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The Constitutional Amendment as a Radical Action: The Case of Greece

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Abstract

It is widely accepted that Greece is facing the most severe period since the establishment of the 3rd Hellenic Republic in 1974. In this environment, the demand for change is becoming essential. Any change proposed should primarily focus on combating problems at the institutional level. Under this perspective, an amendment of the highest legal norm, the Constitution, is inevitably at the top of every reformative agenda. In this respect, the aim of this paper is to propose directions for an effective amendment that focuses on three interrelated issues: 1) democratization of institutions and as a result 2) restoration of the lost public trust in institutions and 3) modernization of fundamental rights protection. This aim will be specified with the analysis of certain pivotal provisions that should be revised, primarily the criminal accountability of members of the Cabinet and the enhancement of institutions of participatory democracy; regarding fundamental rights, the amendment proposed shall focus on making certain provisions that can successfully address the challenges of the 21st century and therefore make the protection of rights more effective. The provisions examined in the paper are chosen due to their traditionally special form of protection within the Greek Constitution, State and Church relations in light of religious freedom and the provision of university education exclusively by public law entities.

Keywords: *constitutional amendment, criminal accountability of cabinet members, referendum, freedom of religion, university education*

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"The purpose of government is to enable the people of a nation to live in safety and happiness. Government exists for the interests of the governed, not for the governors"

Thomas Jefferson (1743-1826)

Introduction

Political trust is an essential element in the relationship between citizens and governors in representative democracies. It is a state of mind that confirms that the representative government does not exercise power for its own benefit, but for the benefit of the governed. John Locke underlined the significance of this element by stating that "the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supreme Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them" (1764:§149). In Locke's view, the people have the absolute right to reclaim the power vested to the government in case of betrayal of their trust on behalf of the latter.

But how this trust can be defined? Because of high social diversity, a common and concrete view on political trust is difficult to be achieved in modern representative democracies; nonetheless, a certain level of trust should necessarily exist in order to confirm legitimacy of the government in the eyes of the people (Tsatsos, 1998: 29-30). In that sense, no representation theory describing a form of legitimate government is complete without an account of trust (Williams, 1998: 33). Every scheme of representation shall contain a rational basis of trust in government, a set of reasons that convince people that the institutions of representation will function in order to correspond to their respective roles. Thus, the qualitative characteristics of trust (or its absence) may differ on the basis of diverse perceptions and approaches, but the quantitative ones can be standardized; in other words, there is a variety of reasons for which a government may be trusted or not, but whether it is trusted or not in the first place, remains a fact.

In the case of Greece, political trust was never at a very high level (see statistical depiction below). An important distinctive fact is that the country is dealing with the most severe crisis since the establishment of the 3rd Hellenic Republic in 1974. The crisis which is highlighted to the country's public finances has tremendously affected all aspects of social and political life and eventually damaged the people's trust in political institutions even more. In this environment, the public demand for *change* is increasing. At institutional level, any form of change is to a large extent connected to the country's highest legal norm, the Constitution; hence, the constitutional amendment is on top of every reformative agenda. Both the governing parties (Nea Dimokratia - PASOK) and the major opposition party (SYRIZA) have addressed the necessity for constitutional amendment, from their respective view. On December 6, the members of the Parliament representing Nea Dimokratia submitted a proposal regarding constitutional amendment.

The complete analysis of a possible constitutional amendment in a single paper is not a feasible task. The aim of this paper is to examine certain parameters of a possible constitutional amendment in Greece. This amendment should not be directed by the crisis, but the latter shall be perceived as an opportunity to try to forward radical changes that effectively deal with structural problems in the democratic function of the institutions. As a result, an initiative for the gradual restoration of political trust to institutions will be provided. Additionally, the modernization of provisions regarding a more complete protection of fundamental rights will be examined as a crucial matter in state-citizen relations.

Methodologically, the paper will focus on the analysis of pivotal provisions that should be revised on the basis of the aforementioned reasoning. Cases have been equally selected from the two main parts that the Constitution is composed of: the organization and functioning of the State and the fundamental rights of the citizens (Mavrias, 2002: 69). Regarding the first part, the criminal accountability of cabinet members and the enhancement of participatory democracy will be examined, since the existing regime in both cases increases mistrust. More specifically, the current criminal procedure for cabinet members creates a sense of unfairness as the perception that ministers remain unpunished is widespread within society, with the process being characterized as totally antidemocratic (Varvitsiotis, 2006: 982). Moreover, participation of citizens in the decision making process is very limited to such an extent that people have the sense of being sidelined (Dimitropoulos, 2013: 3). With reference to the second part, religious freedom and the status of university education as an aspect of freedom of sciences and research will be analyzed. The reason lies upon the special form of protection of those two rights in the Greek legal order, which essentially limits the rights at stake. In that sense, the two rights will be better clarified, strengthening the sense of security in society.

