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The Israeli Constitutional System in a Comparative Perspective

1. The Israeli legal system is quite often quoted by comparative law scholars, both European and North American, though the interest of the latter is stronger for many reasons: the closer cultural links between Israeli and Anglo Saxon scholars, the many similarities between Israeli constitutional law and the US, Canadian or UK constitutional orders.

Less attention is paid towards Israeli law in countries like France, Germany, Spain or Italy, as is shown by the lack, in Italy, of a study entirely devoted to Israeli constitutional law until the publication of the book presented here[1].

I will not discuss here the general features of the Israeli legal system, as a mixed system, partly ruled by common law, partly by civil law, as it is well known by comparative law scholars.

I will focus directly on the constitutional features.

Probably the most quoted feature, in foreign legal literature, is the lack of a written constitution in Israel, or, more properly, the lack of a constitution written as a single document, produced by a sole act of will of a Constituent Assembly.

The role of the Supreme Court is equally studied, from at least two standpoints:

a) the development of the judicial review of legislation, outside any constitutional provisions, following the American model of Marbury vs Madison; Israel is placed in the category of countries that have a decentralized system of constitutional review, together with the US, Canada, Japan and Australia (in Europe, only Estonia).
b) the activism of the Supreme Court, that is the protagonist in every field of social and political life; especially the creation of a judicial catalogue of fundamental rights

[1] "Il sistema costituzionale dello Stato di Israele" a cura di T.Groppi, E.Ottolenghi e A.M. Rabello, Torino, Giappichelli, 2006.

and the guarantees of these rights even while facing a state of emergency, war or terrorism.

Other features studied include:

a) the system of government, mainly in the years 1996-2003, when the direct election of the prime minister was introduced. For example, the Israeli model is frequently referred to by scholars and politicians in Italy, as far as the subject of the constitutional reform of government is concerned, and there are many articles written on this matter;

b) the control on political parties: from this point of view, Israel is classified, together with other countries, such as Germany, into the category of "protected democracies";

c) the judiciary system, mainly the selection of the judges;

d) the citizenship rules, that are unique in the comparative perspective, and that identify the very essence of Israel identity;

e) the relationship between religion and state power, and everything about the secular character of the State, as a "Jewish and democratic state";

f) techniques of constitutionalizing rights, like the presence of limitation or override clauses.

And there are likely many more features of Israeli Constitutional law that have been examined by comparative scholars.

Thus, it seems to me that the most relevant feature that has to be pointed out – in order to find, if it is possible to find any, some "lessons from Israel" – is the attempt to build a constitutional democracy without a formal Constitution.

I have chosen to devote the rest of my presentation to this point.

I'd like to show that, from a comparative point of view, after the transformations in the '90 (known as "constitutional revolution"), that statement is not true any more, and that Israel has today both a written and rigid constitution.

All the same, it is a "crippled" constitution, as Barak said, different in many ways from the constitution of the "constitutional state".

Finally, I'll point out that this attempt, especially if we judge it to be successful, is a challenge to many of the certitudes that constitutional law scholars usually have. I would like to mention my conclusion in advance: in spite of first impressions, the Israeli constitutional experience is not as different as it would appear from the experiences of most constitutional democracies, with or without a formal constitution.

2. This presentation would need an introductory explanation of the meaning of the words “constitution” and “constitutional state”, and also of the role of the constitution in a constitutional state.

a) What is a constitution and when was it conceived?

The modern idea of a constitution was developed at the end of the 18th century in the United States and France. The constitution is a regulating text that is a primary legal source and it is binding both for citizens and public authorities. The constitution lays down the rights of the citizens and the relationships among the powers of the state. The constitution derives from the constituent power, a power that “uno actu”, in a single moment, enacts the constitution. However, in the liberal states of the 1800s, the constitution failed to impose its supremacy over the law, which emerged as the supreme and unlimited legal source since it is the expression of Parliament's activities. According to that approach, Parliament represents the nation, seen as a whole composed of identical and equal individuals.

b) What is the constitutional (or democratic and pluralist) state?

It emerged in the 20th century through an evolution of the liberal state aimed at acknowledging the differences existing within society that need to be partly overcome and partly protected.

