Liber Amicorum in Memoriam of
STAVROS TSAKYRAKIS

Τιμητικός Τόμος
ΣΤΑΥΡΟΣ ΤΣΑΚΥΡΑΚΗΣ

# Human rights in times of illiberal democracies

# Ανθρώπινα δικαιώματα σε καιρούς ανελεύθερων δημοκρατιών


Ανάτυπο

ΝΟΜΙΚΗ ΒΙΒΛΙΟΘΗΚΗ

ΙΔΡΥΜΑ ΜΑΡΑΓΚΟΠΟΥΛΟΥ ΓΙΑ ΤΑ ΔΙΚΑΙΩΜΑΤΑ ΤΟΥ ΑΝΘΡΩΠΟΥ (ΙΜΔΑ)
MARANGOPOULOS FOUNDATION FOR HUMAN RIGHTS (MFHR)

Liber Amicorum in Memoriam of
STAVROS TSAKYRAKIS

Τιμητικός Τόμος
ΣΤΑΥΡΟΣ ΤΣΑΚΥΡΑΚΗΣ

# Human rights in times of illiberal democracies

# Ανθρώπινα δικαιώματα σε καιρούς ανελεύθερων δημοκρατιών

ΝΟΜΙΚΗ ΒΙΒΛΙΟΘΗΚΗ

ΙΔΡΥΜΑ ΜΑΡΑΓΚΟΠΟΥΛΟΥ ΓΙΑ ΤΑ ΔΙΚΑΙΩΜΑΤΑ ΤΟΥ ΑΝΘΡΩΠΟΥ (ΙΜΔΑ)
MARANGOPOULOS FOUNDATION FOR HUMAN RIGHTS (MFHR)

# Constitutions and Judicial Discretion

**George Tsebelis**
Anatol Rapoport Collegiate Professor of Political Science University of Michigan[1]

Stavros and I often discussed areas of overlap between our approaches of politics and law – in particular, constitutions (human rights and organization of political powers) and the judiciary. He was very concerned about the Greek judiciary for two reasons: the overwhelming delays of judicial decisions, and the lack of criteria besides seniority for judicial promotions.This in combination with government selection of the leaders of the judiciary could lead to very unfortunate results. In an expression of stoicism, he was attributing his confrontation with the President of Court of Cassation to these reasons.

In this paper, I show the impact of the Greek political system on judicial discretion. First, I will make a theoretical argument about the political conditions that determine the discretion of the judicial system. I will distinguish between two different kinds of judicial discretion: statutory (the authoritative interpretation of laws) and constitutional (the authoritative interpretation of constitutional rules). Second, I will focus on the Greek political conditions in order to specify statutory discretion of the Greek judiciary. Finally, I will examine the constitutional discretion of the Greek judiciary. In the analysis, I will use the Veto Players Theory and present my arguments with figures. The negative of using figures is that the reader will have to work a little harder in the beginning to understand them. The positive is that because it is a theoretical argument, it will support counterfactuals, so it is possible to understand what would have happened if certain conditions (of our choosing) were different. In particular, we can examine what will happen when foreign constraints get removed, as well as what will hap-

1. I would like to thank Vassilis Tzevelekos for helping me with legal cases presented in this article, Aris Alexopoulos, Thanasis Georgakopoulos and Dimitris Sotiropoulos for political examples supporting the arguments, and Nicos Alivizatos and Yannis Anastassakos for discussing the ideas with me.

pen if the electoral system of the country changes not only as it will (according to current Parliamentary decision) but also as it may (according to plausible revisions).