Statistical depiction of trust to institutions of representation

With reference to quantitative measurements, political trust in institutions of representation in Greece has dramatically decreased during the last few years and has nowadays reached exceptionally low levels. The recent tendencies are highlighted in the following table:

YEAR (report number)	TEND TO TRUST THE PARLIAMENT (%)	TEND TO TRUST THE GOVERNMENT (%)
2008 (69-70)	49 – 32	34 – 23
2009 (71-72)	33 – 47	25 – 44
2010 (73-74)	23 – 24	25 – 21
2011 (75-76)	17 – 12	16 – 8
2012 (77-78)	12 – 9	6 – 7
2013 (79-80)	10 – 12	9 – 10
2014 (81-82)	16 – 14	16 – 11

Source: European Commission, Standard Eurobarometer

Two conclusions can be drawn from the table. In general terms, people in Greece do not tend to trust the institutions of representation, given the fact that the highest percentage of trust is 49% in the last 6 years. Additionally, in the eyes of the people, the institutions have been proven to be extremely insufficient to combat the crisis, since the percentage of trust has reached its lowest point in 2012 for both the Parliament and Government (9% and 7% respectively).

Every process of amendment is predictably influenced by the general political environment where the relevant discussion is proceeding. In that sense, an exaggerative approach to the issue is highly possible by political schemes, mainly of the opposition, on the basis of a political strategy of using people's understandable condemnation for canvassing. This danger of *constitutional populism* (Sotirelis, 2011: 2) connects every possible amendment

to the immediate solution of every economic and social problem that people in Greece are dealing with by presenting the Constitution as “savior machine”. Nevertheless, the constitutional amendment shall improve the concept of democratic legitimacy of institutions and set a new framework, but it does not (and cannot) replace either economic or social factors and cannot in any way affect the global financial system (Drossos, 2013: 1-2). Under this perspective, there is a thin line between improvements in institutional function towards the direction of restoration of the lost political trust to institutions on one hand and the manipulation of people’s disappointment and anger by using the constitutional amendment as a tool on the other.

Institutional reform

Criminal accountability of members of the cabinet

The criminal accountability of both serving and former members of the cabinet for offenses committed during the discharge of their duties, as well as the respective special criminal procedure is included in article 86 of the Constitution. This provision as an outcome of the 2001 constitutional amendment is significantly different compared to the regular criminal process.

Firstly, as article 86, par. 1 reads “only the Parliament has the power to prosecute”. The process is specified in paragraph 3 and demands at least 30 members of the Parliament to submit a motion for prosecution. On this motion, the Parliament decides by absolute majority to set up a special parliamentary committee for conducting a preliminary examination; the findings of the committee are introduced to the Plenum which decides by absolute majority on whether the prosecution shall begin or not.

The rationale of this provision refers to an institutional guarantee for the protection of the cabinet members from proceedings, in order to focus on their tasks undisturbed. Indeed, as has been aptly pointed out (Symeonidou-Kastanidou, 2011: 500), in recent years every governmental action in the direction of privatization, public procurement, project assignment etc. is characterized by the opposition of the time as an undercover criminal action; in addition, especially in the times of crisis, people tend to equalize political and economic decisions with committing high treason on behalf of the government, an attitude that has been also included in the rhetoric of certain political parties, most notably the Independent Greeks and Golden Dawn. Even in a smaller scale, ministerial decisions may contravene with personal interests; a fact that could lead to the conversion of most of political decisions to criminal cases. Should article 86 be absent, the amount of cases against cabinet members would have reached exceptionally high numbers and as a result ministers would be consumed in dealing with substantially unfounded charges at the expense of their governmental tasks.

Although the abovementioned argument does reflect a sense of reality, the judiciary can play a major role in solving the problem of unfounded charges. In this perspective, on a case-by-case basis, a general framework will be developed regarding criminal accountability of cabinet members through case law by additionally taking all parameters of a possible conviction or dismissal into account. However, the significant position of a minister within the functioning system of the state contributes to the complexity of the case at stake. On this ground, a different criminal treatment could be justified. Hence, the prosecution process shall be entrusted to highly ranked and experienced prosecutors, even, as Vlachopoulos proposed (2013: 7), of the Court of Cassation, so that the objectivity of the process will be ensured at the uppermost level.

