New and old challenges to the legitimacy of constitutional adjudication

di Tania Groppi

1. Beyond Israel

The so called "overhaul" of the judiciary in Israel, proposed in January 2023 by the Netanyahu cabinet, raises several issues that go far beyond the Israeli unique geopolitical situation and constitutional system.

On one hand, current developments in Israel can be framed within the recent global tendency of many populistic regimes to capture or make oversight bodies toothless. The essence of populism lies in its anti-pluralistic nature: populists pretend to speak on behalf of the "true" people[1]. They present the people as a single entity, which only populists may represent, whereas political opponents are described as enemies. The limits set by constitutional democracy to protect pluralism are considered incompatible with this vision of "democracy": populists' claims against "juristocracy" stress the necessity to give the voice back to the "people", i.e., to the "real people", i.e., to the populists themselves, by limiting the so called "activism" of legal elites (i.e., courts).

On the other hand, Netanyahu's cabinet proposal for a change in the judicial system is related to the longstanding tension between majoritarian decision-making (electoral democracy) and constitutional justice (as part of constitutional democracy). This tension has been existing since the establishment of the government system we call "constitutional democracy", separating the "normal" decision-making process (which is in the hands of electoral majorities) from the higher decision-making process (which requires qualified majorities and constitutional adjudication)[2]. It accompanied the great diffusion of constitutional democracy in the last decades of the 20th Century, and it has only been refreshed and emphasised by the growth of populist movements in the first decades of the 21st Century.

The proposal of Moshe Cohen-Eliya and Iddo Porat ("A New Deal for the Israeli Judicial System") may be read within this background.

2. Questioning the legitimacy of constitutional adjudication

The great success of constitutional justice, witnessed both by its progressive and continuous diffusion and by the evaluations, usually very positive, of individual national experiences, does not mean that this process took place painlessly, nor

[1] J.W. Müller, *What is Populism?*, Philadelphia (PA), 2016.
[2] B. Ackerman, *We the People. Foundations*, Cambridge (MA), 1998.

that the classic question, present since the beginning of the US experience (how can, and based on what legitimacy, nine unelected judges undo what the democratically elected representatives of the people wanted?) has definitely been overcome.

The question continues to hover, unresolved, over the oldest experiences of constitutional justice and to hang, like a suspended cleaver, over the new ones.

In the United States (and in other similar cases, such as Australia or Israel) the problem is increased by the fact that the judicial review of legislation is not expressly provided for by the Constitution but has developed through jurisprudence. However, the problem also exists where constitutional justice enjoys a constitutional foundation, due to the intrinsic "non-majoritarian" (or "counter-majoritarian") character it presents, being called upon to guarantee the intangibility, for the political majorities, of the principles contained in the Constitution, on which "there is no vote," as Judge Robert Jackson stated in his well-known opinion in the case *West Virginia Board of Education v Barnette* [3].

At least three circumstances make the coexistence of constitutional justice with electoral democracy problematic: a) the lesser democratic legitimacy of constitutional judges compared to the object of their judgment, i.e. the law; b) the rigidity of the constitution, which prevents parliament from easily neutralizing a ruling of unconstitutionality, and actually requiring the legislative body to resort to constitutional revision; c) the interpretative difficulties posed by constitutional norms, as they usually contain principles and not rules and the resulting wide margin of discretion left to judges in interpreting such norms[4].

It is almost inevitable, therefore, that a situation of tension arises in the constitutional democracy with respect to electoral democracy, to the point that the systems that traditionally rely on the sovereignty of Parliament (United Kingdom) or of the law, as an expression of the general will (France), are those which have struggled the most to accept constitutional justice. There are many symptoms of the permanent tension between constitutional justice and electoral democracy: they range from simple words (declarations by members of political majorities who "rebel" against judicial decisions), to attempts to surreptitiously influence the composition of the courts to gain control over them (e.g. by changing the number of members, or revoking them, or in any case causing them to lapse before the deadline), to proposals for reform of the constitutional justice system (whether they are successful or not, is secondary), to the non-application of unwelcome decisions by the political majorities (through the re-approval of laws declared unconstitutional or inaction in implementing rulings). The presence of constitutional revisions made "against" decisions of the constitutional court also represents an indicator of this tension: it is true that the "right to the last word", in the relationship between constitutional justice and constitutional legislation belongs to the latter, but it is truly the last resort of politics[5].

