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In the Name of the People or in the name of the Constitution?

Constitutional Courts, Democracy and Justice


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1. The Will of the People, or the Command of the Law?

The law is the product of the same political forces that it seeks to regulate\(^1\). From this, one of the most important and debated issues of our time derives: in cases of conflict, what must prevail – the will of the People, or the command of Law?

This issue has two parts: why do parliamentary majorities, that are omnipotent, dictate Constitutions, which have the power to bind their actions? Why do these entities establish additional limitations, by means of those Constitutions, and accept to submit themselves to the scrutiny of courts?

This paper is concerned with the second of these questions, which is becoming increasingly relevant with the diffusion of constitutional courts, a phenomenon that has undergone extraordinary acceleration in recent decades. Indeed, in 164 of the world’s 193 States, a mechanism to review legislation exists, and in 76 of these, the review is entrusted to a constitutional court\(^2\). After the fall of the Soviet Union, all the countries of Central and Eastern Europe developed constitutional courts based on the Kelsenian model, and, in the majority of the cases, its German incarnation

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\(^2\) F. Ramos Romeu, in “Rev. of Law and Economics”.
(except for Estonia). In 2009, the British Law Lords became the Supreme Court of the United Kingdom, and the French *Conseil Constitutionnel* gained powers to perform *a posteriori review*.

The diffusion of constitutional justice is due to a “disillusionment with the political” (that also gave rise to the development of sub-systems governed by scientific knowledge, expertise and professionalism, such as, for example, central banks)\(^3\). The decision to entrust the task of review to *ad hoc* judicial bodies can be explained by reference to the difficulties encountered in deferring such task to traditional courts, that may be tempted to apply traditional criteria in interpreting new constitutional norms.

2. *“The Court mirrors public opinion”*

The question set out above is generally given three entirely different answers. The first denies the very existence of any such problem: on this view, there is no conflict-generating divide between politics and constitutional justice. The second answer explains constitutional justice as an artifice developed by politicians, used when they find it convenient to

let other parties decide issues that they cannot determine themselves, either because the issues are excessively controversial or divisive, or because they wish to exclude the issues from the political debate. The third answer takes the distinction between long- and short-term as a starting point and assumes that political majorities seek to bind short-term decisions to those on the long-term.

The first point of view – according to which “courts mirror public opinion” – has been expounded several times over the last fifty years. Among the first scholars to endorse it was Robert Dahl, according to whom “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majority of the US”$^4$.

This point of view was recently developed by Barry Friedman, in his comprehensive and valuable research on the history of the U.S. Supreme Court. According to Friedman, the Supreme Court does not usurp the People’s power, but, rather, provides the People with something that the People itself desires. There is substantive consonance between the People’s will and the Court’s decisions. An “alignment of the justices with

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popular will” takes place; the Court is in the “mainstream of public opinion”. Friedman adds that “the Court has so much political capital that the public will accept a few decisions (apparently even the major ones) with which it disagrees”. Thus, “judicial power exists at popular dispensation”\(^5\).

Let us pause to consider this interpretation. It is based on the U.S. experience. It is expressed in different terms, because Dahl refers to a consonance between the Court and the “lawmaking majority”, while Friedman refers to a direct alignment between the Court and the People\(^6\). However, following a famous observation made by Woodrow Wilson, Friedman then proceeds to distinguish between “opinion[s] of the moment” (from which the Court can depart) and “opinion[s] of the age” (with which the Court is, instead, allegedly in consonance)\(^7\). Finally, if the Court exercises its power because popular will so dictates – if, therefore, the Court is ultimately accountable to the People – the theory of democracy (according to which all power derives from the People)


\(^6\) This difference is important, since, as shall be illustrated in an upcoming paper by P. Pasquino, in the People (Public Opinion)-Majority-Court triangle, there may by different forms of “alliance” and, in particular, a court cannot resist a coalition of the People (Public Opinion) and Parliamentary majority.

\(^7\) B. Friedman, *op. cit.*, p. 382.
remains intact, but what happens to that part of constitutional theory which perceives the Court as a means to counter the tyranny of the majority?