What seems to be the problem with judges taking over on cases against ministers is the lack of trust towards the judiciary with reference to a possible political reasoning behind the legal decision (Venizelos, 2002: 287), which would create tension between the judiciary and the executive. Argumentation on this basis is doubtful for a variety of reasons. First of all, the role of judiciary is not related to the avoidance of tensions, but shall be blindly focused on the significant task of delivering justice. If the latter is pervaded by the former, it is implied that the judiciary is not free to exercise its power; in other words, the ones holding any form of power to create tension automatically obtain a peculiar right to be treated differently when facing justice. The possibility of misjudgment and its results to a public figure although important, cannot constitute an adequate legal basis for the establishment of a "field of protection" as described in article 86 of the Constitution. In the same line, the indirect expression of mistrust of the executive towards judiciary in the Constitution stokes the same feeling within the rest of society. If judges, even of the highest rank, are not in position to distinguish their personal political beliefs from the legal characterization of actual facts in cases of ministers, then what makes them competent on ruling upon cases of political nature involving other citizens? And if, for the sake of the argument, some sort of political subjectivity is accepted, should not all citizens be protected? This distinction between "ministers and others" in the Constitution ultimately undermines the function of the judiciary.

Furthermore, assigning prosecution regarding current and former cabinet members to the Parliament as an alternate aftermath to the lack of trust towards judiciary is highly uncertain. Since an absolute majority is needed for the commencement of the prosecution, voting against a sitting minister by parliamentarians attached to the governing party is hardly possible. The minister enjoys, as member of the government, the confidence of Parliament expressed by the absolute majority; as Chrisogonos (2003: 562) observes, putting charges to a person that has been voted for governing the country by the same majority would constitute an excessive contradiction. Moreover, this action would have a tremendously negative impact on the inner party relations, a fact that constitutes a decisive element in the formation of conscience for the members of the Parliament in general terms. Under this perspective, the concept of criminal accountability ends to be activated only in cases against former cabinet members (Chrisogonos, 2003: 562).

This mentality was exemplified in the most recent voting for setting up a parliamentary committee to conduct preliminary examination regarding the so called "Lagarde list",[1] on 17 January 2013. The proposal, at the time of the three parties of the coalition government (Nea Dimokratia, PASOK, DIMAR) was limited to the criminal responsibility of the former minister for finance Mr. Georgios Papakonstantinou. The major opposition party, SYRIZA, added the former Prime Minister Mr. Georgios Papandreou, whilst other opposition parties, namely the Independent Greeks and Golden Dawn, proposed the additional examination of both the former PM Mr. Loukas Papadimos as well as the former minister for finance and active leader of one of the coalition partners, PASOK, Mr. Evangelos Venizelos. As widely expected, only the proposal of the governmental parties finally passed (Euronews, 2013).

One key conclusion may be drawn from this process: the *a priori* politicization of a purely legal investigation. Without willing to express any argument on the validity of the proposals in legal terms, it is apparent that the rationale behind all proposals was highly political, a

[1] On October 2010, the former French minister of finance Christine Lagarde sent a list of 1,991 potential tax evaders, who hold accounts with HSBC bank in Switzerland, to her Greek counterpart Georgios Papakonstantinou. The subsequent handling of the case on behalf of the latter raised issues of legality. The case has been widely known as "the Lagarde list".

fact up to a certain extent understandable given the Parliament's political nature. On one hand, there was no possibility that the governmental parties would start a criminal process against Mr. Venizelos. Having formed a coalition government that included PASOK, a theoretical proposal in favor of Mr. Venizelos's examination would imply that Nea Dimokratia and DIMAR substantially admit their co-operation with a party whose leader should have been under preliminary examination for criminal offenses. This contradiction would severely damage the political profile of both parties and of course undermine the valuable governmental stability. In the same line in terms of political motivation, the opposition parties adopted a "dropping names" policy by proposing examination of more former governmental members manifestly irrelevant to the case, in an attempt to usurp the public demand for justice in order to raise their popularity. Consequently, the whole discussion resulted in a political argumentation rather than legal procedure. Hence from an applied politics perspective, the Parliament is not in a position to assure objectivity regarding the criminal accountability of ministers (Chrisogonos, 2003: 563).

Another aspect of the special treatment for the cabinet members is related to the period of time during which the Parliament may exercise its relevant competence. According to article 86, par. 3, section b, this period lasts until the end of the second regular session of the parliamentary term commencing after the offence was committed. According to article 64, par. 1 the regular session normally starts on the first Monday of October each year and its duration cannot last less than 5 months (paragraph 2). Additionally, in case of dissolution of the Parliament before the end of its second regular session, the Parliament's abovementioned competence expires *a fortiori*, since a new parliamentary term begins with the election of a new Parliament (Venizelos, 2002: 296). In practice, if the Parliament commencing after the offence is of similar composition to the previous one in terms of representation, the majority would hardly approve the enactment of a criminal process against an active or former minister.

