Political Emergencies as Challenges to the Impartiality of Public Law

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Abstract The hard cases of emergency are not isolated episodes. Rather, they spring out of deep political conflicts. Their resolution is the measure of endurance of democratic Constitutions, which are tested on two grounds: the ability of the state to take the necessary measures, and of the political system to deliberate and resolve the political conflicts according to the rules of the game. Constitutional politics operate on a rule of reciprocal impartiality—both procedural and substantive (respect for civil rights). Greece’s rich constitutional experience with political emergencies offers an excellent case study of these problems.

1 Introduction

Alexander Hamilton wrote in *The Federalist Papers*: ‘it seems to have been reserved to the people of this country […] to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force’. ¹ This brings to mind Aristotle’s analysis of the causes of change: ‘nature, necessity, and chance, with the addition of intelligence [nous] […]’.² According to Aristotle’s conception of practical reason, the answer to the question how we shall act must be the outcome of deliberation based on the exercise of prudence, in face of a(n) (un-)certain situation.³ The Rule of Law adds to the Aristotelian framework of practical reason the requirement that the exercise of political power, to be legally right, must be justifiable as public law. In a

¹Alexander Hamilton, John Jay and James Madison, *The Federalist Papers*, n. 1 (Random House 1964) 3.
²Aristotle, *Nicomachean Ethics* (trs. H. Rackham, Harvard UP 1982) 134–135.
³David Wiggins, *Needs, Values, Truth* (3rd edn, OUP 1998) 215, 234–236.
nutshell, it must be impartial\(^4\) and neutral, reasonable,\(^5\) and in the public interest. In that sense, constitutional law is \textit{political} law, which strives to become \textit{public} law, without ignoring or disregarding its political origin and source.\(^6\) Political emergency brings forth in a particularly forceful manner the political essence of constitutional law, creating circumstances of necessity, which challenge the regularly established processes of constitutional decisionmaking. Facing such situations, practical reason is needed to analyze what is reasonable and rational to do under the circumstances. However, the final decision and political choice must be constitutionally defensible according to the principles of public law.\(^7\) Defending the constitutional continuity, stability and normativity of practical reason, in face of an emergency, is much more fruitful than the attempt to discuss political emergency in the traditional framework of legal formalism, applying rules of preexisting fact-patterns to cases falling under them. The hardest cases of emergency are those which arise out of fundamental political conflicts,\(^8\) which put great pressure on the rules of the political game. Substantive disagreement sets the tone, eroding consensus over constitutional basics. The challenge is to resolve the political conflict by democratic means, while preventing the dangers from an emergency to materialize. The Greek constitutional experience, discussed in this work, shows that a serious impediment in dealing with hard cases of emergency comes from the notion of constituent power, which disregards the normative requirements of government by consent.

\section{2 The Impartiality of the Rules of the Game}

The rules of the game, authorizing and legitimizing power, make possible the exercise of legitimate authority and therefore the compliance of the defeated party. But at the same time, they constrain the victor not to violate them, because this would gradually erode the basis of (his) legitimacy (as well). In this regard, the procedural impartiality of the rules of the game becomes constitutive of constitutional politics. The impartiality of the rules of the game is a condition for empowerment of authority.

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\item\(^4\) Cf. Pierre Rosanvallon, \textit{Democratic Legitimacy - Impartiality, Reflexivity, Proximity} (trans. Arthur Goldhammer) (Princeton UP 2011) 104–107 (discussing democratic impartiality).
\item\(^5\) Cf. Moshe Cohen-Eliya and Iddo Porat, ‘American balancing and German proportionality: The historical origins’ (2010) \textit{I.Con} 263, 267.
\item\(^6\) Ioannis Tassopoulos, \textit{Popular Sovereignty and the Challenge of Impartiality} (Kritiki 2014) 79 (in Greek). Richard Fallon, ‘Legitimacy and the Constitution’ (2005) 118 \textit{Harv.L.Rev.} 1787, 1791 (‘Judgments of legal, sociological, and moral legitimacy all reflect concerns with the necessary, sufficient, or morally justifiable conditions for the exercise of governmental authority’).
\item\(^7\) Oren Gross and Fionnuala Ni Aolain, \textit{Law in Times of Crisis—Emergency Powers in Theory and Practice} (Cambridge UP 2006) 155 (emphasizing ‘the need to give reasons ex post’).
\item\(^8\) Fundamental political conflicts, in the context of Greek history, are those associated with divisive cleavages; e.g. Greece’s participation or neutrality in World War I; the Greek Civil War during the Cold War; the dilemmas associated with the Greek Crisis, regarding relations with Europe etc. (discussed below).
\end{itemize}
and for government by consent. As Gavison has argued ‘All constitutions must have a rules-of-the-game part, which structures, legitimates, and facilitates all organs of government. […] What is special about the rules-of-the-game part is that most of its provisions are neutral. […] The neutrality of the rules of the game is, of course, not accidental. It is what makes them a strong source of legitimacy, especially in divided societies’.9

In any form (rigid or not), the Constitution is the entrenched rules of the game for resolving the conundrum of pluralism and discord. In Greece, the rigid Constitution has always been the legal code which guarantees the rules of politics and the power of the people to establish government by consent and to exercise the right of self-government by participating in unbiased, multiparty parliamentary elections, on universal suffrage (since 1844, and constitutionally guaranteed since 1864, establishing Greece’s long tradition with elections). This is the most salient feature of the country’s constitutional identity.

