The Mechanics of Representation and the Autonomy of Parliament: Proposals for the Reinforcement of the Representative Body*

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Abstract

The study aims to highlight, in the specific context of a modern Greece still suffering the effects of a prolonged financial crisis, the tension between democracy and representation; furthermore, the study critically describes and evaluates the institutional role of parliament within the contemporary system of the separation of powers. The analysis focuses on the constitutional mechanics of the principle of representation and its relation to the democratic deficit that has gotten worse during the financial crisis. The theory of representation will be the conceptual prism through which the study analyzes the institutional impact of the financial crisis on the functioning of democracy. Given the fact that the legal narrative of the financial crisis has not ended, the study aims to contribute to this debate.

I. Introduction

REPRESENTATION is the mechanism that institutionally allows the formation of the general will as a (pluralistic) unity and the (indirect) exercise of popular sovereignty[1]. The representation principle is identified - implicitly or explicitly - with the democratic principle, at least historically, if not also conceptually, in contemporary constitutional doctrine. However, even if liberal democracy is essentially a representative regime, the concept of representation bears the elements of its own crisis. More precisely, the modern representation scheme presumes a fictional confusion - one that is both politically and technically necessary - between the representative and the represented, although it remains evident, from a philosophical and democratic standpoint, that one's will cannot be

[1] For the concept of representation in general see H. PITKIN, *The concept of representation*, University of California Press, California, 1967.

represented without it being entrusted to another[2]. Representation is in fact not just a mere technical necessity of modernity, but a sophisticated institutional form of government and a manifestation of the general will which inevitably, and particularly in times of crisis, leads to the creation of an insufferable gap between the governors and the people. Nevertheless, besides the emergence of various sophisticated theories of direct and participative democracy institutions, as a potential remedy to the modern democratic deficit in the western liberal democracies and the post-war adoption by modern democracies of party-system regimes, parliament remains the main forum of political and legal argumentation and lawmaking, the mirror of our political representation and its failures.

This paper does not focus on conceptual arguments: its aim is rather to highlight, in the specific context of a modern Greece still suffering the effects of a prolonged financial crisis, the tension between democracy and representation; furthermore, we aim to critically describe and evaluate the institutional role of parliament within the contemporary system of the separation of powers. The analysis will focus on the constitutional mechanics of the principle of representation and its relation to the democratic deficit that has got worse during the financial crisis. The theory of representation will be the conceptual prism through which we aim to analyze the institutional impact of the financial crisis on the functioning of democracy and, finally, suggest some coherent proposals for the reinforcement of the representative body. When it

[2] See N. URBINATI, *Representative Democracy. Principles and Genealogy*, University of Chicago Press, Chicago, 2006.

comes to legal matters with a significant political impact, such as the legislation passed during the crisis, both the democratic element of the rule of law and political legitimacy are at stake. Given the fact that the legal narrative of the financial crisis has not ended, the harsh way in which the legislator has exerted his authority has challenged constitutional theory.

II. "Back to the Roots" of the Representation Crisis

A. The Emergence of Political Representation: A (Very) Short History of Ideas

Since the 19th century, parliamentarism has been at the heart of constitutional doctrine, meaning usually not only a system of governance, but also the system of representation as a whole[3]. However, the historical emergence of representative forms of government and limitations on monarchical power do not coincide with the contemporary democratic principle[4]. Parliamentarism was born in Britain, primarily as part of a monarchical system[5]. The democratic principle has been attached to the concept of representation through the introduction of universal suffrage, in a new civic reality, where people claim their sovereignty within the limits of the

[3] See IF. KAMTSIDOU, *The parliamentary system. Democratic principle and governmental responsibility*, Savvalas, Athens, 2011, p. 15 (in Greek).

[4] See A. MANESSIS, *The guarantees of respect for the Constitution*, vol. 2, P. Sakkoulas Bros. Publications, Athens-Thessaloniki, 1965, pp. 174-176 (in Greek).

[5] See D. TURPIN, *Le régime parlementaire*, Dalloz, Paris, 1997, p. 11.

Constitution[6]. The representation principle has a dual function: on the one hand, it is a constitutive element of the general will, which ontologically can be founded and expressed via the representatives' free will (in a scheme that Thomas Hobbes invented as the relation between the "bound author" and the "free actor"), and on the other it has invented the idea of political unity as a whole[7]. Nevertheless, this nominalist foundation of the modern concept of representation, based on its legal and constitutional perception, fatally ignores or underestimates the social and political divergences and conflicts within the total abstraction of the general will. Modern democratic theory (for instance, Rousseau and Kelsen) has underlined the philosophical, political and legal failures of the concept and the imperative need to enhance the representation principle in order to secure better representation for diverse social classes and interests. In this framework, the emergence of political parties and later of civil society organizations, along with the direct democracy techniques and institutions (referenda and direct law-making initiatives by the people) seem to fulfill the democratic purpose and, in addition, to correspond to a doctrinal turning away from the concept of representation to that of "representativity". The latter must be defined as the contemporary mutation of the modern concept of representation, as the tendency to depict institutionally and legally the real people's will, or, in short, as an inversion of the traditional relation between the repre-

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[6] See F. HAMON / M. TROPER, *Droit Constitutionnel*, LGDJ, Paris, 2003, p. 174.