This perspective demonstrates the *de facto* inactivity of the process due to several political aspects; a fact that eventually makes justice dependent on political contingency. In this regard, a highly protective legal framework for cabinet members, former and active, has been established within the Greek legal order. This framework tends to end up in a non-punishment system which empowers the mistrust towards institutions within society. Nevertheless, the inner characteristics of a ministerial position justify some sort of special treatment, under the principles of reasonable inequalities as developed by John Rawls (1958: 165), since the role of ministers is of highest importance within the functioning of the State and hence objectivity shall be secured at the uttermost level. Therefore, in a possible amendment of article 86, the prosecution against ministers shall be entrusted to highly ranked and experienced prosecutors and the court competent for judging the relevant cases should remain a Special Court composed of judges of the Council of State and the Court of Cassation, as specified in article 86, par. 4. The results will be binary: on one hand the demanded objectivity will be secured, on the other, a sense of equality and hence trust will be developed in society that ministers face the judiciary and thus possible criminal offenses do not remain unpunished.

Enhancement of participatory democracy

The system of representative democracy is manifestly demonstrated in the basic provisions of the Constitution; as dictated in article 1, par.1, the form of government in Greece is parliamentary republic on the basis of popular sovereignty. However, the representative character of the republic does not preclude the institutionalization of alternative methods which seem to limit that character to some extent (Papadopoulou, 2013: 1). One method in

this direction is the constitutionally guaranteed in article 44, par. 2 referendum process. The process involves both the legislative and the executive and is, at the end, proclaimed by the President of the Republic on two occasions: crucial national matters and bills passed by Parliament regulating important social matters with the exception of the fiscal ones. In the first case, a resolution voted by the absolute majority in the Parliament is required, taken upon proposal of the cabinet, while in the second case the referendum is decided by the 3/5 (180) of the total number of members, on the ground of a proposal of the 2/5 (120) of the total number of members in the Parliament. However, only one referendum has been conducted throughout the history of the 3rd Hellenic Republic, on December 8, 1974 with reference to whether the institution of the monarchy should be abolished or not.

On the other hand, as has been described above, the lack of trust in representative institutions has dramatically increased in the recent years. In other words, an expanding gap between decisions of institutions and public will exists in a sense that undermines the principle of popular sovereignty. This crisis of representative democracy leads citizens to assert an active participation in central political decisions that impinge on them, in the exercise of power which at the very end, according to the Constitution, derives from them.

Nevertheless, the legislative and executive seem reluctant to accept this parameter. On the subject of pivotal political decisions which affect the form of state and its powers, such as accession of Greece to the EC or the implementation of the EU-establishing Maastricht Treaty and its subsequent amendment Treaties, the people were not consulted. In the most recent example, a proposal for referendum that was announced on October 2011 by Mr. Papandreou for the acceptance of the austerity programme and its consequent measures so as to keep Greece in the euro zone was almost immediately withdrawn, on November 3, after severe reactions from both internal and external political factors. The rationale behind the deflection of conducting a referendum is that the electorate is not competent enough to decide on matters of the highest political significance and impact (Drossos, 2012: 13-14); political solutions to political problems shall be left to governors on an expertise-based logic that reflects a sense of authoritarianism, where citizens are totally absent.[2] This approach clarifies the democratic deficit in the decision making process and questions the very idea of representative democracy.

The solution to the above described problem could be the institutional enhancement of participatory democracy. Under this perspective, in a possible amendment, article 44, par. 2 should be revised with the establishment of popular referendum, which principally relocates the plebiscitary initiative from state institutions to citizens. This form of referendum contains several aspects that can be included in the Greek legal order.

On the occasion of bills already passed by the Parliament on important social matters, under the abovementioned type of referendum, citizens obtain the right to set the bill before the electorate and gain the opportunity to convey their thoughts on social matters of highest importance that directly affect them in a straight and precise way by either approving or rejecting the solution expressed by their representatives. This type of referendum has decisive power in the sense that a negative public opinion leads to the revocation of the bill and the proposal of a new one according to the respective constitutional provisions or by the citizens' legislative initiative (see below).

[2] J. Habermas addresses the lack of citizens' participation by pointing "the concentration of a power in the hands of an inner circle of government leaders who impose their agreements on national parliaments" and argues that the politicians should clearly explain the situation and restore power of decision to citizens (Presseurop, 2011).

The popular plebiscitary initiative differs with regard to the referendum for crucial national matters. The difference lies upon the timing of the referendum in relation to the bill. Since this referendum is conducted *ante legem*, the citizens would have the opportunity to determine the political framework and fully formulate the plebiscitary topic. In this case, the beginning and the outcome of the legislative process essentially belongs to the citizens. Although this method suits more to direct democratic forms of government, the exceptional case of its application (crucial national matters) could justify the verdict of the ultimate source of political power, the people. Nevertheless, the choices of the citizens cannot be unlimited; as an alternative mean of the legislature, this proposal shall cover topics under the competences of the Parliament. Therefore, issues covered by e.g. EU law where the Parliament simply implements the EU pieces of legislation in the Greek legal order shall be exempted. The President of the Republic, who ultimately proclaims the referendum, ought to be responsible for deciding on the issue of competence. Besides the popular referendum, a mixed form, based on a common initiative from both citizens and formal institutions could be also introduced (Varvitsiotis, 2006: 967-968).