The rules of the game aim at establishing political unity in the form of constitutional regularity, which achieves political change under conditions of constitutional continuity. A fair and impartial procedural sequence clearly delimited and scheduled, which continues uninterrupted, empowering the people to express freely and safely their personal will, is strictly opposed to violent force and coercion as a means of political change. The interplay between consent derived out of the political process and disagreement on political values, substantive issues of justice and choices about the political direction of society depends for its survival on the exercise of civil rights, which enable the people to form and express their opinion, and to participate in politics collectively, through associations and political parties. The political process itself is not immune from challenge. Indeed, universal suffrage has been a divisive issue, and a right obtained through revolutionary agitation (1848), although not in Greece, where the easy acceptance of universal suffrage on broad consensus and without resistance remains an interpretive riddle. In most cases, challenging the political process is intertwined with substantive political disputes; they go together. For this reason, subversive advocacy, i.e. argumentation in favor of the use of revolutionary violence for the overthrow of the constitutional system, may have a rational element, if it points out the inefficiency of the political process, providing the impetus and the incentive to change and adapt, contributing to a more inclusive constitutionalism, which takes into account the legitimate interests and rights of political minorities.10

But of course, subversive advocacy in the form of protest must be clearly distinguished from the actual undertaking of the overthrow of government. The situation is further complicated by the passionate character of political discord. It is however the prevailing doctrine that suppressing political enthusiasm backfires. It is therefore preferable on consequentialist grounds, and right in principle as a matter of dignity,

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9Ruth Gavison, ‘Legislatures and the Phases and Components of Constitutionalism’ in Richard Bauman and Tsvi Kahana (eds), The Least Examined Branch—The Role of Legislatures in the Constitutional State (Cambridge UP 2006)198, 205.
10Ioannis Tassopoulos, The Constitutional Problem of Subversive Advocacy in the United States of America and Greece (Ant. N. Sakkoulas 1993) 58.
to let people speak out themselves freely, no matter what they want to say, regarding their common political destiny. This is better established in the US,\textsuperscript{11} but it is accepted in Europe as well, where the European Court of Human Rights found that: ‘[E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation’.\textsuperscript{12} The right to withdraw consent, \emph{expressis verbis}, is crucial in a regime of popular sovereignty, provided that it does not create a clear and present danger for the compelling interests of the state.

Respect for rights is the crucial feature of the reciprocity of the rules of the game. Respect for rights, as a matter of human dignity and as a type of legal discourse in quest of a common denominator for the achievement of reciprocal political consensus, is crucial to maintain and stabilize the equilibrium between process and substance, in constitutional politics. The dialogue on rights is undertaken, both socially and institutionally, between courts, legislatures and other national or supra-national authorities. Deliberation between persons who are capable for practical reason in the context of collective decision-making is the fundamental presumption of democracy, which justifies the counts of numbers, i.e. the principle of majority; and not vice versa.\textsuperscript{13}

Much of constitutionalism’s difficulty with necessity, exception and protection of democracy comes from problematic, if not fallacious, reasoning (1) about the extreme relativism and subjectivity of the decision to declare an emergency (see below Sect. 9); and (2) over the factual nature of constituent power, legitimizing any effective elimination and replacement of a Constitution as legally valid, regardless of how seizure of power had occurred (see below Sect. 7). Next follows Greece’s constitutional experience with emergencies and exceptions, in quest of constitutional legitimacy.\textsuperscript{14}

\section{Emergency as a Limitation of Power: The Introduction of Parliamentarianism in Greece}

The first case to discuss is the introduction of parliamentarianism in Greece. We may have the tendency to think of emergency as a disruption of legality. But emergency tends to restrict power by limiting the occasions of its exercise, i.e. by rendering it rare and infrequent.

\begin{enumerate}
\item \textit{Brandenburg v. Ohio} 395 U.S. 444 (1969) at 447.
\item \textit{Karataş v. Turkey} App no. 23168/94 (ECtHR, 8 July 1999) para 52.
\item Tassopoulos (n. 6) 223, 234.
\item Aristovoulos Manessis, ‘L’évolution des institutions politiques de la Grèce’ (1985) \textit{Les Temps Modernes} 772.
\end{enumerate}
In Greece, under the Constitution of 1864, this limiting function of emergency was crucial for maintaining the sensitive equilibrium among the institutional arrangements for the appointment of the prime minister, the dismissal of government, and the dissolution of parliament. Article 31 of the Greek Constitution (GRC) of 1864 provided laconically: ‘The king appoints and dismisses his ministers’. This language survived identical in fundamentally different Constitutions. The earlier monarchical Constitution of 1844 also contained such a provision (Article 24). By contrast, the Constitution of 1864 introduced the principle of popular sovereignty. How did the change of the regime, from monarchy to democracy, affect the meaning of the provision? The dilemma was between parliamentarianism and a system of double confidence, where the government needed both the confidence of the king and of Parliament to survive in power. Article 31 of the 1864 Constitution, was interpreted to provide a royal prerogative, in exceptional circumstances, to disagree with the prime minister and to force him to resign, and to call elections to resolve the dispute. The catalyst to trigger the royal prerogative was the existence of emergency, marking the provision’s change of meaning, following the elimination of the Monarchical Constitution of 1844 and its replacement with the Democratic Constitution of 1864.

In the logical course of events, once recognized as the regular center of political power, Parliament was bound to control the selection of the prime minister, making it obligatory for the king to appoint as prime minister the person supported by parliamentary majority. This logical extension of parliamentary supremacy from the vote of confidence, to the prime minister’s appointment, was not easily swallowed by king George I. He preferred, for a decade following 1864, the Orleanist reading of the Constitution, choosing, appointing and dismissing prime ministers of his choice. This led to a whole scale political conflict, which ended with the introduction of parliamentarianism in Greece. In summary, the pieces of the puzzle are the following:

The protagonists of the conflict were basically three: King George I; the traditional politicians, supporting the royalist reading of Article 31 GRC 1864; and the radical reformers, who argued for the introduction of parliamentarianism. Although the king was certainly closer to the former, it seems that he had an even more ‘ambitious’ agenda, aiming at a revision of the Constitution of 1864, with the introduction of a second chamber of Parliament, a Senate, which, in the absence of a native aristocracy, would consist of representatives from a newly emerging social class of wealthy Greek capitalists, bringing capital into the country from the Greek diaspora. The king’s plan unravelled in connection with a major investment by an international consortium of Italian, French and Greek interests, for the exploitation of the mines of Lavrion, in Attica, close to Athens, in 1871. The project did not work out as planned, and as a result, a major diplomatic, political and financial crisis erupted, involving even

\[15\] Eve Mavromoustakou, ‘The Declared Confidence weighed by the sources’ in K Aroni-Tsichli and L Trycha (eds), Charilaos Trikoupis and his Era (Papazisis 2000) 175, 193 n. 29 (in Greek).

