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The Role of Constitutional Justice in Contemporary Democracies

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I. THE EVOLUTION OF CONSTITUTIONAL JUSTICE IN CONTEMPORARY DEMOCRACIES

Rosalind Dixon's *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age*, is a complex and rich work, filled with food for thought in terms of both general constitutional theory and constitutional practice. The discourse adds several concrete examples to a broad conceptual and methodological basis, providing rich material for researching the role of constitutional justice in contemporary democracies, especially in moments of crisis or weakness.

From the perspective of my experience, which above all focuses on European constitutional systems, I offer the following comments on the responsibility of constitutional courts in the event of a weakness in or a crisis of democracy, taking a cue, albeit broadly, from Professor Dixon's text.

First of all, we should remember that the role of constitutional courts within the political dynamics of contemporary democracies is one of the most traditional themes of analysis in comparative law research, particularly in works concerning constitutional justice.[1] Starting with the debate between Kelsen and Schmitt regarding who should be the guardian of the Constitution,[2] scholars have long wondered about the predominantly 'political' or, 'technical' role of these courts. A single answer is impossible since there are too many variants to consider, including the historical moment of introduction of the courts, the constitutional reference text, the evolution of the political and social context, and a series of other political and legal variables.

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1 Please refer to Matteo Nicolini and Silvia Bagni, *Comparative Constitutional Justice* (Eleven 2021).

2 Lars Vinx (ed), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge UP 2015); Stanley L. Paulson, 'Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the "Guardian" Controversy of 1931' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2014).

An indispensable condition for the correct exercise of constitutional justice is the independence of the courts and their judges, which derives from the general political and institutional framework and from the culture of the rule of law existing in a country. Prof. Dixon herself admits this when she speaks of political, legal, and social responsiveness, arguing in part II, chap. 5, D, par. 1that "there is significant variation in the degree to which courts worldwide enjoy true formal and functional independence". A series of 'technical' measures can favour such autonomy. Examples include methods used in selecting constitutional judges (the participation of various state powers in their selection; a long term in office; the prohibition of re-election, in which the lack of expectation of re-election highly dilutes any political nature of the appointment), high technical-legal competence and previous professional experience in a legal career which further tend to detach the judge from their constituency, and the same competences of the courts (control over their budget is also relevant, as Dixon points out). In particular, the procedures for selecting judges represent a sensitive issue. This aspect is evident from the fact that the election of constitutional judges with a simple majority vote of the lower house (a very fragile procedure) favoured the manipulation of the appointments of constitutional judges in Poland after 2015 and, therefore, the 'capture' of the Constitutional Tribunal.[3] Another element to consider in evaluating the political role of the 'judge of the laws' is the means of accessing the body (in other words, the quality and quantity of the applicants). The comparative panorama offers a wide range of highly diversified models. Consequently, the impact of the courts on the democratic life of a country and on the modulation of fundamental rights can lead to quite different results. Even though one may expect the court's role being conceived as anti-majoritarian, this is not the case in every country.

Among the non-secondary aspects, particularly in the case of the European courts, the historical phases and the political circumstances of a country's adoption of its constitution have aimed the activity of these bodies at specific purposes, at least in the initial stages of establishing a constitutional legal system. For example, with the birth of the V French Republic, the *Conseil constitutionnel* had the primary task of acting as the 'guardian' of the separation of the spheres of competence of government and parliament (considering the particular political reasons that had led to the drafting of that constitution with a certain anti-party and anti-parliamentary imprint). Only later, beginning in the 1970s, constitutional amendments and the evolution of *Conseil* jurisprudence added the protection of rights to the court's purview. The role of constitutional courts in the post-fascist (following the Second World War or in Mediterranean Europe in the 1970s) and post-communist (after 1989–91) periods has inevitably been directed towards cleansing the legal system of the most hateful limitations of fundamental rights in order to consolidate the stability of democracy,

[3] On this point, many references are available. See, for example, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford UP 2019).

