

Is the Constitutional Court An Independent Court or A Political Body?

Good morning/evening Ladies and Gentlemen,

I am honoured to have been invited to participate in a conference organised in cooperation of the International Judges Association, the Constitutional Court and judiciary of Taiwan. The conference is very timely in that it concerns the extremely important topic of the status of the constitutional court in relation to its role as a separate, but equal, branch of the government.

Why are there constitutional courts at all? What are they for? The constitutional court in Europe was intended to act as a guardian of individual's rights and freedoms, protecting them from the tyranny of the majority. The development of constitutional courts in Europe took place in the period after the Second World War and was linked to the appalling effects of Nazi legislation, which was created by the will of the parliamentary majority, according to the rules of enactment in force.

"The cataclysm of fascism and Nazism ruined constitutional theories based on the primacy of the law, and of parliament" - as the natural protector of freedom and the majority will, identified with the popular will. Politicians and jurists in the Post-War world sought to establish institutions that would prevent the recurrence of the 'terrible beast'. What are the models for constitutional courts, as they have developed?

First of all, constitutional courts examine the constitutionality of legal acts, and they may do it preventively or consequentially. They do so at the request of public bodies, on appeals from lower courts, and also as a result of complaints from citizens.

Depending on the concepts adopted in the various states, constitutional review may be exercised by a judicial authority specifically created for this purpose or may be entrusted to courts established for the administration of justice in the normal operations of the justice system. In the alternative, this function may be exercised by only one court or by any court deciding a case falling within its jurisdiction. As a result, the system may reflect either centralized or diffuse (de-concentrated) review of the constitutionality of a particular law. From a comparative perspective, there are two main models of judicial review of the constitutionality of a law: the American one, which grew out of the common law tradition, and the Austrian one, which is generally adopted in most European countries.

However, whether we are talking about constitutional courts supreme courts exercising centralized constitutional review or ordinary courts exercising

constitutional review within the framework of a so-called diffuse constitutional system, these must be judicial bodies so shaped as to be able to protect every individual from politicians. The tyranny of the political majority, progressive authoritarianism usually tends to curtail the rights and freedoms of citizens guaranteed by the constitution, by other legal acts.

In the Post-War effort to create institutions that protect individual liberties, judicial review of the constitutionality of a law presented an appropriate instrument for guaranteeing the rights of political minorities. It also provided a means of placing fundamental rights, civil rights and liberties beyond the reach of the legislature. It was, after all, after the Second World War that Europe's peculiar manifesto of rights and freedoms, the European Convention on Human Rights, which guaranteed the protection of fundamental rights and freedoms for everyone, was enacted. The judicial function at the constitutional level was intended to safeguard the rights of the individual and the popular minorities against the 'tyranny of the majority', tyranny in the name of the law, as expressed in legislation. The appointment of the constitutional court as guardian of the Constitution represented a limitation on the concept of democracy, identified with the **unlimited and "tyrannical"** will of the majority.

Put another way, constitutional review by courts is the guarantor of the separation of powers, the rule of law and, it should be stressed, the fundamental rights of the human being and the citizen. They are a protection of the primacy of law over the primacy of force. Force is the world of the political majority.

What are the risks? Authoritarian tendencies are evident all over the world. This has been the case for centuries. Politicians, political power want to have full authority, they want to ensure impunity for themselves, and this means an obvious threat to democracy, the rule of law, minority rights and finally - human rights.

Recent history in Central Europe presents a case study in Poland as to what can happen to diminish the ability of the courts to exercise effective constitutional review of laws passed by the parliament.

Thus, constitutional review by courts is often the first victim of the expansion of the empire of political tyranny. This has been the case in Poland and in Hungary. Both countries had constitutions in force, and the ruling party did not have the majority to change the constitution. So formally the constitution was not changed, but practically the constitutional system was changed by means of laws. The protection against politically motivated changes to the constitution was the Constitutional Tribunal. In Poland, this is a separate court with the jurisdiction to review laws to determine if they conform to the constitution. It was intended to be an independent, apolitical, branch of the

judicial system, but when one party gained the majority in the parliament, this changed. The judges of the Tribunal were discharged [retired] and replaced with politically acceptable appointees who would interpret the laws in conformity with the will of the majority in parliament.

This is how the so-called constitutional crises initiated by the transformation of an independent constitutional court into a political body came about. It was not done all at once, but gradually.

At the outset, the president refused to take the oath of office from duly elected judges, and in their place, so-called "understudy judges" were appointed, chosen by the political formation from which the president originated. These were often incompetent persons, persons without impeccable character, and politicians with extreme views were often chosen.

A number of instant unconstitutional system and procedural changes were made to the Constitutional Court itself. For example, a new president of the Constitutional Court was appointed not in conformity with the traditional mode of appointment. The new president rearranged the panels and judges in the already appointed panels, mainly appointed only "politically certain" judges for political cases, excluded 'old' judges, changed the order of hearing cases, some were heard very quickly and others were not heard at all.