\[16\] Gunnar Herring, Die Politischen Parteien in Griechenland, vol 1 (MIET 2004) 448–449, 471, 492 (in Greek).
threats of Gunboat diplomacy, over an imminent intervention of the French Navy in Piraeus.17

A serious impediment to the king’s plans came from the insistence of the English Ambassador on the king’s respect for the Constitution and against any coup d’état.18 But the Constitution of 1864 provided (Article 107) (1) that there could be no revision of the Constitution in the next 10 years following its enactment, and (2) that there were material limits to its change; the Constitution could be amended only with regard to its non-fundamental provisions. As a result, the royal plans were bound to fail, among other reasons, owing to the Constitution’s entrenchment.

More serious than the king’s plans, was the conflict between the king and his supporters against the reformers, who were in favor of English-type parliamentarianism.19 The king’s abuse of his prerogatives, e.g. appointing in 1872 as Prime Minister the leader of a minority party, although there was a clear parliamentary majority,20 resulted in the formation in 1872 of the so-called Fifth Party, with the explicit agenda of introducing parliamentarianism in the country as an indispensable means for more general modernization. The leader of the party was the most important reformer of 19th century Greece, Charilaos Trikoupis.

As the king was continuing his total disregard of parliamentary majorities, the politico-constitutional conflict reached its peak in 1874, when the king appointed D. Vougaris as Prime Minister, who was infamous for his rigged elections and for his electoral violence. Vougaris confirmed his bad reputation holding elections the way he knew… A few days after the elections, Trikoupis published an article in a newspaper accusing the Throne’s anti-parliamentary tactics for the dysfunctional constitutional and political life of the country. Trikoupis implied that unless there was a change in the way the system was running, there would be no other road left for the People but to revolt. Vougaris, the Prime Minister, took it as a provocation and an emergency situation, deriving such a threat out of Trikoupis’s publication. Vougaris returned to Athens on a Gunboat, sent the army on the streets of Athens and had the Public Prosecutor arrest Trikoupis with serious charges carrying capital punishment as sanction. However, the judiciary (in council), both in first degree and on appeal, in a strong show of judicial independence, dropped Trikoupis’s charges, who, as a result, did not stand on trial.

In the next phase of the crisis, the situation worsened even more, because that time it involved undisguised unconstitutional actions on the part of Vougaris, violating the Constitution’s quorum requirements for Parliament. These violations extended over a period of months, in the course of which Vougaris deployed the army to exert pressure on parliamentarians, falsified the records to misrepresent the participation of deputies in the meetings etc.21

17 George Dertilis, History of the Greek State 1830–1920, vol 1 (Estia 2009) 538–539, 557 (in Greek).
18 Cf. Herring (n. 16) 491–492.
19 Ibid., 471.
20 Ibid., 487.
21 Ibid., 516–517, 521–522.
The reaction to all this was unprecedented. The country was on the brink of insurrection. Twenty newspapers of Athens addressed the people, and the names of the deputies involved in Voulgaris’s actions were written on columns, following the similar ancient Greek custom for traitors.\(^{22}\) Showing flexibility and adaptability, the king’s attitude switched in time and in April 1875 he appointed Trikoupis as Prime Minister! From 1875 until approximately the end of the century, the first two-party system of government consolidated parliamentary democracy in the country.

The constitutional crisis of 1875 makes clear that the transition from monarchy under the Constitution of 1844 to popular sovereignty under the Constitution of 1864 changed the meaning of the phrase ‘The king appoints and dismisses his ministers’. In the course of the struggle, which led to parliamentarianism’s victory, situations of emergency were defined in terms of contested, allegedly unconstitutional, actions of the political actors involved. Constitutional entrenchment was relied on to secure the political victory of the supporters of parliamentary government in a conflict marked by various episodes of emergency. The resolution of the crisis removed the source of emergency, stopped the episodes of emergency and restored normality. In the post-1875 constitutional order, at the normative level, emergency became ideally the key criterion for the transformation of the king’s power to create and dismiss his ministers into a prerogative designed to operate as a guarantee in a system of checks and balances, whenever the king thought that an issue was so critical that it would be appropriate to bring the matter to the sovereign people, through the dissolution of parliament and elections.\(^{23}\)

4 The Enclaves of Royal Power. Emergency over Greece’s Participation in World War I, and the National Schism

The next example of the interplay between emergency and entrenchment did not have a happy end. It ushered the most severe crisis of the 1st half of the 20th century in Greece, known as the National Schism. On the surface, the conflict concerned the participation of Greece in the war on the side of Entente, as Prime Minister El. Venizelos argued, or the neutrality of the country, as the pro-German king Constantine desired. At the political and constitutional level, the question was who decides about emergency, once the king has exercised his royal prerogative to bring the matter to the people, and the people voted against the king’s position by reelecting the Prime Minister.

In 1915, it had become crystal clear to Venizelos that there was only one way that the dispute could be resolved: through elections. Venizelos did not put in question the royal prerogative to force him to resign and to dissolve Parliament, although he deeply resented the fact that the king appointed the leader of the opposition to prepare the elections, which took place many months later, violating constitutional

\(^{22}\)Ibid., 524–525.

