TRIBUNAL CONSTITUCIONAL

10th JUDICIAL YEAR OF THE CONSTITUTIONAL COURT OF KOSOVO

International Conference:

'Ensuring the Rule of Law & Human Rights

Through Constitutional Justice Mechanisms: 21.st Century Challenges'

THE COUNTER-MAJORITARIAN DIFFICULTY

Gonçalo de Almeida Ribeiro

Judge of the Constitutional Court of Portugal

Madam President of the Constitutional Court of the Republic of Kosovo
Dear Colleagues of the Constitutional Courts of Kosovo and Other Countries
Remaining Members of the Judiciary and Public Officials
Distinguished Guests

I am honored to represent the Constitutional Court of Portugal on this very special occasion – the celebration of a decade of constitutional justice in the Republic of Kosovo. Let me, Madam President, convey to you heartfelt congratulatory regards from President Costa Andrade. Rest assured that the Constitutional Court of Portugal treasures its historical friendship with the Constitutional Court of Kosovo. I am personally delighted to be here for a second time, three years after my first visit, enjoying your superior hospitality and in bewildered awe at the ability of these fine women and men of the law to establish and consolidate over a short span of time an institution entrusted with so outstanding a task as that of dispensing constitutional justice – that is, as the Constitution of Kosovo adroitly puts it, exercising 'final authority for the interpretation of the Constitution and the compliance of laws with the Constitution'.

Now that seems to be precisely *the point* of constitutional justice: interpretation and enforcement of the constitution. That is why constitutional justice is so intimately associated with the rule of law and human rights, as the topic of this conference highlights. On the one hand, it is associated with the *rule of law* because the constitution whose interpretation and enforcement a constitutional court is specifically tasked with is the supreme law of the land, both empowering and limiting ordinary law-making agencies such as legislatures and governments. On the other hand, it is associated with *human rights* because one of the most important businesses of this supreme law is to protect those rights that individuals have by virtue of being human, that is to say, rights that are 'indivisible, inalienable and inviolable', in the elegant wording of the Constitution of Kosovo. And it seems fairly obvious that to enforce this supreme law – that is to say, to defend the rule of the highest among the laws and to protect the highest among the rights – the political branches must be policed by a constitutional guardian whose activity is triggered by a variety of *mechanisms*. The guardian is none other than the constitutional court and the mechanisms are those standard procedures – such as abstract review, incidental control, and constitutional complaints – designed to bring it into business. These, one might say, are the nuts and bolts of constitutional justice.

Alas, it is not even remotely as simple as that. Things would be extremely simple indeed, if enforcing constitutional provisions entrenching human rights meant that the constitutional court would have to determine in any given case whether a law that has been challenged interferes with a particular right. Yet that is usually just the back swing of a far more complex chain of reasoning. For as article 55 of the Constitution of Kosovo duly provides, individual rights, even the highest rights which now concern us, may be *limited* by ordinary law. They may be limited for the sake of competing individual rights or collective goods the importance of which justify, under the circumstances in which the law applies, the limitation therein established. Indeed, a certain degree of limitation is not just tolerated but mandatory. That is because rights do not merely place the government under *negative duties* to abstain from certain courses of action; they create as well *positive duties* for the government to act. To give a few trivial examples, the government must interfere with privacy in order to prosecute criminal offenses, it must interfere with property in order to fund the provision of social goods, and it must interfere with freedom of gathering in order to protect physical integrity. Indeed, constitutional documents often qualify individual rights with specific limitation clauses, a technique illustrated by numerous articles in the Constitution of Kosovo.