An additional component of participatory democracy that would enhance the active role of citizens in the decision making process is the citizens' legislative initiative. This method of participation pertains to the formulation of a law proposal within civil society and its subsequent request for formal debate in the Parliament. The citizens' legislative initiative should primarily have consultative status in the sense that its approval by the Parliament is not legally binding. The opposite opinion would substantially lead to the abolishment of representative form of government since the representative institution in the field of the legislature would be replaced by the citizens; a practice that constitutes the basis of direct democracy. Nevertheless, Parliament needs to adequately explain the reasons in case of rejection. Again, the citizens may propose only on topics covered by the competences of Parliament.

This active form of the civil society in the decision making process shall include proposals for the amendment of the highest legal norm of the state, the Constitution. Should the amendment process begin in accordance with article 110, par. 2 of the Constitution, proposals for the revision of certain provisions should be formulated within the civil society and sent to the Parliament on a consultative basis; whereas the Parliament would be under obligation to examine the proposals and respond on the ground of an adequately justified explanation. In this way, people actively participate, in political terms, in the shaping of the concept before being materialized to a legal norm and becoming a part of the organizational structure of the state or the fundamental rights of the citizens. It should be noted that the proposals of the citizens cannot contravene the exceptions indicated in article 110, par. 1 of the Constitution regarding the non-amendable constitutional provisions.

In an environment of mistrust towards institutions of representative democracy, people should be provided with the chance to be engaged in political decisions that have tremendous impact on their daily lives. This implies the enactment of a co-operative method of government based on the form of representative democracy with some enhanced elements of direct participation. Both the popular referendum and the citizens' legislative initiative contribute towards this direction since they constitute a resource for the gradual restoration of political trust to institutions without disrupting the balance in the system of representation. In that sense, the two aforementioned forms should not be perceived as opposing, but in a supplementary role to representative democracy (Papadopoulou, 2013: 4).

Modernization of fundamental rights

General observations

The fundamental rights protected within the Greek legal order are mainly articulated in part two of the Constitution entitled “individual and social rights” (articles 4-25). In certain cases exceptionally detailed provisions have been included which do not add any value to the core of the right at stake, on the contrary, this approach results to lengthy, sometimes confusing articles. For example, article 4 (equality), paragraph 1 reads that “all Greeks are equal before the law” whilst paragraph 2 adds that “Greek men and women have equal rights and equal obligations”. Paragraph 2 guarantees an aspect of the principle of non-discrimination which falls under the scope of the existing article 5, par. 2 (non-discrimination clause).

Other examples could be article 18 (special cases of property protection) covered by the general provision on protection of property, 9A (personal data protection) that could be included in a separate paragraph to the protection of private life as substantially found before the 2001 amendment (Mitrou, 2001: 85), paragraphs 3 (equal terms of state supervision to ministers of all religions), 4 (prohibition of non-compliance with laws on the basis of religious beliefs) and 5 (oath) of article 13 that are totally unnecessary.

In conclusion, a horizontal revision of fundamental rights’ structural form shall be forwarded. The framework of the reform would be based on simplification and clarification of the rights protected. Furthermore, a significant revision of certain rights is needed for better compliance with fundamental rights framework in the European legal order. For instance article 5, par. 2 (non-discrimination) shall be enriched with more discriminatory grounds, i.e. sexual orientation.

State and Church relations in light of religious freedom

Due to historical reasons (Clogg, 2002: 7-45), a special provision regarding State and Church relations has been included in every constitutional text of the Modern Greek state; this provision grants to Orthodoxy the status of “prevailing religion” in Greece. Throughout the country’s constitutional history, the interpretation of the term “prevailing” triggered the discussion with reference to certain advantages that the prevailing religion could enjoy in conjunction to the fundamental right of religious freedom. On the ground of “prevailing religion”, the worship of other religions was not guaranteed as free, but was simply tolerated by state authorities in the majority of Greek Constitutions (Daskalakis, 1952: 27-30).