[7] P. BRUNET, *Vouloir pour la nation. Le concept de représentation dans la théorie de l'Etat*, Publications de l'Université de Rouen-Bruylant-L.G.D.J., Rouen-Bruxelles-Paris, 2004.

sentative and the represented. For this theory, it is the will of the represented that binds the representative and not the opposite[8]. In the political field, the constitutional abstraction of the general will has always been mediated by the social and political institutions, where the claims of representation see the light and express, each from its own standpoint, the popular sovereignty. So, in fact it is the mediation itself that is always being reviewed and updated in the liberal democracies, as a dynamic concept of the legal order.

Political parties have assumed their representative role from the very beginning: they have always expressed different and rival social forces and political ideologies, and the system of representation has gradually evolved from an "oligarchic" institution of the bourgeoisie to a democratic institution based on universal suffrage[9]. The first political parties enhanced the masses to participate in politics, being the mirror of big cleavages and social expectations[10]. After the Second World War, the class-based parties of the past gradually became catch-all parties, more willing to offer political programs for the electoral market than to act as collective intellectuals of a kind of homogenous bloc of social forces[11].

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[8] B. DAUGERON, *La notion d'élection en droit constitutionnel*, Dalloz, Nouvelle Bibliothèque de Thèses, Paris, 2011.

[9] See the classic analysis of M. DUVERGER, *Les partis politiques*, Armand Colin, Paris, 1951.

[10] See S. LIPSET / S. ROKKAN, Cleavage structures, party systems and voter alignments *in:* S. LIPSET / S. ROKKAN (eds), *Party systems and voter alignments: cross-national perspectives*, The free press, New York, 1967, pp. 1-64.

[11] See O. KIRCHHEIMER, The transformation of western European party systems *in:* J. LA PALOMBARA / M. WEINER (eds), *Political par-*

During the last few decades, European political parties, mostly those belonging to the big families of the center-right and the center-left, have moved further in the same direction. They have been transformed into cartel parties, which depend more on the State institutions of the country in which they operate than on the social classes or their voters[12]. Thus, in Europe, the markets and the supra-national organizations have undermined the potential of the democratically legitimized representative body, the Parliament, to decide over alternative policies. In this context, the economic crisis of 2007-2008 naturally turned quickly into a failure of the political system, especially in Greece, and therefore into an unprecedented crisis for the representative institutions. As a result, the electoral "backlash" in many European countries did not focus on the policies that individual parties pursued, which could perhaps have been amended through legislative oversight institutions, but rather on the desirability of the ESM and the EU's treaty-based economic policy regime[13]. This institutional dialogue between the economic and the political actors largely depends on the autonomy of parliament, the channel of interaction and the monitoring of the policies implemented.

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ties and political development, Princeton University Press, Princeton, 1966, pp. 184-188.

12 See P. MAIR, Political parties, popular legitimacy and public privilege, *West European Politics*, 18 (3), 1995, pp. 40-57, and the development of this analysis in R. KATZ / P. MAIR, The cartel party thesis: a restatement, *Perspectives On Politics*, 7 (4), 2009, pp. 753-766.

13 T. WINZEN, *Constitutional preferences and parliamentary reform. Explaining national Parliaments' adaptation to European integration*, Oxford University Press, Oxford, 2017, pp. 164-165.

B. The Impact of the Crisis on the Greek Representative System

In Greece, the fundamental role of the parties in the function of parliamentary democracy has been stressed since the inter-war era[14]. However, only after the collapse of the military dictatorship in 1974 did the parliamentary parties become mass parties, establishing their presence in every aspect of social life[15]. Since 1974, which is known as the "*metapolitefsi*" in Greece, the Greek people had trust to the political system and the institutions of representative democracy[16]. After the mid-90's, the people's confidence in their political system has gradually weakened as the two biggest parties, the socialist PASOK and the center-right New Democracy, started to implement common policies[17]. Nevertheless, overall, during the 35-year-period between 1974 and the onset of the economic crisis in 2009, the Greek people generally trusted their representative system, as the vast majority were able to identify themselves with the traditional majoritarian

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[14] See A. SVOLOS, *The new Constitution and the bases of the regime*, Pirsos, Athens, 1928, pp. 89-101 (in Greek).

[15] See CH. VERNARDAKIS, *Political parties, elections and party system. The transformations of the political representation 1990-2010*, Sakkoulas, Athens-Thessaloniki, 2011, pp. 67-68 (in Greek).

[16] See N. DEMERTZIS / P. KAFETZIS, Political cynicism, political alienation and mass media: The case of the 3rd Greek Republic *in:* X. LYRINTZIS / I. NIKOLAKOPOULOS / D. SOTIROPOULOS (eds), *Society and politics: Aspects of the 3rd Greek Republic 1974-1994*, Themelio, Athens, 1996, pp. 174-218 (in Greek).

[17] See K. FEATHERSTONE, *Politics and policy in Greece: The challenge of modernization*, London, Routledge, 2005.

two-party political system, along with the frequent alternation of the left and the right in power. Greek parliamentarism had always been a majoritarian one, with strong governments representing about 80% of the electoral body, until the crisis erupted and radically destabilized the political system.

