

Who Decides in Last Resort?

Elected Officials and Judges in Historical Perspective

by Nicos C. Alivizatos

In July this year, the German Constitutional Court, the most important of the kind in Europe, heard in Karlsruhe the case against the first Greek bail-out package and the euro-rescue fund. Wolfgang Schäuble, the German Minister of Finance, appeared in person before the Court to defend the program, while, on behalf of the applicants, Karl Albrecht Schachtschneider, a professor of constitutional law at the University of Nürnberg, widely known for having attacked –unsuccessfully as it was subsequently proved- before the same Court the ratification by Germany of the Lisbon Treaty, claimed that Germany's commitment to lend money to Greece violated the right to property of the German people and the

German Parliament's discretion to adopt as it deems appropriate the country's budget in the years to come.

Along with Switzerland, Germany is indeed the only European Country whose Constitution has an explicit debt containment rule.

[Spain, by the way, has just joined the group, by adopting a constitutional amendment ten days ago; Portugal and Italy have announced that they will soon do the same].

Recently amended to face the forthcoming deficit crisis, Article 115 of the *Grundgesetz* provides that, as from 2016, federal revenues and expenses should in principle be balanced and that, under normal circumstances, revenue through borrowing should not exceed 0.35% of the country's GDP. Should Germany, by far the leading economic power of the European Union, break that rule, in the name of European solidarity?

In his opening statement, Andreas Vosskuhle, the 48 years old president of the Karlsruhe Court, a judge nominated by the Social-Democratic Party, left the question open: "the Court does not want to hear a debate on the measures' economic merits", he said, "because the right economic strategy is a matter for politicians and not

for judges". But, he added, his Court "has to consider the limits that the Constitution sets for politicians".

* * * * *

I will address the issue "who decides in last resort" in modern democracies mainly from a historical standpoint. Starting with the French Revolution of 1789, how accurate has been the fundamental claim of modern democracies that they are based on government from the people, by the people and for the people? My perspective will be that of a European constitutional scholar, on whose judgment the past weighs in a more significant way than it does on this side of the Atlantic. For making this option though, I find consolation in the fact that the old continent's experience in the various forms of government is more diverse than the American. Under the present economic crisis and for the purpose of drawing practical conclusions, this diversity might indeed be useful.

* * * * *

It has been said that, beyond national specificities, the slow advent of parliamentarism in Europe from the 17th century onwards reflects the rise and consolidation of democracy. This is obvious as far as the old European nations are concerned -and above all Britain: in the

course of the years, their monarchies, although deeply rooted in their respective societies, were obliged to share power with representatives who were initially elected only by a small fringe of citizens –the aristocrats and the rich- and subsequently by the population at large. In Britain, this process lasted several centuries; its duration was in principle shorter in other countries. In the second half of the 19th century, the same monarchies –with one major exception though, that of the German Empire- made a great concession: in order to avoid the fate of their French counterparts, they preferred to transfer real power to elected officials; they thus succeeded to keep their thrones, though with no substantial prerogatives whatsoever.

What is striking however is that, beyond old monarchies, newly born nation-states followed the same path to modernity. Instead of establishing republics, which at the time were seen as a strange if not an awkward form of government in Europe, they preferred with one exception –that of Switzerland- to import monarchies from the outside, that is to say to name as kings persons having family ties with the old European dynasties. They were thus hoping to join the group of the old nations with the smallest possible cost. That was the case of Greece, whose attempt to adopt a republican form of government during the years of her war of independence failed.

Subsequently, Serbia, Bulgaria and the other Balkan countries followed the same path.

The answer, therefore, to the question who decided in last resort in Europe before WW1 is not as clear as one would have imagined: the crowns decided; they were nevertheless gradually superseded by elected Parliaments. Along with the adoption of franchise, the latter reflected more and more the people's will and managed to impose prime ministers and cabinets of their own choice. Significant particularisms from country to country of course persisted: for instance, in wilhelminian Germany, the Kaiser could completely ignore and effectively ignored the Parliament's will on matters related to foreign affairs, the military and defense policies. In Britain the House of Lords remained very influential at least up until 1911, in spite of the fact that its members were not –and by the way still are not- elected. These specificities, though, did not affect the main tendency: to the extent that they reflected their people's will, Parliaments put the monarchs aside; at the same time they claimed and gradually gained real power in their respective countries.