3. Ulysses and the Sirens

The second point of view also denies that constitutional review interferes with the People’s right to govern. On this view, review is advantageous for the political majority, which sacrifices its own short-term interests in exchange for greater or long-term benefits. The majority thus behaves as Ulysses did with the sirens: it ties itself, to be able to overcome the difficulties of navigation.

This perspective was recently illustrated by two U.S. “Law and Politics” scholars, Tom Ginsburg and Ran Hirschl. According to Ginsburg, politicians choose to submit their own decisions to reviews for constitutionality as a form of “political insurance”. If they expect to remain in power after the Constitution is approved, they choose weak courts. If they expect to exit from power, they choose strong courts, to ensure that they retain “some access to a forum in which to challenge the legislature”\(^8\).

For Hirschl, judicial review is “a form of self-interested hegemonic preservation”. “[…] [P]olicy-making authority is increasingly transferred by hegemonic elites from majoritarian policy-making arenas to semiautonomous, professional policy-making bodies primarily in order to insulate their policy preferences from the vicissitudes of democratic politics”. The transfer of decisional powers from the legislature and the executive to judges may correspond to several interests of politics, such as ensuring support for certain policies by means of decisions taken by perceivedly apolitical professional bodies, removing decisions that may be under threat from the political context, which is governed by the principle of majority, or increasing political strength vis-à-vis opponents. Hirschl’s conclusion is that “[…] the current global trend toward judicial empowerment through constitutionalization is part of a broader process whereby self-interested political and economic elites, while they profess support for democracy […], attempt to insulate policy-making from the vagaries of democratic politics”. As a consequence, “[a] new political order – juristocracy – has been rapidly establishing itself throughout the world”\(^9\).

This conclusion is based upon an analysis of the experiences of recently constitutionalized countries (such as Taiwan, Mongolia and South Korea in Ginsburg’s work, and Canada, New Zealand, Israel and South Africa, in that of Hirschl), some of which introduced an attenuated form of judicial review.

There are certainly several cases in which politicians may find it expeditious that other parties take decisions on “hot” topics. Issues such as divorce, abortion, euthanasia, homosexuality, and same-sex marriage, are extremely controversial. Legislators encounter several difficulties in deciding them. It may thus be easier to let an external, neutral party take the first step, and intervene only subsequently, to correct, broaden, or restrict: hence, perceptions of legislative inertia and judicial activism arise. A very well-known example – to which we shall return – is the issue of the Canadian right to secede. In that case, the political system was not able to reach a decision. The Supreme Court thus intervened, managing – with great constitutional wisdom – to establish a number procedural rules, that were then accepted by both sides, that in favour and that against secession.

But, if one shares this view, it is necessary to give up the very idea of neutrality and independence of justice, as constitutional courts appear to be
instruments of politics, that delegate or do not delegate decision-making powers to judges, at its will.

4. Prometheus Bound

The third point of view may be depicted by a comparison with the mythological figure of Prometheus, chained by Zeus as a punishment for having brought fire to men, and to prevent him from distributing other privileges of the divine world. Courts prevail over legislators, thus menacing the very idea of democracy, in the name of the law. They control the tension between the principle of majority rule and constitutionalism; they pose a threat to popular will in the name of the protection of constitutional rights.

The decision that best symbolizes the Supreme Court acting in this role was given in the well-known case of Brown v Board of Education (of 1954)\textsuperscript{10}, through the US judiciary bound legislators and ensured that the principle of equality prevailed over racial segregation. In such a context, judges operate as a “parallel legislature”\textsuperscript{11}.

\textsuperscript{10} 347 U. S. 483.
\textsuperscript{11} The expression was used in India, in relation to the Indian Supreme Court (Global Constitutionalism, III-7).
According to the U.S. constitutional scholar Alexander Bickel, constitutional courts may limit legislators in the name of their “passive virtues”, by virtue of their very “insulation from popular will”, that enables them to remain loyal to the “sovereign will”. For this reason, limits and conditions are placed upon them, such as “standing”, “ripeness”, “mootness” and “political question”12.

