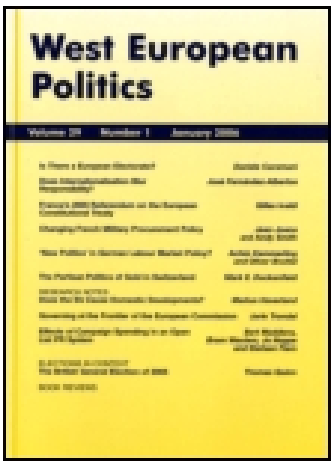

West European Politics
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/fwep20

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Published online: 25 Jan 2007.

To cite this article: Pavlos Eleftheriadis (2005) Constitutional Reform and the Rule of Law in Greece, West European Politics, 28:2, 317-334, DOI: 10.1080/01402380500059777

To link to this article: http://dx.doi.org/10.1080/01402380500059777

West European Politics,
Vol. 28, No. 2, 317–334, March 2005

Constitutional Reform and the Rule of Law in Greece

PAVLOS ELEFTHERIADIS

ABSTRACT *In the area of constitutional law in Greece, where at least since 1975 there has been a well functioning democracy, the ideal of 'modernisation' must mean adherence to the substantive principles of legality and the rule of law as political ideals. Even though the Simitis government showed some concern for improvement in these areas, the constitutional amendment of 2001 did not attempt to tackle longstanding problems such as civil service corruption, irregularities in public procurement, the independence of the judiciary and the like. The amendment was motivated, it seems, by a more majoritarian 'communitarian' legal philosophy seeking to strengthen political majorities.*

The modernisation project of 1996–2004 under Costas Simitis changed Greek political life in at least this respect: it made executive competence the central political issue of the day. It was not a small achievement. During the 1980s the Pan Hellenic Socialistic Movement (Πανελλήνιο Σοσιαλιστικό Κίνημα, PASOK) seemed to be guided by ideological visions of a just society or emotional outbursts over 'the national issues' (that is, relations with Turkey and the United States) and with redressing the wrongs of the right-wing repression that followed the civil war. Constantinos Mitsotakis' New Democracy (Νέα Δημοκρατία, ND) government in 1990–93 too resorted to nationalist posturing and ideological bravado that resulted in some ill-fated 'privatisations' and other economic policies. After many disappointments on all these fronts, by the late 1990s emotional and ideological eruptions of this kind had disappeared from frontline policy debate. Simitis offered a markedly different style of politics. His moderation in speech and conduct, his emphasis on organisation and self-discipline, his openness to the country's foreign partners and his eventual successes in joining European Economic and Monetary Union, smoothing relations with Turkey and achieving some administrative reform showed that politics was not just empty bombast. A new reality of economic progress and a sense of security changed the way ordinary citizens viewed public life. It was not meant to be

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ISSN 0140-2382 Print/1743-9655 Online
DOI: 10.1080/01402380500059777

a source of fear and excitement as it had been until then, but the task of improving real life. This change, although not immediately popular, appealed to the voters and eventually won Simitis a second term. It has had a lasting effect because, ironically, the 2004 election was probably lost for Simitis' party (despite his unprecedented withdrawal from the leadership of the party) because the electorate did not forgive it the fact that for a variety of reasons the government had stopped being competent.

This return to real politics has had great impact on the law. The emphasis on ordinary government made legal institutions and their servants more central to public life and more fundamental to political debate. Judges and other important public servants have also personally become more prominent. A major element of ND's electoral manifesto, for example, concerned the 're-foundation' of the state. The reform of judicial institutions has already figured very highly in the first few months of the new government's agenda. This prominence of legal institutions explains, in my view, the programme of constitutional reform that was initiated at the start of the 1990s by both major parties. After a protracted process that enjoyed wide consensus, the Greek Constitution was finally amended in 2001.

Although extensive, the amendment did not touch on some of the deepest problems of social and political life. Greece has a well-established constitutional order but it is still beset by the inability to apply its high principles in practice. Some of the best known examples of such failures are: existing laws are not always properly implemented; courts and disciplinary bodies have failed to tackle widespread corruption in the civil service; courts do not deliver justice within reasonable time limits; ministries often refuse to comply with court orders against them. As a result, public authorities do not generally inspire trust and respect. Politicians are seen as indifferent to the condition of public services. It was documented, for example, in the European Social Survey in 2003 that 77.6% of Greeks believed that few or no politicians care about what ordinary people think (European Social Survey 2003). The equivalent figure for Britain, for example, was 46.7%. Many of these problems are related to a badly organised and largely haphazard civil service. This is, of course, not a legal problem but a deeper problem related to political, social and cultural factors. Yet it is important that constitutional lawyers and courts do what they can to correct a situation that drains the constitution of its real meaning. It is in this area, I believe, that we will find the content of any project of 'modernisation' in the Constitution.