## 1. Legislative and constitutional cores and judicial discretion

Each country has a series of political actors whose agreement is required for the change of the status quo. I call these actors **Veto Players** (Tsebelis 2002). They can be generated either by the constitution (in Presidential systems the President and the one or two legislative bodies are required to agree in order to change the status quo), or by the political game (in Parliamentary systems the parties participating in a coalition need to agree in order to introduce draft legislation into Parliament and have it approved by (their) majority). On the other hand, the judiciary interprets this legislation (makes statutory decisions) or the constitution (constitutional decisions). If a court decision is a statutory interpretation, it can be overruled by a new law. If it is a constitutional interpretation, it can only be overruled by the political system through a constitutional amendment. The fundamental assumption in this paper is that judges do not want to be overruled. This assumption will restrict judges from making particular decisions and, consequently, determines judicial discretion. On the basis of this assumption, empirical analyses (Alivizatos 1995, Cooter and Ginsburg 1996, Lijphart 1999, Tsebelis 2002) have already demonstrated that the more difficulty in political decision making is associated with a greater importance of the judiciary. There are also studies on the Italian constitutional court (Santoni and Zucchini 2004] and courts in developing countries (Andrews and Monitola 2004). Cooter and Ginsburg (1996) used expert surveys (as most of the literature) in addition to their own analysis of the contribution of judges to rulemaking in different countries in order to assess "judicial daring" (as they call judicial discretion). Similar arguments can be found in Ginsburg (2008) who argues that "institutional veto players make it difficult to shift policies from the status quo," and in turn, "this expands the space for judicial policy-making." Similarly, Voigt, Gutmann, and Feld (2015) state that "the higher number of veto players implied by federalism increases the potential for conflict among political actors." Thus, "a judiciary independent from the other two branches of government might be beneficial if it is able to avert or at least settle conflicts between veto players." Finally, Ferejohn (2002) and Shapiro (1981) argue that political fragmentation creates demands for a third party to resolve disputes, and thus, gives the court more policy-making power. Table 1 uses their measures to show that unlike the expectations produced in legal analyses, that systems of common law or Anglo-Saxon systems produce powerful judges while civil law or continental European systems produce weak judges. While the more meaningful distinction is between countries with more veto players producing stronger judges and fewer veto players producing weaker judges. Among Anglo-Saxon countries, the US (with many veto players) has a very significant judiciary, while the other countries do not. Similarly, among continental European law countries, the Netherlands, Belgium, Italy, and Israel (with many veto players) have a significant judiciary,

while Japan, Spain, and Sweden do not. I focus on this intersection between the political system and judicial discretion.

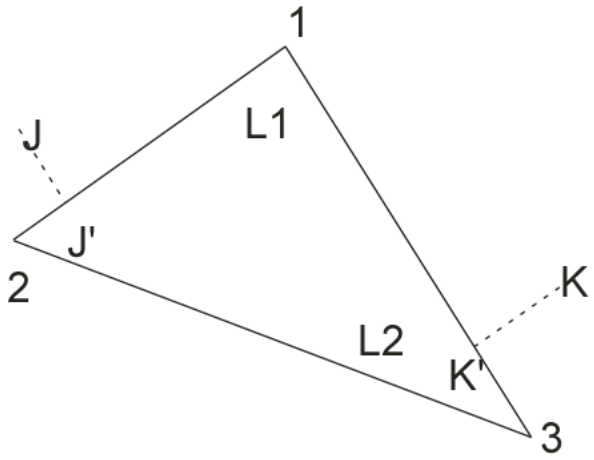
***Table 1:*** *Countries with many Veto Players have higher "Judicial Daring" (data from Cooter and Ginsburg (1996)*

| | **Many Veto Players** | **Few Veto Players** |
|---|---|---|
| **Civil Law System** | Netherlands (4.2)<br>Belgium (3.50)<br>Italy (3.33)<br>Israel (4.50) | Japan (2.17)<br>Spain (2.00)<br>Sweden (2.50) |
| **Common Law System** | US (4.42) | UK (2.10)<br>New Zealand (2.00)<br>Australia (2.33) |

Assume that a political system has three veto players (three parties in a coalition government, or three political institutions in a Presidential system). Figure 1 presents the ideal points (preferences) in a two-dimensional space (assume that the horizontal axis represents the left-right continuum, and the vertical axis the environment). If each one of these actors prefers points closer to their own preference over points further away, then they cannot change any policy that is located inside the Triangle 123. For any point inside this triangle, any movement of the status quo to the north will be objected by Veto Player 3, any movement to the south will be objected by Veto Player 1, and any movement to the east or west will be objected by either Veto Player 2 or 3. A legislative change from point L1 to L2 is impossible, because it will be objected by Players 1 and 2 who will find the final outcome further away from their preferences. Similarly, a change from L2 to L1 will be objected by Veto Player 3.[2]

2. I remind that decisions are made by unanimity since each veto player's agreement is required (by the definition of "veto player").

***Figure 1:*** *Legislative Core: The Court can make any statutory interpretation inside it*




This analysis can be used in order to explain judicial discretion since any decision inside the triangle cannot be overruled by the political system. If the judiciary in the corresponding country prefers L1 or L2, it can interpret the law accordingly without any fear of being overruled. However, if it prefers points J or K, it will have to select points J' and K' in order to avoid a legislative decision overruling its interpretation.

