Democratising and Judicialising: The Judicialisation of Politics

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Within the classical tripartition of powers, courts and tribunals have always held the most marginal role, limited by the interpretation of laws. In the last decades, however, judiciaries have been increasingly addressed with the task of resolving moral issues and political questions, drawing power away from representative institutions. The intention of this essay is to analyse the judicialisation of politics and how this emergent phenomenon is slowly reshaping the skeleton of political structures and mutating the political environment — particularly within the United Kingdom. In order to provide beneficial outcomes, this phenomenon should be accompanied by an attempt to embrace more democratic principles, seeking to promote a more inclusive space in the light of greater political responsibility, dialogue, and plurality of opinion.

Origins

The term *'judicialisation'* refers to both the expansion of judges' powers at the expense of politicians and executives by conferring decision-making rights to the former, and the proliferation of legal discourse, procedures, and decision-making methods outside the judicial sphere.[1] The ambivalent term is employed to define multiple interrelated processes, including the increasing politicisation of the judiciary which has characterised the political environment since the late twentieth century. In Britain, this has occurred in the form of greater judicial involvement in issues such as educational policy, prison discipline, and social welfare.[2] The phenomenon of 'constitutional supremacy' — in which judiciaries gradually establish their influence over legislative and administrative entities — has spread globally to over one hundred countries.[3]

Constitutionalisation has been largely prominent in many post-authoritarian regimes transitioning to democracy, such as those in Latin America, Asia, and the new Eastern European states emerging from the former USSR.[4] However, the adoption of a new constitution or the revision of rights have also been important factors in the diffusion of judicialisation as a trend. Since 1945, in fact, Japan, Turkey, India, the Philippines, and many European countries have attributed or re-ascribed review powers to their judiciaries, meaning that courts could criticise legislative enactments and administrative rules as inconsistent with constitutional norms, thus declaring them invalid.[5] The institutionalisation of policies into legal agreements and the consequent decline of legislative supremacy thus prepared the ground for the decisive establishment of judiciaries as a global phenomenon.

Among the many causes of judicialisation, democracy stands out as being one of the main drivers of this tendency.[6] Though judicial review is founded upon a counter-majoritarian and unelected basis — which would appear to contradict the very notion of democracy — many theorists support the view that active judiciaries are both a prerequisite and by-product of democracy.[7] The debate around the role of courts in a democracy has been ongoing since the origins of political thought, involving prominent figures such as John Stuart Mill, who wrote in the tradition of British parliamentary supremacy, and Alexander Hamilton, who supported the independence of a United States judicial system.[8] The issue of liberty within a constitutional system which aims for the protection of basic rights is crucial in the context of a democracy. In the imminent words of Charles-Louis Montesquieu, a predecessor of the judicialisation of political powers, "there is no liberty if the power of judging is not separated from the legislative and executive."[9]

Additionally, it has also been argued that the judicialisation of politics has evolved concomitantly with the increasing de-politicisation of democracy. According to this view, the trans-nationalisation of the state, which primarily conceptualises itself as an actor in the international arena, leads to domestic neglect and a shrinking space for political discourse on a national dimension.[10] Nonetheless, in order for a healthy democracy to survive, dialogue amongst citizens is necessary to provide legitimacy to any rising constitutionalism through free and engaged participation.

The Judicial-Legislative Relationship

Prior to the 1950s and the general rise of 'new constitutionalism,' the role of judges was conscribed by a strict separation-of-powers doctrine and was therefore committed solely to interpreting the constitution. With the growth of 'judicialisation' however, political issues have progressively been translated into legal questions, with courts now operating as policymaking bodies by limiting the exercise of parliamentary authority, creating substantive policy, and desiring more control over political activity. In fact, the increased willingness of judges to regulate political activity, also beyond the legislatures, has been enforced through implemented standards of acceptable norms and behaviours for parties, interest groups, and individual agents.[11]