\(^{23}\)Ibid., 535.
deontology and impartiality. Things changed dramatically when the king insisted on his position, notwithstanding Venizelos’s reelection. Can the king continue to resist the Prime Minister’s position, without subverting the principle of popular sovereignty and overthrowing the regime, and reintroducing the monarchical principle? Is, finally, the king entitled to refuse to comply, in the name of a watertight enclave of royal power over national issues of defense and foreign relations? Venizelos was adamant that the king violated the Constitution and subverted its democratic identity.24

Both on the surface and at a deeper level, the conflict over Greece’s participation in the war was one of emergency. On the one hand, Venizelos was extremely lucid and convincing about the catastrophic consequences of Greece’s neutrality in the war, at the time when Bulgaria and Turkey had already aligned with the Central Powers. Greece would not have another opportunity to take advantage of the imminent dissolution of the Ottoman Empire. Beyond mere diplomatic advantage what was at stake was nothing less that the quest of national integration, bringing within national borders the various Greek populations of Minor Asia who were threatened as nationalist sentiments replaced the disintegrating and collapsing multi-national Empires. On the other hand, there was the more conservative part of society which feared the war and had second thoughts over the cost of war in their personal lives, and opted for peace. In a way, the dilemma was tragic with legitimate arguments on both sides. This was the context of the National Schism, which, incidentally, had been experienced primarily as a constitutional struggle about the identity of the regime (democracy or “monarchy”), as much as a national crisis.25

Here again it is obvious that emergency springs out of a deep political conflict, whose volatile potential erupts and produces several episodes of emergency. In the course of the various phases of the National Schism, in 1915–1917, in 1917–1924, and in 1932–1935, the episodes of emergency succeeded one another, being of unimaginable scale: Separation of the country into two different states in 1916, when the king refused to comply with the mandate of the people who reelected Venizelos in 1915; intervention of the Entente forces in Athens, resulting in the dethronement of King Constantine; violence between political opponents escalating at the level of civil war; abuse of the coercive apparatus of the state by those in power against their political rivals; various attempts of coup d’état, eroding and destabilizing the long democratic tradition of the country; elections in 1920, lost by Venizelos, which served as a catalyst for the collapse of the Asia Minor military campaign, and the influx of about a million and a half of refugees in the country in 1923 etc.

In the course of these events the state of emergency was transformed at the normative level as well. The Constitution of 1864 did not provide for the state of exception.

24Ioannis Tassopoulos, ‘The Experiment of Inclusive Constitutionalism, 1909–1932’ in P Kitromilides (ed), Eleftherios Venizelos—The Trials of Statemanship (Edinburgh UP 2006) 260.
25George Mavrogordatos, Stillborn Republic—Social Coalitions and Party Strategies in Greece 1922–1936 (University of California Press 1983) 280–288.
The constitutional amendment of 1911 accommodated it for the sake of external security under strict legislative guarantees. During the Balkan Wars of 1912–13, it was applied. This happened again between 1917 and 1923. In 1925, Th. Pangalos used the state of siege to impose his dictatorship. In 1935, it was also employed for internal causes as well. Moreover, the executive usurped legislative power, enacting ‘laws of necessity’, circumventing Parliament. In addition, legislative encroachments on civil liberties created crimes of opinion, outlawing disputes of the republican form of the regime (1924), or anti-communist legislation (Idionym law 1929).

The episodes of emergency destabilized the Constitution. The law of necessity and the limitation of civil liberties were a slippery slope, undermining the constitutional order, delegitimizing the rules of the game. But, interestingly enough, this conflict did not undermine the more profound fundamental commitment on elections to the extent that the dictatorships did not represent any deeper challenge in favor of a totalitarian transformation of society. Greece’s constitutional system experienced a crisis of legitimacy but nothing similar to the crisis of constitutional identity involved in totalitarian threats. More akin to this type of regime was the Dictatorship of the 4th of August 1936, imposed by Ioannis Metaxas. This however depended on a double hierarchy, with a pro-English king, who controlled the army and who placed a brake on the most extravagant tendencies of the regime.

5 The Civil War, the Emergency Legislation, and the Marginal (Parallel) Constitution

The 3 decades between 1944 and 1974 are very rich in terms of Greece’s experimentation with emergency, exception and constitutional entrenchment. Indeed, this complex relation has been in the heart of the political conflict of the age. When Greece was going to be liberated from the occupation of the Nazis, in 1944, a Conference in Lebanon took place in preparation for the next day in the political life of the country, with the resolution of the issue of the head of the state (royalist democracy or republic) and the participation of the left in government and in the preparation of a new Constitution. However, in December 1944, the Civil War erupted in Athens. With Churchill’s personal engagement, the Communists did not seize power. In 1945, a renewed effort to arrive at a peaceful solution failed again and between 1946 and 1949, Civil War engulfed the country. During the Civil War no dictatorship was imposed; however, a state of siege was enacted in 1948, as well as various extraordinary legislative measures, punishing the ‘communist insurrection’ with heavy sanctions.

26Nicos Alivizatos, Les institutions politiques de la Grèce à travers les crises 1922–1974 (Themelio 1983) 39–44 (in Greek).
27Ibid., 46, 51.
28Ibid., 65, 81.
The crucial feature of the anti-communist measures of the Civil War was their temporary character, precisely because they were extraordinary. Their validity was not supposed to exceed the time of the ‘insurrection’. Consequently, under the Constitution of 1952, the anti-communist measures of the Civil War were preserved, with the explicit recognition that they formed a body of law of exception, marginal and parallel to the Constitution, i.e. a ‘Para-Constitution’, as it came to be known. For this reason, Parliament could abolish this body of law, restoring the integrity of the Constitution by ordinary legislation, i.e. by statute. The political conflict of the 1950s–1960s regarded precisely the fortune of this ‘Para-Constitution’. In the climate of the Cold War, the most conservative political forces, with the support of the Throne, invoked the risk of a criminal conspiracy covered behind the veil of a political party (insisting on the illegality of the Communist Party of Greece, imposed in 1947, during the Civil War). As a result, the Civil War was not declared officially terminated by statute, while the courts refused to take judicial notice of the objective fact that the Civil War had already ended. Hence, the law of exception survived, despite the political pressure of Liberal Centrists to restore the Rule of Law and the integrity of the Constitution, by abolishing the Para-Constitution.

In 1963, in keeping with the trend of democratization of the period, the conservative party tried to achieve a compromise by incorporating, and thereby entrenching, the most critical aspects of the emergency measures into the Constitution, by providing that a Constitutional Court could dissolve anti-democratic and anti-constitutional political parties. The reaction to this normalization of the exception and to the dilution of the traditional principles of political liberalism, as embedded in Greek constitutionalism, marked the deeper political conflict which thoroughly undermined the legitimacy of post-war constitutional order (i.e. the Constitution of 1952 with its Para-Constitution), leading finally to the Dictatorship of the Colonels, who invoked discredited parliamentarianism.