[3] 319 U.S. 624 (1943). In one of the first pronouncements on the Canadian Charter of Rights, the Supreme Court of Canada reaffirmed that, in this system, the judicial review of legislation was entrusted to the judges by democratically elected representatives, whereby "Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy": *Motor Vehicle Act* [1985] 2 SCR 486, 497.

[4] V. Ferreres Comella, *Justicia constitucional y democracia*, Madrid, 1997, 42 ff.

[5] On the « right to the last word » see L. Favoreu, *La légitimité du juge constitutionnel*, *Revue internationelle de droit comparé*, 1994, 557 ff.

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3. Looking for legitimacy of constitutional adjudication

There are also many attempts to find forms of coexistence between the two spheres, that of constitutional justice and that of politics (or of electoral democracy).

Scholars, for their part, have from the beginning elaborated theories that justify the presence of constitutional justice in democracies: they range from the Kelsensian conception of democracy as a compromise, in which courts perform an anti-majoritarian function, to that of deliberative and procedural democracy, in which courts legitimize themselves through their continuous dialogue with the legislator and the opening of a public space for debate[6].

There are also many normative solutions offered by comparative law to reconcile constitutional justice and electoral democracy.

The most obvious is the option for centralized systems of constitutional justice, characterized by the existence of a "specialized" court in charge of checking the constitutionality of laws. The "specialty" of constitutional courts is primarily to be found in their composition, in which political bodies, first and foremost parliaments, intervene (although in different ways). In the European systems of constitutional justice, of Kelsenian origin, an attempt is thus made to reconcile the technical-legal competence with a certain dose of political sensitivity: entrusting the control of constitutionality, in a centralized way, to a specialized court, means in these systems to subtract it from ordinary judges, in favor of a body whose composition makes the control itself more tolerable for the political system.

The extent of the competences of these "specialized courts" in the various legal systems speaks of the difficulty, more or less harsh, and of the more or less urgent need to find the compromise: in systems where the specialized constitutional court is such above all for the object of his judgment (the law of parliament, while the control over the constitutionality of the other acts belongs to the ordinary judges), contrast systems in which the specialized constitutional court is such for the parameter, in the sense that they are called to rule not only on the laws, but on any act, as long as there is a question of violation of the Constitution, from whoever it may originate, thus wanting to steal the entire Constitution from the "claws" of ordinary judges [7].

The need for qualified majorities within the courts to declare an act of the public authorities unconstitutional can also be traced back to this requirement [8]: in the legal systems that provide for such majorities, the presumption of constitutionality is especially valued, and the "privilege of the legislator" protected, requiring not only that it has its own special judge, but also that within

[6] See, for example, H. Kelsen, *La garantie jurisdictionnelle de la Constitution* (1928), in Id., *La giustizia costituzionale*, C. Geraci (cur.), Milano, 1981, 171 ff.; J. Habermas, *Fatti e norme. Contributi a una teoria discorsiva del diritto e della democrazia*, Milano, 1996, 285 ss.

[7] Many factors affect one or the other choice, not least the distrust of ordinary judges, which is particularly strong in the phases of transition to democracy, as shown by the experience of the countries of Central and Eastern Europe.

[8] The comparative analysis shows that a similar provision is present only in several countries. See G. Tusseau, Contentieux constitutionnel comparé, Paris, LGDJ, 2021, 112 ff. Among them, see article 105, paragraph 2, of the Mexican Constitution (where a majority of 8 votes out of 11 is required to declare the unconstitutionality) and article 5 of the Organic Law on the Constitutional Tribunal of Peru (where 5 out of 7 votes are required). In Germany, pursuant to art. 15, paragraph 4, of the law on the Constitutional Tribunal, the majority of 2/3 of the members is required for the impeachment and for the dissolution of political parties.

this special judge, there is a "special" majority in support of the unconstitutionality. If, as it happens in some countries, this majority is required only for some subjects, this introduces a form of variable rigidity.

Other provisions with a similar aim are those which allow courts to postpone the effects of their unconstitutionality rulings, to leave room for the legislator to act, as it is the case of decisions where the mere incompatibility or unconstitutionality is ascertained, but not declared, as in the German and Austrian experience.