One consequence of this phenomenon is the rise of institutions of constitutional adjudication, particularly in countries that have historically been hostile to such practices. A clear example is the case of Britain, where legislative supremacy has been prominent throughout the country's political history, as judicial review is non-binding. However, high courts have now achieved emancipation from their traditional role, and are entitled to interpret statutes and public acts, as well as declare whether statutory provisions are compatible with the constitutive elements of the State and can thereby challenge the acts of Parliament.[12]

What distinguishes judicial from political power is that the former involves an independent third party — embodied by the judge — whereas the latter includes a plurality of interests which enables the pursuit of a majority principle among a chorus of conflicting values. While in principle the judiciary is devoted to the impartiality of a single judge, legislative practices are characterised by the possibility of bargain and compromise which enables discussion and dialogue between parties, rather than the assignment of a single solution to a complex dispute. The role of reason emphasised by the judicial power thus privileges solutions which are meant to be impartial yet universally accepted, clearly in contrast with the appraisal of conflicting values that distinguishes the legislative or executive.[13] In addition, the judiciary is an organ which must be petitioned into action, given that it does not operate on its own initiative like a legislature can.

For these reasons, an unelected judiciary system enabled to operate as a policymaking body, rather than countering a tyranny of the majority, may become a danger if it fails to interact with other political entities, including citizenry, and if its roles and fields of action are not clearly legitimised. In fact, the forms in which judiciaries can relate to other powers are considered to be 'from without,' through the judicial review of executive or legislative actions, or 'from within,' by which the introduction or expansion of judicial modalities delineates the principle of more adjudication and less administration.[14] It is then clear that constitutionalism and administration are inversely proportional. Thence, the role of courts is limited to defending fundamental rights and freedoms in their 'negative' sense, defined by Isaiah Berlin as the mere absence of interference.[15] The judicialisation of politics may, however, have a profound impact on political freedom as a whole, by undermining essential elements such as action and participation, which constitute the very heart of a true democracy.

Prospects

In the framework of this growing reliance on judicial procedures and courts, it is important to consider arguments for and against the judicialisation of politics, and the concomitant politicisation of law, in a democracy. The conflict between constitutionalism and basic democratic principles is at the core of these phenomena. The main line in defence of constitutionalism aims to portray judicial review as a means of achieving basic democratic principles, which, through a supposedly apolitical and impartial third party, aims to protect rights more effectively. This is also enhanced by the independence of judiciary power which is supposed to be more insulated and therefore less self-interested.[16] However, although the main arguments against judicialisation have often appealed to the unelected and 'counter-majoritarian' nature of judiciaries, perhaps the strongest would be that which refers to the institutional basis upon which they are founded. This, in fact, appeals to an empirical experience of institutions which are organically embedded and contextualised, not eradicated from their socio-political system.

The act of deference of courts itself is due to political rather than judicial factors, and as such has been portrayed as a mechanism of 'hegemonic preservation' pursued by the legislatures.[17] The issue is therefore political, and as such should be addressed using democratic means, through both discourse and deliberation. Judicial empowerment should also be subject to political contestation by those who are affected by their practices to avoid the political apparatus shifting into what some have described as a juristocracy. As discussed above, legislative power is mainly directed by the people through election and participation, the main sources of legitimacy in a democracy. On the contrary, the issue emerging with judicialisation is the lack of a concomitant process of democratisation in society, which is not necessary for its occurrence but enables it to act legitimately.

Lastly, the judicialisation of politics must be followed by a new vocabulary of legitimising principles to help guide the legal translation of intrinsically political matters. This requires a re-allocation of authority which must also happen through deliberation and public contestation. For these reasons, a balance between judicial and democratic power presents itself as the solution to avoid the two possible extremes of a government led by pure adjudication, and of a total majoritarianism.[18]

Although often limiting political discussion within the public sphere, judicial power is crucial to preserving negative freedom and ensuring the protection of fundamental rights. However, in order for this to be effective and sustainable, it must be analysed in its political origins and integrated with full democratic legitimacy. Therefore, the phenomenon of political judicialisation may, in the near future, find a meeting point between constitutionalism and majoritarianism only through the conciliation of these mutually-supporting principles. In other words, judicialisation should be legitimised through a democratic revision of the separation of powers.

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Endnotes

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