6 Restoration of Democracy: Respect for the Rules of the Game, Delegitimizing Exception

The restoration of democracy in Greece, on the 23rd of July 1974, took place under conditions of extreme emergency. On the 15th of July 1974, the Military Junta in Athens attempted to overthrow President Makarios of Cyprus. Turkey invaded

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29 Ibid., 536, 542. The Civil War did not lead to the imposition of dictatorship in Greece. The anti-communist legislation of the Civil War was recognized to be exceptional, inconsistent with the liberal principles of the Constitution and justified only during the emergency. From the perspective of the Dyzenhaus-Gross debate (Victor Ramraj, ‘No doctrine more pernicious? Emergencies and the limits of legality’, in V. Ramraj (ed), Emergencies and the Limits of Legality (Cambridge UP 2008) 7–9), the extra-constitutional provisions of the emergency measures, formally speaking, seem to occupy the middle ground between extra-legality and legality. This happened under the extreme deference of the courts, which accepted the creation of a ‘black hole’ in the Rule of Law (David Dyzenhaus, The Constitution of Law (Cambridge UP 2006) 160, 183).
Cyprus, on the 20th of July 1974, occupying approximately 37% of the territory, invoking its capacity of a Guarantor Power. On the same day, Greece mobilized. Greece’s intervention in Cyprus against the Turkish invasion would have provoked immediate war between Greece and Turkey, not only in Cyprus, but in the Aegean and on the land border. In the night from the 23rd to the 24th of July 1974, the dictatorship collapsed, and ex-Prime Minister Caramanlis was called from Paris. With the country on the brink of war and the acceleration of political developments, the citizens of Athens made clear, in a delirium of political enthusiasm, that the political presence of the people could hardly be ignored. Meanwhile, supporters of the dictatorship were agitating, in an effort to reconquer power.30

Reactions to emergencies are uneven; full of contradictions and compromises. In Greece, after 1974, they developed at various layers, including the following three, which formed together a peculiar combination of continuity and change: (1) The Council of State (CS) recognized that the National Unity Government which succeeded the Dictatorship was a de facto authority, exercising constituent power, whose Constituent Acts were legally valid. With this holding (CS 3700/1974 in plenum)31 a long line of decisions continued, recognizing the de facto government on the basis of the doctrine that an established revolution creates law (i.e. a new legal order), on the tacit consent of the people subject to it.32 (2) Fundamental for the inclusive and pluralist character of the new constitutional order was the Legislative Decree of September 23, 1974, which legalized the Communist Party of Greece, and abolishing the Para-Constitution. It was a new beginning, closing the period of exceptions and exclusions, restoring the integrity of constitutional democracy and of the Rule of Law in Greece, and establishing a fundamental consensus on the inviolability of the Rules of the Game. (3) However, Constituent Act of October 4, 1974 provided that the new Parliament, which was going to be elected in the elections of November 17, 1974, would not be a Constituent Assembly, but a Revisionary one, having the competence of amending the Constitution of 1952, in all but one respect: the form of the regime as presidential or royal democracy, which was going to be resolved by referendum. Indeed, on December 8, 1974, 69.2% of the People voted for the republic, abolishing the monarchy which has been the catalyst of all the political crises of the country. The rejection of a constituent assembly was a move of prudence in favor of constitutional continuity. Once again, a de facto constituent power, at a moment of crisis, opted to reconnect with the past, “amending” the old constitutional order, rather than eliminating the previous Constitution to replace it with a new one. Continuity closed the door to the unexpected, which could have unpredictable consequences in a time of crisis.33

30Nicos Alivizatos, The Constitution and its Enemies (Polis 2011) 489–499 (in Greek).
31Yannis Drossos, An Essay on Greek Constitutional Theory (Ant. N. Sakkoulas 1996) 299 (in Greek).
32Ibid., 301, 303.
33George Kassimatis, The Transition to Democracy and the Constitution of 1975 (Foundation of Greek Parliament 2005) 29–31 (in Greek).
The national emergency implementing the transition to democracy without war and bloodshed (but also without an agreement with the dictators offering them immunity from prosecution), under conditions of sociopolitical consensus, explains this strange mélange of continuity and change. The legalization of the Communist Party, combined with the abolition of the Constitution’s rightwing flank, i.e. the throne as a reactionary and anti-democratic center of power, bracketed the period of crises as an *anomalous parenthesis*, before returning to constitutional normality; to the legal sources of ascending constitutionalism, in an effort to restore regularity: 1864 (popular sovereignty, civil rights, universal suffrage), 1875 (parliamentary system), 1911 (Rule of Law), which, in principle, had survived in the Constitution of 1952, notwithstanding the Civil War.

The sequence of crisis, emergency, and exception conceptualized as a parenthesis, is not a way of speaking, a metaphor devoid of legal meaning. On January 18, 1975, the 5th Revisionary (i.e. not Constituent) Assembly issued Resolution Δ declaring that ‘Democracy, legally speaking, was never dissolved’. The mutiny of the colonels from 1967 to 1974 was ‘a coup d’état’ and the governments, ensuing out of it, were ‘Governments of violence’. This declaration abolished the old doctrine that a revolution which prevails establishes a new legitimate constitutional order replacing it with the doctrine of ‘anomalous parenthesis’, reflected in Article 120 para 3 of the GRC: ‘Usurpation, in any way whatsoever, of popular sovereignty and of powers deriving therefrom shall be prosecuted upon restoration of the lawful authority; the limitation from which punishment for the crime is barred shall begin as of the restoration of lawful authority’.