When the crisis erupted, the problems in the representative system turned into a crisis of representation, and the austerity measures implemented by the Memoranda of Understanding (MoU) increased social discontent. The Greek Parliament lost much of its authority as it appeared willing to transfer its decision-making powers to external institutional and political actors. In other words, although the Parliament remained, as always, the constitutionally competent organ and passed laws implementing the austerity measures in the normal way, its very legitimacy was substantially challenged. Hence, its members were called upon urgently to pass Bills running into thousand pages that included, sometimes in only one article, numerous provisions concerning every aspect of social life[18]. Moreover, the governments of the past ten years have used on an unprecedented scale the parliamentary procedure for urgent debate and voting, while discussions in Parliament have often taken place in the presence of very few of its members. In addition, during this period the governments have issued many more Acts of Legislative Content than in any previous period. The Acts of Legislative Content (Art. 44 par. 1 of the Greek Constitution) are legal instruments which have effectively replaced the former "laws of necessity" in the Constitution and call to mind the turbulent

[18] See G. KARAVOKYRIS, *The Constitution and the crisis*, Kritiki, Athens, 2014 (in Greek).

times in which such laws of necessity used to be enacted[19]. Even though the normal parliamentary procedures have been more or less followed and the "state of necessity" constitutional provisions (Article 48 of the Greek Constitution) have not been triggered, the financial crisis has emerged as a new institutional background and has reshaped the relations between the legislator and the executive power.

As for the citizens, the deficit of representation, which is a main characteristic of majoritarian systems, has escalated. The perception that prevailed was that the Parliament is unable to exercise strict control and to effectively influence the decisions of the Government. The Government's decisions - that is to say, law proposals - are approved by the Parliament without intensive parliamentary control, either by the majority, because of the imposition of party discipline, or by the minority, since it lacks the necessary checks and balances to buffer the power of the ruling party[20].

As the crisis seems to have ushered in a new legal normality, its significant impact on the main features of contemporary democracy, such as parliamentarism and representation, must be thoroughly examined in order to reconsider, if not

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[19] See G. KAMINIS, *La transition constitutionnelle en Grèce et en Espagne*, L.G.D.J., Paris, 1993, pp. 23-25. For a general theoretical approach to the "law of necessity" with reference to the current crisis see G. KARAVOKYRIS, Constitution and Necessity in Times of Crisis: An Alternative Way of Understanding the Complicated Relation between Law and Politics, *European Politeia*, 2/2015, European Public Law Organization, pp. 347-363.

[20] See S. CHRISTOFORIDOU, David and Goliath: The citizen's position towards the constitutionally entrenched institutions of representation, *Revista Jurídica Piélagus* (USCO), Vol. 12, N° 1, pp. 35-45.

reinvent, the position of the Parliament in the field of the separation of powers. This debate may provide a source of inspiration for constitutional innovation and reveal the real flaws and shortcomings of representative democracy and the rule of law, in terms of the constitutional mechanics, rules and principles that are currently being disputed, not only in the Greek, but also in the European context[21]. Constitutional theory may help us overcome the institutional crisis and reconnect the concept of representation with the capital concept of the general interest[22].

II. Dealing with the Representation Crisis: A Two-way Process

The concept of representation in a contemporary constitutional democracy has two major aspects that are essentially interdependent: the expression of the popular sovereignty, as the democratic element of representation, and its guarantees and controls stemming from the rule of law principle, representation within the limits of the Constitution. In this framework, we shall present proposals regarding constitutional policies that aim to reconnect representation with popular sovereignty and give new breath to the Parliament on the one hand (*A*), while also reinforcing representation through respect of the rule of law on the other (*B*).

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21 G. SARTORI, *Comparative constitutional engineering. An inquiry into structures, incentives and outcomes*, New York University Press, New York, 1997.

22 N. URBINATI, *Representative Democracy. Principles and Genealogy*, *op. cit*.

A. Enhancing Democracy: Restructuring the Mechanics of Representation

I. Revitalizing Citizens' Direct Participation in Law-making

The representative character of the Greek system of government is a monist version of parliamentarism that implements the majoritarian principle. However, the representation crisis of the last few years has reintroduced the forgotten debate on reinventing the system of representation through institutions of direct citizen participation taking political decisions and legislating. In this sense, the dominant party of the former governmental coalition, SYRIZA, has proposed the introduction of such forms in the form of constitutional amendments[23]. In its proposal, SYRIZA suggested revising the second paragraph of Article 44 of the Constitution, so as to enable the electoral body to initiate a referendum. More precisely, according to this proposal, a referendum on important national matters could be triggered after a petition signed by five hundred thousand citizens, while a referendum on Bills passed by Parliament regulating important social matters, except those of a fiscal nature, could be triggered after a petition signed by one million citizens. The same proposal also provided for two institutions of popular participation: the ratification of international treaties by means of a referendum (Article 28 par. 2) and the popular legislative initiative (Article 73 par. 1). In 2014, New Democracy, had also proposed that a referendum could be triggered by popular initiative,

[23] See the whole draft in Greek at http://www.avgi.gr/article/10842/9304742/oloklere-e-protase-tou-syriza-gia-te-syntagmatike-anatheorese

both on Bills and on important national matters[24]. In 2006 PASOK had proposed that a referendum on Bills could be triggered after a petition signed by 5% of the total number of the voters[25]. Finally, from the abovementioned proposals one has been approved by the constitutional revision of 2019: according to the new Article 73 par. 6, citizens will be able to submit up to two legislative proposals (in each parliamentary term) for discussion in Parliament, provided they have acquired a minimum of 500,000 signatures. These bills, however, cannot, in any case, relate to issues of fiscal and foreign policy, or defense.

