A New Deal for the Israeli Judicial System. Yes, but what New Deal? A response to Moshe Cohen Eliya and Iddo Porat

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The Israeli constitutional crisis can be read as much as the outcome of a particular path - the 1992 Constitutional Revolution - in a context defined by numerous specificities such as Israel's, as well as a global symptom of the crisis of constitutional democracies, which increasingly sees the emergence of tensions between the judiciary and political power.

Distinguishing between these two matrices of the Israeli constitutional crisis is not easy. Still, it is necessary where one intends to reason, as Cohen-Eliya and Porat do, about possible avenues of reform concerning the judiciary's role, particularly the Supreme Court, in the Israeli constitutional context.

Starting from the "local" matrix, we cannot but emphasize that Israel represents a unique constitutional, institutional, and social context.

The traits of this Israeli singularity are to be traced in an extreme fragmentation that concerns different aspects, ranging from ethnic and religious fractures to economic and social divides.

Moreover, from an institutional point of view, the constitutional revolution in 1992 radically changed the power relations between the legislative, the executive, and the judiciary, leading to an unprecedented empowerment of the Supreme Court[1] and its increasingly pronounced activism even in areas defined as "mega-politics." Over time, from the arbiter of mere technical controversies of a predominantly administrative nature, it has become the arbiter of fundamental rights and the legitimacy of law vis-à-vis the Basic Laws approved by the Knesset. As unanimously acknowledged by legal scholarship, it was a constitutional revolution that disarticulated the system of division of powers of the Israeli model.

This evolution is even more relevant if we consider that Israel does not have a formal constitutional text. Still, the constitutional terrain is defined by the Basic Laws approved by the Knesset without qualified majorities or special procedures while enjoying a higher normative value than ordinary legislation.

Finally, another key institutional element we should consider is the unicameral nature of the Israeli parliament, in which the very diverse social

[1] L. Pierdominici, Evoluzioni, Rivoluzioni, Involuzioni. Il costituzionalismo israeliano nel prisma della comparazione, Cedam, 2022, p. 67 ss.

demands do not find expression in a second chamber that can counter the first, as in other constitutional experiences.

In this context, the Israeli Supreme Court, which over time has developed a relevant jurisprudence in some of the most sensitive areas of Israeli politics, such as religious rights and the protection of minorities, is now perceived to be one of the most powerful actors in the Israeli context and is often identified as an institution carrying a liberal and progressive vision, antagonistic to the religious component, in particular the ultra-Orthodox.

Not only that, but the Court's intervention has gone so far as to judge the legitimacy of the executive's action in areas relating to political discretion and not only directly affecting the protection of fundamental rights.

Against this backdrop matured the Netanyahu coalition's attempt to limit, through a series of changes, the Supreme Court's role and influence. As observed, the constitutionalization of rights to quell social conflict has shifted the battle to the institutional level[2].

As mentioned above, however, it is not possible to treat the Israeli case only in the eyes of a kind of exceptionalism. Israel participates in recurring dynamics in different constitutional contexts from a comparative perspective, and therefore, we can also identify common roots of these recurring phenomena at a global level.

The first element concerns the precise historical juncture at which these reforms are introduced.

Indeed, as the authors also point out, we are facing a context of extreme social and political polarization, the emblem of which, from a comparative perspective, is the American case. However, one can also speak of growing polarization at social, economic, and institutional levels when looking at the European continent, both in infra-state and inter-state terms, that is, between different member states of the European Union, as evidenced by several lines of tension, above all those involving the cases of Poland and Hungary.

Another element that brings the current Israeli crisis back into the fold of the common challenges facing contemporary states - and which, moreover, is a symptom of polarization itself - is that of the growing tensions between judicial and political power with attempts to "capture" the former by the latter. Concerning this profile, the Polish case is perhaps the most emblematic. Still, other experiences in the comparative perspective show attempts to limit the independence of the judiciary and depower its function. Consider, for example, proposals to redefine the powers and appointment of U.S. Supreme Court justices[3], as those addressed by the Presidential Commission on the Supreme Court established by Executive Order No. 14023 on April 9, 2021.

The Commission was tasked with discussing and designing several reform options to address the current crisis faced by the Supreme Court,

[2] Ibidem, p. 109.