Article 48 (state of siege) and 44 para 1 (acts of legislative content) GRC (1975 as amended in 1986) codify the Greek experience with emergency and the law of necessity. The model of accommodation of 1975/1986 rests squarely on 4 pillars: (i) the narrow and strict specification of the state of siege, in case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, for a limited time (15 days), under the guarantee of Parliament, which adopts the initial resolution of emergency by a three-fifths majority of the total number of Parliament’s members; (ii) the rather broad and bold constitutionalization of the law of necessity, i.e. of legislative power of the executive without delegation, in the form of acts of legislative content issued by the President of the Republic on the Cabinet’s proposal, in cases of urgent and unforeseen necessity (nonjusticiable and nonreviewable, according to current jurisprudence), which, shortly, must be submitted to parliamentary sanction (normally 40 days); (iii) the entrenchment of Article 29 para 1 GRC, providing, according to the prevailing interpretation, that it is not possible to outlaw a political party in Greece, leaving therefore no room for conceptions of militant democracy;

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34Dionysis Spinellis, ‘The Right of Resistance and Penal Law’ (in Greek) http://www.kostasbeys.gr/articles.php?s=3&mid=1096&mnu=1&id=24181, accessed 17 June 2016.

35Kassimatis (n. 33) 38–39.

36Cf. Gross and Aolain (n. 7) 26 and Clinton Rossiter, *Constitutional Dictatorship* (Greenwood Press 1979) 79.
(iv) vigilance against encroachment on political activities by legislation, which could lead back to the slippery slope of the interwar years (with antiterrorist measures being the most contested part of post-1974 security measures).

7 Emergency Powers and Constitutional Entrenchment: The Irreducible Tension Between the Voluntarism of Constituent Power and Government by Consent

The transition to democracy in 1974, under the pressure of necessity to avoid war and to prevent further disasters, changed in the most profound way the relation between emergency and constitutional entrenchment. First, emergency has been demystified of the normative magic of revolutionary constituent power, i.e. of the genesis of the normative out of the factual. At the root of this metamorphosis of the worm into a butterfly is the attribution of the national will to the dominant political power, which succeeds in imposing its authority on the populace, on the basis of tacit consent. Although Sieyès admitted that the nation is made out of the unison of individual wills, arguing that ‘Dans la première on conçoit un nombre plus ou moins considérable d’individus isolés qui veulent se réunir. […] le jeu des volontés individuelles. L’association est leur ouvrage; elles sont l’origine de tout pouvoir’, 37 he personified the nation: ‘La nation existe avant tout, elle est l’origine de tout. Sa volonté est toujours légale, elle est la loi elle-même […] Dans chaque partie la constitution n’est pas l’ouvrage du pouvoir constitué, mais du pouvoir constituant’. 38 According to Sieyès the will of the nation is the origin of legality: ‘La volonté nationale, au contraire, n’a besoin que de sa réalité pour être toujours légale, elle est l’origine de toute légalité’. 39 The crucial move here is that the political unity of the nation is taken for granted. 40 It is assumed as already existing, whereas this is the source of the problem of government by consent and the challenge of constitutionalism: how to arrive at political unity without violence, or authoritarian homogeneity at the cost of democratic pluralism. The problem here is the self-referential conception of popular sovereignty. ‘The object of popular sovereignty is in principle, not the will of the people per se, in any self-referential way, but the res publica and public

37 E. J. Sieyès, Qu’est-ce que le tiers État (Boucher 2002) 51 http://www.leboucher.com/pdf/siyes/tiers.pdf, accessed 17 June 2016.
38 Ibid., 53.
39 Ibid., 54.
40 Carl Schmitt, Dictatorship (Polity 2014) 100 (‘Rousseau referred to the totality that issues from the social contract as a common ‘I’ with its own life and will’).
Popular sovereignty is a qualification of state sovereignty. Popular will reflects public opinion and the regular functioning of the rules of the game is necessary for its formation and expression (Article 52 GRC). The missing point in Sieyès’s analysis is Aristotle’s admonition, on which Greek constitutional theory has rightly focused: ‘For the people become a monarch, and is many in one; and the many have the power in their hands, not as individuals, but collectively […] And the people, who is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot’.43

The notion of constituent power belongs to the pre-history of constitutionalism, being adequate for the negative phase of opposition against a tyrant or a despot (external or internal), when the people were fighting for political independence and self-determination; but is hardly adequate for the resolution of deep political disagreements which lie at the heart of emergencies.44 An emergency is a political situation (open to legal characterization); whereas constituent power is a legal concept to the extent that its exercise creates the normative legal order. The excessive political voluntarism of the theory of constituent power opens the leeway to answer such dilemmas with the sword (the ‘ineliminabile funzione unificatrice propria della sovranità’, according to Mortati).45 However, the only legitimate reaction of a mature democracy in handling the crisis is collective exercise of practical reason, public deliberation and political prudence, within the contours of functioning and efficacious democratic rules of the game. The collective self-determination of a historical society organized in the form of a nation-state; preservation of the constitutional subject of practical reason, are the ultimate goals of political unity. In a liberal democracy, the essential conditions of political unity are rational exercise of authority, which justifies challenging authority; consensus on the rules of the game; and respect for human dignity, fundamental rights and the value of pluralism.

8 The Emergencies of the ‘New Age’

Let us call the ‘New Age’ the time following the economic crisis of 2008. Since then many serious emergency situations directly related to constitutional entrenchment and change occurred in Greece. The first, in December 2008, occurred when
a policeman shot a 13-year-old boy. Mass demonstrations of students and other protesters, riots and fires, lasting over a month, disrupted public order seriously, inciting a debate whether emergency measures were appropriate. More than the language of Article 48 GRC, which does not provide for the state of emergency on such occasions, Greece’s post-dictatorship political culture is extremely reluctant to pass the threshold of emergency, e.g. legitimizing the intervention of the army to restore public order.