including the regulation of relations between politically active bodies. In the former Communist countries, in particular, the question involved complex tasks, with the succession of several jurisprudential 'seasons'. In the beginning, they experienced a phase of democratisation, which also included transitional justice, followed by stages more focused on the resolution of political conflicts, the protection of fundamental rights, and Europeanisation.[4] For some of these courts, sad seasons of democratic decay and, therefore, of support for this involution followed.[5] Paradoxically, a constitutional court among the most 'gifted' from the point of view of competencies such as the Hungarian Constitutional Court was the first to be 'punished'.[6] On the European continent, any discussion of the role of constitutional courts must include regional supranational courts, such as the Court of Justice of the European Union and the European Court of Human Rights. The face of constitutional justice in Europe arises from a dense network of relationships and reciprocal influences that lead to the so-called 'multilevel protection' of rights.

Regarding the content of the decisions, the judges' attitudes depend on a series of complex variables, revealing a picture that is broader than the simple dichotomy between 'politicised' judges and judges who apply a legal syllogism similar to that used by other jurisdictions. Despite this complexity, the macro-difference in models and roles of the European constitutional courts compared to the Anglo-Saxon apical courts is evident:[7] while in the 'diffused' type of control, the procedures for reaching decisions about the constitutionality of a law are more similar to the processes used by other ordinary courts, the constitutional courts that exercise exclusively constitutional review are special courts. Their judges enjoy a greater degree of discretion, also for the type of normative material they deal with (vague provisions). Today, for European constitutional judges, the outlines of their reasoning are becoming increasingly narrow as they are influenced by a series of elements, including the European and international legal environment in which they are 'immersed' (think, for example, of the possibility of making a preliminary reference to the European

[4] See Carna Pistan, 'Constitutional Justice and Judicial Power. The Role of Constitutional Courts in the Processes of Democratization and Europeanization' in Angela Di Gregorio (ed), *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe* (Eleven International Publishing 2019).

[5] On this matter, please refer to Angela Di Gregorio, 'Constitutional Courts in the Context of Constitutional Regression. Some Comparative Remarks' in Martin Belov (ed), *Courts, Politics, and Constitutional Law Judicialization of Politics and Politicization of the Judiciary* (Routledge 2019).

[6] Following Stephen Holmes, 'Back to the Drawing Board' (1993) 2(1) EECR 21, these courts were super-equipped in the first few years after the transition, which would have made them unpopular with legislators: "overconfidence in constitutional courts might diminish the power and prestige of legislatures, and that courts have no right to decide on complex legal and political problems by invoking abstract constitutional principles".

[7] Manuel Fondevila Marón, *Los jueces de la constitución y del pueblo. Un ensayo de derecho Procesal Constitucional sobre los fundamentos, cambios y retos de la justicia constitucional* (Editorial Colex 2020); Guillaume Tusseau, *Contentieux Constitutionnel Comparé. Une introduction critique au Droit Processuel Constitutionnel*, (LGDS 2021).

Court of Justice). The conditioning of the social context is difficult enough to detect; even harder might be the influence that politics exerts on judges. This influence is hardly noticeable in those countries, such as Italy, where judgement is rendered collegially (no dissenting or concurring opinions), and judges are appointed by different state powers and, with regard to legislative power, with distributive shares (both the majority and opposition parties participate in the election 'pro quota').

Finally, it should be remembered the growing influence that the constitutional courts have played in recent decades by exercising an 'aristocratic' power that replaces the authority of the law. As said, "while making political choices or decisions that influence politics, these judges motivate decisions according to rational patterns of the judgment. But whenever they find the latter too narrow, they do not hesitate to appeal to transcendent values and to use rhetorical arguments typical of discretionary decisions".[8] If constitutional courts are considered, as happens in Europe, the guardians of the supreme constitutional principles considered unchangeable, they end up being superior even to the constituent power. This is evident in cases where they may evaluate constitutional amendments acts, regardless of relevant competence and perpetuity clauses in the constitution.[9]

II. THE ITALIAN CONSTITUTIONAL COURT'S ROLE IN CASE OF LEGISLATURE'S INERTIA: THE ISSUE OF EUTHANASIA

Dixon's book calls us to focus on a more specific aspect: the courts' responsiveness in times of democratic weakness. In these cases, due to the division of political forces, or the inertia of the legislature, or the predominance of majority political forces, the protection of constitutional rights is at risk of falling short, especially concerning some particular minority groups, such as gender and sexual discrimination but also with reference to political rights.