This debate is not at all new in Greece. Such proposals on strengthening the democratic aspect of our political regime were also popular during the inter-war era, in a period when the legitimation crisis of the system of representation had grown[26]. However, the Constitution of 1975 was the first Greek constitutional text which adopted a form of direct democracy institution by giving the President of the Republic the power to proclaim a referendum on crucial national matters (Article 44 par. 2)[27]. This competence was one of the so-called "superpowers" which the Constitution gave to the President of the Republic and did not require a counter-

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[24] See its proposal in Greek at http://www.syntagma-dialogos.gov.gr/?p=19876.

[25] See A. PSAROUDA-BENAKI (ed.), *The Constitution of Greece and the proposals of the parties for its revision*, Greek Parliament, Athens, 2006, pp. 290-291 (in Greek).

[26] See A. SVOLOS, *The new Constitution and the bases of the regime*, Pirsos, Athens, 1928, pp. 143-161 (in Greek).

[27] See A. PANTELIS, *Les grands problèmes de la nouvelle Constitution hellénique*, LGDJ, Paris 1979, pp. 214-220.

signature, therefore the exercise of this competence could have brought him into conflict with the government[28]. The revision of the Constitution in 1986 suppressed this competence of the President to proclaim a referendum on crucial national matters and conferred it on the Parliament, which decides after a relevant proposal by the government. Moreover, it provided for the possibility of proclaiming referenda on Bills adopted by the Parliament regulating important social matters, with the strict exception of fiscal ones, if this was decided by three-fifths of the total number of the members of Parliament. So far, a rather dubious and constitutionally questionable referendum on a crucial national matter has been held only once, in 2015, while no referendum has been held on any Bill passed by the Parliament regulating important social matters. It is likely that the institution has not been applied more often because of the conditions provided for by the revision of 1986, which has essentially given the power to proclaim a referendum to the governmental majority[29].

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[28] For a description of the debate on the "superpowers" of the President of the Republic see IF. KAMTSIDOU, *Pratique et révision constitutionnelles dans la République hellénique*, Thèse de Doctorat, Paris 1989, pp. 20-22. The most influential intervention from the field of constitutional theory has been that of A. MANESSIS, The judicial-political position of the President of the Republic according to the governmental draft Constitution, *Nomiko Vima*, vol. 23, 5, 1975, pp. 449-464 (in Greek).

[29] See L. PAPADOPOULOU, Forms of 'direct' legislation: Referendum and popular legislative initiative, *in:* CH. AKRIVOPOULOU / N. PAPACHRISTOS (eds), *The challenge of the revision of the Constitution*, Sakkoulas, Athens-Thessaloniki, 2013, p. 41-42 (in Greek).

Taking the above into account, if the purpose is to revitalize this participative-democracy institution, the citizens' power to carry out a legislative initiative or to initiate the procedure of a referendum should be provided by the Constitution. That is crucial because it means that *the people would participate not only by giving the answer but also by forming the question*. In this framework, the popular will on central political issues would be expressed directly and would not be entirely mediated by the representatives. As a result, the public debate on lofty political matters would be substantially upgraded[30] and the general will would constitute a counterpart of the representative body. If new forms of direct citizen participation in the taking of political decisions and legislating are provided by the Constitution, Parliament (in fact, its majority, which is politically identified with the government) will be much more in line with the popular sovereignty. From this point of view, such a change corresponds to an approach to constitutional law that mitigates challenges to representative democracy by enabling greater popular participation in constitutional decision-making[31]. In addition, it should be stressed that such forms of participatory democracy have emerged in European constitutionalism as an immediate institutional response to the current failures of representation[32].

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30 See L. PAPADOPOULOU, *Institutions of "direct democracy" in the Constitution,* Evrasia, Athens, 2014 (in Greek).

31 See R. BELLAMY, *Political constitutionalism. A republican defence of the constitutionality of democracy*, Oxford, Oxford University Press, 2007.

32 See X. CONTIADES / A. FOTIADOU (eds.), *Participatory constitutional change. The people as amenders of the Constitution*, Routledge, London, 2018.

Thus, the recent constitutional amendment on the popular legislative initiative is in the right direction. The enhancement of participatory democracy, however, could turn out to be a populist threat to constitutional democracy, if it were established unwisely and abused, although, especially in times of crisis and as an institutional exception to the mainstream forms of the law-making process, could lead to the greater legitimacy of State policies.

2. Upgrading the Status of the Members of Parliament

Besides the law-making process, which is at the heart of representation, one of the major factors that led to the representation crisis is the radical degradation in the status of parliamentarians, mostly from the citizens' point of view. In other words, the crisis of representation, which can also be considered as a crisis of legitimacy, cannot be dissociated from the symbolic status held by the Members of Parliament.