In the current Constitution the State and Church relations are covered by article 3 and freedom of religion is guaranteed in article 13. Although, it has been argued (Dagtoglou, 2005: 440, Troianos, 1984: 68-69, *contra* Poulis, 2002: 40) that the term “prevailing religion” reflects a statistical fact, i.e. the religion of the overwhelming majority within society, the existence of such term in a separate constitutional article, symbolically put in the beginning of the Constitution, substantially limits to some extent the concept of protection of religious freedom (Manesis, 1981: 256, Minaidis, 1990: 134), since it provides an interpretative tool for provisions that manifestly interfere with the enjoyment of certain rights for reasons of religious beliefs; for example, the Christian form of oath that the President of the Republic is obliged to take according to article 33 of the Constitution. In this regard, a structural reform of articles 3 and 13 will be proposed that mostly clarifies the constitutional concept of religious freedom.

The complete protection of religious freedom has two basic aspects: religious conscience and worship that are interrelated since the development of religious conscience is a prerequisite for worship. Both aspects are guaranteed in the first two paragraphs of article 13. In addition, paragraph 2 sets limits to religious freedom on three occasions: offence of public order and public morality and actions of proselytism. Public order is a set of principles, values and perceptions, common within society, that reflect its special characteristics and designate the acceptable form of behavior; as such, they are embodied in the laws of the state. In that sense, the protection of public order is entrenched in law which provides the necessary means for this protection. For example, religions whose rites of worship include suicide are not permitted as violating the notion of public order, but ultimately, such practices are contrary to the laws of the state. As a result, sufficient measures already exist in Greek legal order for protection of public order, so that the constitutional provision is to a large extent implicit.

With reference to public morality, the term dictates a broad legal notion, not adequately elucidated. In general, public morality have a moral dimension; the term symbolizes behavioral perceptions and habits which derive from the prevailing social morality, undefined in legal terms, but applicable for social harmony not to be disrupted. With reference to freedom of religious worship, public morality is inevitably related to the social perception towards religion and in the case of Greece, taking into account the historical state and church connection and the extensive social embracement of the Christian Orthodox traditions, public morality is to a large extent affected by the Orthodox principles (Raikos, 2002: 409; Marinos, 1972: 173-174). As a result, the concept of a constitutional limitation to religious worship has been essentially affected by the principles of one specific religion, Orthodoxy; in this context, the rules of Orthodoxy end up to substantially interfere to the worship of other religions establishing a situation of non-compliance with religious freedom.

Another reason for abolishing public morality from the constitutional text pertains to its added value in the interpretation of religious freedom. The Constitution expresses clauses usually formulated in an abstract way that encapsulate moral principles with political essence; for example, allowing free application of every religion is primarily a political action on a moral basis which defends that every person is entitled to develop and express his religious beliefs. In practice, those abstract constitutional clauses are interpreted on understanding whether they have been infringed or not on the basis of actual incidents. For instance, to answer whether imposing criminal sanctions to people who try to convert others by reading and differently interpreting texts of the Holy Bible infringes the right to manifest religion as an aspect of religious freedom or not,[3] demands an opinion that delineates the right at stake and finally decides on whether the case falls into the scope of the right. The rationale of this opinion derives from the interpreter's own understanding of the right in its entirety, as Dworkin punctuates (1996), his/her *moral reading*. In that sense, a broad term such as public morality can be interpreted at will with reference to when they are offended by religious rites. Hence, except of certain extreme cases where public morality is particularized (Vermeulen, 1998), but can be solved at the level of formal law, the added value of the term is very limited.

Greece has drawn much European-wide attention because of the relatively high number of cases that reach the ECtHR regarding the third limitation of religious freedom in the Greek Constitution, proselytism. Proselytism is the act of attempting to convert people to another religion. In principle, freedom of religion includes the right to manifest religion, a right that

[3] These were the facts of the landmark ECtHR case Kokkinakis vs. Greece, application no. 14307/88.

"includes in principle the right to try to convince one's neighbor, for example through "teaching", failing which, "freedom to change one's religion or belief," enshrined in article 9 (ECHR) would be likely to remain a dead letter".[4] The Strasbourg Court basically held that convincing people to change their religion (proselytism) falls under the scope of religious manifestation; especially in cases of newly established religions, proselytism is the only mean for approaching members.

On the other hand, several methods of proselytism may be abusive. The Strasbourg Court has acknowledged cases of improper proselytism which described as "the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a church".[5] The characterization of a proselytism method as improper is decided on a case by case basis always under the principle of proportionality to the legitimate aim pursued.[6] The general clause "proselytism is prohibited" of article 13, par. 2 seems to confuse the notion with the methods. Proselytism is principally allowed; certain of its methods can be prohibited. The improper proselytism methods could be outlined in a modern criminal law provision and inserted in the criminal code. From this standpoint, the limitation on the ground of proselytism is not in compliance with freedom to religious manifest.

To sum up, all three limits set in article 13, par. 2 of the Constitution should be abolished, either as practically useless or as essentially contrary to aspects of the right to religious freedom.