In the course of Europe's "short" 20th century, things changed dramatically. In the interwar period, parliamentary democracy proved extremely weak in facing an unprecedented economic crisis with dramatic social

effects, a crisis whose management needed quick state action and bold decisions. The loss of jobs, hyper-inflation and, above all, the lack of confidence in democracy's capacity to face the crisis, favored the extremes. Communism, which had already come to power in Russia after the 1917 revolution, and the extreme right gained mass appeal. The Fascist and the Nazi Parties in particular became Italy's and Germany's strongest parties well before Mussolini's and Hitler's advent to power. Trapped between the two extremes the moderate parties, from the center to the right to the center to the left, resorted to punctual measures, which proved to be well below the circumstances: under the term "reinforcement of the executive", they aimed first at reducing parliamentary obstruction and, second, at empowering the executive to legislate, either on the basis of legislative delegations granted without significant restrictions by the Legislator himself or even on its own, i.e. on an autonomous basis.

Nevertheless, this "rationalization of parliamentarism" –as it was called at the time- gave poor results and one after the other all countries of central and southern Europe found it easier to turn toward authoritarian forms of government. More than the Italian case, the rise and fall of the Weimar Republic in Germany symbolizes the weakness of the 19th century parliamentarism to face the new realities. Moreover, proportional representation,

instead of enhancing consensus among moderate forces, favored fractional divisions, party politics and, as a result, immobilism in a context that needed urgently fast decisions and coordinated action. Might I remind you that in Italy, which was a constitutional monarchy, and in Germany, which was an uncrowned Republic, the advent of the fascist and the nazi party respectively occurred with legal means, that is through popular vote and with no straightforward violation of the letter of the Constitution. To some extent, that was also the case in Greece, where general Metaxas won an impressive vote of confidence in the Greek Chamber, well before imposing an open dictatorship, with the support of the crown. Seen from that angle, it may be more accurate to qualify the advent of fascist and nazi regimes in Interwar Europe as a suicide of parliamentary regimes rather than as a case study of violent overthrow of democracy.

It was the Executive therefore which decided in last resort in Interwar Europe, either on the fringe or openly against the Constitution. That was so, because Parliaments failed to adapt their rules to the increasing needs of government action in deeply divided societies; they lost therefore their previous legitimacy. The cost of that persistent inaptitude was the rise of authoritarian regimes for which Constitutions, if they survived, were reduced to a mere formality.

At the aftermath of WW2, two major changes occurred in the constitutional framework of European nations: first, the proclamation and inclusion into their national constitutions of bills of rights inspired by the French Declaration of 1789 and the first ten amendments of the American Constitution. And, second, the establishment of Constitutional Courts, with power to settle the relevant disputes and impose the respect of the protected rights in practice.

At this point, it is important to have in mind that, until WW2, contrary to what was the case in America, the proclamation of rights in Europe had a rather symbolic character. This was due to numerous factors, the most important of which was the widespread lack of trust if not respect toward judges. In France, in particular, under the *ancient régime*, judges had become notorious for their absence of independence and their loyalty toward nobility and the monarchs. Not surprisingly, as early as 1790, the French Revolution adopted a Statute (which, by the way, is still in force) explicitly forbidding judges from reviewing not only executive action but also legislative acts.

Though closely linked to this French originality, this distrust toward the judiciary spread all over continental Europe; judges were not seen as independent actors but

rather as civil servants who were expected to act, as put by John Henry Merryman, an American authority on the civil law tradition, as “mere engineers of a machine designed by the legislator”. In this context, as explicitly proclaimed by the French Declaration of 1789, acts of Parliament were considered as reflecting the people’s will; as such, once they were adopted, they were considered as almost sacred and no one, could touch them.

In light of the above, *Lochner* and the well known opposition of the American Supreme Court to labor market regulation at the beginning of the 20th century was perceived in Europe as an extravagance. In a book that subsequently became famous, Edouard Lambert, a French professor of Civil Law, fustigated the *gouvernement des juges* as an intolerable anomaly. And Hans Kelsen, the famous Austrian legal philosopher who had invented in 1920 the first Constitutional Court in his homeland, vehemently opposed the consitutionalisation of the bill of rights. Should that be the case, he said, judges will necessarily abandon the domain of law and get involved into politics; as he concluded, this is not their role.