Constitutional Modernisation and the Rule of Law

It is essential that we spend some time defining our terms. If the concept of 'modernisation' is ambivalent in most political contexts, it is especially unsuitable in assessing law and institutions. In constitutional matters we often praise respect for tradition, as many constitutional lawyers do both in Europe and the United States precisely because the tradition embodies

something we consider valuable and sound. The ideas of 'progress' and 'reform' need not coincide in this field, at least whenever a constitutional settlement has long provenance and enjoys deep moral support.

Greek constitutional history is in fact rich and largely liberal and democratic. Unlike other areas of political and social life, Greek constitutional law has always been somewhat ahead of its time, at least since the constitutional texts of the 1820s. For most of its history (with the two exceptions of, first, the Metaxas coup and the German occupation and subsequent civil war between 1936 and 1949 and, second, the colonels' coup in 1967–74) Greece has been a constitutional monarchy or republic. It was one of the first countries in Europe to expand suffrage to all adult males and allow, towards the end of the nineteenth century, the constitutional review of statutes by courts. At least since 1974 it has enjoyed a widespread commitment to liberal and democratic principles among the main political parties. Under the Constitution of 1975 there has been a functioning system of independent courts, all speech, political or otherwise, has been entirely unrestrained, while regular free and fair elections return different parties to power. The Constitution is continuously interpreted and studied by constitutional lawyers, who enjoy full academic freedom and are in constant contact with the main currents of legal thought in Europe and the United States.

Can we conclude that in such circumstances there is no need for 'modernisation'? We need to make a more substantial distinction. The statements of general principle or the shape of institutional relations and processes are not sufficient to give us a full picture of a constitutional order. The quality of a constitutional arrangement depends on deeper and more complex criteria that have to do with the application of principles in concrete circumstances. Constitutional theory often refers to these criteria as standards of 'the rule of law', meaning political and social presuppositions for the strength, clarity and fundamental fairness of institutions. In addition to a well drafted constitutional text (I leave aside here the complexities of the British case) and independent institutions, the ideal of the rule of law requires among other things that 'the law should be clearly and publicly laid down for all to see, so that people should be aware of it and will be able to plan their lives accordingly' (Raz 1994: 371). A fuller conception of the rule of law involves, also, an insistence 'on an open, public administration of justice, with reasoned decisions by an independent judiciary, based on publicly promulgated, prospective, principled legislation' (Raz 1994: 374). Whatever version of the ideal of the rule of law we may wish to endorse, a 'bureaucratic' thin conception or a fuller 'principled' conception, I think it will not be controversial to say that constitutional lawyers achieve a better assessment of a legal system when they take into account not just the formal arrangement of institutions but also the real relations between the governing and the governed. There might be some resistance to such a move, especially among traditional 'legal positivists', for whom the function of constitutional law is just to set out how power is exercised, irrespective of the content of

such limits and irrespective of wider political ideals. This view is very popular among Greek judges and lawyers (Pollis 1987; Stavros 1999: 7). Yet such a narrow approach has serious difficulties in making sense of the very project of constitutionalism. Setting legal limits to public power is often controversial and unpopular. What is the purpose of a seemingly rigid and restrictive constitutional framework if it interferes with the freedom of the majority to govern as it pleases? Lawyers and judges may claim to be exercising a technical function, but they cannot defend the inevitably political impact of their role on technical grounds alone. Unless there is a deeper political value to introducing limits to political power through a written constitution or other means, there can be no sufficient reason why lawyers may obstruct political forces supported by wide majorities. Formalist constitutional law is in this sense unstable or self-defeating (for further defence of this position see Eleftheriadis 1999a). Hence, there is nothing radical in saying that constitutional law is normally associated with substantive ideals and the ideal of the rule of law in particular (Dworkin 1986: 355–99; 1996: 1–38). If 'modernisation' has any meaning in this context, it should therefore be related to ideals of legality and the rule of law. A project of improving a constitutional settlement must involve improving the way in which the law guides the conduct of officials and individuals.

Major Constitutional Changes in 2001

The Constitution was amended in 2001 by consensus of both major parties, PASOK and ND (Tsatsos and Contiades 2001; Eleftheriadis and Alivizatos 2002). Amending the Greek Constitution requires two separate parliamentary votes on either side of a general election and a majority of three-fifths of the total number of seats in at least one of these votes. With bi-partisan support most of the recent amendments passed comfortably through Parliament in a process that was formally started in 1997 and was concluded in the spring of 2001, a year after a general election returned Simitis' socialists to power.