Nevertheless, the issue of "prevailing religion" remains. Firstly, it should be noted that the existence of the term *per se* does not automatically lead to violation of religious freedom. There is a distinction between prevailing religion as interfering with state policy and as depending on its impact within society. As long as specific safeguards for the individual's freedom of religion are included, in particular the right not to be forced to enter or prohibited from leaving the prevailing religion, the requirements of religious freedom are satisfied.[7] In this regard, freedom of religion is sufficiently protected within the Greek legal order; therefore there is no need to totally abolish the relevant term.

Instead, attention should be drawn to the interpretation of prevailing religion, which needs to be strictly restricted to the historical significance and considerable level of acceptance of Orthodoxy within the Greek society. Therefore, the issue of prevailing religion may enter as paragraph 3 in article 13, after the concept of freedom of religion. Symbolically, this approach highlights the priority of protecting religious freedom which prevails over any possible limitation on the ground of "prevailing religion" and on the other hand it reflects a cultural event and a major social aspect towards religion (Piret, 2012: 68-69, *contra* Alivizatos, 2001: 260). For reasons of certainty, an explanatory line stating that "nothing in this paragraph shall be interpreted as limiting religious freedom" may be added. The rest of article 3 shall be repealed.

[4] Ibid, par. 32.
[5] ECtHR case Larissis and Others vs. Greece, application nos. 23372/94, 26377/94 and 26378/94, par. 45.
[6] This is the position of the Strasbourg Court expressed in various cases. See among others ECtHR case Wingrove vs. the United Kingdom, application no. 17419/90, par. 53, ECtHR case Masaev vs. Moldova, application no. 6303/05, par. 24.
[7] See EComHR case Darby vs. Sweden, application no. 11581/85, par. 45.

The status of university education

Freedom of arts, sciences, research and teaching is provided in article 16 which states that their development and promotion is an obligation of the state. Paragraph 5 refers to the status of university education in Greece and dictates that it is exclusively provided by public legal entities. At the same line paragraph 6 characterizes university professors as public functionaries, whilst paragraph 8 confirms this approach by explicitly stating that the establishment of university level institutions by private entities is prohibited.

Unlike state and church relations, the exclusive public-oriented system of university education is not a deep rooted constitutional tradition in Greece. On the contrary, the first constitutional text where the term "higher education" was entered, in 1844 (article 11), allowed the establishment of private institutes without setting limitation stemming from the level of education; the constitutional texts of 1864/1911 and 1927 continued at the same line. As a result, one of the oldest universities in Greece, Panteion University, was firstly established as a private legal entity in 1933 under the name "Panteion School of Political Sciences". The characterization "civil servants" for university professors was included in the 1952 Constitution. However, the form of function of universities as public legal entities was completed in the two pseudo-constitutional texts of the military dictatorship (article 17, par. 4 in both 1968 and 1973 Constitutions); a perception maintained in the Constitution of the 3rd Hellenic Republic.

The main arguments for justification of this approach are related to the better guarantee of academic freedom of university members as a prerequisite for the university to accomplish its mission. It has been argued (Kamtsidou, 2006: 376-377, 2007a: 217-219, 2011) that the public character of the universities has been linked to the recognition of institutional guarantees related to the function of the universities on behalf of the state in democratic manner. In other words, the status of the universities as public legal entities has strengthened the state obligation not only not to interfere within the academic issues, but also, when it does, to legally guarantee and materially provide with the necessary means for the accomplishment of the mission that the universities have undertaken. Therefore, freedom of research and teaching is secured in the best possible way. On the contrary, as argued (Kamtsidou, 2007b), the transfer of academic activity from the public sphere to private will alter its fundamental principles and basic functioning rules. The reason is that the establishment of private universities, even in a non-profit form, consist an economic activity and as such, the person who launches a private university falls under the protection of article 5, par. 1 of the Constitution (free participation in the social, economic and political life of the country), instead of article 16, where the state has limited power of interference inasmuch as the core of economic freedom is not impinged.

Initially, it is widely acknowledged that the protection of academic freedom is essential to the mission of academia and a foundation of the unimpeded operating of the university. However, this protection is already institutionally guaranteed in article 16, par. 1 of the Constitution. Private entities establishing universities will be bound by article 16, par. 1 in the same manner as public universities. Although they pursue an economic activity, the purpose of this activity must inevitably be referred to teaching and research as described in article 16, par. 1 in order to fulfill the necessary criteria for establishing a university. Therefore, in case of a conflict, article 16, par. 1 shall prevail as *lex specialis* in comparison to the general economic freedom of article 5, par. 1.

