CATOLICA Global School of Law

CATOLICA RESEARCH CENTRE FOR THE FUTURE OF LAW
LISBOA · PORTO

CGSL WORKING PAPERS

No. 1/2024

A Constitutional Judge at Work

Gonçalo de Almeida Ribeiro

A Constitutional Judge at Work

Gonçalo de Almeida Ribeiro[*]

Abstract

This is a short essay written for a collection of papers paying tribute to the work of Harvard Law School's legal theorist Duncan Kennedy. It is a first-person or introspective interpretation of the double experience of freedom and constraint of a constitutional judge working on the relevant materials to craft a particular legal object – in this case, a defensible conception of constitutional democracy –, in the vein of Kennedy's critical phenomenology of adjudication.

[*] Vice-President of the Constitutional Court of Portugal. Professor of Law at Universidade Católica Portuguesa (Lisbon).

I have a vivid memory of a thrilling moment early in the Fall of 2006, when I was an LL.M. student at Harvard Law School. I was reading Duncan Kennedy's 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) – a rare example of literary genius in the law review genre – and I had an 'Aha!' moment. It took me a while to get there, maybe a couple of weeks. That is an eternity for an impatient young man intent on conquering the world of ideas and, by the way, also on impressing his supervisor. What did I finally get on that fateful moment? That from the standpoint of someone doing legal reasoning, the law is neither necessarily determinate nor indeterminate, neither an iron curtain nor a rainbow, neither an instruction manual nor an empty vessel. It is a medium one experiences as both resistant and malleable, and these are contingent and changeable experiences as one goes about working on the materials at hand – provisions, precedents, images, histories, theories, authorities, maxims, techniques, and the like. This legal work does not have to be the business of finding and following the law – like the sequence of steps required to assemble a piece of furniture or the commandments issued by an omnipotent and omniscient divinity – but it is not a matter of reading whatever one wishes into it either. It is a creative enterprise and a form of craftsmanship, in which one tries to make the law speak what seems to be right, or is in accordance with a project, or moves it in an auspicious direction, or turns things upside down. Sometimes it is the other way around: working on the legal materials changes one's mind about what is appropriate. This picture of legal reasoning struck me as far more realistic and elaborate and exciting than most of the other theories I was roughly familiar with, from doctrinal fetishism to rule-skepticism, not to speak of the dormitive difference-splitter of the core and the penumbra. In my juvenile excitement at this most important discovery – my supervisor's own thought! – I immediately e-mailed Duncan, declaring my understanding of and allegiance to his account of legal indeterminacy. At our next meeting, he praised me half-mockingly for finally getting the critical phenomenology of adjudication right. I denied the mockery and embraced the compliment. A good day in the life of a graduate student.

***

I have been a constitutional judge for a few years now. That is ironic. How is it like to be an apex court judge – tasked with interpreting and enforcing that most elusive of legal texts, the Constitution – with a critical legal background? I am not sure I have a

structured and honest answer to give to this question; besides, I have no idea if my experience speaks beyond the contingency of my personality, my jurisdiction, my institution, and other more or less idiosyncratic circumstances. One thing (among many) that I learned from Duncan's writings on adjudication though, as well as from countless conversations in his old office on the third floor of Griswold, is that it is best to approach the matter from within, from the experience of adjudication, from particulars as they present themselves in practice, as opposed to some first jurisprudential principle – say, 'the law works itself pure' or 'no rule determines its own application' – from which one derives, in rationalist *more geometrico*, a whole treatise about the nature of law. That is what Duncan calls the 'phenomenological' perspective: a half-way between Husserl's phenomenology of consciousness and Heidegger's existential phenomenology 'loosely derived' from Sartre and generously seasoned with 'cannibalized' bits of 'fancy theory', all set against the background of the legal realist tradition. Let me try my hand at this phenomenological enterprise, with the utmost brevity dictated by the benevolent tyranny of the editors, stressing at the outset that I am not going to imagine an experience but to relive or reenact one I actually went through in my first year in office.

