CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA

30th Anniversary of the Constitutional Court of the Republic of Albania

CELEBRATIONS AND INTERNATIONAL CONFERENCE

«Role of Constitutional Courts in New Democracies»

Tirana, 20 – 21 October 2022

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INTERVENTO DEL VICEPRESIDENTE NICOLÒ ZANON ALLA CONFERENZA INTERNAZIONALE "RUOLO DELLE CORTI COSTITUZIONALI NELLE NUOVE DEMOCRAZIE" IN OCCASIONE DEL 30° ANNIVERSARIO DELLA CORTE COSTITUZIONALE DELLA REPUBBLICA DI ALBANIA - TIRANA 21 OTTOBRE 2022

Does a Constitution "draw its meaning from the evolving standards of decency that mark the progress of a maturing society"?[1]

I address a greeting to the colleagues of the Constitutional Courts and to all the Authorities and personalities present here.

Please, allow me to address a special greeting, together with heartfelt thanks, to the President of the Constitutional Court of Albania, Miss Vitore Tusha, and to the entire Albanian Constitutional Court, for having invited the Italian Constitutional Court, which I have the honour to represent today, to celebrate this very important anniversary, and to give its own contribution in such a qualified international context.

The title of this panel ("*The role of constitutional justice in development of the fundamental value of society*") invites us to think on a sort of maieutic role of constitutional Courts, as if the decisions and the arguments of the constitutional adjudication could bring people closer to the fundamental principles of a Constitution.

As Italian scholar, and now as a judge, I am well aware of this perspective. At the very beginning of its history, in the fifties and sixties, the Italian Court played an important role from this point of view, particularly in striking down many provisions on the authoritarian regime.

When you are dealing with a new Constitution, you need a booster, if I may say so, to promote the values enshrined in it. A Court, nevertheless, is not playing alone: elected representatives have an important role and, at the end of the day, the support of the citizens is decisive.

But, as an Italian judge, my question is: when a Constitution is well established, or an old one, what kind of role does a constitutional Court play in relation to the common values and principles emerging from society?

As you see, I am suggesting a reversal of the perspective: how can the evolution of social consciousness – in ethical, moral or scientific matters – affect a Court's interpretation of constitutional provisions, in particular of provisions included in a constitutional bill of rights? How can judges deal with social changes, when having to interpret unchanged laws and, especially, an unchanged Constitution?

But, even before that, might Courts stand up antennae to pick up those social changes? One could immediately think it is none of their business, for elected legislators usually do that by amending statutes, or even the Constitution, where necessary.

[1] US Supreme Court, *Trop v. Dulles*, 356 U.S. 86 (1958)

Courts obviously cannot amend a constitutional or a statutory text; nevertheless, they can try to reach a similar result by means of interpretation, even though I would find a little hard to accept it…

As you can easily understand, this problem concerns mostly old Constitutions and might not be of interest for a relatively new one. However, from a theoretical point of view, for each and every legal system this issue is a theoretical knot for a very theory of constitutional interpretation.

Let's take for example the American situation: the US debate on doctrines of constitutional interpretation is divided between two major approaches.

The first approach is *originalism*. Put roughly, originalism anchors constitutional interpretation on the fixed, original legal content of a constitutional provision at the time of its enactment. Originalists disagree on whether that content is a product of the lawmakers' original intention or original expected applications, or whether it is the original public meaning of a provision (the latter approach is now the most popular among originalists, following the opinion and the doctrine of Justice Antonin Scalia[2]). The purpose of originalism is to limit the arbitrariness of judicial interpretation: a constitution is a "dead law", and judges must understand and apply only what a constitution says, not what judges would like it to say. What is at stake here is the respect of democracy and the separation of powers.

What I would like to point out is that for originalists there is no place for any possible interpretation of legal texts shaped on alleged social changes.

The second approach is *living constitutionalism.* Living constitutionalism sees interpretation as a more dynamic and directly normative endeavor. It is based on the idea that it is often or always impossible to separate legal interpretation from moral evaluation, and that a constitution must develop over time. A constitution is a body of laws that (unlike ordinary statutes) grows and changes over the years, in order to meet the needs of a changing society. Time works changes, brings to existence new conditions and purposes: «therefore, a constitutional principle to be vital must be capable of wider application than the mischief which gave it birth»[3]. Interpretation must account for the transformative purpose of the constitutional text. Thus, a constitution is not intended to preserve a pre-existing society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. From this point of view, a constitution does draw its meaning from the

[2] See A. Scalia, *A Matter of Interpretation – Federal Courts and the Law*, 1997, Princeton University Press, p. 37 ff.; Id., *Original Meaning*, in A. Scalia, *Scalia Speaks. Reflections on Law, Faith, and Life well Lived*, Crown Forum, NY, 2017, p. 180 ff. In the Italian literature, see now G. Portonera, *Antonin Scalia*, IBL Libri, Torino 2022.

[3] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 43 Guild Prac. 1 (1986)

evolving standards of decency that mark the progress of a maturing society, and it is a judge, a Court, that determines those needs and "finds" this changing law.

I am well aware of the fact that the Italian and the European context of legal interpretation is quite different from the American one.

Usually the Italian Constitutional Court does not take explicitly part in the debate over the methods of constitutional interpretation: when deciding cases we rather prefer a "low profile approach": so, with rare exceptions, there is no proclamation of great principles of interpretation, nor any taking part in disputes in favour or against textualism, for instance. We prefer not to adhere to any particular position binding the Court and the decisions to come.