It is a pluralistic state: it sees the participation of all the different components of society, which maintain their own identity; differences are allowed or even enhanced but discrimination (for age, gender, social class, language, religion) is opposed. It differs from the 1800s state, from which it inherits many features, in terms of its institutional layout, as the free political competition (free elections and freedom to found political parties), the principle of the separation of powers, the guarantee of the rights and freedoms, the rule of law.

c) What is the constitution in the constitutional state?

In a pluralistic, constitutional state, the basic role of the constitution implies contributing to the unity of the system.

This constitution is: a written text; as the content, it lays down the organisation of the political power (power relations, political parties, elections) and it guarantees the rights of minorities (political, social, religious, linguistic minorities); it is product of a “democratic constitutional moment”, in which in some ways “the people spoke”, and there was a consesus on the constitution: the constitution is the product of a compact on shared values and principles, approved by the people.

As a result, this constitution is the higher law, binding for all subjects and institutions: it is defined "rigid" and is protected by constitutional justice, i.e. judges charged with enforcing the general compliance with the constitution. It may be modified only with the agreement of a large part of Parliament or through a referendum, and certain provisions may not be amended. Lawmakers are also bound by the constitution: the level of political majorities differs from that needed to amend the constitution, which is higher.

The aims of the constitution are at least three:

a) to provide a symbolic foundation of the State, of its unity;
b) to improve the rule of law, by submitting all the powers to the law, including the legislative power;
c) to guarantee a set of fundamental rights and principles by taking them away from the will of the majority.

The constitutional state is an attempt to react to the failure of the legislative state, of the collapse of the democratic regimes in the 30'. The constitution ensures social cohesion: the minorities accept being subject to the majorities only under certain conditions, i.e. the conditions enshrined in the constitutional charter.

3. As all the new states created after the World War II, also Israel, in the very moment of its foundation, decided to enact a Constitution: the founding document, the Proclamation of Independence, set a deadline for the adoption of a Constitution: it should have been adopted by a Constituent Assembly elected "not later than the 1st October 1948".

All the same, after a few years of attempts by the First Knesset, the project was dismissed and, in 1950, the "Harari resolution" established that "the First Knesset assigns to the Constitution, Law and Justice Committee the preparation of a proposed constitution for the state. The constitution will be made up of chapters, each of which will constitute a separate basic law. The chapters will be brought to the Knesset, as the Committee completes its work, and all the chapters together will constitute the constitution of the state".

The arguments put forward by those opposed to the constitution, headed by David Ben-Gurion and the religious parties, are of importance.

These arguments were the idea of the constitution developed in previous centuries, against the background of social and economic struggles that no longer existed; that

despite and perhaps even because of the absence of a written constitution in Great Britain, the rule of law and democracy there are solid, and civil freedoms are upheld; that the Proclamation of Independence includes within it the basic principles of any progressive constitution, and the Transition Law of 1949, which was passed by the Constituent Assembly, constituted a fulfilment of the state's obligations towards the United Nations on this issue; that only a minority of the Jewish people had already arrived in Israel, and the state does not have the right to adopt a constitution that will bind the millions that have not yet arrived; that because of the nature and special problems of the state, it is difficult to reach a consensus regarding the spiritual principles which are to shape the image of the people and the essence of its life, and the debate about the constitution could lead to a cultural war between the religious and secular communities; that the State of Israel was in the midst of a continuous process of change and crystallization, and this cannot go together with a rigid constitution.

Thus, in Israel, at the moment of the foundation of the State, a "will of constitution" (the *Wille zur Verfassung* pointed out by German scholars) was absent: there were not the conditions for a "constitutional moment" (to use the words of Bruce Ackerman), a moment in which the wills of all the political actors tend towards a common purpose, in order to establish shared principles, higher than partisan interests, that should direct the "normal politics".

In the debates about the enactment of a written constitution the conflict between universalism and particularism that marks all Israeli constitutional history, and that divides political parties and public opinion, takes root: a conflict implicit in the Proclamation of Independence, where it is established that the State of Israel "will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture".