***

The case concerns the constitutionality of a provision in the Code of Corporate Income Taxation that increased the tax rates for certain types of corporate expense, such as employee allowances and automobile purchases, that often operate as non-taxable income or fringe benefits. Taxing these transactions is a way of preventing widespread tax avoidance. The provision was introduced in early December of a given year but applied to transactions from January onwards of that same year. The issue is whether this does not violate Article 103(3) of the Constitution, which provides that 'no one shall be obliged to pay retroactive taxes'. The case comes to me as an appeal from a decision of the lower court striking down the law as unconstitutionally retroactive and, consequently, ruling for the taxpaying corporation. The opinion of the lower court is based on a simple syllogism: retroactive taxes are unconstitutional; this is a retroactive tax; *ergo*, this is an unconstitutional tax. I am delighted by this not because I agree with it but because I am eager to show that it is not that simple, that constitutional norms rarely apply mechanically, that retroactivity is a very slippery concept, and that, moreover, it makes little sense for the Constitution to contain a categorial prohibition against retroactive taxes, for that would be inequitable, illegitimate, and ultimately irrational. I am eager to show this but I have no idea if I

can do it, let alone do it persuasively – to me, to my colleagues, to an imaginary public audience that in my wildest dreams is attentive to my work. It is thrilling and frightening at the same time. This is my first really big case, one which will allow me to play with big ideas and dispose of large stakes, and it is either going to a memorable triumph or a humiliating failure.

I have been at the Court for less than a year. I am by far the youngest judge and my background is exotic (America? Harvard? Kennedy? What?). Although I no longer feel like the odd one out on every single occasion, I am still seen by my colleagues (or am I projecting?) as a theory-cowboy type with eccentric opinions and contempt for the status quo. I am not in the least bothered by my reputation as disruptive and unpredictable – a friendly colleague remarks in a coffee break that I often shift the terms of the discussion, and that satisfies my ego – but I want to make sure that I am taken seriously. More importantly, it has been clear to me from early on in office that in order to achieve anything meaningful, notably to further the values one regards as paramount, the respect and cooperation of the colleagues is indispensable. The case is a chance to cement my reputation as an intellectual *enfant terrible* while also earning the lasting admiration of my peers. I want to strike at the heart of the conventional wisdom about the prohibition against retroactive taxation – the notion that it operates pretty much mechanically, categorically, and absolutely. I have a profound dislike for any such notion.

***

Why does it bother me so much? I do not deny that the expectations of the taxpayers in the stability of the tax regime in place at the time of the relevant transaction are perfectly legitimate and worthy of protection. But there are countervailing values to be considered, such as equity and justice, and these may very well justify retroactive taxation in at least some cases. I can think of a couple of obvious classes of cases: legislation aimed at filling a loophole that has been massively exploited by resourceful economic actors to the serious detriment of equity in taxation or an exceptional increase of the tax rates applicable to transactions in luxury goods or to the highest personal incomes in the context of a major fiscal crisis leading to draconian measures. It seems to me that legitimate expectations have to be, as with most interests or values, balanced against whatever has counter-weight in the relevant circumstances; if free speech, affordable healthcare, and even human life are placed on the scales all the time, why on earth would the expectations of the taxpayers be treated differently?

Moreover, I do not see what title the constitutional lawmaker has to make these balancing judgments in advance and come to the remarkable conclusion that, when it comes to taxes, legitimate expectations always outweigh anything else. Why would the judgment of the dead preempt that of the living or that of a minority prevail over that of a majority, when what is at stake is subject to politically charged and reasonable controversy? It is not easy to justify the counter-majoritarian status of constitutional norms in a democracy, but the problem becomes unmanageable – an aporia – when the provisions in a constitutional text read like sectarian policy choices or entrenched interests. From my European perspective, it is shameful, arbitrary, and pathetic that the phrase '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, *shall not be infringed' is taken to prevent both federal and state legislatures from pursuing a sane policy with respect to guns in the United States.*

My confidence in this starting point begins to wane when I consider some obvious counterexamples. What about the prohibition against torture? What about retroactive criminalization? I feel that these are different from retroactive taxes but I cannot quite put my finger on it. As doubt creeps in, bringing me to the brink of despair (could it be that I was wrong from the very beginning, betrayed by inexperience and narcissism into thinking there was an important case to be made here?), I find a satisfactory way out. The prohibition against torture is not absolute in the sense that we refuse to consider any countervailing reasons, but in the altogether different sense that nothing seems to be important enough to justify – to render rightful instead of wrongful – such an odious practice (although I am willing to concede that it may, *in extremis*, be excusable and go unpunished). As to retroactive criminalization, it is not like retroactive taxation because criminal laws are meant to guide human conduct; you cannot change the past simply by declaring that what was then lawful is now criminal. This is not generally true of tax laws, which aim primarily at tracking each person's ability to pay for public expenditures, something that can certainly be achieved retroactively, indeed in many cases more effectively so. It is true, of course, that retroactive criminalization is not unprecedented – Nuremberg and Tokyo come to mind – but that is under the (disputed) theory that the deeds were already wrong at the time they were committed and that the fact that the law of the land did not say so is neither justification nor excuse. I find these distinctions sound enough to eschew the *ad terrorem* argument that if a categorical prohibition on retroactive taxation does not exist, then everything is permitted. I am committed to reframe the prohibition as a principle open to balancing.