One highly influential proposal during the period of the economic crisis has been the revision of the provisions concerning the immunity of Members of Parliament[33]. In Greece, the protection of the Members of Parliament from prosecution, arrest, imprisonment or other forms of confinement has deep historical roots, going back to the era of constitutional monarchy. However, under the existing Constitution, this immunity has been transformed from a constitutional guarantee of free speech and political activity into a personal privi-

[33] For a comparison with the UK's legal provisions see P. EVANS, Privilege, exclusive cognisance and the law *in:* ALEXANDER HORNE / GANIN DREWRY (eds), *Parliament and the Law*, 2nd ed., Hart Publishing, Oxford and Portland, 2018, pp. 28-31.

lege of each Member of Parliament[34]. The European Court of Human Rights has repeatedly condemned Greece for violating Article 6 of the Convention with its over-protection of Members of Parliament compared with other citizens[35]. According to the Court, the requirement that Parliament should give prior permission for the prosecution, arrest, imprisonment or any other restriction on Members of Parliament should be limited to offenses directly related to the performance of parliamentary duties. The Members of Parliament should be treated in the same way as all other citizens in cases of penal procedures or civil disputes: this is a *sine qua non* for the restoration of the Parliament's credibility. The need for this change seems to have gained the consensus of the biggest parliamentary parties and is largely adopted by constitutional theorists[36]. Consequently, Article 62 of the

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[34] See the statistical data given by A. FOTIADOU, Freedom of parliamentary speech and immunity of the Members of Parliament *in:* X. CONTIADES / F. SPYROPOULOS (eds), *The future of the Greek Parliament. Constitutional and political dimensions*, Sideris, Athens, 2011, pp. 113-123, and the general remarks by CH. ANTHOPOULOS, The revision of the Constitution between economic crisis and antipolitics, *in:* CH. AKRIVOPOULOU / N. PAPACHRISTOS (eds), *op. cit*., p. 274-276.

[35] See the decisions cited in G. GERAPETRITIS, The revisional course towards a rational parliamentarism *in:* CH. AKRIVOPOULOU / N. PAPACHRISTOS (eds), *op. cit*., p. 37.

[36] See, among others, N. ALIVIZATOS / P. VOURLOUMIS *et al*, *An innovative Constitution for Greece*, *Kathimerini*, Athens, 2016 (in Greek) and especially Articles 53-55 in their draft. However, according to A. MANITAKIS, *Constitutional law*, Sakkoulas, Athens-Thessaloniki, 2004, p. 298 (in Greek), the immunity of Members of

Greek Constitution has been amended. It now stipulates that the MPs' immunity is active strictly for their acts related to their parliamentary duties or their political activities. Moreover, a significant amendment has been agreed on the penal responsibility of the Ministers (Article 86 par. 3 of the Constitution) as the limitation period for the prosecution has been suppressed.

Another popular proposal is the significant reduction in the number of Members of Parliament. Article 51 of the Greek Constitution provides that the number of Members of Parliament shall be specified by statute, although it cannot be below two hundred or over three hundred. Professors Alivizatos and Manitakis have suggested that the number should be reduced to 200 as a response to the distortion in representation caused by clientelism[37]. However, this reasonable reaction is likely to have the opposite effect to that intended, making clientelism more concentrated. From this point of view, it seems more fruitful to focus on the changes needed in the electoral system. The replacement of the "cross" system with the system of predefined lists, might help to enable a more substantial and meaningful debate on political agendas, and not on personalities, so long as the rules of democracy are also

Parliament cannot be abolished because it is strongly connected with the principle of representation.

[37] See N. ALIVIZATOS / A. MANITAKIS, Five proposals for restoring the credibility of politics, *Kathimerini*, 11.3.2012, available at http://www.kathimerini.gr/729357/opinion/epikairothta/arxeio-monimes-sthles/pente-protaseis-gia-thn-apokatastash-ths-a3iopistias-ths-politikhs (in Greek).

strictly observed by the parties, both substantially and procedurally[38].

On the other hand, a significant step towards improving the quality of the relationship between the voters and their representatives may imply placing a limit on the number of the possible terms of office of Members of Parliament[39]. This proposal has been put forward in response to the phenomenon of "permanent" Members of Parliament who establish long-term clientelist relations with the voters and effectively turn their occupation with politics into a profession[40]. Such a change could contribute to the renewal of Parliament, making access to the body easier and more attractive for a larger number of people and therefore improving the quality of parliamentary control[41]. In other words, reform of the parliamen-

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[38] The system of predefined lists was implemented in Greece in the elections of 1985 and September 2015 and was judged not to contravene the Constitution by the Supreme Special Court in its decision no. 34/1985 (*Nomiko Vima*, 5, 1985, pp. 606-608).

[39] See A. VLACHOGIANNIS, The Fixed-Term Parliaments Act of 2011: a model for reform of Greek parliamentarism?, *European Review of Public Law*, vol. 26, 3, 2014, where, however, the author focuses more on transplanting the British Act of 2011 into the Greek constitutional system in order to limit the actual powers of the Prime Minister and thus devise new checks over the executive power.