[3] A. Baraggia, Reshaping the US Judiciary in times of polarization: Biden's Judicial nominations and Supreme Court reform, in DPCE Online, [S.l.], v. 56, n. Sp 1, feb. 2023.

particularly its politicization. As Sitamaran and Epp argue, "several factors—such as increased polarization in society, the development of polarized schools of legal interpretation aligned with political affiliations, and greater interest-group attention to the Supreme Court nomination process—have conspired to create a system in which the Court has become a political football, and in which each nominee can be expected to vote along ideological lines that track partisan affiliation predictably.[4]"

We can also refer to the Spanish constitutional crisis[5], which concerned precisely the reform of the system of appointment of TC judges, again to avoid forms of blockade by the oppositions and thus strengthen the ruling coalition's control over TC[6].

Even in contexts of more fragile democracies, there are attempts by the executive to exert some influence on the judiciary: consider the recent case of Bosnia Herzegovina, where the Assembly of Republika Srpska ask the Vice-President of the Constitutional Court of Bosnia, Mr. Zlatko Knežević, to resign in advance[7].

The Israeli case, with the proposals put forward by the governing coalition, is in the vein of these contemporary trends of executive power intervention aimed at limiting the growing influence of the judiciary at the expense of democratic-representative power.

The proposal put forward by Cohen Eliya and Porat focuses on the issue of the selection and appointment of constitutional judges, an aspect that is perhaps most affected by the phenomenon of polarization, which can potentially lead to a politicization of the Court, thus damaging its image as a neutral, nonpartisan body.

Precisely having in view that of limiting the politicization of the Court, the authors propose as a model the German case, which would seem, more than any other, able to offer a balanced solution that also respects minorities and at the same time can provide stability and democratic legitimacy to the Constitutional Courts. In short, it could represent an antidote capable of mitigating the effects of polarization on the appointment of judges.

From a European perspective, the question is whether this model can be successfully exported to a very different context as the Israeli one.

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[4] G. Sitaraman-D.Epps, How to Save the Supreme Court, 129 YaleLaw Journal,148 (2019),Available at: https://scholarship.law.vanderbilt.edu/faculty-publications/1129

[5] L. Frosina, *La crisi costituzionale spagnola tra* lawfare, *conflitti tra i poteri e rischi di erosione delle istituzioni*, in *Nomos. Le attualità del diritto*, 3/2022 e C. Vidal Prado, *Crisi istituzionale in Spagna: il rinnovo frustrato del* Consejo General del Poder Judicial *e del* Tribunal Constitucional, in *Federalismi.it*, 34/2022, iv ss.

[6] A. Ruiz Robledo, *An Institutional Crisis that Dissolved Like a Sugar Cube*, in *Verfassungsblog.de*, 5th January 2023; J.M. Castellà Andreu, *Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España* e G. Ruiz-Rico Ruiz, *¿Réquiem por el Tribunal Constitucional? Comentario al último caso en el proceso de politización de la justicia constitucional en España (la atribución ilegítima de una competencia para el control preventivo de los actos del Parlamento)*, in *DPCE online*, 4/2022, 2259 ss. e 2273 ss.

[7] Venice Commission, Bosnia and Herzegovina - Constitutional Court - Statement by the Venice Commission, https://www.venice.coe.int/webforms/events/?id=3530, 16 June 2023.

To answer this question, we should look at the rationale behind the rules on appointing judges.

The selection of judges is, in fact, one of the most sensitive aspects that define the role of the courts - especially the supreme and constitutional courts - in a given system. The rules of appointment respond, in essence, to two requirements that do not fully coincide: on the one hand, to ensure a certain democratic legitimacy or at least a certain connection with the democratic component and, on the other hand, to guarantee the independence of the judiciary from other powers and as well as its counter-majoritarian nature, ensuring the rights of minorities as well. Different models of judicial appointment respond variably to these needs[8].

The Israeli model, with the provision of a commission composed of representatives from the government, parliament, the Supreme Court, and finally, the bar, responded precisely to the need to avoid a direct line of dependence on the governing coalition. As observed "While there has been criticism of the workings of the system over the years, it has largely guaranteed that the judges on the Supreme Court, as well as on lower courts, have been well-qualified legal professionals who have displayed their independence from the other branches of government"[9].