An example will clarify this point: in the case of the convicted murderer of the "17 November" terrorist organization in Greece, the judicial system in the beginning gave a series of furloughs on the basis of law no. 2776/1999 (i.e. the Penitentiary Code), but in April of 2019, it refused the next petition (Decision no. 93/2019 of the First Instance Judicial Council of Volos). Ultimately, the decision was overruled by the Court of Cassation (Decision no. 1001/2019), which identified a number of flaws in judicial reasoning and referred the case back to the competent judicial council to reexamine it. The political parties of the opposition have consistently criticized these decisions to give furloughs, and the leading opposition party has pledged to change the legislation so that furloughs in these situations will become illegal.

This example indicates that while changes of the status quo (whether furlough is appropriate or inappropriate in this case) are impossible within the Triangle 123 (the "core" of the political system), they are possible through judicial interpretations (if the Court of Cassation had not interfered);[3] and if the statutory interpretations are within the political core (the triangle

3. One can make the argument that in this particular case strictly speaking it is not the judiciary that makes the decision at first place, but an administrative body that is composed of judges. This does not affect the essence of my argument that within the legislative core both judges and bureaucrats have discretion to interpret the law one way or the other.

123), no reaction of the political system is possible. If however these interpretations move outside the core, then a political overrule of the judiciary is possible. The judicial decisions (whether giving or denying furloughs to the convicted felon) were within the core of the SYRIZA government, but permissions are outside the core of a ND government, which will change the law in order to prevent the judiciary from making such decisions.

What would have happened if the basis of this set of decisions was not the aforementioned Penitentiary Code but the constitution? If the judicial decision was predominantly based on the human rights of incarcerated citizens? Then, instead of the legislative core of the political system, we would have to base the analysis on the constitutional core. In most countries, it is more difficult to modify the constitutional than the legislative status quo.[4]

***Figure 2:*** *Constitutional Core larger than legislative core: Any constitutional interpretation within the constitutional core stands*

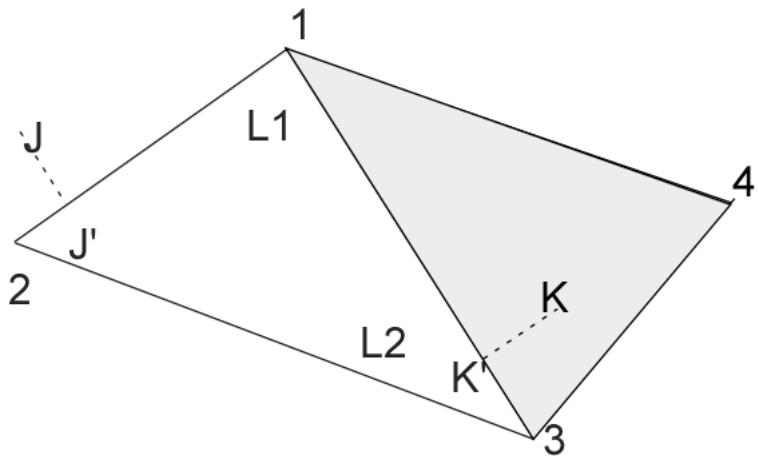



Figure 2 gives a visual representation of the situation. I have added one more veto player in Figure 1. The Quadrilateral 1234 represents the constitutional core (the Veto Player 4 is also required for a constitutional revision). As a result, changes of the constitution inside the Quadrilateral 1234 are impossible, and any constitutional interpretation[5] inside this area becomes possible. From Figure 2, it is clear that while a judicial decision J would be overruled (no matter whether it was on statutory or constitutional grounds), a decision K would be overruled on statutory grounds but would be valid on constitutional grounds.

4. Exceptions to this rule are the UK, India, Israel, and N. Zealand where a simple parliamentary majority is sufficient to modify any status quo. The situation sometimes entails confrontations between legislative and judiciary.

5. I use the term despite the fact that officially the Courts do not interpret the Constitution but review the constitutionality of legislation.

Therefore, in our hypothetical example, if the Court of Cassation had based its decision (exclusively) on the constitution, a legislative overrule would have been impossible as it would require amending the constitution, rather than a simple change of law no. 2776/1999. The conclusion is that the larger the difference between the constitutional and the judicial core (the shaded area in Figure 2), the more empowered the judges to make constitutional interpretations (as opposed to statutory ones).