However, on this view, which is the entity that ultimately oversees the tension between government by the People and government according to law? What is the supreme authority that decides whether the legislator ought to be placed under control? Is it the Constitution (and, therefore, the constituent majority, deemed superior to the simple majority), a super-majority (i.e. the qualified majority that is normally called upon to amend constitutions, usually by means of special procedures), or the majority itself, that therefore submits itself to control?

5. Democracy and justice

I now wish to discuss the democracy/justice dichotomy. I shall attempt to respond to five questions: who are the constitutional judges?

What kind of power do they wield? With what kind of issues are they confronted? In which manner do they reach their decisions? What are their strategies? I shall conclude that the democracy/justice antithesis requires more careful analyses.

Some preliminary cautions must be made. First, the question posed above cannot be given answers that are applicable to all countries. Ginsburg and Hirschl consider it possible to generalize conclusions, drawn from their observation of the few countries listed above, to all the places in the world where mechanisms for constitutionality reviews have been introduced.

Second, the debate on courts is deeply influenced by U.S. culture, i.e. the culture of the country in which a mechanism for constitutional review was first introduced.

American scholarship is influenced, on one hand, by the nature of the system of judicial power, and, on the other, by the concrete application of case-law. The system of U.S. judicial power is archaic: at the State level, judges are elected by the People, while on the federal (and Constitutional) level, they are appointed by the President with the Senate’s assent, and their office is not subject to age limits. Thus, judicial power is of political
derivation, although interstitial norms and practices have introduced several counterweights to defend the principle of merit.

As far as legal analyses of judicial decisions are concerned, a strong oscillating trend can be registered in American history. From a “Langdellian”, systematic use of case-law, based on the choice of “appropriate” cases, ordered in accordance with conceptualistic or formalistic criteria, a shift was made towards an opposite, “realistic”, orientation, that tends to explain judicial activity in political and even gastronomic terms (“judges decide on the basis of what they had for breakfast”)\textsuperscript{13}.

6.a. Who are the constitutional judges?

First, the stark antithesis between politics and constitutional justice fails to account for the fact that constitutional judges are not wholly alien to politics. They are appointed by political bodies (in the U.S., by the President upon approval of the Senate; in other countries, by the

\textsuperscript{13} There is a wealth of literature on this topic. Among the most recent publications, see I. Pupolizio, Più realisti del re? Il realismo giuridico statunitense nella prospettiva dei “Critical Legal Studies”, in “Materiali per una storia della cultura giuridica”, a. XL, n. 1, June 2010, pp. 73 et seq.
Parliaments). A partial exception arises in Italy, where one-third of the constitutional judges are elected by the highest judiciary.

This close tie is balanced by long mandates (lasting from 9 to 12 years) or by life tenure (as occurs in the U.S.), and, in any case, by a clause for non-renewability of the appointment (the only exception in this respect is the possibility for re-appointment of judges of the European Court of Justice).

Life tenure or long mandates seek to isolate the judges from political bodies. Therefore, judges are nominated by political bodies under one majority remain in office with different majorities. A reduction in the length of the mandate (as occurred in Italy, from 12 to 9 years) can thus be interpreted as an attempt to submit a court to the control of politics\textsuperscript{14}.

It cannot, therefore, be said that political bodies and constitutional courts are wholly separate from one another. A genetic link connects them, although the relationship of accountability between the appointer and its appointee is broken: constitutional judges are of political derivation, although they are not required to answer to politics.

7.b. An interstitial power

Second, constitutional judges decide in an interstitial fashion. They do not have “docket control”; that is to say, they do not control their own caseload, as cases are referred to them by other parties (other judges, or even private citizens, as in the Spanish or German experiences); even the Justices of the U.S. Supreme Court, who have the power to accept or reject cases without providing reasons, cannot choose to hear cases or disputes of their own initiative; they must be sure that the cases referred to them effectively arise from “a case or controversy”, rather than being fictitious or hypothetical; once cases are referred, the Justices may not escape the question posed: they may interpret it, but they are bound to address it; in examining the case, they may not choose among a set of procedures, such as, for example, negotiation: they must follow an adversarial procedure; in deciding, they are bound to observe precedents; should they choose to depart from precedent, they must provide adequate reasons; they may not adopt compensatory measures, such as the “package measures” typically endorsed by EU institutions, in which an agreement is reached, thereby broadening the scope of the decision; in the course of the examination and in the decision, they cannot follow any criteria other than the law.
A well-known U.S. case in which the claimant’s petition was rejected is *Padilla v Hanft* (a decision given in 2006)\(^{15}\), concerning an individual who had been detained for several years without being subjected to a trial. In that case, the Supreme Court considered the case to be fictitious since it was hypothetical, as, in the meantime, Padilla had been accused and detained in accordance with the law: “Padilla is held pursuant to the control and supervision of the United States District Court for the Southern District of Florida, pending trial of the criminal case”. In other words, in this case, the Court was compelled to refuse to give a decision, because it was asked to examine a case that was not pending, but that was, rather, hypothetical.