[40] See B. MANIN, *Principes du gouvernement représentatif*, Flammarion, Paris, 1996, p. 279.

[41] See I. KAMTSIDOU, The introduction of a maximum limit on terms of office and the enhancement of the democratic principle. Thoughts on the revision of Article 56 of the Constitution, *Epitheorisi Dimosiou Dikaiou kai Dioikitikou Dikaiou*, 2013, p. 561 (in Greek).

tary mandate is another crucial factor in the legislator's legitimacy, which has been adversely affected during the recent years of the financial crisis.

3. Amending the Law-making Process

The free and democratic functioning of Parliament which is provided for by Article 65 par. 1 of the Greek Constitution is not adequately observed by the current constitutional provisions. The deliberation and voting of Bills in Parliament is based on provisions which do not necessarily suit the principles of representation, transparency and impartiality[42]. Even if the constitutional provisions prove to be generally adequate, their application by the political actors seems to compromise the above-mentioned fundamental principles. Moreover, the accountability of Parliament as a decision-making body and a body that is supposed to represent the nation as a pluralistic unity is undermined[43].

Unlike the previous Greek Constitution, the current one does not specify the minimum number of MPs that is required for a parliamentary sitting. During the debate in the Fifth Revisionary Parliament, the basic argument of the majority was that such a provision had been used in the past by the minority parties in order to deliberatively obstruct par-

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[42] See G. GERAPETRITIS, *The Constitution and the Parliament. Autonomy and lack of control of the interna corporis*, Nomiki Vivliothiki, Athens, 2012, pp. 87-107 (in Greek).

[43] A. CYGAN, *Accountability, parliamentarism and transparency in the EU. The role of National Parliaments*, Edward Elgar Publications, Cheltenham-Northampton, 2013, p. 5.

liamentary procedure[44]. Consequently, most of the time debates on Bills take place with very few Members of Parliament present, creating general public dissatisfaction with, if not contempt for, Parliament. Such a situation could be reversed by providing for the presence of a minimum number of Members of Parliament (for example, a quarter of their total number) in order for a parliamentary sitting to be held, just as is now the case in other countries such as the United States, Germany and France[45].

Moreover, the voting procedure could also be amended, as the provision laid down in Article 67 of the Constitution - namely, that "Parliament cannot resolve without an absolute majority of the members present, which in no case may be less than one-fourth of the total number of the Members of Parliament" - is usually violated. The general provision of Article 70 par. 3 of the Standing Orders of Parliament that open votes should be conducted by either the raising of hands, standing-up or the calling of individual names, has often resulted in disputes over whether a Bill had the constitutionally required majority. In this sense, the Members of Parliament are supposed to have voted almost blindly for their party's stand, without assuming any personal responsibility[46]. Constitutional provision for the open vote is made

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44 See CH. KOUROUNDIS, *The Constitution and the Left. From the "sweeping change" of 1963 to the Constitution of 1975*, Nisos, Athens, 2018, pp. 438-439 (in Greek).

45 See G. GERAPETRITIS, The revisional course towards a rational parliamentarism *in:* CH. AKRIVOPOULOU / N. PAPACHRISTOS (eds), *op. cit*., p. 28-29.

46 See D. TSATSOS, *Constitutional Law*, vol. 2, Ant. N. Sakkoulas, Athens-Komotini, 1993, p. 91 (in Greek).

only in the case of the election of the President of the Republic (Article 32). The Standing Orders of Parliament also provide for an open vote in the cases of a motion of confidence or a motion of censure (Art. 141 par. 5 and Art. 142 par. 4), proposals for establishing the incapacity of the President of the Republic to discharge his duties (Article 151 par. 3 and Article 151A par. 5) and proposals to bring charges against the President of the Republic (Article 159 par. 4). However, the obligatory open vote should become the rule, especially on major occasions such as votes on Codes, votes on the composition of parliamentary committees, votes on the prosecution of a Member of Parliament, or votes concerning constitutionality matters[47]. Such a provision, combined with the one mentioned above on providing for a quorum during debates on Bills, would strengthen the legitimacy of Parliament, making an empty House a thing of the past. These changes are not only of a technical nature; in terms of political representation, they must be considered as the essential precondition for public debate[48], which determines the political claims and arguments that set the parliamentary agenda[49].

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[47] See G. GERAPETRITIS, The revisional course towards a rational parliamentarism *in:* CH. AKRIVOPOULOU / N. PAPACHRISTOS (eds), *op. cit*., p. 30.

[48] See J. HABERMAS, *The structural transformation of the public sphere: An inquiry into a category of bourgeois society*, MIT Press, 1991, *passim*.

[49] See the relevant general remarks by F. WENDLER, Parliaments as arenas of representation and public contestation: insights from the Eurozone crisis *in:* D. JANCIC (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis*, Oxford University Press, Oxford, 2017, pp. 189-190.