***

As I look for the case law on the issue, I find out that the very provision whose constitutionality has been challenged in the proceedings was previously ruled unconstitutional by the Court. The conclusion was drawn from the following premises: first, the prohibition against retroactive taxation is categorical and lends itself to mechanical application; second, only those laws which apply to events entirely located in the past are genuinely retroactive (as opposed to merely retrospective); third, taxes may target discrete transactions, such as purchasing a property at a particular point in time, or periodic events, such as the income earned over the course of a year, and it is only the latter that may be merely retrospective, when they apply to an ongoing periodic event; fourth, the kind of tax at stake in the proceedings targets discrete events – allowance payments and automobile purchases –, and is therefore genuinely retroactive. I am unsure about the fourth premise. There is an argument to be made that these taxes on fringe benefits are really an aspect of the income tax, and thereby, although they are formally discrete, they are periodic in essence. But this is not an interesting line of argument to pursue, since my goal is not to argue against the application of the prohibition in this case, but against the view that the prohibition is categorical and applies mechanically. I am not going to challenge settled case law for anything less than reframing the whole field.

I realize at this point that it will be very difficult, to say the least, to persuade a majority of my colleagues to endorse an opinion whose outcome contradicts settled case law – a good number of them, as a matter of fact, supported those earlier decisions. But really the outcome of this particular case is of little concern. It does not matter all that much if this particular tax is unconstitutional for violating the prohibition against retroactivity, but whether the latter can be balanced away in other cases where the outcome does matter, and indeed whether constitutional norms bearing on large issues of public policy are understood to set rigid limits to or operate as flexible constraints on political choice. I recall that some of the greatest cases – from *Marbury v. Madison* to *Costa v. Enel* – changed the law dramatically in the context of a minor issue or through an *obiter dictum*, corroborating the proposition that 'little questions can have high stakes'. I cannot put away the phantasy that this rather tedious tax case whose outcome is not particularly significant will be just as revolutionary in my jurisdiction. This brief narcissistic moment is embarrassing, and I get (delude?) myself into thinking that I am doing it with serious legal arguments and out of care for the

greater good of perfecting constitutional democracy. My strategy will be to reassert the previous case law to the effect that the provision at issue is indeed unconstitutional for violating the prohibition against retroactive taxation, while mounting an assault on the underlying reasoning.

***

The leading cases on the prohibition of retroactive taxation offer two main arguments for its purportedly categorical and mechanical nature. The first is that the prohibition was introduced in 1997, by means of a constitutional amendment, precisely to counteract the Constitutional Court's early case law, which displayed broad tolerance with respect to retroactive taxation. The second is that the expectations of the taxpayers in the stability of the regime at the time of the relevant transaction can only be properly safeguarded if the prohibition cannot be balanced away. I set out to debunk these arguments.

As to the first, I argue that it rests on a false alternative: it is either the case that retroactive taxation is generally permitted or that it is categorically excluded. The intermediate option, which the case law has not even considered, is that it is in principle prohibited or *prima facie* unconstitutional, meaning that it can only be set aside if the reasons on the other side of the equation are sufficiently strong to justify it. It is perfectly plausible that in 1997 the constitutional lawmaker did not mean to entrench an absolute prohibition against retroactive taxation, but rather the general principle that, contrary to the case law at the time, retroactive taxes are unconstitutional; retroactive taxation is, under this view, not to be regarded as a regular instrument of tax policy, but a measure of last resort, subject to strict judicial scrutiny aimed at showing that there are strong grounds for sacrificing the legitimate expectations of the taxpayers. I consider the counter-argument that the prohibition is redundant if it is understood to constitute nothing more than a corollary or specification of the general principle of legitimate expectations, which the Court has traditionally derived from the even more general principle of legal certainty, in turn derived from the extraordinarily vague and general principle of the rule of law. But that misunderstands the relationship between the general principle and the specific norm: the fact that the right to freedom of movement is grounded in the more general right to freedom of action does not mean that the former is redundant or that, in order to be useful, it has to be categorical; it means that we do not have to go all the way up to the more general right to deal with cases concerning freedom of movement, namely

to establish that the latter follows from the former. The prohibition against retroactive taxation is useful, even if it is not absolute, because it is more easily administrable than the abstraction of 'legitimate expectations'. Indeed, the alleged historical reason for its introduction in the constitutional text – correcting a mistake in the administration of constitutional justice – suggests that its nature is as described.