The amendment did not have an overarching theme. It tackled several provisions, especially those in the area of fundamental rights, with a view, as its authors announced, to 'modernising' them. Some new provisions were added. All in all 71 provisions were amended or introduced. Some of these changes are local in effect; others may have lasting and general effects. The most important and perhaps far-reaching change concerns Article 25, the last article in the fundamental rights section. This article seems to introduce general interpretive principles concerning the whole of the rights catalogue. Now Article 25 reads as follows:

> 1. The rights of man as an individual and as a member of society and the principle of the social welfare state are guaranteed by the State. All

> State organs have an obligation to ensure their unobstructed and effective exercise. These rights are in force in relations between individuals, whenever appropriate … 2. The recognition and protection of fundamental and inalienable rights by the State aims at realising social progress through freedom and justice. 3. Abusing rights is not allowed. 4. The State has the right to demand of all citizens that they fulfil the duty of social and national solidarity.

It is hard not to notice the scepticism expressed here towards rights. It reflects, I suppose, a strong tradition of an 'organic' conception of the state according to which duties to the states are equally significant to rights against it (this is well described in Pollis 1987: 605). Such was the tenor of the 1975 Constitution, when these provisions were first drafted. But the new provisions here concern, first, the introduction of a principle of the 'social welfare state' and, second, the horizontal effect of all rights in relations between individuals. The first change may have important effects if it is interpreted as giving courts the power to check any scaling back of the social welfare state. Indirectly, of course, this means that courts may assume powers over economic and taxation policy, but this remains to be seen. Secondly, courts can now use the Constitution directly in private law. The idea of the horizontal effect of human rights is an old one and one that has exercised legal theorists for a long time (Tushnet 2003; Clapham 1993). Traditionally, human rights are thought to check the powers of the state against individuals, allowing them more freedom. If human rights are taken to check individuals in their relations with others, then their effect may be to limit freedom. The question is indeed one of great complexity which turns on conceptions of liberty and coercion. The new provision leaves such questions to be answered by the courts by giving the broadest possible recognition to horizontal effect, following the example of the South African Constitution. This will no doubt prove fertile ground for innovative litigants in the years to come. Everything will depend on how courts interpret the clause 'where appropriate'.

Other changes in fundamental rights are local in scope. For example, there is a new right (Article 5 Para. 5) to 'the protection of health and one's genetic identity'. There is a new right (Article 9A) against the 'collection, processing and use, especially through electronic means, of one's personal data'. There is also a new right (Article 5A) 'to receive information' and a right (also in Article 5A) 'to participate in the information society'. Just like the more general reforms mentioned above, such innovations will certainly occupy the courts for years to come.

One area where important changes took place was that of the law of property. These changes were introduced to expedite the compulsory purchase of land involved in building projects connected to the 2004 Olympic Games. The new provisions (Article 17 Para. 4) provide, among other things, the following:

> In order to complete works of general importance for the economy of the country, it is possible for the court that is competent to decide on the final or provisional determination of compensation to permit the carrying out of works even before compensation has been calculated and paid, if the right-holders receive an appropriate part of the compensation and a full guarantee for their claims.

Now such a provision might be thought unnecessary if courts operate promptly and efficiently. The sluggishness of the Greek judicial system prompted Parliament to introduce this taking of property without compensation. Nevertheless, the effect of such a measure will be that, for the benefit of the 'national economy', some families may lose their homes without first receiving full compensation. I cannot see how this is not a taking of property without prior payment of compensation, something prohibited by the international law of human rights. This provision punctures a large hole in the defences of property under the Greek Constitution and may not comply with the spirit and letter of the protection of the right to property under the European Convention on Human Rights. It remains to be seen if and how this mechanism is applied in practice and how national courts interpret it (see further Gerapetritis 2001).