Considering this profile, and moving from theoretical reflection to practical examples, an interesting case study is one in which the courts, while intending to actively affect the choices of the legislator in support of fundamental rights, see their efforts being frustrated due to an irremediable division between

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8 Lucio Pegoraro, *Giustizia costituzionale comparata*, (Giappichelli 2007), 209.

9 This is the position of Lucio Pegoraro, 'Blows Against the Empire. Contro la iper-Costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale condiviso' in *Annuario di Diritto comparato e di Studi legislativi*, XI, 2020, 461, which criticises the claim of constitutional courts to place themselves above even the constituent power. Following Lucio Pegoraro, *Giustizia Costituzionale Comparata* (Giappichelli 2007) 208, "Constitutional courts were defined from time to time by scholars from all over the world 'permanent constituent power', 'island of reason in the chaos of opinions', 'aristocracy albeit in modern guise'". See also Lucio Pegoraro, *Sistemas de justicia constitucional* (Astrea 2020).

political forces. One such example, taken from Italy, is the so-called 'end of life', or 'euthanasia' question, a highly sensitive ethical issue.

Since its establishment, the Italian Constitutional Court has played a progressive role in defining or clarifying the contours of the fundamental rights in which the legislature has struggled to intervene.[10] In this endeavour, the Court has interpreted legislation progressively in order to take society's evolution into account, thus competing with another fundamental instrument that the Italian Constitution has provided for in terms of an anti-majority function, such as the referendum to abrogate laws. In particular, the 'end of life' issue offers an example of a 'virtuous' competition between the two instruments in trying to remedy the unsustainable inertia of the legislature. Nevertheless, an act of Parliament is necessary to regulate a series of relevant aspects because a 'surgical' intervention, such as the one produced by an abrogative referendum, could actually lead to further problems.

The need for legislative regulation of euthanasia has been dragging on in Italy for several years, with the attention paid to a series of painful cases in a strongly Catholic social context and with the relevant political influence of the Vatican. Political forces are seriously divided on ethical issues, both among themselves and internally. Because of particular cases that have received wide media coverage and the involvement of well-known politicians (eg the Cappato case), the Constitutional Court intervened in a two-step process to remedy, albeit partially, the inability of Parliament to regulate the matter. In particular, the Court's intervention turned to the criminal case of the indictment of assisted suicide (or passive euthanasia) pursuant to Article 580 of the Criminal Code. At first, in order no. 207 of October 23, 2018,[11] the Court found that some aspects of the indictment were unconstitutional (referring to a person suffering from an irreversible pathology that was a source of intolerable physical or psychological suffering, kept alive by life-support treatments, still able to make free and informed decisions). In these cases, an indiscriminate prohibition of assisted suicide would limit the patient's freedom of self-determination in the choice of therapies, including those directed at freeing him from suffering, without this limitation being aimed at protecting another constitutional interest, thereby violating human dignity. With this order, however, the Court suspended the declaration of unconstitutionality of Article 580 of the Criminal Code in relation to the cases indicated to allow the legislature to intervene. After a year of legislative inaction, with judgement no.

[10] Vittoria Barsotti, Paolo Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford UP 2015); Vittoria Barsotti, Paolo Carozza, Marta Cartabia, Andrea Simoncini (eds), *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (Routledge 2021); Paolo Passaglia, 'Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way' (2016) 2 The Italian Law Journal.

[11] https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=207.