Thus, legislative interference with a right is a necessary but vastly insufficient condition for a judgement of unconstitutionality. I do not mean to suggest that there are no absolute rights, at least in the minimalist sense that legal interference with some rights – the prohibitions of slavery and torture come to mind – cannot be tolerated. That is a very big question on its own. However, it is uncontroversial that *most rights* are open to limitation by law as part of the ordinary business of what the Constitution of Kosovo, attuned to the European Convention on Human Rights, calls 'an open and democratic society'. The question with respect to such laws is whether the limitation is justified, and answering it involves one form or another of *proportionality analysis*. When the issue is whether the limitation created by law is excessive – and I say 'when' because occasionally the issue is whether the protection of a right is defective – the analysis involves a four-pronged test. The first prong concerns the *legitimacy* of the aim for the sake of which the right is limited − whether it resonates with those tasks which justify the existence of a constitutional government in the first place. The second prong focuses on the *suitability* of the restrictive law to realize its aim – whether it is fit or unfit for its underlying purpose. The third prong is about the *necessity* of the limitation, that is to say, whether it is the least restrictive within the set of suitable means to realize its purpose. The fourth and final prong involves a

balancing judgement; figuratively speaking, it is a matter of placing the virtuous end and the vicious means on the scales of justice, and determining whether the former outweighs the latter.

All of this is broadly familiar to constitutional judges and the larger community of constitutional scholars. Most constitutional cases that are about individual rights take this form – indeed, proportionality analysis is the bedrock of constitutional justice. It does, nevertheless, contain a major difficulty. For assessing the legitimacy, adequacy, necessity and especially the all-things-considered justification of laws enacted to strike out a compromise among the basic values of an 'open and democratic society' is precisely what elected officials, particularly those that sit in our legislatures, are expected to do. That is, after all, what political decision-making is essentially about: identifying collective problems, determining goals, selecting means, and above all weighing in the pros and cons of alternative courses of action. In other words, it seems to be the case that doing proportionality analysis and striking down disproportionate laws throws constitutional judges, by the very nature of their office deprived of direct democratic legitimacy and insulated from the ordinary forms of political accountability, into the perilous territory of second-guessing the representatives of the people. To say that a law that limits rights is disproportionate appears to be a euphemism for 'we the judges do not agree with it'. Moreover, since the 'we' here is really but the majority of the judges that voted for striking down the law, a majority of unelected and unaccountable officials that happen to disagree with the elected majority in the legislature, the problem is evidently one of democratic legitimacy. That is, in a nutshell, the *counter-majoritarian difficulty* of constitutional justice.

It is tempting to explain the problem away. One might argue that the counter-majoritarian difficulty dissolves in the face of a *dualist account* of democratic law-making. The theoretical foundations of this doctrine lie in the familiar distinction, established by Sieyès in the wake of the French Revolution, between *pouvoir constituant* and *pouvoir constitué*. Political authority lies originally with the people, who has the foundational right to organize itself politically in whatever form it sees fit; this is its *pouvoir constituant*. The authority of the various branches of government instituted by the people in its constitution-making capacity, on the other hand, is derivative and precarious; they are mere *pouvoirs constitués*. Therefore, we must be careful to distinguish between two senses of 'democracy' in constitutional discourse: there is democracy as a *form of government* enabled by constitutional norms, meaning essentially the process of legislative decision-making; and there is democracy as *popular sovereignty*, the supreme power of the people to establish a constitution. Now if the

people in its constitution-making capacity decided to entrench certain rights, to enable limitations to those rights, and to establish a constitutional court to police such limitations, there is no counter-majoritarian difficulty at all, since the second-guessing of legislative choices implicated in the tasks of constitutional justice realizes an explicit constitutional mandate. The legitimacy of judicial review of legislation might be doubtful if there is no express constitutional provision for it, as in the United States, and it might be flatly denied where there is not even a written constitution, as in the United Kingdom. Yet in legal systems where the constitutional document itself institutes a 'guardian of the constitution', as it is common in the countries of the so-called second and third 'waves of democratization', the charge of illegitimacy is mute. It is in the very nature of constituent power, as the primeval embodiment of democracy, that it can do as it pleases, and that includes the creation of a counter-majoritarian institution such as a constitutional court.