It turns out that this argument is not just imaginary. In 2017 (with its Decision no. 100/2017) the Council of State (the highest administrative court) found that an administrative act allowing commercial shops in certain touristic zones to operate on Sundays clashes with a number of (constitutionally protected) human rights, including human dignity and the rights to family life and health/well-being (paras. 9 and 10). If such a decision had been presented as a statutory interpretation, the government would have modified the law, because the specific provision was based on a European request of opening the markets. As a constitutional interpretation, it became completely invulnerable.[6] Within the national framework, it cannot be disputed by the political system, but it *can* be modified by the Court itself. In a recent judgment (no. 18/2019), the Council of State considered the purpose -aiming at protecting general interest- and the necessity of an administrative act regulating the opening of commercial shops on Sundays in certain touristic areas. It found the regulation to be permissible as it amounts to a proportionate interference with said human rights (para. 22). Thus, the Court declared the act lawful. We see here the ability of the Court to perform u-turns within the constitutional core (the quadrilateral of Figure 2).

Another example of the Council of State modifying its constitutional interpretation over time is a series of Government decisions imposing financial burdens to specific social groups as the means to fulfil financial obligations of the Greek Government to lenders. In several cases, the Council of State decided that such burdens were unconstitutional. These decisions have been considered as additional constraints for the Greek Government. As such, they have been incorporated in subsequent arrangements between the Government and the lenders' institution: subsequent agreement required "financially equivalent" measures if some of the Government decisions were judged unconstitutional.

The Greek Council of State was not unique among supreme judicial bodies of countries subject to "memorandums" to judge government decisions unconstitutional. The Portuguese Constitutional Court has made similar decisions. Stavros Tsakyrakis has written poignantly that these decisions assumed that the constitution was a "money tree" since they did not consider their financial consequences. The traditional analysis speaks about "judicial activism" when judges extend their decision making powers. However, what has to become clear is that this "extension of powers" or this "activism" is in fact a violation of the constitution,

6. I do not deal with the issue that EU law says differently and it is interpreted as prevailing over the Greek constitution (as in the case of the main shareholder).

which delegates economic and planning decisions to the elected representatives of the people (legislative and executive brunches). Also, on these issues, judges have to exercise self-constraint, because if they make a constitutional interpretation, there is no alternative but a constitutional amendment, which in some countries may be a very difficult enterprise (as Figure 2 demonstrates). The Greek Council of State understood this point, and in a recent decision declared such Government decisions as constitutional.[7]

These arguments are by no means restricted to national courts (like the Greek or the Portuguese). International Courts – whether the European Court of Justice (ECJ) or the European Court of Human Rights (ECtHR) [8] – are established by treaties (with multiple signatories who act all as Veto Players since their agreement is required in order to render a Treaty modification binding on them). Here, I present a case where the ECtHR departed from previous case law. This example concerns Greece, which is the focus of this paper. The case law at issue examines the compatibility with human rights of certain privileges (i.e. preferential treatment consisting in shorter time-limit and different starting points for default interest) granted by national legislation to the state in its disputes against private entities or civil servants. In *Varnima Corporation International S.A. v. Greece* (no. 48906/06, 28 May 2009) and *Zouboulidis v. Greece No. 2* (no. 36963/06, 25 June 2009), the ECtHR found said types of preferential treatment to be incompatible with (i.e. disproportionately limiting) one particular aspect (namely equality of arms) of the human right to fair trial, in the former case, and with property rights, in the latter. However, in a number of more recent judgments (e.g. *Giavi v. Greece*, no. 25816/09, 3 October 2013; *Viaropoulou v. Greece*, nos. 570/11 and 737/11, 25 September 2014), the ECtHR, arguably considering also the impact of the economic crisis in Greece, departed from earlier case law, finding that general interest justified granting this type of privileges to the state.

Judges do not want to appear to change their minds, so while I am focusing on the "essence" of the decision in order to identify the contradictions, the legal arguments will be more complicated and so that the same person will be able to support both aspects from a judicial point of view. Let us now focus on this distinction between statutory and constitutional interpretations in the Greek context.

