis,

V. The history of legal science, like an ancient secret trust, has condescended to entrust you with an exceptionally difficult, but prominently noble task, of great importance for the shaping of the pan-European legal culture. It assigned to you the bridge-building between the various legal

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[38] See on this MARKESINIS, *Comparative Law*…, p. 15 *et seq*.

[39] MARKESINIS, *op. cit*., p. 1 *et seq*.

systems and the promotion of communication between the jurists of the world. And you - as if you had been under the shadow of a golden eagle[40] - proved to be a foreman at this task. You have added a cornerstone to the foundation that is built up today for Europe, "so that it looks even higher on it" as it was envisioned - a lady and a governor of the civilisation - by Kostis Palamas in *The King's Flute*[41]. You took on your shoulders, as Aeneus that you have loved[42], the continental legal thought to pass it through to England and across the Ocean. And you have always been carrying with you the glory and greatness of Greece. Here it is, Ladies and Gentlemen, the award of His Honour, as clear as it can be.

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[40] *The Myth from the Widow's Son* by KOSTIS PALAMAS, indicates the one destined to achieve great things.

[41] Chapter 11, verse 215 *et seq*.

[42] See in particular B. MARKESINIS, *Good and Evil in Art and Law*, 2006, p. 130 *et seq*.