These considerations suggest that the view which opposes majority decisions to judicial decisions, democracy to justice, is simplistic. The contexts for action, the means to proceed, the methods for decision, the criteria for action, are all different. It is true that constitutional judges restrain legislative power, but it is also true that this very power is subject to intrinsic limitations.

\(^{15}\) 126 S. Ct. 1649 (2006).
8.c. Polycentric issues

There is a further important difference between the power held by the legislative majority and that held by judges, related to polycentric issues. The term was coined by Lon Fuller and indicates all those issues in which more than one possible outcome are open, or that lead to numerous implications.

One example is provided by the Belmarsh Prison decision given by the UK House of Lords in 2004, concerning the detention of foreigners without trial in cases of suspected involvement with terrorist activities. Articles 5 and 15 of the European Convention on Human Rights allow such detention only in case of emergency. Lord Bingham, who wrote the main opinion, stated that only the government could evaluate such a risk, in deference to the principle of proportionality. Indeed, the issue required “a pre-eminently political judgement. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did”.

17 A. X and Others v Secretary of State for the Home Department, UKHL 56 (2004), especially para. 29.
In polycentric issues, several possibilities are open, and there is no single solution. In these cases, both legislation and constitutional jurisprudence pose a limit to judicial activity. This limit is described in various ways, such as, for example, the “political question” in the U.S. or the “legislator’s discretion” in Italy.

A well-known case in this context is Goldwater v Carter, decided by the U.S. Supreme Court in 1979, concerning President Jimmy Carter’s decision to withdraw from the Sino-American Mutual Defense Treaty. The Supreme Court received the case from a Court of Appeal, but decided that it posed a “non-justiciable political question”, as “there [wa]s no constitutional provision” and “[they were] asked to settle a dispute between coequal branches of the government, each of which ha[d] resources available to protect and assert its interests [...].”

9.d. Judgment and judgments

The fourth reason that the simplistic Parliamentary majority/Constitutional Court opposition is wrong is that constitutional judges do not decide alone, in a vacuum. There are parties who “bring” the

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case to be decided before them; if the issue is significant, it will most likely have been preceded by public debate; in several cases, there will have been micro-decisions taken by other judges, experts or technicians, or administrative staff; in other cases, there will have been efforts to legislate; judges themselves, insofar as they belong to an “epistemic community” of not only national dimensions, receive information from several sources, are open to dialogue with other courts; decisions will be reached when the issue is deemed to be “ripe”; finally, important decisions are usually taken on the basis of principles that were established and tested in less significant cases.

In other words, prior to deciding, a dialogue takes place between judges, different sectors of society, public opinion, and the epistemic community. Furthermore, decisions are not to be evaluated individually, but in light of the flux to which they pertain, within a process of decision.

10.e. Are decisions of constitutional judges final?
The main argument of those who are concerned by the “counter-majoritarian difficulty”\textsuperscript{19} and oppose democracy to justice, and decisions taken by the representatives of the People to those taken by the “wise men”, is related to the fact that constitutional judges have the last word. If their decisions are “final”, the decisions of the Parliamentary majority must give way.

However, this does not take into account that constitutional justice is a flow of decisions, rather than a sum of individual isolated decisions. If the “flow” is taken into consideration, it may be seen that constitutional judges proceed by “trial and error” much more than one might originally imagine: minor “pilot” decisions pave the way for more significant decisions; many decisions are withheld or postponed; several decisions are open, or do not have immediate effect. In the space of time between the lesser and the more significant decision, there is room for the Parliament to act, as in the case in which the decision is postponed or when the effects of the judgment are deferred in time (in this respect, as an ultimate example, reference shall be made to the \textit{Hartz IV} decision given by the I Senate of the German \textit{Bundesverfassungsgericht} in January 2010\textsuperscript{20}).