One of the proposals at stake - put forward by the Minister of Justice, Levin - would replace the professional component with two "public representatives" chosen by the Minister of Justice (instead of the two members selected by the Bar Association). Moreover, it would increase the number of the Committee members from nine to eleven with two additional members, a government minister and a member of the Knesset. This proposal, extending the influence of the governing coalition on the judges' appointment, would go exactly in the direction of a "capture" of the Court by the executive branch.

This is undoubtedly an extremely problematic reform in violation of the independence of judges and in contradiction to the original model, which was careful to ensure a balance between the different components, which is all the more necessary in a context of extreme opposition.

Cohen-Eliya and Porat's proposal identifies appointment mechanisms that "prevent one political camp from taking over the composition of the judge"[10] while maintaining a certain degree of political representation in the appointment procedures of supreme judges.

The model that is proposed is the German one, which is characterized by an all-parliamentary appointment of judges: the 16 judges of the Bundesverfassungsgericht are elected half by the Bundestag and half by the Bundesrat by a 2/3 majority, but according to different procedures. While in the case of the Bundestag, the selection is made by a 12-member commission, which deliberates by a 2/3 majority within itself on the nomination proposals made by the parties, in the case of the Bundesrat, the

[8] A. Osti, La nomina dei giudici costituzionali tra indipendenza e democratic legitimacy, Editoriale Scientifica, 2019.

[9] D. Kretzmer, Israel's Constitutional Crisis, in Quaderni Costituzionali, 1/2023, p. 180.

[10] M. Cohen Eliya, I. Porat, *A New Deal to the Israeli Judicial System*, DPCE online, 2023, p. 6.

appointment, again by a 2/3 majority, is made by the plenum of the assembly. One point unites both procedures: the secrecy of voting and the absence of public hearings of judicial candidates.

While appointing German constitutional judges appears to be marked by the search for consensus among the various political components, it is also strongly characterized by a predominant role of the parties-particularly two main parties-and little transparency[11].

Is this a viable solution in Israel? This is a challenging path.

The fragmentation of the Israeli political environment, its pronounced multipartyism, and high polarization would not be fertile ground for the development of compromise in appointments; on the contrary, it could become a ground for increased conflict, to the point of stalling the appointment process and making it even more divisive. The secrecy of the procedure, too, is a questionable feature that, while mitigating conflict, would come at a cost regarding transparency and accountability that is undesirable in a polarized context torn by social tensions.

Not only that: the absence of a second chamber would give the appointment of judges entirely to the Knesset, foreshadowing a total concentration of this prerogative in a single chamber.

Thus, an importation with any chance of success with the German model into Israel seems difficult. And certainly, the deep crisis of Israeli democracy cannot be solved by mere constitutional engineering interventions alone. As the protests that have erupted in Israel also show: alongside constitutional mechanisms, they need to be supported by a culture of democracy and separation of powers.

This is why the second aspect of Cohen-Eliya and Porat's proposal, namely to introduce of a "process-based" approach to judicial review, in my opinion, represents an interesting model, especially in polarized societies: the courts rather than entering into the resolution of the most contradictory and divisive cases, which risk perpetuating unresolvable value conflicts on the constitutional level, should move on the level of protecting democratic rules and protecting minorities.

However, as Gardbaum notes, this cannot be enough in a context where courts and, more generally, democratic orders are affected by variously defined phenomena of democratic backsliding or democratic retrogression. Here then, the doctrine's attention should, as Gardbaum suggests, "expand beyond the courts and include democratic design methods, the forces of political competition, the revitalization of democratic norms, responsive political policies and programs, as well as other independent institutional actors to protect the processes and structures of representative democracy[12]".

Thus, the idea of a New Deal for the Israeli judicial system appears fundamental. Still, if a new deal is to be made, it must address the institutional aspects carefully - identifying the best arrangements for the Israeli context - as much as the political, social, and democratic ones.

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[11] U. Kischel, Party, pope, and politics? The election of German Constitutional Court Justices in comparative perspective, I-CON, vol,. 11 no. 4 2013, 969.

[12] S. Gardbaum, *Comparative Political Process Theory*, 18 International Journal of Constitutional Law, 2020,1457.