One area where no change was made was that of religious liberty. Yet this might be considered the only area where problems have persisted in human rights throughout the life of the 1975 Constitution. The establishment of the Greek Orthodox Church as the 'dominant' religion in the state (in Article 3) and the particular configuration of religious liberty (in Article 13) and its application by law have spurred a number of decisions before the European Court of Human Rights, where Greece was found to have violated the Convention (European Court of Human Rights 1993; 1996; 1998; Stavros 1999; Alivizatos 1999; Gilbert 2002: 754). Some of the most restrictive practices have been amended in response, yet one would have expected that a sweeping amendment of the Constitution ought to have looked at the provisions that have created these problems. The most likely cause of this reticence is the popularity of the Greek Orthodox Church and the combative defence of its privileges by its recent leaders (see generally Mavrogordatos 2003; Prodromou 2004). It is important to note here that when in May 2000 the Data Protection Authority ruled that identity cards should not bear religious affiliation – for this had nothing to do with their purpose – the church reacted with great vehemence. Despite mass support for the church's position, the government stood its ground and supported the agency for the sake of privacy and religious liberty. Both domestic courts and the European Court of Human Rights eventually vindicated the Data Protection Authority (Council of State 2001; European Court of Human Rights 2002).

Institutional Changes

The 2001 amendment also brought changes to Parliament and other institutions. The most important is the rule that Members of Parliament (MPs) shall have no paid employment outside Parliament (Article 57). The government representative without any prior consultation introduced this rule suddenly at the second stage of the amendment process. The amendment was nevertheless carried by MPs from both parties, even though it proved controversial. Its critics claimed that it made it impossible for people without serious independent means to enter Parliament, as doing so would probably undermine their income. On the other hand, the argument went that every possible suspicion of collusion with economic interests had to be stamped out. The suspicion towards politicians is widespread, yet this extreme measure is unlikely to silence it, considering the various other ways in which any such collusion may materialise.

A similar attempt at responding to concerns about corruption was a new provision on the finance of political parties. Political parties that are represented in Parliament already receive generous funds from the state budget. The new article 29 places this on a constitutional footing when it states: 'Political parties have a right to financial support by the State for their electoral and day to day expenses, as provided by law'. But the same provision creates novel restrictions:

> A law provides the safeguards for transparency as to electoral expenses and the economic administration of parties, Members of Parliament, candidates for Parliament and candidates in local elections ... The control of electoral expenses of parties and candidates is conducted by special body, constituted with the participation of senior judges, as provided by law.

A great deal turns now on how the special body is designed by the new law that was introduced to give this provision effect (Law 3023/2002) and how this will be specified by delegated legislation and applied in practice. The constitutional provision allows the legislator great discretion over the new system. But some reform is urgently needed. In practice, the financing of parties and candidates today is still largely shrouded in secrecy. Current spending limits for candidates are commonly held to be violated with impunity.

Finally, a significant change took place with regard to the legal foundations of independent administrative agencies. Such agencies – e.g. the National Council for Radio and Television (Εθνικό Ραδιοτηλεοπτικό Συμβούλιο), the Ombudsman (Συνήγορος του Πολίτη), the Energy Regulator (Ρυθμιστική Αρχή Ενέργειας), the Data Protection Authority (Αρχή Προστασίας Δεδομένων) – had been set up by statutes in the last ten years to regulate sensitive areas of the economy. Such agencies were

not part of the administrative arm of the state and were not subject to the supervision of a minister. Such independence is now guaranteed by the Constitution for at least five of these agencies: the Data Protection Authority (Αρχή Προστασίας Δεδομένων – Article 9A), a Confidentiality of Communications Authority (Αρχή Διασφάλισης Απορρήτου Επικοινωνιών – Article 19 para. 2), the National Council for Radio and Television (Εθνικό Ραδιοφωνικό Συμβούλιο– Article 15), a Civil Service Appointments Authority (Ανώτατο Συμβούλιο Επιλογής Προσωπικού – Article 103 Para. 7) and the Office of the Citizen's Advocate (Γραφείο του Συνήγορου του Πολίτη – Article 103 Para. 9). According to a new Article 101A, in all these cases the personnel staffing these agencies shall enjoy 'personal and functional independence' and will be appointed by a decision of an all-party Parliamentary Committee requiring unanimity or at least four-fifths majority. In other words, these appointments will not be strictly partisan, but ideally the result of consensus between at least the two major parties, hopefully more.

It is uncertain what role these provisions will eventually play in securing the true independence of these agencies. In some cases independence has been achieved by the hard work and ingenuity of leaders. The Citizen's Advocate, for example, has proved both independent and very successful and has now become an indispensable tool in the accountability of public power in Greece. Under the guidance of Professor Nikiforos Diamandouros – who was subsequently elected the European Ombudsman and was replaced by Professor Yiorgos Kaminis – the agency established itself as a major player in the accountability of public authorities. Its annual reports provide a unique insight into the real world of government in Greece and point out the many serious shortcomings of public administration at every level (its annual reports are published at http://www.synigoros.gr).