## 2. Legislative core in Greece

In Greece, single party governments were the rule after 1974.[9] The first exception occurred under memorandum in 2012, and included three parties: ND, PASOK, and Democratic Left

7. Council of State 1307/2019. See <https://www.ddikastes.gr/node/4717 > accessed June 2020.

8. Stavros Tsakyrakis has often addressed this court with great success in defense of human rights cases.

9. The only exception was in 1989 where the Right and the Left entered in a coalition against PASOK.

(DHMAR).[10] This three party government was replaced by a two party one after the departure of Mr. Kouvelis. After two successive elections in 2014, SYRIZA and ANEL became the governing parties. In terms of veto players and the size of the legislative core, the situation was the following: the single party governments had a single veto player, who consequently could change the status quo at any time and in any way they pleased. In this respect up to 2012, Greece, despite the fact that it has always had a multiparty parliament, had a single veto player the same way as with the prototype of bi-partyism in the UK. After 2012, the situation changed and there were multiple veto players- first three of them and then two. In principle, the three veto players should produce a larger core than two, but because of the ideological distances among the different coalition partners, the situation was significantly different.

***Figure 3:*** *Core of Gov. SYRIZANEL > Core of Gov. ND-PASOK-DHMAR > Core ND-PASOK*

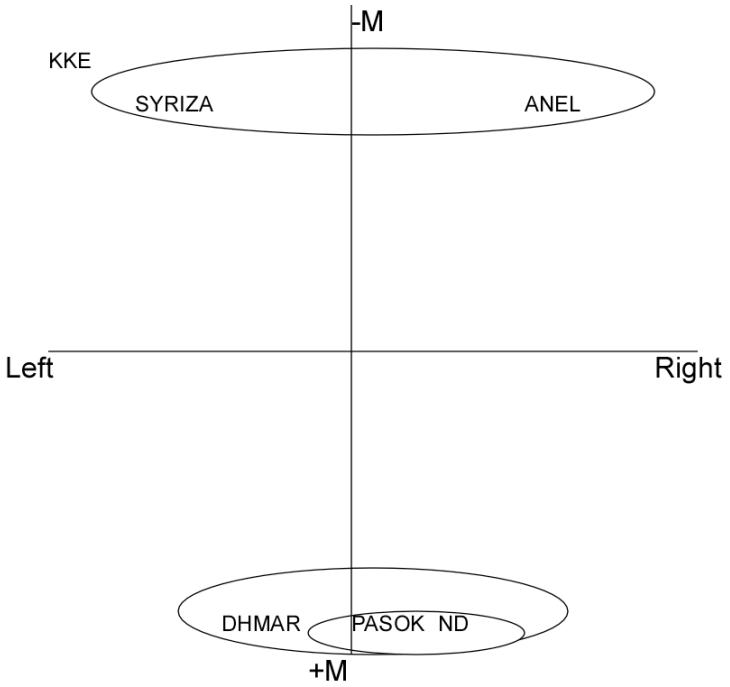



Figure 3 visualizes the situation in a two dimensional policy space. These dimensions are the most important divisions of Greek political life before 2015: the left right continuum, and the memorandum/anti-memorandum axis. The different parties are placed in this space

10. One can also add the Papademos' government in 2011 which had the support of three parties (ND, PASOK, and an extremist Right wing party), which does not have an effect to the argument I am making.

on the basis of their programmatic positions in the 2012-2015 period. In 2015, after the transformation of the referendum results from "NO" to "YES" by the Tsipras I government, all parties voted for the Third Memorandum to save the country from bankruptcy. Immediately after the "universal" vote, Tsipras called for new elections. The election resulted in the Tsipras II government, which was the same as the Tsipras I government despite the fact that the memorandum/anti-memorandum axis ceased to exist. The implication of this change is that after 2015, the second axis of the Greek political life was eliminated and all the parties were placed only on the traditional left-right dimension. Along this axis, the differences between SYRIZA and ANEL are much larger than the differences between the three parties in the first Samaras government and much larger than the difference between the two parties in the Samaras-Venizelos government (as shown in Figure 3). The implication of these political differences are that the size of the core changed in a non-intuitive way: it shrunk from the first government (three parties) to the second (two party government), and it expanded significantly from the Samaras-Venizelos government to the Tsipras coalitions (both before and after the 2015 elections). As I have argued in the beginning of this essay, the policymaking ability shrinks with the size of the core, and the judicial discretion increases with it. In other words, policy inaction is a necessary but not sufficient condition for judicial discretion. There are some examples about the policymaking ability of different governments to provide some *prima fasciae* support for my argument, but serious corroboration must be left for the future.

First, it is important to clarify that whether the axis of Memorandum (+ or -) existed or not, Greek governments had to accept the prescriptions (in the form of advice, suggestions, or instructions) of the international institutions (such as the IMF and the EU) representing the lenders (called "Troika", or later "institutions"). Consequently, policies along this axis were uniformly carried out by whoever was the government of the country.