Having said so, sometimes, without mentioning it explicitly, we have decided some cases in which the evolving standards of decency were at stake. For instance: cases on assisted suicide, and on the provision that did not allow married couples to give the mother's surname to their children at birth.

For this reason, I am convinced that the American debate on constitutional interpretation is a good starting point to understand the role of Courts in recognizing social changes and to ask ourselves how they could transfer that understanding to the interpretation of the constitutional provisions.

But, primarily, my question is if the Courts have to do so.

Sometimes Courts are required to rule on delicate aspects that deeply affect social customs and standards of decency, interpersonal relationships and family life: an area in which any heteronomous and authoritative intervention – all the more so if not stemming from a democratically elected legislator – is very delicate and risks being (or being perceived as) inappropriate or even arbitrary.

An argument often occurs in both the legal scholarship and public discourse, when it comes to new rights and new demands for justice knocking on the courts' doors, in respect of which the elected representatives are accused of inaction.

It is not infrequently argued that such inaction would legitimize judicial lawmaking. While a Parliament may decide, for political reasons, not to act on requests for new rights, this option is not open to the courts, since they are never allowed to decline a case because there is no applicable law (*non liquet*).

In my opinion, there is a conceptual inversion in this argument. When it is argued that the silence or inertia of the elected representatives in embracing a new right or value would legitimize judicial lawmaking, the obvious truth is forgotten that legislative discretion is exercised not only in the expression of new normative choices but also in

the very tacit preservation, over time, of normative options already embodied in the system.

Moreover, just because something is not decided in a Parliament does not mean that it must be decided elsewhere. One should first ask oneself whether a non-decision could actually express a conscious decision not to act, which must in any case be respected.

But the essential point is the need to clearly understand the meaning of the expression "standards of decency", in particular from the point of view of a theory of constitutional interpretation.

Without aspiring to give a definitive theoretical definition, at the very least it is necessary to clarify which data and assumptions will be used to discern and interpret changes in standards of decency, especially when the exercise serves precisely to interpret constitutional provisions that work as benchmarks for the validity of legislation.

When what is at stake is the interpretation of constitutional provisions, there would be manifold misgivings if the solution were to be that everything can be resolved by leaving it up to the personal convictions of the judges. Their subjective views would be allowed to become the direct interpreter of societal standards of decency and how they evolve.

If it were only a question for the Constitutional Court's judges to become the chosen and direct interpreters of evolving standards of decency (*The Constitution is what the Judges say it is!)* and if this alone were to underpin the change in the meaning of constitutional provisions, then the criticism levelled at this perspective by originalist doctrines (not only in the United States) would not be entirely unfounded.

Standards of decency is an expression that refers to something objective. On closer inspection, indeed, identifying and interpreting societal consensus and how it evolves is the opposite of an individual's or a Court's arbitrariness. Precisely because they have a social and collective dimension, evolving standards of decency are diffuse and objective, and must also be borne out by indicators that should themselves be objectifiable in identified and observable data. In turn, the expressiveness of such data in indicating an evolution in a certain direction should be clear and rationally arguable.

Understanding what these data are, of course, is not easy, and a constitutional court certainly cannot be described and considered in the same way as a representative body, which records the political, social and cultural trends prevailing in a certain social body of reference.

There are, however, indicators that fill in the context in which a Constitutional Court decides.

By way of illustration, one can think of a variety of indicators, internal and external to a national legal system, better still if there are many: bills pending in Parliament, information deriving from foreign and comparative law, supranational and international provisions (including soft law), recommendations, previous lines of case law of the Constitutional Court itself, authoritative, persuasive and accredited trends in the literature.

In addition to this, a decisive element signalling an evolution in standards of decency is the presence of numerous and consistent referral orders raising questions of constitutionality (and thus clearly indicating a direction).

So, referring courts, or rather their referral orders, work as antennae of the Constitutional Court in identifying relevant changes for the constitutional interpretation of evolving standards of decency. It is perfectly within the logic of incidental constitutional proceedings, a centralised but widespread process.

The objectivity, clarity and expressiveness of the indicators in question entail an important corollary: if on a particular issue the constitutional provision is vague and if there is evidence that the public debate on it remains open and that standards of decency are not evolving in a clear direction, but on the contrary society is divided, I think a Constitutional Court should not be left isolated in the vanguard.

The public debate – especially if dealing with sensitive issues, or even with what is referred to as 'tragic choices' – should not be put to an end through a final ruling with *erga omnes* effects. A constitutional Court's decision, in my opinion, should not stop the democratic process itself, which develops through public debate, open to all and occurring perhaps in the representative institutions themselves.

However, there are objections to this conclusion as well. In Italian legal system, the first objection lies in Articles 136 and 137(3) of the Constitution, which provides that the Constitutional Court makes (and, therefore, must make) final decisions.

But it is precisely the creation of the conditions allowing the Court's final decision that is in question.

I think it is necessary to shape a theory of constitutional adjudication capable of striking a balance between, on the one hand, the superior rationality of the *iuris-dictio* of the Supreme or Constitutional Courts and, on the other hand, the permanent and very strong democratic interests of *legis-latio*, in contexts that are marked not only by ever-increasing complexity and frequent interactions and encounters, but also clashes, between systems, sources, charters, courts and cultures.