The most prominent of the independent agencies has been the National Radio and Television Council. Its record has not been very encouraging so far. Perennially understaffed, the Council was continuously undermined in the 1990s by a 'Minister of Press and Media' (a government post – abolished in 2004 by the ND government – which under the Simitis administration both provided government media briefings and was responsible for all regulatory issues to do with the press and the media). During its first few years of operation, for example, every decision of the Council, e.g. imposing a fine or other penalty on a radio or television station for some violation of the law, had to be approved by the minister. The minister in fact never approved these decisions, seriously undermining the standing of the Council vis-à-vis the media owners. The law was finally amended in the late 1990s, but the standing of the Council was diminished. It remains to be seen what difference the constitutional footing will make to the powers and prestige of the Council.

The Problem of Media Businesses and Public Procurement

This brings us to a problem that the National Radio and Television Council is supposed to tackle and which is of major significance for the political system as a whole. This is the extraordinary power wielded by a small number of business conglomerates controlling radio and television stations together with construction and other companies (Mouzelis and Pagoulatos 2003). Numbering no more than half a dozen, these business groups appear to enjoy the lion's share of public procurement contracts. There has been a very widespread belief that these public contractors purchase influence over contracts in return for airtime and other favourable treatment towards a small number of politicians, members of PASOK party and the Simitis government, whom they systematically supported through their news and current affairs programmes. It is clearly very difficult to assess the truth of such allegations. No one knows if such procurement contracts were won out of shrewd business acumen or through corruption. No one knows exactly how editorial decisions are taken within the radio and television stations. Yet the opposition's allegation of collusion between the government and media was enough to damage public trust. So widespread was the view that something was wrong that both parties took it upon themselves to do something in the constitutional amendment.

What they did was introduce into the Constitution a measure that had already been introduced by statute, but had proven very ineffective. The PASOK government had introduced a law making it illegal to own both media outlets and public contracting businesses (Law 2328/1995; see Anthopoulos 2001). More or less the same solution has been introduced as Article 15 para. 9 of the new Constitution:

> 9. The ownership, financial situation and the means of funding of the media ought to become known, as provided by law ... It is forbidden to join the control of more media of the same or different kind in the same person, as provided by law. The position of owner, partner, major shareholder or executive of a media business is incompatible with that of owner, partner, main shareholder or executive of a public procurement business entering into contracts for the construction of works, provision of goods or services to the State or state owned entities. The prohibition covers also any intermediary persons, such as spouses, relatives, economic dependent persons or companies.

The meaning of the provision is that one cannot be the owner or major shareholder in both media businesses and public procurement businesses. At first there seems little logic to the rule, but the explanation is easy: the media conglomerates can use their political power to secure (illegally, of course, and against the interests of the taxpayer) undue influence over the award of public procurement contracts. The solution endorsed here is to disaggregate

the two interests. If media companies cannot engage or participate in public contracts, then they will not use their news or other programmes to exercise pressure on the government or other politicians.

The provision has been widely praised by Greek politicians. The government representative in the process of amendment and its final architect, Mr Evangelos Venizelos – a former constitutional law professor – has written that this measure guarantees 'transparency and pluralism' in the media, seeking to 'control with these legal concepts a plurality of processes and of complex phenomena that develop with speed and ingenuity in the living reality of the market' (Venizelos 2002: 206). The author refers to transparency but he does not explain why transparency is helped by the incompatibility of the two business activities. He was more forthright in his speech to Parliament during the amendment debates, where he said that transparency refers to a general problem in Greek political life: 'the phenomenon of illegitimate political influence or the exercise of political blackmail, which is, if you like, one of the most common aspects of the phenomenon of non-transparency and ''intermingling'' [of business and media interests]' (Parliamentary Record 2001). In this rather coy way the then Minister of Culture admitted that the deeper problem was that public procurement companies could use political influence to secure contracts through the control of the media. The then leader of the opposition used much stronger language to criticise the same phenomenon, which he attributed directly to the government:

> The leadership of this Government, beholden to a group of state-maintained businessmen ... is driving us to economic and social decline ... It concentrates wealth and political power in organised economic interests ... Important decisions are imposed on the state by non-institutional sources. [The government] organises support for itself and criticism for its opponents. Its main weapons are the opinion forming mechanisms and mainly the electronic media ... [The government] has tried to lure, to blackmail, to imprison ... It has served ... the concentration of wealth and political power in monopolistic suppliers of the State, in private interests. (Parliamentary Record 2001)

For that reason Karamanlis supported the proposed constitutional amendment. Similarly, former Prime Minister Mitsotakis defended the proposed measure in September 2000 by saying that everyone knows that:

> the incompatibility would be evaded if it did not include intermediate persons, such as relatives, financially dependent persons or holding companies. The tough reality in Greece teaches us that a vague provision with a broad formulation, such as a provision on

> competition, might work elsewhere, but in Greece it would certainly be evaded. (cited by Alivizatos 2001: 227)

There are a number of logical problems with these arguments. The stated aim and the chosen means do not make sense. The provision does not seek to make public procurement transparent. It only limits the access of media businesses. But others may exercise the same pressure, as long as public procurement remains vulnerable to influence from the top, that is by corrupt or weak politicians and civil servants awarding contracts at will. The proposed solution does not seek to address the state of public procurement in general, strengthening it against all external pressure. Can it be that the provision seeks to curb the arbitrary power of media owners? But, again, this power will endure even if media businesses lose interest in public procurement. Such organisations may still use their power to blackmail or threaten politicians in order to secure other types of favours, for example in other types of licences or in preferential treatment in real estate development or in the award of frequencies. As long as such media outlets are not effectively regulated by the National Radio and Television Council, they will run riot with whoever stands in their way. But this provision does little to help the regulation of radio and television.

The only remaining aim behind this provision may be to prevent particular existing conglomerates from abusing their power here and now. It seems that both Mr Venizelos and Mr Karamanlis had some idea which these businessmen were. They both seemed to agree that they ought to be stopped by not having access to public procurement. But this seems something that should be tackled by public prosecutors, not the Constitution. The obvious method to stop and punish any suspected criminal activity is by a criminal investigation. This would defend transparency, would defend the public purse and would stop any corrupt businesses and their associates in the civil service from offending again – if they were found guilty and properly punished. Transparency therefore suffers because, instead of a criminal investigation over public procurement contracts that the alleged wrongdoers have already secured, Parliament has decided to ignore the criminal dimension of the problem. It introduced a general constitutional provision that seeks to stop the suspected offenders from offending again without punishing them or rooting out corruption in public procurement once and for all. This is by far the most puzzling provision in the new Greek Constitution.

Corruption

The underlying problem here is of course a much deeper one; one with institutional, economic and cultural dimensions. The bi-partisan consensus condemning the collusion between the media and public contractors points to corruption in the civil service as the source of all irregularities in public

procurement. If the system of public procurement had been independent and fair, no amount of airtime for politicians could have touched it. Corruption is in fact a longstanding, and widely tolerated, phenomenon in Greek politics and the civil service (Koutsoukis 1989; 1998). A survey in 1996 revealed that 65% of those polled believed that the Greek state is corrupt or probably corrupt (Panagopoulos 1998). According to Transparency International, in 2003 Greece ranked fiftieth in a list of 133 countries in perception of corruption, well below all its then European Union partners. This perception, at least as far as the public sector is concerned, is confirmed by a study of the civil service itself. à 1998 study of disciplinary cases against corrupt civil servants revealed that the few cases that go to disciplinary committees or the courts take very long to complete (in some cases several years) and the penalties they incur for bribery or forgery were very light. They rarely included, for example, losing one's position in the civil service (Skylakakis 1998). The mechanisms for internal control within the civil service are weak and ineffective. It seems that corruption is fed by widespread inaction and tolerance.

Indeed, little was said about it during the recent amendment process. Although both parties recognised that public procurement was an area of concern, they proposed no measures to tackle it. They could have followed the example of the United States, where the Office of Federal Procurement Policy (OFPP) provides government-wide policies and oversees good practices in every area of the federal government (which can be found at http://www.whitehouse.gov/omb/procurement; see also Rose-Ackerman 1999: 59). Such an office could oversee and coordinate procurement policies across the board, making them both more rational and more accountable. As we saw above, other independent agencies found their way into the Greek constitutional text. Yet the issue of public procurement was not discussed outside the context of media influence.

The Simitis government acknowledged the problem of the lack of accountability in the civil service and addressed it in a non-constitutional way. By a series of laws in 1997–2002 the socialist government created a new body, the 'Civil Service Internal Inspectors Σώμα Επιθεωρητών Δημόσιας Διοίκησης – Law 2477/1997, Law 2738/1999, Law 2839/2000 and Law 3074/2002; see http://ils.ekdd.gr/seeda). It seems that the new body is following in the footsteps of the well-organised Citizen's Advocate in that it methodically lays out its priorities and tasks and produces an annual report. If this body works effectively over the next few years, it may bring more change than any constitutional provision ever could. It is too early, however, to assess its success or promise.