Policy differences could only emerge on non-financial issues. Sometimes, if the votes were not necessary for passing of a piece of legislation, a government coalition partner was permitted to vote "present" in Parliament (a position different for approval or rejection) in order to keep the connection with the supporters. For example, the left wing partner in the first government (DHMAR) voted this way several times (for example on 7 November 2012 on labor issues). Other times, bills were retracted because of disagreement from DHMAR (for example, the retraction of the Government's agreement for settlement with SIEMENS on 13 September 2012).[11] However, in the case of elimination of the public television station (ERT), it opted to vote "no" and withdrew from the coalition. The remaining two parties continued having the majority in Parliament and continued their course with significantly less disagreements up to the proclamation of the new election in January 2015 (see Figure 3).

11. See <http://www.akioe.gr/default.asp?node=page&id=9538> accessed June 2020.

The January 2015 election produced the impossible on the left-right axis coalition of SYRIZA (extreme left at the time) with ANEL (extreme right until its complete demolition in the European elections of 2019). This government was only possible because both parties were against the Memorandum. As I said before, this would have no policy consequences as the Greek PM Mr. Tsipras realized that after the referendum on July (when he transformed a "NO" vote into a "YES", that is, an agreement with the EU under worse terms than before). The second axis had a very short span in Greek political life. The fact that the government coalition from September 2015 until July of 2019 had a large core in the left right axis made decisions difficult for the Greek government (besides the ones financial ones dictated by the EU). For example, when the PM and his party wanted to change the content of secondary education books on religion, the issue was aborted by the coalition partner (and the Minister of education replaced). When the PM wanted to introduce legislation on LGBTQ issues, the government partner voted "no" and the issue would have been defeated if it were not for the support of centrist parties of the opposition. Similarly, the Prespes Agreement, i.e. a bilateral international treaty solving the naming dispute with North was voted down by the leader of ANEL (who was also instrumental in replacing the Foreign Minister who negotiated the treaty) and would not have survived but for the support of some centrist deputies. The SYRIZANEL government had very few opportunities for political initiatives precisely, because its core was too large.

According to the first part of this essay, a large core is fertile ground in producing judicial independence. It is important to systematically investigate this prediction. Impressions go against this, because higher level prosecutors and magistrates moved against the opponents of the Government in the so-called NOVARTIS (alleged) scandal where they accused many leaders of opposition parties, including two ex-PMs, of corruption in what the government called the "biggest political scandal". This judicial behavior does not indicate independence. On the other hand, an investigation of the issue is currently underway and the sources and motives may be revealed.[12] I will come back to this issue at the end of the essay.

## 3. Constitutional core in Greece

Looking at the constitutional core of the country, the Greek Constitution can be changed with a complicated procedure according to Article 110 of the Constitution. First, a series of constitutional provisions regulating the form of Government as a Parliamentary Republic (enumerated in the first paragraph of the article) are considered "eternal" (cannot be modified at all). Second, for the remaining articles, a successful revision requires votes by two different parliaments with an intermediate election with a combination of an absolute majority (in the first or second parliament) and three fifths majority (in the second or first

12. See <https://www.hellenicparliament.gr/Koinovouleftikes-Epitropes/CommiteeDetailView?CommitteeId=69ad1283-eb23-4483-b5b4-aae6013e9a56&period=1d81f25b-0dfd-4649-8dab-aa8d00a81852. > accessed June 2020. The jurisdiction of this committee got recently expanded.

parliament). One way or another, a successful amendment requires a .5 (=simple) majority in one parliament, and .6 (3/5) in another. This is a high threshold, and makes the Greek constitution a rigid one. Third, and even more significant from the perspective of revisions, according to paragraph 6 "Revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision".

These provisions make significant modifications of the constitution very difficult. For example, in the amendment under way, the Parliament voted for some amendments with a simple majority (the ones supported by SYRIZA). It is questionable whether the most likely winner in the next election (ND) will introduce these proposals for a final vote. There are other proposals like the modification of Article 16 which prohibits the private universities, which was not supported by SYRIZA, and consequently is not part of the amendable provisions. There was an identical on Article 90 of the Constitution, according to which the Government selects from a list the judges to be appointed to the leadership of the judiciary. The votes of ND alone were not enough to introduce this article in the second round of decision making. Finally, there are some provisions that had the agreement of most parties and cleared the 3/5 threshold from the fist parliament, but they will now require merely an absolute majority in the second for modification.