As to the second argument, although it is true that an absolute prohibition is theoretically more reliable and easier to administer than a relative one, it is the case that it overprotects the expectations of the taxpayers and that in practice it is a source of uncertainty. On the one hand, the expectations of the taxpayers are worthy of protection only when they are legitimate and in proportion to their weight; an absolute prohibition is blind, in the sense that it treats equally those with dirty and clean hands, and it sacrifices everything else in any circumstance whatsoever. The proposition that the expectations of the taxpayers ought to be protected even when they are neither legitimate nor on balance weighty enough is hardly persuasive; moreover, it is simply wrong to say that a flexible regime is incapable of generating certainty since it allows that in many, indeed most cases, certainty outweighs equity. Recalling the semiotic structure of policy argument, I realize that my reasoning has obvious weaknesses – citing the virtues of equitable principles and standards is vulnerable to the counter-citation of the virtues of hard-and-fast rules −, but I have something more powerful in my pocket.

The case law draws the distinction between retroactive and retrospective taxation, confining the scope of the prohibition to the former. This is disingenuous, rudimentary, and unpredictable. It is disingenuous because it defines the scope of the rule by means of the very method of balancing that the rule is supposed to exclude: the judgment that the prohibition only targets the most serious form of retroactivity is in essence a matter of balancing the pros and cons of prohibiting retroactive taxation. It is rudimentary because it considers only one variable – the degree of retroactivity − relevant to assess the intensity of the sacrifice of legitimate expectations, excluding other relevant factors, such as the magnitude of the tax increase; a couple of cents more on my personal income tax of last year is far less detrimental to my economic plans than a significant increase of the tax rates applicable to the ongoing year. Finally, it is unpredictable because, apart from its technically convoluted character, the distinction can be manipulated by the lawmaker, since it depends on the way in which the fact that triggers the tax is constructed in the law; whether a tax on corporate expenditures is conceived as a discrete tax on a transaction

(automobile purchase) or as part of the corporate income tax regime (non-deductible cost) falls to the discretion of the legislature.

***

I am content with my refutation of the main arguments for the categorical and mechanical reading of the prohibition against retroactive taxes. Although in the course of the critique I pointed out the reasons for conceiving the prohibition as flexible and open to balancing, I feel compelled to articulate as concisely as possible the positive argument that my reading is superior from every conceivable standpoint − justice, certainty, and legitimacy. The justice of a flexible prohibition is entailed by its equitable and relative nature: it protects only those expectations that are worthy of protection and only to the extent that their value is not overridden by other values. Its certainty might seem counterintuitive at first, but it is by now well-established: since it disregards the distinction between retroactive and retrospective taxation, a flexible prohibition goes to the substance of the taxpayers' expectations, protecting them even where they would be at the mercy of a cunning lawmaker. Finally, a flexible prohibition is more democratic than a strict rule, for it empowers ordinary lawmakers to perform the ideologically charged task of balancing conflicting values – as opposed to leaving it in the dead hand of the *pouvoir constituant* −, subject to oversight by constitutional judges that, at least in my country, roughly speaking, have indirect democratic legitimacy (elected by two thirds) and are in office temporarily (nine-year term).

***

The arguments seem to me both somewhat strong and fragile, persuasive and doubtful, sophisticated and otherworldly, candid and devious. These ineradicable tensions play out in my mind, triggering an anxiety that tests my resolve. I take the decisive step: *alea jacta est*. I am confident in my ability to put together a strong case, but also fearful that I will fail to convince my colleagues and indeed myself to go along with it. Although this fear concerns superficially my ability to generate the effect of legal necessity– or, at least, the non-necessity of the opposite line of reasoning −, deep down I am unsure about whether, if successful, I would be moving things in the right direction. Working the law is a two-way street, changing both the material and the craftsman. It is a surprisingly risky business, for one's soul hangs on a thread.