

Undermining the constitution

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A bill presented by the government threatens democracy, rule of law

Opinion

Comment

Court

Legislation

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Photo: Matthew Mirabelli

The Constitutional Court of Malta, in line with the consistent and well-established case law of the European Court of Human Rights, has ruled on several occasions that stiff administrative penalties constitute a criminal sanction.

According to the Maltese constitution, these can only be applied by a court of law, composed of judges or magistrates. The government is now trying to stultify these judgments and trip the Constitutional Court by amending the constitution through a simple ordinary majority in parliament, rather than by the two-thirds majority imposed by the constitution.

The minister had, some time ago, presented a bill to amend the constitution to shrink the right to a fair hearing and deprive the ordinary citizen from the protection of a court of law in criminal proceedings. This bill was opposed by the opposition and, since a two-thirds majority was needed for its approval, it has, for some time, been having a siesta on the parliamentary agenda.

To invalidate the requirement that a constitutional amendment needs a two-thirds majority to be approved, the government is now proposing an amendment to the Interpretation Act, to the effect that administrative penalties, some of them running into exorbitant amounts of hundreds of thousands of euros, will no longer need be imposed by a court of law – as repeatedly decided by the Constitutional Court – but by any public officer or authority that might also include persons of trust.

Our due-process protection in serious criminal proceedings, hitherto entrusted to a court of law, will, in future, be replaced by the decisions of government-appointed officers or members of government entities. The vast majority do not enjoy any security of tenure, come with no guarantees of independence and impartiality and their appointment, term of office and aspirations to reappointment depend exclusively on the caprice and pleasure of the government of the day.

This perseverance in reducing, rather than enhancing, the fundamental rights set forth in our constitution is, by itself, already serious. What is even more lethal is the use of the means chosen to reach this end, namely the use of an ordinary law to change the meaning of the constitution.

If the government's intrigue is accepted, then this would constitute the thin end of the wedge and there would be no restrictions to the government altering the meaning of important terms in the constitution by simply using its ordinary parliamentary majority to cripple beyond recognition the supreme law of the land. The supremacy of the constitution would translate into the will and whim of transient politicians.

If the government is allowed by an ordinary law passed by a majority of one in the legislature to remodel the meaning of the constitution, it could in the future do almost anything like, for example, change the meaning of "person" in the article relating to the right to life; it may restrict fundamental rights to Maltese citizens only, by excluding foreigners and refugees from the meaning of the word "person". It would mean the end of the supremacy of the constitution and legal certainty as willed by the constitution itself.

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and EU institutions*

This bill amending the interpretation of the constitution sets out to destabilise, in one mortal blow, both the supremacy of the constitution and that of the Constitutional Court. When the apex court in our country delivers judgments interpreting and enforcing the constitution, the government will be able, by a simple majority of one, impose its own reading of any article of the constitution at variance with that of the supreme court of Malta!

This bill is a clear and present threat to democracy, the separation of powers and the rule of law. It rubbishes all the values which we have believed in and which successive administrations, with different levels of observance, have tried to abide by, namely that the executive and parliament operate within the four corners of the constitution and the Constitutional Court in full adherence to human rights law.

It sounds the death knell to the protection of our rights and liberties under the constitution. Our rights will depend on the fads and impulses of the politicians of the day, no longer on the protective provisions of the supreme law of the land.

It will put us on a collision course with the Venice Commission and, we dare add, with European Union institutions. Poland and Hungary have been summoned to respond to charges far less serious than slighting the supremacy of the constitution of a democratic state.

This is not a political issue. It is a serious human rights one. On our vigilance, resistance and opposition to arbitrariness depends the future of democracy under law in our country.

Kevin Aquilina is head of the Department of Media, Communications and Technology Law at the University of Malta. Austin Bencini is a constitutional lawyer. Giovanni Bonello is a former judge of the European Court of Human Rights. Tonio Borg is a former deputy prime minister and European commissioner.