\textsuperscript{19} A. Bickel, \textit{op. cit.}
\textsuperscript{20} 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09.
The democracy/justice antithesis is resolved in favor of the former in those countries such as Canada, New Zealand and the United Kingdom where, in the name of Parliamentary sovereignty, mild forms of judicial review were introduced. For example, in Canada, Section 33 of the 1928 Constitution contains the “notwithstanding clause”, according to which Parliament may expressly declare a law to be effective notwithstanding the fact that it may violate Sections 2 and 7 to 15 of the Constitution. The declaration is valid for a period of five years and can be renewed\textsuperscript{21}.

11.f. Judicial strategies; Conclusion

Finally, to evaluate the relationship between the courts and the political system it is necessary to analyze the judicial strategies adopted by constitutional courts in extreme cases, such as those related to major social conflicts, to relations with indigenous populations (Aborigines, natives, etc.), or to terrorism.

It is possible to identify four strategies: regulation of incoming cases; time control; “self-restraint” (or “activism”); and the “construction” of the decisions.

\textsuperscript{21} Moreover, a constitutional convention developed to refrain from applying this provision.
It has already been observed that constitutional courts do not have “docket control”. However, this does not preclude them from controlling other parties’ initiative (usually, that of referring judges). This may be done by means of procedural instruments that lead to declarations of non-admissibility of the claim (due to non-relevance, lack of ripeness, inconsistencies, the fictitious or hypothetical nature of litigation, etc.)

In relation to the timing of the effects of decisions, the statutes regulating several constitutional courts (including, for example, those of France and Germany) expressly enable them to determine when decisions have legal effect. The decision will be binding from the date established by the court\textsuperscript{22}. Other courts consider such a power to be implied, and do employ it.

“Self-restraint” and “deference” towards Parliaments are illustrated by three American cases. Two well-known cases decided by the U.S. Supreme Court in 1978, both concerning the relations between the legal orders of Native American tribes and the general legal order (\textit{Oliphant v Suquamish Indian Tribe} and \textit{Santa Clara Pueblo v Martinez}\textsuperscript{23}). In both cases, the Court concluded that the issue was one for Parliament to decide.

\textsuperscript{22} Recall the \textit{Hartz IV}, mentioned above, given by the German Constitutional Court.

In another important case, *Medellin v Texas*\(^{24}\), decided in 2008, the U.S. Supreme Court concluded that the decisions given by the International Court of Justice were not directly applicable in the United States, as a decision to this effect would undermine “the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgement directly as domestic law”.

Finally, decisions do not necessarily provide a final solution to the claims raised, especially when important social issues are involved. Rather, they establish the “rules of the game”; they set the procedure, by creating sequences and assigning roles; they establish the hierarchies between norms. A well-known case in this context is that decided by the Supreme Court of Canada, *Reference Re Secession of Quebec*\(^{25}\), mentioned above, in which it was established that the democratic rights enshrined in the Constitution are linked to constitutional obligations, which also give rise to a duty, imposed upon any majority that may invoke the right to self-

\(^{24}\) 552 U. S. 491.

government, to negotiate secession with the other States and with the federal government.

This cursory analysis leads to the conclusion that constitutional courts, while not having the flexibility enjoyed by Parliaments, may address important social issues, which involve intense political conflicts, with a considerable degree of elasticity.

In conclusion, constitutional judges are not wholly separate from politics. If they are final and can restrain rulemaking power, they are themselves, on one hand, subjected to intrinsic limitations and, on the other, able to exercise self-restraint and defer to legislators.

Moreover, Constitutional courts do not decide alone, in a vacuum, but in the course of a conversation, in an open dialogue with society; they proceed “by trial and error”; they adopt strategies to adjust their powers to the other powers.

Therefore, the stereotype that opposes justice to democracy should be re-examined in the light of more careful research.