Theories of the Constitution

I have argued that in constitutional law 'modernisation' – at least at this stage of Greece's already advanced institutional settlement – means

strengthening the rule of law. This view has many supporters in Greek constitutional law. Such a view is reflected, for example, in the writings of Nicos Alivizatos of the University of Athens, who has steadfastly argued for the strengthening of 'checks and balances' in the Constitution. Alivizatos has argued that:

> both under its parliamentary and the presidential version, modern democracy means that the majority does not rule unchecked. On the contrary it introduces checks and balances to arrest the action of the rulers, whenever they take a wrong turn … Only after the legal assumption of power by Mussolini in Italy and Hitler in Germany through elections, did European legal thought realise that for democracy to survive and for minority interests to be secure, it is necessary that we go beyond the law of the majority. We need checks; we need guardians of the Constitution. In post-war Constitutions, this role is played by judges and independent agencies. (Alivizatos 2001: 223)

Alivizatos is here following the lead of Aristovoulos Manesis, who in his 1962 inaugural lecture 'Constitutional Law as a Technique of Political Freedom' had outlined an argument for the democratic justification of civil liberties (Manesis 1980: 54; for insightful commentary see now Vassiloyiannis 2004; for the history of liberal ideas in Greece more generally see Theodoridis 1991). We could call this now the 'constitutional democracy model', after Ronald Dworkin's recent exposition of it as follows: 'The constitutional conception of democracy … takes the following attitude to majoritarian government. Democracy means government subject to conditions – we might call these the "democratic conditions" – of equal status for all citizens' (Dworkin 1996: 17; see also Holmes 1988; Ely 1981; Waldron 1999: 282).

It is clear that even though the Simitis government showed that it was sensitive to the demands of the rule of law and the protection of individual liberties – through, for example, the creation and strengthening of independent agencies or the protection of religious liberty during the 'identity cards' saga – it did not match this with a solid plan for constitutional reform. The amendments carried out in 2001 were not meant to strengthen the rule of law, at least not primarily. Instead, the government's 'modernisation' project focused on low-key reforms that did not go to the core of any major institutional problem. Why was that? One reason is that the leading philosophy behind the government's initiative did not share the ideal of the 'constitutional conception of democracy' but endorsed a more majoritarian conception.

We can glean the leading philosophy of the amendment primarily in the writings of its architect, Venizelos, who rejected explicitly the theory of the 'checks and balances' in his book-length commentary on the amended

constitution. Rejecting the suggestion that independent administrative agencies are 'institutional checks' on the majority, Venizelos writes:

> [Administrative agencies] do not function, or rather should not function as counter-majoritarian checks and balances, but as guarantees that relate either to the legal or to the democratic and pluralistic character of our constitution, through the protection of the autonomy of politics against the concentration of economic, communicational [*sic*], and, at the end of the day, political influence. Independent agencies from this point of view function just like judicial power, which is not (should not be) an institutional, that is a political, check on the political institutions of the State, but a guarantor of the democratic rule of law. (Venizelos 2002: 227)

It seems that for Venizelos independent agencies and judges are not barriers to power but additional guarantees for the 'democratic rule of law', i.e. the will of the majority as expressed through existing constitutional avenues. Instead of the balance between elected bodies and unelected checks that Alivizatos suggests, we have, instead, a rather conscious emphasis on strengthening central power against powerful private interests – for what else does the 'democratic rule of law' mean in this context? It seems that this constitutional philosophy sees the state not just as a facilitator but also as the active champion of political and social values in all areas of society. Commenting, elsewhere in his book, on the new provisions on the horizontal effect of human rights, Venizelos notes: 'The ''social whole'' becomes the regulative field of the Constitution not just as a field of developing and constituting private relations, but also as a field of the State, which constitutes – let us repeat – the major and comprehensive social relationship' (Venizelos 2002: 135). This view, that the state may be 'the major social relationship', is not compatible with the 'checks and balances' position (which is sceptical towards the state because it considers individuals' own freely chosen relations as primary) and outlines, in my view, a truly distinct political philosophy of the Constitution. It is close to the conservative neo-Kantian philosophy of Constantinos Tsatsos (Tsatsos 1978; Stamatis 1984), but we may better call it, using modern terminology, a 'communitarian' vision. It puts more trust in majorities than intermediate institutions and seeks to promote mainly collective and social goals, not limit and control the power of the state for the sake of private autonomy. This theoretical background explains perhaps why Venizelos was one of the few supporters of the church's position on the compulsory mention of religious affiliation on identity cards, while most constitutional lawyers and the courts endorsed the liberal view.