Courts themselves, through their own jurisprudence, have developed tools that increase their "acceptability" for the political system. Some decisional techniques that make the judgment of reasonableness "measurable" can be ascribed to this need, such as balancing or proportionality tests, the attention for an accurate and clear reasoning of the rulings and, in general, for their transparency, even with the use of communication tools, the judicial self-restraint and the doctrine of political questions, as well as the creation of types of sentences that limit (in time or space) the impact of decisions of unconstitutionality.

Other normative solutions indicative of the difficulties in accepting constitutional justice pertain to the introduction of tools that allow political power to overcome the decisions of courts: they range from legal systems in which this can only happen through constitutional revision or in any case with qualified majorities[9] to those in which constitutions themselves include clauses of flexibility which allow the ordinary law to disregard the rulings of constitutional courts, as it happens in the legal systems of British tradition.

A scholarly attempt to find a normative solution to the legitimacy difficulties of constitutional justice can be found in the so-called "*New Commonwealth Model of Constitutionalism*"[10]. This definition describes institutional arrangements placed in an intermediate position between those with a rigid and those with flexible constitutions, characterized, respectively, by the supremacy of the judiciary or the legislative power. From the point of view of constitutional justice, this model has been reduced to a new typology, that of the "weak forms of judicial review"[11], which contrast with the traditional "strong forms", in that the unconstitutionality decisions are, always and in any case, binding on all the subjects of the legal order; conversely, in the "weak forms", the last word always belongs to the legislator.

It is a phenomenon that has been traced back to the codification of rights in a series of systems of British origin, which has been accompanied by the introduction of forms of jurisdictional guarantee that leave a wide space for the legislator to respond to the decisions of the Court.

The starting point is considered to be the adoption, in 1982, of the Canadian Charter of Rights and Freedoms; followed by the New Zealand Bill of Rights Act 1990 , the Hong Kong Bill of Rights in 1991, the Basic Laws of Israel in 1992, the Human Rights Act in the United Kingdom in 1998 and, subsequently, some state-level codifications in Australia (Australian Capital Territory's Human Rights Act 2004 and Victorian Charter of Human Rights and Responsibilities 2006), a

[9] This possibility was foreseen, with a majority of two thirds, in Poland between 1986 and 1997 and in Romania until 2003.
[10] S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, *The American Journal of Comparative Law*, 2001, 707ff.
[11] M. Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton (N.J.), 2008, 25.

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country where the issue continues to be present in the debate on the possible introduction of a federal Bill of Rights.

At the end of the day, in all the aforementioned countries the "strong form of judicial review", where the judicial interpretation of the constitution is final and unreviewable by ordinary majorities, is ultimately rejected. Instead, space is left for the legislative body to intervene, according to different arrangements and tools ranging from the use of a notwithstanding clause (Canada and Israel), or the issue of a declaration of incompatibility (United Kingdom), or conforming interpretation (New Zealand).

While these systems undoubtedly have the advantage of cushioning the impact on the political power of decisions of unconstitutionality, facilitating the acceptance of constitutional justice, they, on the other hand, leave open the question of their effectiveness[12], in terms of guaranteeing rights: only the presence of an attentive and vigilant constitutional public opinion and a legislator endowed with a high constitutional sensitivity can prevent the depletion of one of the central conquests of constitutionalism, i.e. the guarantee of minorities against contingent political majorities.

4. Enhancing Constitutional Awareness

Against this background, "A New Deal to the Israeli Judicial System" rejects the increase of the weak system features of the Israeli judicial review, that is part of the judicial overhaul. Conversely, it focuses on the composition of the Supreme Court (and especially on the appointment process), combined with a process-based approach to judicial review, inspired to the John Ely perspective.

I consider the proposal, especially the second part, difficult to implement for reasons which go beyond the lack of political consensus in the actual polarized context.

Whereas the change in nomination process needs a legislative reform, (and it can benefit from the comparative perspective, especially from that of centralized systems of judicial review), the process-based approach escapes any regulation. It is up to the judges of the Court, not to the legislator, to steer judicial review towards a more process-based, substantive-based or source-based approach, depending on their conception of their legitimacy and their role.

With this, I do not want to underestimate the role of academia. In the face of a constitutional crisis, such as Israel is experiencing, scholars are asked not only to make legislative proposals, but also, and even more, to enhance and guide the constitutional culture. Making current and potential future judges aware of the risks and potentiality of their job is also part of the contribution that constitutional scholars can make to mitigate the conflict between politics and the courts.

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[12] Thus, nine years after his first article, S. Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism* , in I•CON , vol. 8, n.2, 2010, 167 ff.