On one hand, thus, freedom and peace "as envisaged by the prophets of Israel"; on the other hand, equality of rights, without any additional qualification and without any links to a definite historical tradition: a discrepancy that does not allow us to assert, following Bruce Ackerman's theory on constitutional moments, that in 1948-49, in Israel, the people had spoken, and leaving the apathy of the "*normal politics*" period, had directly taken a decision about foundational values.

4. With reference to the Harari resolution, some scholars (also Italians) have qualified the Israeli constitution as a "step by step constitution" [which does not have exactly the same meaning as the "Crippled Constitution" referred to by Aharon Barak].

In fact, over the years, as is well known, the Knesset has enacted many Basic Laws. By now, with the exclusion of some rights, such as equality or social rights, that remain uncodified, all constitutional matter is ruled by Basic Laws: as I have already said, the rights of the citizens and the relations among the powers of the state.

We should add that the Supreme Court (in the famous decision *United Bank Hamizrahi Ltd. v. Migdal Cooperative Village*, then clarified by other decisions, such as the Herut case, in 2003) took a position about the place of the Basic Laws in the hierarchy of the source of the law: "Basic Laws are chapters of the state's constitution. They are products of the Knesset's constitutional authority. A Basic Law exists at the highest normative level. Consequently, Basic Laws and their provisions should not be changed by anything but Basic Laws.…Similarly, a regular law does not have the power to infringe upon the provisions of a Basic Law, unless such is allowed by the limitation clauses which are part of the Basic Laws themselves".

Thus, although they do not include any entrenched formula, they are superior and they cannot be derogated by any subsequent ordinary law (the concurrent opinion of Justice Cheshin is contrary on this point). A law, in order to amend a Basic Law, must refer to itself as a "Basic Law": when there is a contradiction between a basic law and an ordinary law passed after the basic law is passed, the ordinary law is null and void.

It seems to me that this is the very essence of the "constitutional revolution": the recognition of the supremacy of the Basic Laws (and not only of the Basic Laws on rights, nor of the Basic Laws with entrenched clauses). On this point, I share the opinion of Ruth Gavison: the "constitutional revolution" is a product of the Court more than of the Parliament; it is a result of an interpretation by the Court.

The consequence of this statement is the judicial review of legislation, that is established by the Court at the same time, by the same decision: it is for the judicial power (and not only for the Supreme Court) to control if an ordinary law is consistent with a basic law: thus, a decentralised system, judicially, and not statutory, created.

From a comparative point of view, we can maintain that, as a consequence of this1995 decision, Israel has both a written and rigid constitution.

It has a written constitution, with the only peculiarity that it is not contained in a sole document, but in a plurality of basic laws. The content of these basic laws is constituted

both by regulations which aim to organize the separation of powers and by regulations which are specifically directed at protecting rights.

It has a rigid constitution, meaning a constitution that is the supreme law of the land: firstly, because these rules cannot be modified by the ordinary laws, but they need an explicit amendment by another basic law; secondly, because the supremacy is guaranteed by the judicial review of legislation.

The main difference between the Israeli constitution and the constitution of the constitutional states (as I have already mentioned) is, besides its formal appearance, the fact that the former is not enacted as the founding document of the legal order, as the result of a "constitutional moment", in the sense that it is not a product of an act of will of the people. As a consequence, it can be amended by simple majority (with the exception of the few provisions that are entrenched in formulae) and there is not any statutory foundation of the judicial review of legislation.

Apart from the theoretical framework to explain the Knesset's power to enact a constitution (according to many arguments, for example in Barak's view, the reason for this is that "the constituent continuity was not interrupted when the constituent power of the Constituent Assembly, i.e. the First Knesset, was passed to the second Knesset", whereas Shamgar has a different approach, for he based the Knesset's constituent power on the doctrine of the Knesset's unlimited sovereignty), one first question, in a constitutional democracy, is "when did the people speak (about the constitution)"?

I think that the reasons given by some scholars to maintain that in 1992 the people spoke, and that it was a constitutional moment, are slightly weak (these reasons are, e.g., the expectations of Israeli public opinion, the awareness of the Knesset that it can exercise the constitutional power which emerges from parliamentary work and from the evidence of the protagonists of the event, on the fact that parliament accepted the judicial review of legislation without opposition, as the case of the *kasherut,* which led to the introduction of the override clause in the Basic Law: Freedom of occupation, shows – Barak Eretz).