Articles 16 and 90 (among others) require waiting five years after the completion of the process of constitutional revisions in order to be reconsidered for revisions. Same thing is true about Article 110, which given its draconian conditions should be revised- new discussions will start at least five years after the completion of the current ones. The current constitutional revision has been during a time of extreme polarization. As a result, only cases of extremely urgent amendments where all parties have been in agreement (like the elimination of the provision that the inability of a parliament to elect President of the Republic by 3/5 of the votes triggers a new election) are likely to be adopted at the end. It is obvious that the current revision will be incomplete even after it is over.

Linking this section of the paper with the former one that focused on the role of courts, this analysis indicates that as long as Article 110 is in place, Greek courts will continue to have exceptionally high discretion on constitutional issues. The combination of Article 110 with the positioning of the parties in Figure 3 (with or without the second dimension) shows that amendments require large consensus for a long time in order to be successful.

## 4. Conclusions

I started with the distinction between legislative and constitutional core and argued that the first is necessary (but not sufficient) condition for judicial discretion in statutory decisions while the second is necessary (but not sufficient) for judicial discretion on constitutional issues. In Figure 2, I presented the difference between the two (shaded area). The larger this area, the more incentives the courts have to turn their decisions into constitutional interpretations. For all practical purposes, court decisions become immune to change. This

is the problem that Franklin Roosevelt confronted in the interaction with a conservative Supreme Court in the US. All his policies were deemed unconstitutional, and he had no way of invalidating the judgments. His solution was to threaten the Court that he would change its composition with additional appointments (the number of the members of the Supreme Court is not included in the American Constitution). The judges caved, and until today, there has not been a popular sentiment of abuse of power by the Supreme Court.[13] Obviously, the Greek Courts could imitate the example and always use constitutional interpretations. Such a practice would still find possible obstacles in European Directives, as well as ECJ decisions (which supersede national law).

It is likely that the legislative core will expand. At the time I am writing (middle of June of 2019), there is an upcoming national election where most predictions are that New Democracy will gain an absolute majority of seats in the Parliament. Yet, the leader of the party has proclaimed that he will ask for wide coalitions (proclamation which could have a sole recipient the center-left party of KINAL). If the next government of the country is a coalition, the legislative core will again be wider than most governments since 1974. If not, a single party government prevails. Then in all likelihood, we will have a four year single party government. It is unlikely that internal problems will lead the PM to proclaim early elections, particularly since the next election will be with a pure proportional system that SYRIZA unsuccessfully tried to include in the constitution but was finally implemented for the election following the one of July 2019. If this proportional representation election manages to form a government, it will be a multiparty one, leading to an oversized (for Greek political history) core. If not, there will be a new election with an electoral system decided by the upcoming government. This electoral system is likely to reduce the 50 seat electoral bonus to the first party, which will again produce coalition governments.[14]

No matter how exactly things evolve, it is possible that Greece will enter a phase of coalition governments, which will expand the statutory interpretation discretion of courts. Will this lead to judicial independence?

The arguments I have presented lead to the result that larger cores lead to higher judicial discretion, but not necessarily independence. The size of the core provides the necessary conditions, not the sufficient ones. As the case of NOVARTIS indicates, the large core of the SYRIZANEL government did not lead to judicial independence. The current investigation of the issue as well as future legal battles that the accused in the case politicians have promised will shed light in the case. But this brings us back to Stavros' argument: We have to focus on the structure judiciary. Strict criteria for promotion, and probably different

13. The situation may soon change if Trump continues to appoint conservative judges with the support of the Republican majority in the Senate and weaponize the Court.

14. This expectation was wrong, because the ND government very slightly modified the 50 seat bonus. In addition, the COVID-19 pandemic has led SYRIZA and some political commentators to anticipate early elections so that the ND government will be inoculated from the difficult times for the Greek economy that are likely to follow.

mode of selection of its leadership. The most recent examples under SYRIZA were not very encouraging: The government (as enabled by Article 90 of the Constitution), decided to appoint a person that received 8 votes in the Parliamentary Conference of Presidents instead of the person that received 15 votes for the leadership of the Court of Cassation. Later, the Minister of Justice asked the main opposition party to come to a consensus (leaving all the other parties out of the deal). The offer was declined, and the Government proceeded to appoint its own favorite person for the office. The President of the Republic refused to sign the appointment. The ND government has indicated that it will respect judicial independence. We have to wait and see, but regardless of government decisions, the reader has to remember that Article 90, which regulates the issue, has not been even discussed, let alone included in the possible constitutional amendments, and this is something that remains to be done (after 5 years go by, according to article 110).