After the nazi defeat, the discovery of the concentration camps and the holocaust, such reserves could no longer obstruct the proclamation of human rights: bills of rights

could not but be constitutionalized. However, the failure of national Parliaments to avert the rise of fascism and Nazism imposed the creation of special courts with power not only to enforce protected rights but to efficiently review the constitutionality of acts of Parliament which violated them. This role, though, was not assigned to ordinary judges, who continued to be regarded with reserve if not distrust, but to Constitutional Courts, whose members, according to the kelsenian model, were not supposed to be career judges but personalities with legal background, whose nomination was to be confirmed by Parliament. Thus, it was hoped that they would have the legitimacy to adjudicate “hard” cases, in the sense of Ronald Dworkin’s definition, i.e highly sensitive cases both politically and morally.

In that way, next to Parliament and the Executive, Constitutional Courts claimed for the first time in Europe a political role. Although initially that role was supposed to be limited within the realm of the Bill of Rights, it soon became evident that the respective jurisdictions of constitutional judges and legislators could not be clearly separated in advance. In line with the Supreme Court of Washington, European Constitutional Courts got more and more involved into the decision making process in the name not only of the Constitution, but also of the general principles the latter was supposed to contain.

Consequently, the answer to the question who decides in last resort changed once again: in modern European democracies, the last word belongs more and more to judges. This is the case not only in the domain of human rights but also in a wide variety of issues which affect the citizens' day-to-day life. In our days, what is more important is that, for a variety of reasons, the judiciary's role has an intrinsic tendency to increase and encompass the review of the constitutionality not only of major laws, but also of rules of secondary importance, for which one would expect that the last word belongs and should belong to legislators.

* * * * *

The obvious advantage of the evolutionary approach that I have discussed until now is that it shows the different stages through which modern democracy was built in Europe: the weight of history and the inevitable survival of deeply rooted traditions favored the interaction instead of the separation of powers. The fatal consequence of this interaction was the different perception of the concept of checks and balance in Europe than in America: while it has always been essential for understanding how presidential regimes function, in parliamentary democracies it is perceived almost as an oddity, as a

singularity which might entail nasty consequences if left unchecked. The criticism provoked by judgments issued on political cases by constitutional judges all over Europe, including Germany, as opposed to the way in which the press reports Supreme Court judgments in America is one example. A second example is the famous French debate on the *quinquennat*, i.e. the reduction of the term of the French president to five instead of seven years, as previously provided, and the almost simultaneous holding of the presidential and the parliamentary elections, in order to avoid the recurrence of a *cohabitation*, that is of the co-existence of a conservative president and a socialist prime minister or vice-versa. Starting with Madison's doctrine on factional struggle in republican government, as developed in the *Federalist No 10*, and going down to the recent conflict between the House Republican majority and President Obama on the debt ceiling, most European constitutional scholars find it difficult to understand why, on matters not related to fundamental constitutional choices but to day-to-day politics, a democratically elected president is not left free to enforce the platform for which he has been elected.

On the other hand, the historical approach to the question who decides in last resort has an important disadvantage: it takes for granted that the various nation-states which have followed the parliamentary path to modern

democracy made their constitutional choices without outside pressure, as if their were free to determine their future in a sovereign way. The truth however is that, depending on their strength, economic, military if not strategic, some were much more independent from the others. In fact, behind the appearances, the margin of appreciation of smaller nations was by far narrower than the one benefited by the great European nations, from which small States remained economically and strategically dependent for long periods of time. I have in mind countries like Greece, where dependence from the so-called protecting powers was open for long and often institutionalized.

In our days, nevertheless, the freedom of smaller nations to chose their form of government and to decide in last resort on a wide range of issues is restricted in another way. For almost three decades, globalization is not just one among other choices offered to modern nations but the unique alternative for economic development. As a consequence, in determining their economic and financial policies, modern nations are bound to cope with an increasing number of fundamental rules, embodied in international treaties they have to respect. In these fields, a growing number of decisions are taken over and above nations, which are independent and sovereign only in theory.