I would like to point out the words of Judge Cheshin, in the Mizrahi case: a constitution has to be enacted in full awareness, with consent, publicly, and with a direct mandate from the people, and should not be enacted like the basic laws concerning human rights, in haste, and with neither awareness nor appreciation of their significance and importance.

Thus, it seems to me that, even if we agree that in Israel there is a written and rigid constitution, there is not a constitution as a product of a decision of the people on its future political unity, as a result of a "constitutional moment".

It seems to me as well that a real constitution is necessary: the educational and unifying value of a charter of shared values would be particularly important in Israel, where men and women coming from countries with profoundly different regimes and political cultures, and whose integration appears arduous if left to "being Jewish" alone, arrive and continue arriving. All the same, scepticism about the concrete possibility of adopting a constitutional text dominates: if the Jewish people did not succeed in this at the founding moment of the new legal system, when a document like the Proclamation of Independence, with indisputable constituent importance, was written, how much more difficult will it be to do so today, in a historic period when the premises for the foundation or re-foundation of the legal system are lacking, when, once the "veil of ignorance" was lifted, all the same the divisions and ideological positions at the basis of the failure of the constituent process of 1948-1950 have not been faded ?

5. The next question concerns the suitability of this kind of constitution to reach the aims of the constitution in the constitutional state.

It seems to me that it cannot provide a symbolic foundation of the state: in any case, it is not needed today any more, and in addition the Declaration of Independence suits to this goal, establishing the unity of the people of Israel. On the contrary, it provides to the aim of submitting all the powers to the rule of law, whereas the third function (to save a set of principles, by taking them away from the majorities) is problematic and it cannot be taken for granted, because the Basic Laws can be amended by simple majorities, in most cases.

But, above all, it does not provide a proper foundation for the judicial review of legislation: in almost every country the legitimacy of judicial review of legislation is questioned, and more often in those countries where there is not a statutory provision for this review. The Israeli debate shows how the problem of legitimacy of judicial review is prominent and how the two aspects (absence of a shared constitution and questioning the legitimacy of Supreme Court) are related (I am thinking of Ruth Gavison's articles).

A result of the Constitutional revolution was a decrease in the legitimacy of the Court, as shown by the initiatives to establish a separate Constitutional Court. And this despite the moderation demonstrated by the Supreme Court in its use of judicial review, which has been quite cautious (only five statutes have been overruled by the Court in more than ten years) by comparative standards. It is not possible, for example, in Israel, to use the so called "source based" strategy to legitimise the judicial review: it is interesting to refer the opinion of the Supreme Court of Canada, in an important decision dealing with legitimacy of judicial review (Motor Vehicle Act (B.C.) Reference [1985] 2 SCR 486, 497): " It ought not be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the Courts but by the elected representative of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts to its legitimacy".

In order to justify the legitimacy of the Supreme Court, a wider definition of constitution has been sought, such as the definition that can be found in the work of Barak. According to Barak, the constitution is a combination of praxis and history, of the activities of public powers (parliament, the Supreme Court) which intertwine with a large consensus in scholars and public opinion.

If we would like, following the theory of Bruce Ackerman, to ask when the people spoke, the answer for Barak would be found in the very election of the First Knesset as a Constituent Assembly and, afterwards, in every parliamentary election, because electors have to vote considering constitutional reform as well, references to which are always contained in the manifestos of the political parties.

On this kind of constitution, according to Barak, the legitimacy of the Supreme Court is based. It has to maintain a close alliance with public opinion, it has to act as if the confidence of the people in the entire judicial system depended on the way with which the Court exercises balance: "the need to ensure confidence means the nerrd to preserve the public's sense that judicial discretion is being exercised objectively, through a neutral application of the laws and of the fundamental values of the nation".

6. I think that if we consider the countries with a formal constitution, produced by the constituent power of the people, as usually happens in democratic states, the problems which have arisen are not very different.