Remarkably, another crisis started unravelling, covered by the dailies of Athens in parallel to the violence of December 2008: The Sovereign debt. At the beginning, one could hardly focus on these reports, which, however, described pretty accurately what was going to happen in May 2010! The case of the economic crisis revealed, in Greece, a new dimension of emergencies: the threat of underestimation, inertia, imprudence and lack of practical reason. Can the Constitution offer a remedy for the lack of statesmanship? The executive failed to handle the crisis not by overreacting, as is usually the concern, but by omission, i.e. by not taking the necessary measures between the end of 2008 and the beginning of 2010. The result has been the extremely intense and thorough European and International (IMF) economic control in May 2010. A terrible tragedy marked the initial stages of the protests against the austerity measures, adding up to the fresh memories of the 2008 riots: during the general strike against the 1st Memorandum of Understanding for Greece’s bail out, three young bank employees (among them a woman carrying a baby) died, when the bank was set on fire by protesters. The courts, as is well known, ratified the Memoranda reducing dramatically salaries and pensions, and cutting back the welfare state. The courts invoked the law of necessity, and the paramount national interest of preventing the official default of the country. The Parliament, the Voule, saw its legislative function severely restricted by the excessive recourse of the executive to acts of legislative content (Article 44 para 1 GRC, autonomous legislation of the executive). The period between the two elections of 2012 (May–June) threatened Greece not only with exit from the Eurozone, and potentially from the European Union, but, more dramatically, with the dissolution of the constitutional order. There has been discussion about the possibility of exercising constituent power, for a new Constitution, eliminating the existing one. The elections of June 2012 gave the solution, as the pro-European parties won the elections, and Syriza replaced the Socialists of PASOK as the second pole in Greece’s traditional bipartisan political system, providing incentives to maintain the existing order and the established rules of the game, which had already achieved considerable legitimacy and stability.

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46 Cf. Tassopoulos (n. 6) 318, 404. To the extent that the Greek Crisis is tied to Greece’s prevailing conception of popular sovereignty (cf. Tassopoulos n. 60), i.e. to factors related to constitutional culture and design, we may say—following Sanford Levinson and Jack Balkin, ‘Constitutional Crises’ (2009) 157 U.Pa.L.Rev. 707, 729—that the inertia of 2008–2009 is a case of ‘excessive fidelity to a failing Constitution.’

47 Xenophon Contiades and Ioannis Tassopoulos, ‘The Impact of the Financial Crisis on the Greek Constitution’ in X. Contiades (ed.), Constitutions in the Global Financial Crisis. A Comparative Analysis (Ashgate 2013) 195–218.
Between 2009 and 2016, Greece held 5 general elections, 2 elections for the European Parliament, and 1 Referendum on July 5, 2015. The historical precedent of the elections of 1920, when Venizelos’s defeat ended up with the Minor Asia catastrophe was often mentioned, emphasizing the sense of responsibility. Emergencies may finally enhance the legitimacy of the Constitution’s political process. In the elections of January 2015, under the most severe economic and strategic crisis of Greece during the last 40 years, the Right handed power to the Left, in an impeccable manner. In July 2015, the partisans of Yes and No in the Referendum held rallies peacefully and calmly on the same day in different parts of the center of Athens, despite political polarization and constitutional objections to the procedure of the referendum. The bureaucratic and technocratic management of the crisis by the European Union is in sharp contrast to Greece’s superabundant politicization, which has rendered the political management of the crisis through consecutive elections economically onerous, but hardly avoidable for the formation of political consensus, given the democratic culture of the country.

The referendum of July 5, 2015 brought into focus another very interesting aspect of the constitutional treatment of emergencies in Greece: The Constitution places on the shoulders of the Prime Minister the most important political decisions of the nation, rendering him personally responsible for them. The historical, political, moral, and eventually legal responsibility for the consequences of his or her decision is not shared at the critical moment. Obviously this concentration of authority has its pros and cons.\(^{48}\) In light of Greece’s political history of conflicts between the head of the state and the democratically elected prime minister, the (actual or hypothetical) dilemma of a political confrontation of the President of the Republic with the Prime Minister over the very serious objections regarding the constitutionality of the referendum\(^{49}\) (its question and process) would have been constitutionally quite problematic (given the weak position of the President in Greece), and politically totally counterproductive, in my opinion. This dilemma, as well that of the Prime Minister regarding the official interpretation of the vote to the vague question of the referendum, are both typical examples of the sort of political prudence required for the handling of emergencies in times of crisis. The crucial fact is that Greece’s Constitution survived the crisis, proving its resilience and preserving the consensus on the rules of the game as a condition for the achievement of (a relative and socially precarious, but nevertheless constitutional and democratic) political unity, in an effort to overcome the crisis and handle the emergencies.

\(^{48}\)Jack Balkin and Sanford Levinson, ‘Constitutional Dictatorship: Its Dangers and Its Design’ (2010) Faculty Scholarship Series. Paper 221, 1857, 1858. http://digitalcommons.law.yale.edu/fss_papers/221, accessed 17 June 2106. During the Greek Crisis, the parliamentary majority played a critical role; in November 2011, following the announcement, in Cannes, of a referendum over the bailout, the socialist parliamentary majority (PASOK) voted in a vote of confidence in favor of the socialist government, on the condition that the Prime Minister (George Papandreou, PASOK) would resign from office!

\(^{49}\)Xenophon Contiades and Alkmene Fotiadou, The Resilience of the Constitution (Sakkoulas 2016) 171 (in Greek).
The final crisis to be mentioned concerns the Golden Dawn trial, which started in 2015, when an antifascist musician was killed by persons, allegedly, related to the party. The surge of Neo-Nazi ideology in Greece resulted into proposals for abandoning the established constitutional interpretation of Article 29 para 1 GRC, strictly prohibiting the dissolution of political parties on the basis of the original intent of the constitutional legislator of 1975, in favor of a new functional interpretation, which would tie political parties to the normal operation of the constitutional system of the country. This ‘interpretive accommodation’ would clearly bring about a disruption of substantive constitutional continuity, amounting to a constitutional change by judicial construction and, as such, is hardly advisable.