Of course, this transfer of the decision making power to supra-national institutions is currently institutionalized to the highest degree in the European Union. In spite of the principle of subsidiarity, which is nevertheless officially proclaimed, a growing number of items falls currently under the realm of the competent European Authorities, namely the Commission, the Council and the Parliament. George Tsebelis has shown that by increasing the number of veto-players, the European decision making system does not favor change from the *status quo*; it favors instead stability. From a lawyer's standpoint, though, let me stress that, for a variety of reasons, the role of the European judiciary, that is of the Court of Luxemburg, is actually increasing. In fact it is increasing to such an extent that, on a wide range of issues, including the four fundamental freedoms and their enforcement, it would not be inaccurate to say that European judges decide in last resort. In other words, we witness at the EU level a devolution of power from elected officials to judges similar to the one observed at the national level.

* * * * *

I come now to the last part of my speech, which is devoted to the logic of the assignment of roles as described above. My point is that the growing role of

judges is not an inevitable diversion of modern democracy, but is closely related to specific institutional choices.

Modern Constitutions tend to become longer and more bulky. As observed by Sartori, "constitutional graphomania begins, by and large, after WW2". India's Constitution of 1950 carries 395 Articles, Brazil's of 1988 245 (plus 200 transitional items) while the Portuguese Constitution of 1976, one of the longest in Europe, has no less than 295 Articles. Russia and most of the former "People's Republics" of Eastern Europe follow the trend, having adopted much longer Constitutions than most of Western European Democracies.

Although I believe that, in general, the shorter a Constitution the greater its constitutional merit, I shall avoid formulating a value judgment on this specific issue. I shall instead content myself with drawing your attention on the evident: by including into the Constitution what, under normal circumstances, ordinary legislation should provide for, judges become more and more powerful to the detriment of Parliament and elected officials. In other words, the longer and more detailed a Constitution is, the wider is the judges' role and, as a consequence, the narrower the legislator's freedom to decide.

To illustrate my point, I will take an example from the Greek case. For reasons that have to do with the country's authoritarian past, Article 16 of the Greek Constitution of 1975 forbids private universities; moreover, it provides in detail for the legal form under which State universities should operate. The difficulties of university reform in Greece are closely linked to this specificity, which renders extremely difficult any departure from the *status quo*.

My second point is that the more difficult and complicated the procedure provided by the Constitution for its amendment, the more judges tend to invalidate important acts of Parliament. The reason of this correlation is easy to understand: as a general rule, judges tend to behave as legislators whenever they feel that their decisions will not be overruled and that their status is not threatened. It is important to note in this respect that the power of the judges to invalidate major political decisions does not have to be formally proclaimed by the Constitution. It can also be implicit, in the sense that the Courts, through the so-called constructive interpretation of statutes, can give the latter a different if not plainly opposite content to the one contemplated by the parliamentary majority which had adopted them, without leading to their formal invalidation. In legal systems without Constitutional Courts, this "implicit" method of constitutional adjudication has often been privileged over formal

invalidation, to the extent that it is less provocative towards democratically elected majorities. As a general rule, it is achieved through the method of the so-called "interpretation of statutes in conformity with the constitution" (*verfassungskonforme Gesetzesauslegung*), in which the federal Constitutional Court of Germany has excelled itself from the beginning of the 1950s.

On the contrary, should judges feel menaced in the performance of their duties in an activist way, they would tend to abstain from contesting major political decisions. And they would feel menaced if their country's Constitution is easy to amend. In that case their activism would be conditional and as a result selective, in the sense that they would avoid touching important policy decisions taken by clear-cut majorities. The relatively easy way in which the 1958 French and the 1949 German Constitutions may be amended (they have indeed both been amended more than twenty times in the past thirty years) is in my view the reason why the Conseil Constitutionnel in Paris and the Bundesverfassungsgericht in Karlsruhe restrain themselves from becoming excessively active political players, whenever major policy decisions are at stake in their respective countries.

To sum up, as shown by the American paradigm, the more difficult and complicated is the way in which the

Constitution is amended, the less Parliaments have the last word and judges claim an increasingly significant role in the decision making process.

My third and last point is related to the political decision-making process in modern democracies and, in particular, to the number of veto players that exist in each country. To remind you Tsebelis' definition, veto players are collective or individual actors, whose agreement, explicit or implicit, is necessary to change the status quo; they can be either institutional or partisan; while the first are provided by the Constitution, the latter are created by the political game. Tsebelis has convincingly shown that the greatest the number of veto players, the smaller the chances for important political decisions to be taken and for the *status quo* to be defeated.