B. Respect for the Rule of Law Principle: A New Perception of the Autonomy of Parliament

The struggle over the autonomy of Parliament has led to the famous doctrine and rule of *interna corporis*, the absence of any judicial interference in the collective decision-making of the Members of Parliament in the name of the democratic principle. Put simply, judicial review of the legislator's proceedings is often judged to be in direct conflict with the idea of democratic autonomy. Nevertheless, the Rule of Law principle implies that no legal or political actor can be above the Constitution and that parliamentary procedures should also be subject to judicial oversight in order to prevent any arbitrary exercise of power[50]. Moreover, it is a fact that during the recent years of the financial crisis, the procedures of the Greek Parliament have been highly contested. The governmental majority has often been accused of the misuse of parliamentary procedures in order to vote through and impose controversial public policies. The quality of the law-making process has become severely degraded and Parliament's integrity has been politically compromised. The autonomy of Parliament has been inevitably confused with an arbitrary interpretation of the Constitution regarding the procedural guaranties of law-making.

Besides the abovementioned instrumentalization of the Parliament's procedures, the inflation of the governmental/executive power and its superiority over Parliament can also be seen in the constitutionally contested regularization of Acts

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[50] RT. HON. BEVERLEY MCLACHLIN, Reflections on the Autonomy of Parliament, Spring 2004 / *Canadian Parliamentary Review* 5, http://www.revparl.ca/27/1/27n1_04e_mclachlin.pdf

of Legislative Content, an exceptional method of law-making, which has normally been applied by the executive power as a means of dealing immediately and efficiently with the economic crisis. The fast-track law-making and augmented use of decree-laws correspond to a pragmatic shift in behavior on the part of the legislator, who has had to adapt to the new risks and standards of the financial crisis[51].

1. The Control of interna corporis

The autonomy of Parliament is a principle of major institutional significance which establishes the key role of the representative body. However, in the Greek system, this autonomy seems to be widely confused with the lack of control of its *interna corporis*. In other words, the absolute freedom of the internal parliamentary procedures reproduces a rule of law deficit, as their uncontrolled violation is a multi-level institutional compromise of Parliament's credibility not only in terms of the national law-making process but also in the context of Parliament's relation to other EU Parliaments on the ground of a common application of EU law[52].

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[51] X. CONTIADES / A. FOTIADOU, How constitutions reacted to the financial crisis, *in:* X. CONTIADES (ed.), *Constitutions in the global financial crisis*, Ashgate, London, 2013, p. 15.

[52] For a detailed account of how national Parliaments try to benefit from interparliamentary cooperation in order to achieve a greater impact of their scrutiny work see B. D. PINHEIRO, Interparliamentary cooperation between National Parliaments *in:* A. J. CORNELL / M. GOLDONI (eds), *National and regional Parliaments in the EU-legislative procedure post-Lisbon. The impact of the early warning mechanism*, Hart Publishing, Oxford and Portland, 2017, pp. 87-113.

It is therefore commonly suggested in contemporary constitutional theory that these parliamentary procedures should be subject to judicial review to ensure the effects of the Constitution and their legitimacy. Especially in times of crisis, the complete lack of control of the "political" qualification of Bills, mainly the so-called "urgent legislation", often misinterprets the relevant constitutional provisions and ends up dignifying the absolute rule and power of the governmental majority. In general, the acceleration of legislation and the rather frequent invocation in recent years of urgent circumstances form the arsenal of the celebrated "rational parliamentarism", have assured the government's stability[53]. The abuse of urgent procedures for political purposes in the name of the Parliament's high tempo and its immediate efficacy has undermined the quality and legitimacy of law-making. Moreover, the absolute power of each government to determine and interpret the condition of "urgency" gives to the executive another privilege over the Parliament, under the pretext of the absolute autonomy of the latter[54].

Taking this into account, the judicial control of the *interna corporis* should recalibrate the balance of the separation of powers. For instance, the constitutional provision according to which "A Bill or law proposal containing provisions not related to its main subject-matter shall not be introduced for debate. No addition or amendment shall be introduced for debate if it is not related to the main subject matter of the Bill or law proposal" is regularly, if not always, violated (Arti-

[53] PH. LAUVAUX, *Les grandes démocraties contemporaines*, Paris, PUF, 2004.

[54] G. KARAVOKYRIS, *Constitution and the crisis*, Kritiki, Athens, 2014.

cle 74 par. 5)[55]. The same applies to other infringements of procedure, such as the time constraints on the introduction of amendments (Article 74 par. 2 to par. 5) and the documentation required for a Bill. In any case, the autonomy of Parliament should not be dissociated from the institutional power that the parliamentary minorities are recognized as holding[56]. In that context, the presidents of half of the standing committees should be chosen from opposition parties, in proportion to their parliamentary power, and the committees of inquiry should be set up after a proposal by 120 Members of Parliament. From a rule of law standpoint, the power of the minority is that which legitimizes the majority.

2. The Judicial Control of Acts of Legislative Content

The constitutional provision of Acts of Legislative Content was intended to guarantee an efficient alternative to the legislative initiative of the Government. Nevertheless, from the very moment the Constitution of 1975 came into force, the constitutional limits on the use of Acts of Legislative Content, in other words, their use "under extraordinary circumstances of an urgent and unforeseeable need", have often been crossed. In fact, during the financial crisis, this exceptional way of legislating has evidently escalated and aggravated the representation crisis, turning into a powerful weapon for the

[55] G. GERAPETRITIS, *The Constitution and the Parliament…, op. cit.*, pp. 221-229.