242 of 2019,[12] the Court declared Article 580 of the Criminal Code inconsistent with the Constitution in the part in which it does not exclude the punishment of those who, in the manner provided for by Act no. 219 of 2017 ('Rules on informed consent and provisions prior to health treatments'), facilitates the execution of the suicide intention, autonomously and freely formed, of a person kept alive by life-sustaining treatments, suffering from irreversible pathology source of intolerable physical or psychological suffering, still able to make free and conscious decisions, provided that the methods of execution have been verified by a public structure. The judgement let a certain practice start, waiting for the adoption of a general act. In the meantime, eight bills have been introduced to the Parliament, united in a single text approved by two commissions of the Chamber of Deputies on December 10, 2021. The draft thus began the difficult legislative process in the lower house. This text follows the reasoning of judgment no. 242 but deals with a particular aspect: specifically, it authorises and regulates the right of a person suffering from an irreversible pathology to request medical assistance in order to voluntarily end their life. Accordingly, this approach does not entail active euthanasia but addresses enabling the patient to act autonomously with the help of public medical facilities, thus excluding criminal responsibility for those who help them in this process. However, due to the complexity of the matter, the public debate has continued. Signatures were successfully collected for the holding of a referendum to abrogate Article 579 of the Criminal Code which punishes the murder of the consenting party. Specifically, this case refers to the eventuality in which a third party ends the patient's life at the latter's request (active euthanasia),[13] an act that is currently still punished by the Criminal Code. Should the referendum succeed, active euthanasia would be allowed, and the doctor who administered the lethal drug would no longer be punished (while today they are punished for the crime of murder of the consenting person pursuant to Article 579 of the Criminal Code), provided that the patient gives consent in a form provided for by the law on informed consent (the 2017 law cited in judgement 242/2019). This practice, however, will continue to be punished if the act is committed against an incapable person; a person whose consent has been extorted by violence, threat, or suggestion; or in the case of a child younger than eighteen.

[12] www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=242. In English: Sentenza_n_242_del_2019_Modugno_en.pdf (cortecostituzionale.it). Benedetta Vimercati, 'I-CONnect Symposium: The Italian Constitutional Court on Assisted Suicide—The Italian Constitutional Court and the Recent Decision on Assisted Suicide: The Guardian of the Constitution or the "Guardian" of the Parliament?', Int'l J. Const. L. Blog, December 6, 2018; P. Delbon and others, 'Medically Assisted Suicide in Italy: The Recent judgment of the Constitutional Court' in *La Clinicaterapeutica*, 172, 3, 2021.

[13] Euthanasia can be active, when the patient's death derives from the direct involvement of a doctor who administers a lethal drug, generally through an intravenous injection; passive, when the patient's death is obtained with the doctor's refusal to practise the essential treatments to keep him alive. The notion of assisted suicide is still different, when death is caused by patient himself (and not by third parties) but through the assistance of other people.

The proposal of this referendum—which should have taken place in the spring of 2022 but was stopped by a decision of inadmissibility of the Constitutional Court on February 15, 2022— provides a clear demonstration of the contrast between direct and representative democracy: the relentless inertia of Parliament is answered by addressing an issue directly to the voters. Infact, this is not a situation in which Parliament has adopted an act on euthanasia which was submitted to the voters who can decide to abrogate it or not, but quite the opposite. This is a hypothesis of a 'manipulative referendum', in which, through the elimination of a few sentences from Article 579 of the Criminal Code the result could have been the legalisation of active euthanasia.

III. THE RISKS AND POTENTIAL OF CONSTITUTIONAL COURTS IN DEMOCRATIC CONTEXTS

As Rosalind Dixon states in her Introduction, paragraph, A the courts are relatively well-placed to counter forms of political monopoly, blind spots, and inertia (that is, democratic dysfunction)—but under certain conditions, that is, "where judges enjoy a meaningful degree of independence, political and civil society support and remedial power". Lacking the specified conditions, as seen in 'illiberal' contexts or in cases of democratic degeneration or true authoritarianism, the courts alternatively "may become tools for eroding rather than buttressing democratic constitutional commitments".[14] In contexts characterised by illiberal decay, constitutional courts have failed due to a general weakness of the constitutional framework, partly inherited from the past, and the absence of a mature system of checks and balances. The political involvement of the constitutional courts also depends on their competencies (in Turkey and Hungary, the competencies were huge and with a potential political impact). Venezuela demonstrates the risk of granting broad powers of constitutional control to judicial institutions in weakly institutionalised democracies.[15] In fact, without solid democratic institutions and a strong sense of judicial virtue, constitutional courts can favour authoritarian constitutionalism.[16]