A communitarian view of the Constitution is not a new theoretical position. It is close, in fact, to a familiar set of positions that we can locate in numerous aspects of political culture in modern Greece, from the nationalist

and religious Right to the extreme Left. This romantic outlook is occasionally nationalist, but it is more flexible than that. It disagrees with the liberals in that it considers large collective entities, not autonomous individuals, as the privileged agents of political action. The success or failure of political projects is assessed in terms of their contribution to collective goals, with regard to the nation, the class, or the co-religionists under a historical perspective (Eleftheriadis 1999b). It occasionally finds expression in a conception of the state as an organic entity with independent moral status – related, of course, to the nation (Pollis 1987: 611). Whatever its precise theoretical background, this view is a true force in constitutional law, and one that seems to have supporters in the judiciary.

It is certain that this type of political 'communitarianism' – if it is that – has supporters on both sides of the political spectrum. Nevertheless, it seems that they were not the majority position in Parliament. The attempt to strengthen the executive was evident in the initial proposals put forward by Venizelos, but the attempt was effectively thwarted by MPs of both parties at the later stages of the amendment process (see generally Eleftheriadis and Alivizatos 2002). Some of these original proposals involved narrowing the range of cases that could reach the Council of State, other provisions that effectively delayed the process of constitutional review and, under one interpretation, the weakening of environmental protection. One suspects as well that the proposals did not have the support of Simitis, who, writing in the newspaper *To Vima* in February 1995, seemed to endorse the standard 'checks and balances' approach to the constitution (cited by Alivizatos 2001: 157). It must be certainly significant that Simitis, a former law professor himself, remained absent from the amendment debates.

Conclusion: The Rule of Law Defended?

I have argued that the aim of any constitutional policy in Greece should be the strengthening of the rule of law. I also suggested ways in which the rule of law could be better protected by current institutions, including the Constitution. Nevertheless, legality is only one value, whose satisfaction is of course always a matter of degree, and which is always in competition with other values. To say that we need to strengthen the rule of law does not mean that we should lose sight of other values, such as democracy or equality or economic progress that the Constitution and its officials should also promote. It is precisely the fact that these values have real force that makes the 'constitutional communitarianism' that champions them an appealing account of constitutional law, at least for some. Other values do compete with autonomy and liberty.

There is a particular relevance, however, of the rule of law in an age of expanding participatory and democratic institutions and in an age when television and the other media exercise great power over political life. The communitarian position in Greece – arguing for strengthening rather than

constraining majorities – may be following a much greater development in modern politics. In a closely argued book, Fareed Zakaria suggested recently that the triumph of democratic institutions in the modern world has proven a double-edged sword (Zakaria 2003). Elections provide for immediate legitimacy, yet they promote short-term thinking in government, allow demagogues to flourish, allow well-organised special interests to capture legislative bodies and, often, threaten the rights of minorities. In his memorable phrase, democracy today is in danger of becoming 'illiberal democracy'. He advocates strengthening intermediate institutions that are independent of the electoral cycle and can prevent democracy from sliding towards these extremes.

Some of the problems he identifies – both in modern America and in countries of the periphery – must sound familiar to the student of Greek politics: the flourishing of demagogues, the emergence of 'celebrities' as politicians, the great political power of special (business) interests, the occasional suppression of the rights of minorities. It is not possible to assess here Zakaria's argument in relation to the Greek case in a comprehensive way, yet it is evident that in Greece too occasional majorities, either as consumers or as viewers or as voters, seek to determine every corner of social and political (or sometimes even private) life in chaotic and unaccountable ways. If so, then the emphasis on checks and balances is more relevant now than ever. The answer cannot lie in trusting the party in power. Governments always depend on coalitions with economic and social players and are reluctant to fight battles they gain little from. In such circumstances we need the independent voice of institutions that do not participate in this economy of power and are not part of the compromises it involves. Such institutions, courts and independent agencies, must have the means and the prestige to stand up to power of all kinds, if this is necessary in order to protect fundamental principles of good government and the long-term interests of the body politic. I call this the cultivation of the rule of law, but it may equally well be called the cultivation of liberal democracy.

We saw that the Simitis government took significant steps in this direction, for example by setting up and supporting the Citizen's Advocate, by showing more respect for institutions and by promoting administrative reform, yet it shirked from more fundamental changes. The constitutional reforms of 2001, motivated it seems by a more directly majoritarian constitutional philosophy than a desire to deepen and extend the rule of law, passed these issues by. Nevertheless, the new prominence of legal institutions and the apparent strength of the constitutional conception of democracy among lawyers, politicians and theorists suggests that there will be other avenues for strengthening the rule of law in the near future.

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