In this kind of legal order, in fact, the time that has passed from the enactment of the constitution requires us to reflect on what a constitution really is and on the suitability of a merely formal and textual conception of it to point out its lively spirit, its strength. Once the founders are no longer alive, in the face of elapsing time and the passing of the constituent moment, the necessity of going ahead with the text, of going beyond formalism, again emerges. The relationship between constitutional text and the constitution, between the will to fix the rules and regulations in a written text on one hand, and the unavoidable tacit changes, which determine an increasing distance from the text, on the other hand, is especially evident in the constitutional history of the United States. This is not the only example: Italy as a similar debate, due to the failure of most of the intents to amend the text. It is not the same in other countries, such as Germany, where there is a culture of the "maintenance" of the constitutional text, by amending it frequently.

In the US, the reason of the debate is easy to understand, and it is a consequence of the distinctive features of the US constitution: a constitution that has lasted more then two centuries, and that, in this long period of time, with the epochal changes that have happened, in the United States and in the world, was amended only 27 time, and most of the amendments concern, what is more, precise and not really important articles.

In recent decades a rich debate has arisen in the US legal community. Many scholars and judges have developed an idea of constitution that is independent from a written document, produced by a constitutional compact, such as that of Philadelphia. Others, to stop the creative power of interpretation of the courts, first of all of the Supreme Court, strongly defend the written text, by performing textual interpretation and by enhancing the original intent of the founders. The centre of this debate is what the "US constitution" means today. Is it the written text enacted by the Founders, with the addition of the constitutional amendments, or, on the contrary, is it the living, unwritten constitution, that arises through the decision of the courts, especially following the New Deal and the Civil Rights campaigns?

This is where the question about the role of the Courts in constitutional interpretation arises: where does the interpretation end and the creation of new constitutional rules begin? And where is the foundational framework of the

constitutional adjudication, how can a Supreme Court (or even a Constitutional Court) face representative bodies, if the written text is no longer able to build, to sustain, this legitimacy?

The Israeli constitutional experience seems to point out the opposite side of the coin: without any clear display of constituent power (beyond the debate, rather formalistic, about the transmission of the constituent power by the First Knesset to the following ones), may a constitution, as the "Grundnorm" of a legal order, binding for all the subjects and public bodies, parliament included, arise only from history, culture and court decisions? In addition, it arose at a relatively late stage in the development of the legal system, without any particular historic event occurs. How can it found the legitimacy of the judicial review, or of the power of the judiciary to strike down a product of the people's representatives, democratically elected? In the absence of a constitutional compact on shared, foundational values, how can a court pretend to be the interpreter of these values?

But on a closer look, although these experiences seem to be so distant, the problem underlying them is very similar: in both cases the formal idea of constitution, product of a constituent power that exhausted "uno actu" (the "modern constitution"), is not sufficient to explain the legitimacy of the "living constitution". In one case because the original text, written by the Founders as a compact, is so far away in the past, in the second case because there is not any compact. Thus, the legitimacy of the constitution does not depend on the constitutional moment, on the legitimacy of the Founders, but on the capacity to give suitable answers to the needs of the actual time, of the contemporary people, on the correspondence to the spontaneous forces and vital tendencies of its time, on the capacity to foster and to coordinate these forces, on the capacity to represent the complexity of social relationships.

The constitution (this kind of constitution) has to be constantly re-created, by the concurrence of many wills, of many forces, of many actors, that redefine its concrete and historical significance: only an always re-created compact can continue to be perceived as valid, as long as a consensus, a "rule of recognition" exists, with or without the existence of a "formal" constitution.

The slow sedimentation of judicial, shared, values in the collective perception, or, on the contrary, the increase of tensions and disagreement on the values defined by the Supreme Court are the two possible results of the search for a constitution in Israel.

These results are not very different from what happens in countries with a formal constitution. The lesson from Israel (or for Israel?) is that we should not overvalue the importance of a written constitutional text. It can be useful at the very beginning of a legal order, for many reasons, including the symbolic: but after some time, years or decades, or even more, centuries, it should not be overloaded with too much significance: formal constitutions do not have a thaumaturgical effect, and the life of the constitution, in constitutional democracy, is always a complicated and fragile balance.