In line with the aforementioned argument, the centers of post-secondary education that operate in Greece[8] are regarded as educational institutions, having been licensed by the Ministry of Education. Article 6, par. 2 of Law 3696/2008 as reformed by article 45, par. 1 of Law 3848/2010 states that centers of post-secondary education operate under state review that is exerted by the Minister of Education; the Ministry of Education sets specific criteria for granting licenses, related to premises and other facilities (lecture rooms, libraries etc.), adequate administrative staff for the support of teachers and students, comprehensiveness of the programs offered and qualifications of the teaching staff. To sum up, the sole responsible authority for the operation of centers of post-secondary education is the Ministry of Education. After a possible amendment of paragraphs 5, 6 and 8 of article 16, there is no reason that this regime will change in terms of state evaluation and review. On the contrary, the formal law that specifies the prerequisites for the establishment of a university by a private entity shall put even more strict criteria, the ones that precisely apply for public universities, with special reference to the educational and research background of academic personnel. Under this perspective, the academic quality of both teaching and research will be assured (Contiades, 2006: 70). From the international academic experience, it can be underpinned that several non state universities excel worldwide, providing a very high level of cutting-edge scholarship and research. Besides several well respected US universities, i.e. Yale, Stanford, Georgetown, NYU, Duke etc., private universities or schools emulate with public ones on equal terms in Europe as well.

Regarding state interference, the argument that its purpose is to materially provide with the necessary means for the accomplishment of the university mission is in practice far from real. The severe underfunding on behalf of the state, especially in times of economic crisis, leads universities to a position of being hardly able to cover their operational needs, at the expense of research. Furthermore, the dysfunctional public sector exacerbates the problem. As has been recently pointed out (Gialis, 2013), 700 teaching and research staff have been elected by the respective university electoral committees, but have not been appointed, since their appointment has not been published in the Government Gazette for three years. Therefore, under the abovementioned conditions, the university is not fully capable of playing its leading academic role within society.

In any event, private universities shall not be perceived either as rival or as a substitute for public universities, but more as a supplementary institution, a second pillar in the system of university education in Greece. Above all, the establishment of private universities responds to an important social matter: immigration for university education. A number of high school graduates that do not enter the department of preference through Pan-Hellenic examination are forced to study abroad since there is no alternative opportunity in Greece. In this situation, students have to spend much more for education (living expenses included), a fact that, from a social perspective, precludes an amount of them, the ones with the lower income, from studying (Lakasas, 2012). Thus, under strict prerequisites and evaluation, private universities can promote top level research and offer alternative solutions for university education in Greece. The amendment of paragraphs 5, 6 and 8 of article 16 is a prerequisite, totally necessary for achieving this aim.

[8] Centers of post-secondary education or colleges are institutions that either offer bachelor, master and PhD degrees on the basis of validation or franchise agreement with foreign universities or are directly accredited by international accreditation organizations. The degrees offered by colleges are equally recognized to the respective ones offered by Greek universities in terms of professional qualifications. This recognition has been recently adopted by the Greek government for reasons of compliance with Directive 2005/36/EC. Nevertheless, it creates a paradox: graduates of colleges, who have studied in Greece, hold exactly the same degrees awarded by the mother university which is fully recognized in all the rest of EU member states, while in Greece only the professional qualifications are guaranteed.

Concluding remarks

Greece is going through one of the hardest periods in its modern history. A constitutional amendment, no matter how radical may be, will not magically solve any of the vital financial issues. Nonetheless, its purpose is even more significant; to establish a new relationship between the governors and the governed on the fundamental democratic principles of equality and justice and therefore restore the lost political trust of the latter to the former.

The proposed amendments in this paper focus on that direction. At the institutional level, the modification of the criminal process regarding the criminal accountability of former and current cabinet members with its assignment to the judiciary, as well as the parliamentary immunity, generates a sense of equality within society, especially if we take into account the way that those two provisions have been interpreted in the past. Furthermore, this approach distinct the judiciary from the executive and the legislature in line with the principle of *trias politica*, by clarifying its respective roles.

Politically, the role of civil society will be enhanced through its active participation in central politics. The establishment of citizens' legislative initiative and the addition of the popular referendum in the Constitution would contribute to the actual and effective exercise of fundamental democratic rights, which at the present time remains theoretical (particularly with reference to the referendum). This "shot" of participatory democracy would lessen the very popular idea within society that "they decide for us without us" through establishing a more co-operative form of representative democracy.

With regard to fundamental rights, a very wide re-structuring of the Constitution's provisions is necessary on the grounds of simplification and clarification of the rights contained therein. In particular, the provision of religious freedom needs to be modernized with special reference to its limitations and the addition of the State and Church constitutional relations in the same provision. The right of private entities to establish universities should also be included, as is the case in all EU member states' Constitutions, under strict state control regarding their premises, academic personnel and program structure. Private universities can constitute an additional pillar to university education in Greece providing high quality services of teaching and research and assisting in combating the social problem of educational immigration.

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