9 Safeguarding the Impartiality of Public Law: The Role of the Legislature and the Courts

Upholding the institutional capacities of practical reason in times of emergency requires a double task: On the one hand the executive must be vigilant and able to meet effectively the exigencies of the situation. This requires strong authority. In a state of emergency, the executive is ‘the queen of the party’. However, it is important to distinguish the episodes of emergency from the deep political conflicts which generate the emergency. These conflicts are the political source of the episodes of emergency. It is crucial that it be resolved according to the rules of the game, established by the liberal and democratic Constitution, without allowing the alleged emergency to abolish political deliberation. In a representative system Parliament has the primary duty of political deliberation in times of emergency, being the source of democratic legitimacy. This is why an increased majority is required to declare an emergency, providing an effective guarantee that the finding of fact regarding the existence of an emergency is not a sham, to destroy political opposition and to distort the rules of the game. The transparency of political argumentation, achieved through the clash of political opinions and freedom of speech, is necessary to make possible the emergence of consensus over the resolution of the deeper political crisis, which is the source of emergency. As a result, it is important that Parliament renew periodically its authorization for maintaining the emergency, at short intervals. An important political standard of impartiality against the abuse of the argument of emergency is that of invoking the impartial spectator, whose similar reaction, were she in one’s shoes, can play a legitimizing role. In practice, this becomes possible in systems of political cooperation and mutual political constraint, such as the EU.

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50 Charalambos Anthopoulos, ‘Political Parties and Democracy. Elements for a Reinterpretation of Article 29 para 1’ (2015) Journal of Administrative Law 157 (in Greek).

51 Gross & Aolain (n. 7) 72.

52 Cf. J. H. H. Weiler, The Constitution of Europe (Cambridge UP 1999) 336 (discussing the foundations of political legitimacy in Europe).
Practical deliberation of public authorities, in a constitutional system of checks and balances, involves the courts as well. Against Carl Schmitt’s ad hoc decisionism, the subjectivity of the political decision to declare an emergency and take adequate measures is under four constraints: (1) A finding of fact by the Executive that an emergency exists, coupled with the judgment that the only available way to tackle the crisis is the taking of emergency measures. (2) The role of Parliament vis-à-vis the executive to confer democratic legitimacy to the decision. The political responsibility of the Executive and the Legislature in times of emergencies is to face the circumstances of the crisis in the way prescribed by Aristotle: ‘At the right time, on the right occasion, towards the right people, for the right purpose, and in the right manner’ (3) The guarantee of the rule of law, in the form of respect for human dignity and fundamental rights, as a matter of principle regarding the inviolability of personal autonomy, rather than one of additive and quantitative weighing of interests in welfare, with the caveat: as much as this is feasible. (4) Indeed, the constitutional standard of political action in face of emergencies is prudential, accepting neither nihilistic realism, nor utopian idealism. Unavoidably, deontological and consequentialist arguments are intertwined: averting the greater harm, without violating human dignity or other fundamental rights. The balancing and proportionality undertaken by the Executive and the Legislature in times of emergency must be reviewed by the courts to avoid their distortion. Crucial in this regard is the weighing of the evidence, supporting the existence of a clear and present danger of an imminent threat and proving the objectivity of the factual finding of an emergency and of the ensuing necessity. The role of judicial notice in declaring the beginning and the end of an emergency is crucial in this respect. True, ‘Extraordinary conditions may call for extraordinary remedies’ as Hughes CJ wrote in *A.L.A. Schechter Poultry Corp. v. United States*. However, to punish an innocent for his political opinions, just on the basis of vague and unfounded suspicions (or imagined threats) of the Executive, without any incriminating evidence other than radical ideas and political credos, is not constitutionally acceptable. Trying specific disputes and safeguarding the requirements of due process of law has always been the function of judicial office and the ultimate guarantee of personal freedom and security.

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53Schmitt (n. 40) 14 (‘Whoever rules over the state of exception therefore rules over the state, because he decides when this state should emerge and what means are necessary’).
54Cf. Gross & Aolain (n. 7) 55, 57 (discussing the role of Parliament in safeguarding the limited duration of emergency).
55Cf. Aristotle (n. 2) 92, 93.
56Terry Nardin, ‘Emergency logic: prudence, morality and the rule of law’ in Ramraj (n. 29) 97, 109 (‘The calculations we make in acting on the principle of beneficence are not moral. They are prudential calculations’).
57Tassopoulos (n. 6) 414–415.
58295 U.S. 495 (1935), at 528.
59Cf. in this volume Liav Orgad, Roy Peled and Yoram Rabin, ‘The Law Governing the Right of Enemy Aliens’ Access to Courts (discussing the infringement on the right of ‘Enemy Aliens’ to access to the courts).
10 Conclusion: The Two Doctrinal Pitfalls of Emergency

The dense Greek experience with political crises and emergencies implicates the impartial spectator in the following way. As G. Harman notes in an essay on Adam Smith’s Impartial Spectator: ‘The “examiner and judge” is the agent himself or herself, viewing things from a certain perspective’. In hindsight, the criterion of a successful handling of an emergency is constitutional continuity as stability of practical reason, in the form of public law. This requires respect for the rules of the game, prohibiting the use of violence against political rivals, and preventing the reduction of politics to the grotesque relation between friend and enemy. Safeguarding the continuing ethos of constitutional impartiality in practical reason is the duty and the burden of all branches of government. For the courts, it is of utmost importance to avoid the two doctrinal pitfalls of emergency, which are ultimately interrelated: First, the failure to realize the nature of constitutionalism, based on consensus over the rules of the game and their impartiality, and on prudential prevention of reciprocal destruction in civil war, in sharp contrast to Carl Schmitt’s decisionism during emergencies. Second, the self-referential nature of popular sovereignty, whose culminating point is the doctrine of constituent power as the self-legitimization of any political force which creates right out of might by attributing its arbitrariness and audacity to the will of the people or to the nation. The rules of the game are empowering; they guarantee the right to self-government to future generations: The test of the normative stability of public law is constitutional impartiality as justification of public power under conditions of pluralism: procedural impartiality, in the form of fairness of the rules of the game, and substantive one, as respect for human dignity and fundamental rights for the democratic resolution of deep political conflicts within a common constitutional framework based on consent.

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60 Gilbert Harman, Explaining Value and Other Essays in Philosophy (OUP 2000) 181, 193.
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