The argument is unfortunately much weaker than it looks at first sight. There are two main objections against it. The first objection is that the counter-majoritarian difficulty goes to the heart of the constituent decision to protect certain rights. That is because human rights, namely those rights that make it into constitutional documents, comprise not just the 'liberties of the moderns', which concern the conditions of individual self-determination, but also the 'liberties of the ancients', which concern individual participation in the process of collective self-determination. The value of human dignity to which human rights ultimately hark back entails not only the protection of those interests that enable individuals to take full control of their lives but also their participation as equals in the formation of a collective will that binds them all. In other words, the constituent decision to protect human rights is both a decision to protect what in the 19th century were known as the 'rights of man' and a decision to uphold what were then called the 'rights of citizen'; that is reflected both in provisions concerning the right to vote and to run for public office and in the fact that the legislative process is organized under the light afforded by the democratic principle. Therefore, it would be self-contradictory for the constitution to subject legislative choices, notably those that concern the limitation of individual rights for the sake of other rights or collective goods, matters that in one way or another fill much of the space of politics and are subject to obdurate and reasonable controversy in a pluralist society, to *unrestrained* judicial control under the guise of proportionality analysis. The counter-majoritarian difficulty is not a conflict between rights and democracy settled in favor of the former by a super-democratic constituent power but a tension lurking within the very *constituent decision* to uphold human rights.

The second objection runs even deeper. The dualist argument makes much of the notion that the constitution is a law made by 'the people' as *pouvoir constituent* and that popular sovereignty is the ultimate source of political legitimacy. Yet this 'decisionist' account of constitutional law faces insurmountable theoretical obstacles. To begin with, if we conceive the constitution as 'jumped up' legislation – as a reinforced statute enacted by a supreme legislator – there is no way out of a long list of unresolved constitutional paradoxes, namely the 'intergenerational paradox', the 'amendment paradox', 'the democratic paradox', and quite a few more. The fundamental point, however, is that to think of 'the people' as a legislator is to incur in the naturalistic fallacy. For 'the people' is no agent, no acting entity in the realm of empirical reality. It is a normative concept, a regulative idea of political agency. In the liberal-democratic tradition, 'we the people' is a community of free and equal individuals living together under a common system of laws. It is the conception of popular sovereignty that underlies both classical social contract theory and modern constitutionalism, and which was expressed eloquently in article 16 of the Declaration of Rights of Man and Citizen of 1789: 'any society in which the guarantee of rights is not assured, nor the separation of powers established, is deprived of a constitution.' That is so because only a constitution that contains those elements can be attributed to 'the people' – only then can it be taken as a genuine embodiment of the right sort of popular will. It follows that a constituent decision that denies the permanent addressees of the law the right to be the law's ultimate authors, such as a decision to subordinate the legislature to the judiciary, would not be part of constitutional law properly understood. For a constitutional document to be a constitution of the right sort, it must uphold the democratic principle.

Does that mean that judicial review of legislation is illegitimate? Does it mean that constitutional courts are incompatible with democracy? Not at all. (Incidentally, this is a soothing conclusion, since it allows those of us who serve as constitutional judges to keep our jobs in good faith!) Yet constitutional justice is legitimate not because it was provided for in a document taken to be the expression of an omnipotent political will or because human rights entail the choice of a juristocracy over a democracy. It is legitimate because it is a necessary condition of democratic self-government. In a plural world the people can only speak through democratic deliberation, and there are circumstances in which a handful of unelected and unaccountable judges reflect better than a representative assembly or an elected executive the workings of collective self-government. Elected majorities are occasionally tempted by bigotry and prejudice against insular groups, and

these can only rely on courts or other politically unaccountable and argumentative bodies for a fair consideration of their interests and values. Their views are better represented in an adversarial process where arguments are exchanged and decisions are supported by reasons than in ordinary procedures of political decision-making. The proper function of judicial review, from this standpoint, is to prevent the degeneration of popular rule, the degradation of democratic governance into a tyranny of the majority. It is to *strengthen* democracy. To be sure, this also entails the virtues of democratic deference and self-restraint. Constitutional judges should not ordinarily second-guess the policy choices and balancing judgements of legislators; in most cases, they should confine themselves to testing the overall reasonableness and fairness of legislation. What that means in practice – what *standards of review* under proportionality analysis are appropriate – is the topic for another occasion. What we should bear in mind is that constitutional democracy sits perilously between the extremes of the tyranny of the majority and judicial despotism. If we come to think about it carefully, that is hardly surprising. After all, as popular wisdom informs us, the devil is always in the details.

Prishtina, 24 October 2019.