**Bibliography**

Nicos Alivizatos, 'Judges as Veto players' in H. Döering (ed) *Parliaments and Majority Rule in Western Europe* (New York: St. Martin's Press, 1995).

Josephine T. Andrews and Gabriella R. Montinola, 'Veto players and the rule of law in emerging democracies' (2004) 37 *Comparative Political Studies* 55-87.

Robert D. Cooter and Tom Ginsburg, 'Comparative Judicial Discretion: An empirical test of economic models' (1996) 16(3) *International Review of Law and Economics* 295-313.

John Ferejohn, 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* 41-68.

Tom Ginsburg, 'The global spread of constitutional review' in Gregory A. Caldeira, R. Daniel Kelemen, Keith E. Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008) 81-98.

Arend Lijphart, *Patterns of Democracy: Government forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999).

Michele Santoni and Francesco Zucchini, 'Does policy stability increase the constitutional court's independence? The case of Italy during the first republic (1956–1992)' (2004) 120 *Public Choice* 439-461.

Martin Shapiro, *Courts* (Chicago: University of Chicago Press, 1981, 1986).

George Tsebelis, *Veto players: How Political Institutions Work* (Princeton: Princeton University Press, 2002).

Stefan Voigt, Jerg Gutmann and Lars P. Feld, 'Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators' (2015) 38 *European Journal of Political Economy* 197-211.

Born in Mithymna, Lesvos, Stavros Tsakyrakis (1951-2018) was a professor of constitutional law at Athens Law School and a prominent lawyer. He studied Law at the University of Athens and Philosophy of Law at the University of Rome. He also studied Constitutional Law and Human Rights as a visiting scholar at Harvard University, Columbia University and New York University.

As a lawyer, he argued successfully many cases before the European Court of Human Rights. As an academic, his field of research included human rights, in particular freedom of speech, political and moral philosophy. His article "Proportionality: an assault on human rights?" in the International Journal of Constitutional Law has stirred an international debate on the principle of proportionality.

Extraordinarily popular among his students, Tsakyrakis became over the years a respected public figure, regularly publishing opinion articles in the press and digital media on issues of public interest, tirelessly pleading the causes he thought worth fighting for. In this book, dedicated to his memory, leading scholars debate around what was dear to his heart: freedom, democracy and justice.

Γεννημένος στη Μήθυμνα της Λέσβου, ο Σταύρος Τσακυράκης (1951-2018) υπήρξε καθηγητής συνταγματικού δικαίου στη Νομική Σχολή Αθηνών και διακεκριμένος δικηγόρος. Σπούδασε Νομικά στο Πανεπιστήμιο Αθηνών και Φιλοσοφία Δικαίου στο Πανεπιστήμιο της Ρώμης. Μελέτησε επίσης Συνταγματικό Δίκαιο και Ανθρώπινα Δικαιώματα ως ακαδημαϊκός επισκέπτης στα Πανεπιστήμια Χάρβαρντ, Κολούμπια και Νέας Υόρκης.

Ως δικηγόρος, υποστήριξε με επιτυχία πολλές υποθέσεις ενώπιον του Ευρωπαϊκού Δικαστηρίου Δικαιωμάτων του Ανθρώπου. Ως πανεπιστημιακός καθηγητής, το ερευνητικό του πεδίο περιελάμβανε τα ανθρώπινα δικαιώματα, ιδίως την ελευθερία του λόγου, την πολιτική και ηθική φιλοσοφία. Το άρθρο του "Proportionality: an assault on human rights?" στο International Journal of Constitutional Law προκάλεσε διεθνή επιστημονικό διάλογο σχετικά με την αρχή της αναλογικότητας.

Εξαιρετικά δημοφιλής στους φοιτητές του, ο Σταύρος Τσακυράκης παρενέβαινε τακτικά στο δημόσιο διάλογο, δημοσιεύοντας άρθρα γνώμης στον Τύπο και τα ηλεκτρονικά μέσα, υπερασπιζόμενος ακούραστα τους σκοπούς για τους οποίους πίστευε ότι αξίζει να μάχεται κανείς. Σε αυτόν τον τόμο, που είναι αφιερωμένος στη μνήμη του, κορυφαίοι μελετητές συζητούν για τα θέματα που αγαπούσε περισσότερο: την ελευθερία, τη δημοκρατία και τη δικαιοσύνη.

ISBN: 978-960-654-203-9
17917