Sometimes, the courts may find themselves in a rather uncomfortable position. As the Italian case demonstrates, constitutional courts must provide a delicate balance between different constitutional values. For instance, the

[14] On the role of constitutional courts in favouring the descent into authoritarian degeneration and on the new role they have played afterwards, please refer to Angela Di Gregorio, 'Constitutional Courts in the Context of Constitutional Regression. Some Comparative Remarks' in Martin Belov (ed), *Courts, Politics, and Constitutional Law* (Routledge 2019).

[15] Carlos García-Soto, 'Venezuela', 2017 Global Review of Constitutional Law, 314.

[16] Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 391. Please see also Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law. The Politics of Courts in Authoritarian Regimes* (Cambridge UP 2008); Michaela Hailbronner and David Landau, 'Introduction: Constitutional courts and populism', Int'l J. Const. L. Blog, April 22, 2017.

approach to ethical values and to gender equality, can vary over time.[17] At the same time, the excess of 'jurisdictionalization', a leading role of the courts focusing on individual rights and a liberal society model, risks hiding other crucial values of contemporary democracies that are particularly relevant in non-Western cultures, such as rights of communities, solidarity, duties, etc. This attitude could fuel the populist anger that continues to be used to exploit the dissatisfaction of citizens, especially towards aristocratic and unrepresentative bodies such as courts, a phenomenon that remains present in Europe. Western constitutional courts and legal scholarship are not currently particularly courageous in pursuing the values of fraternity and equality in addition to those connected to liberty. Therefore, a positive evolution can be seen in the position of the courts described by Prof. Dixon in Asia, Africa, or Latin America that courageously include in their arguments the values of local culture. Western tradition in these countries continues to be relevant through the influence of international doctrine, which is almost exclusively Anglo-Saxon, and the phenomenon of imitation for the sake of prestige or cultural imposition. The values of the family, the group, the community, and the nation can also receive a non-authoritarian interpretation compatible with the values of liberal individualism with which they must be balanced. The European Constitutions adopted at the end of WWII also began with the enhancement of social, religious, and community profiles.

In some cases, stability represents a value that should not be overlooked. Consequently, the decisions of some Latin American courts to allow third presidential mandates should be considered in the spirit of the context. Despite the fact that these pronouncements seem to benefit the perpetuation of power, certain institutional mechanisms may be preferable to others in circumstances characterised by strong social, political, and economic instability. The solutions applicable to Western-type constitutional systems are not necessarily suitable for other types of legal systems. Therefore, the relationship between constitutional courts, constitutional text, and constitutional culture varies according to contexts, models, and historical phases, and it is not always easy to determine

[17] An interesting example of the evolution of Italian constitutional jurisprudence comes from the case of a wife's adultery. In 1961 (decision no. 64), the ICC did not consider that art 559 of the Criminal Code violated the principle of equality between spouses (by not punishing a husband's adultery), as a different factual situation was acknowledged (the law did not discriminate but regulated in a different way objectively different situations). However, seven years later, in decision no. 126 of 1968, the same Court, one third of which included the same judges who had ruled in the earlier decision, changed its position when confronted with the same question, declaring two paragraphs of art 559 of the Criminal Code unconstitutional because they did not guarantee the equality and unity of the family. Thereby, the Court established that "the law, by not attributing relevance to the husband's adultery and instead punishing that of the wife, places the latter in a state of inferiority, harming her dignity, forcing her to endure infidelity and insult, and has no criminal protection". Thus, the Court relies on the 'change in social life' and on the fact that women have acquired fullness of rights up to the point of equality with men. See Danilo Castellano, *Costituzione e costituzionalismo* (ESI 2013),107 et seq.

the point of crisis in terms of the democratic balance and the responsibility (positive or negative) of constitutional justice bodies.