In the past few decades, experience has shown that, whenever the number of parties in government is great, i.e. whenever countries are run by coalitions as opposed to single party governments, judges tend to have the last word on a wide range of issues, including important policy decisions. The role of judges is also significant, whenever specific institutions, such as the second Chamber, the president and a specific Court, have the power to veto decisions taken by the popularly elected lower Chamber. *Brown* and the Warren Court in regard to racial

discrimination in the 1950s and 1960s illustrate what I have in mind. Moreover, in Europe, it is a commonplace that, whenever subtle if not unpopular issues are at stake, the political actors openly seek judicial solutions to the relevant disputes, in the name of the Constitution. This has been particularly true in Germany and, to a lesser extent Italy, whose Constitutional Courts have been more than once deliberately invited by political decision makers to issue the last word on important societal, ideological and even foreign policy issues.

* * * * *

I have finally come to my concluding remarks. A few days ago, on September 7, the Second Senate of the German Constitutional Court issued its judgment on the first Greek bail-out package and the euro-rescue fund. As expected, it rejected the three constitutional complaints brought against the relevant national and European instruments, holding that they did not impair in a constitutionally impermissible manner the German Parliament's right to adopt the budget and control its implementation by the government, as well as the budget autonomy of future Parliaments.

It is significant though that the German Court based its ruling on an assumption that may give rise to similar

complaints in the future. The five German academics and the conservative politician who had brought the complaints had standing in their capacity as German citizens invoking their right to elect a free Parliament. That right, as held by the Court, implies the protection by the Constitution of the competences of present and future Parliaments from being undermined, which would make the realization of the citizens' political will both legally and practically impossible. For this reason the Court imposed on the German Government the obligation to always obtain prior approval by the Bundestag –namely the latter's Budget Committee- before giving guarantees.

Needless to say that, by giving such a wide definition of the admissibility criteria in a politically highly sensible case such as the Euro bailouts, the Court reserved its right to review similar complaints on their merits. In other words, while in the past similar cases were put aside as involving "political questions", under the present circumstances they seem to be treated as if they were "normal" legal cases.

What I am trying to say, though, is not that, under the influence of the current economic crisis, the judges already supersede elected officials, but that they reserve their right to do so, whenever they consider it appropriate.

In my view, this appropriation by the judges of the power to have the last word even on matters connected with pure politics such as the Euro rescue package –or the debt ceiling in the United States- is not just one more chapter in the history of western democracy. In most cases it is openly enhanced by the politicians, for a variety of reasons, the most importance of which is their lack of courage and determination to take decisions they consider unpopular. In some other cases, it is tightly related to specific ideological movements on which role should play the state, the markets and financial institutions in a globalized world. To take the notorious example of the Glass-Steagall Act, its repeal in 1999 had been sought by the banking industry since at least the 1980s. Many experts though believe that if it was maintained in force, the 2008 banking crisis in America and the subsequent debt crisis in Europe would not have occurred. Although I am not an expert in American Constitutional Law, I tend to believe that if Congress decided to re-enact a similar Act, there would be many in Washington claiming that it is unconstitutional and many more ready to bring the case before the Supreme Court hoping to obtain a 5-4 ruling in their favor. [*Something that, to my knowledge, did not occur in the New Dear years*].

My profound feeling, though, is that in democracies political questions should be dealt with by elected officials and not by judges. The latter should have the last word only on matters related to human rights, on which the rights of the individual and minority rights should be respected under all circumstances.

The problem, of course is how to define political questions on which politicians should have the last word, as opposed to human rights on which judges should decide in last resort? Starting with Holmes dissent in *Lochner*, going down through the debate on *Footnote Four* and the presumption of constitutionality, and up until Dworkin's distinction between "principles" and "rules", there are many in this country who have tried to answer that question. There are many more in Europe.

Don't worry. I do not intend to remind them to you in the context of this lecture. I will just content myself with saying that, in modern democracies, there does not exist a rule defining in a clear-cut way the respective domains. And that the specific way this hard question is solved in any legal order is a clear indication on how constitutionally mature is the legal order in question.

Ann Arbor, 15 September 2011