[56] On the importance of strengthening parliamentary opposition see BELIGH NABLI, L'opposition parlementaire: un contre-pouvoir politique saisi par le droit, *Pouvoirs* 2/2010, vol. 133, pp. 125-141.

governmental majority[57]. Since the Acts of Legislative Content produce immediate legal effects which cannot be retroactively cancelled, the role of the representative body has declined, and a large number of highly important and controversial austerity measures have escaped strict and democratic parliamentary scrutiny.

According to a long-standing judicial tradition, the Courts do not normally control these Acts[58]. However, this approach is not beyond doubt in Greek constitutional theory. On the contrary, Professor Gerapetritis has recently argued that the judicial control of the Acts of Legislative Content is not only permissible but also necessary[59]. First, the procedural preconditions concerning the proposal of the Acts by the Cabinet and the submission of the Acts to Parliament for ratification within forty days form part of the constitutional review of the Acts. Second, the essential conditions of Art. 44 par. 1, and more specifically the "extraordinary circumstances of an urgent and unforeseeable need", could be evaluated by the Courts. In fact, from a methodological point of view, this control is close to that exercised by the Greek Courts on regula-

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[57] According to C. CHRYSSOGONOS, twenty-five Acts of Legislative Content were issued in 2012, more than those issued in the period 2000-2011; see *The violation of the Constitution in the age of the memoranda*, Livanis, 2013, p. 60 (in Greek).

[58] For the only exception to this rule, the jurisprudence of the Council of State in the first years after the liberation of Greece from the Nazi Occupation, see A.I. METAXAS, *The law of necessity and the conflict between the jurisprudence of the Council of State and the Supreme Court*, Eurasia, Athens, 2017, pp. 295-301 (in Greek).

[59] G. GERAPETRITIS, *The Constitution and the Parliament…, op. cit.*, pp. 111-112, 213-217.

tory decrees issued according to Article 43 par. 2 of the existing Constitution[60]. According to the dissenting opinion in the Council of State's decision 1250/2003, this constitutional review is quite legitimate and should ensure implementation of the rule of law principles. Thus, it prevents distortion of the form of government through a possible abusive exercise of the exceptional procedure provided for in Article 44 par. 1.

The Gordian knot of the control of Acts of Legislative Content can be cut with a *de constitutione ferenda* solution[61]. In order to bring these acts into line with our liberal and democratic standards, we should make their issuance dependent on the functioning of Parliament. More precisely, the Constitution should provide for their legal issuance only when Parliament is in recess. The *ratio* of this constitutional provision (Art. 44 of the Constitution) is to transfer to the executive power the competence to deal with extraordinary circumstances of an urgent and unforeseeable need which could not be dealt with *in any other way*. In times of constitutional normality, Parliament can deliberate and vote, and if needed, appeal to the exceptional procedures of urgent legislation (Article 76 par. 4).

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[60] See V. BOUKOUVALA, *The interpretation of norms according to the Constitution and the judicial review of legislation*, Sakkoulas, Athens-Thessaloniki, 2018, pp. 590-599 (in Greek).

[61] G. GERAPETRITIS, The revisional course towards a rational parliamentarism *in:* CH. AKRIVOPOULOU / N. PAPACHRISTOS (eds), *op. cit*., p. 36.

Conclusions

It is unclear whether the representation crisis is a legal or constitutional one and can be dealt with by means of constitutional or legislative amendments. During the financial crisis, the Constitution has proven its resilience[62] but the quality of the law-making and the symbolic power of Parliament has notably declined. Nevertheless, the representation techniques should be reviewed and adjusted to enable the form of the Constitution to be readjusted to the current democratic standards. Democracy is not only a procedural matter of free elections and respect for the democratic principle, it is also a rule of law principle and a prerequisite in the framework of a liberal constitutional order. Politics and law are essentially and procedurally linked, to enable and promote the identification of the people with those who govern them. In modern political regimes, the position of Parliament in the separation of powers is often marginalized to the advantage of the executive and the judiciary, as the necessary checks and balances on the legislators tend to highlight the aristocratic features of contemporary democracies. However, even if democracy is a mixed regime of elected and designated representative bodies, which implies their mutual control and oversight so that the abuses of any authority can be prevented or attenuated,

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[62] X. CONTIADES / A. FOTIADOU, On Resilience of Constitutions. What Makes Constitutions Resilient to The External Shocks?, *International Constitutional Law Journal*, 1/2015, pp. 3-26; A. MANITAKIS, The impressive resilience of the Greek Constitution in the current financial crisis in Europe, *in:* L. PAPADOPOULOU / I. PERNICE / J. H. WEILER (eds.), *Legitimacy Issues of the European Union in the Face of Crisis: Dimitris Tsatsos In Memoriam*, NOMOS, 2017, pp. 217-233.

we should not overlook the fact that Parliament is still the main forum of political deliberation and dispute, and therefore the very core of our political autonomy. Especially in times of crisis, when radical political parties claim political authority and the balance of the separation of powers is disrupted, restoring the credibility of Parliament is not only a constitutional matter but also a political one of utmost importance.