The new, now "politicised" Tribunal became a significant factor in the politicisation of the entire judiciary, It became a tool of the ruling party for declaring old laws unconstitutional and 'rubber-stamping' new blatantly unconstitutional laws of the ruling party. This body also approved scandalous changes to the Polish judiciary. This concerned both the system of appointing judges and the actions of the National Council of the Judiciary, the Supreme Court, which amounted to a constant undermining of the status of independent courts and judges.

The Constitutional Tribunal became a tool for political games. If a law was politically inconvenient, the subject provoked extreme social reactions. It was not passed in the Sejm (lower chamber of the parliament), but old regulations were challenged to the Tribunal, which declared them unconstitutional. This was the case with the law on abortion limiting women's rights. In that instance, this resulted in hundreds of thousands of Poles taking to the streets during the Covid 19 pandemic and in the harsh reaction of the police.

The judgements of the Tribunal have always taken into account the conclusions of the parliamentary majority, the one that appointed its judges. Before the Tribunal issued a verdict on a case from the ruling party's motion, the people knew what the content of the verdict would be, because it was always going to be in line with the line of the party.

Thus, instead of upholding citizens' rights and freedoms guaranteed by the constitution and controlling politicians, the Constitutional Tribunal became a body which, by its rulings, deprived citizens of their rights and freedoms without any opportunity for parliamentary debate or discussion.

These changes provoked reactions at home and internationally. The US State Department reacted, as did the Venice Commission of the Council of Europe. The European Commission complained to the CJEU, legal circles also objected, and waves of public protests swept through the country. The ECtHR recently ruled in the *XeroFlor v. Poland* case, stating that the Constitutional Tribunal with its improperly appointed judges is not a court established by law (Article 6 of the ECHR). It comes to an unprecedented situation that the Polish Constitutional Court itself, wanting to protect itself from ECtHR rulings" says: "I am not a court". Thus, it is not affected by the jurisprudence of the European Courts and European standards relating to the court. The Polish Tribunal declared unconstitutional Article 6 of the ECHR expressing the right to a court. In effect, this removed Poland from an important relationship to the EU. As a result, a convention that had been a response to the Second World War and became a kind of constitution of rights and freedoms for the whole of Europe was to some extent nullified, at least as far as Poland was concerned. By definition, the question is presented as to whether Poland has a government of laws or a government by tyrannical majority?

The reactions of international bodies, usually necessarily late, are confirmed by national assessments. The internal political opposition does not lodge any complaints to the Tribunal, and the number of legal questions submitted by Polish courts and citizens has fallen dramatically. The Tribunal, quarrelled as it is by factions of the ruling coalition, has ceased to function and has hardly ruled for many months. Polish society's assessment of the Constitutional Tribunal is extremely poor: only 6 per cent believe that it is an organ independent of political influence.

The case study is not just a problem for Poland or a few European countries. It is a systemic threat. Now there are similar protests in Israel. On the streets of Tel Aviv you can see slogans - "Tel Aviv is not Warsaw", "Israel is not Poland or Hungary". So what are the protesters warning against. . .the reality that has just been described. This is crucial to the foundation of democratic government.

According to research, trust in independent courts, impartial courts, contributes as much as 65 per cent to trust in the state. Indeed, 40 percent of trust in the state comes from trust in courts, including constitutional courts.

Wise countries/states do care about the trust of citizens, wise countries/states do care about the achievements of civilization, such as the rights and freedoms of citizens. I would remind you that these achievements were written with the blood of millions of people, victims of the Second World War. There is increasing talk of the independence of the court in Europe, which is linked to the establishment of the court in a legal manner. It is therefore necessary to postulate that the constitutional court can fulfil its role and be a real guarantor of human rights and freedoms. Initially, it should be decided whether the judiciary, whether centralised or diffuse, should constitute a separate branch of government and not merely an extension of the legislative power.

- There should be a discussion on how such courts are selected. To put it somewhat simplistically, it is not a good idea if it is the parliamentary majority that selects the judges of the Constitutional Court who are to later assess the laws passed by the parliament. In essence, it is a kind of formula for a quasi-political body to judge its own affairs. In a situation where parliament is already doing this, the selection of judges should always be an expression of compromise, carried out by a qualified majority. The American model avoids this by having the judges nominated by the President and then confirmed by the upper house of the Congress.
- A proper system should be put in place related to the selection process of persons nominated to become judges so that they are of the highest standards - such a process should be transparent and subject to public scrutiny by e.g. NGOs, universities. This will contribute to public confidence.
- The system of central constitutionality control should be complemented by diffuse constitutionality control exercised by independent courts as part of the normal judicial function. This is a natural defence mechanism against a hostile takeover of the constitutional order. Such a way provides greater guarantees of rights and freedoms and removes any incentive for an attempted political takeover of the system.
- There should be an effective system to protect international rights and freedoms should national constitutional courts lose their independence value. One way to do this would be to confer jurisdiction on the court system as a whole to have authority to enforce judgments from courts in countries that have treaties with the home country of the court.

I wish this for all of us and, above all, for the citizens, whose rights and freedoms the judges, constitutional and otherwise, have a duty to safeguard.