

Debate & Analysis

The Constitutional Court strikes again



KEVIN AQUILINA

No, it is not the Pink Panther that strikes again this time but the Constitutional Court.

Though there are indeed similarities. The former is a thief – essentially he steals jewels. In the case of the Constitutional Court, the latter self-steals, it steals its own judicial independence, offering it on a golden plate to the other two organs of the state when it voluntarily gives up its own independence to appease. First, a law enacted by the Nationalist government and, second, a Labour government measure implementing that same law.

There are of course differences in this comparison. Whilst the Pink Panther is a classical thief – stealing valuables that do not belong to him – the Constitutional Court lowers its own defence mechanism intended to protect its judicial independence so that both the legislature and executive benefit therefrom by pilfering what should be a cherished value to the Constitutional Court – its own independence. It lowers its defence mechanism not out of service or humility but out of reverence or submission to the government of the day. Rather than defending its turf – judicial independence – the Constitutional Court, in total disrespect of the separation of powers and rule of law doctrines, and Strasbourg case law, opts to be as submissive, servile, and loyal as can be to the other two organs of the State to the detriment of the ordinary person who knocks the court's door for that much vaunted remedy that is never dispensed.

Now one must always keep in mind that the Constitutional Court is the only organ of the State in whom the Constitution vests power of interpreting and enforcing the supreme law of the land. But when this last bastion of the rule of law malfunctions, either by accident or by design, the end result is that there is no other institution in Malta that can stand up to the arbitrariness of the legislature and the executive especially

when they are both acting in cahoots together.

The case decided by the Constitutional Court that I have in mind (there are several others of course that can be quoted but let us not go down that route – pleasures yet to come!) is that decided by this court on 29 January 2026 in the names *Joseph Lebrun versus Attorney General and others*. This judgment reversed a judgment that was delivered by the Civil Court, First Hall (Constitutional Competence) by Madam Justice Miriam Hayman on 30 September 2024 where the court of first instance had correctly, applying the *Klass* judgment of the European Court of Human Rights, declared that the authorisation of interception of communication should not be an executive function but a judicial one. Words of wisdom, indeed, that not only were not heeded to by the Constitutional Court but, in its rush to appease both the legislature and the executive, overturned the judgment of the court of first instance.

When the Nationalist government moved a law in Parliament – the Security Service Act – to authorise the Prime Minister or the Minister responsible for home affairs to authorise the Security Service to intercept communications, Parliament was usurping a judicial function by bestowing such power on the executive instead on the judiciary. Indeed, it should be the judiciary in a democratic State governed by the rule of law (as you can see Malta of course is not one) that ought to authorise such interceptions. Otherwise we end up a police state governed by autocratic rule (not that we are not already!). After all, the Criminal Code entrusts the issue of search, arrest, seizure, forfeiture, confiscation, etc. orders and warrants not to the Prime Minister or to a Minister but to a member of the judiciary. And this is how it should properly be.

Correctly, the Criminal Code does so because the judiciary is independent; the executive is not. The judiciary is guided by the law; the executive is guided by political partisan considerations. The judiciary applies due process of law; the government considers itself above the law. The judiciary applies the rule of law; the government misapplies the rule of law. The judiciary is bound by a code of ethics; the executive tends to forget that they are bound by their own code of ethics. Hence, it is obvious why such an investigative power of interception of communications should not be entrusted to a partial, biased, and arbitrary organ of the state such as the executive. Further, authorisation of interception of com-

munications is of the same nature as the other powers exercised by the judiciary.

Through its judgment, the Constitutional Court is not only allowing the executive to intrude and trample upon judicial functions, but it is legitimising, blessing, and constitutionalising such intrusion. Instead of upholding the judiciary's independence by ensuring that judicial functions are exercised by it, not by Parliament (remember the Demicoli case) or by the executive as in this case of telephone tapping, the Constitutional Court is complicit in surrendering lightly what is intrinsically and objectively a judicial function, an act that undermines its own independence whilst enabling the government to – without due process of law – usurp judicial functions. The independence of the judiciary is not intended first and foremost to defend the judiciary: it is primarily aimed at defending the citizen against abuse of power and the arrogance of state institutions.

Now the problem lies in the fact that while Madam Justice Hayman embraced the Strasbourg's Court *Klass* judgment, the Constitutional Court simply ignored it. There is, indeed, not even one single reference to the *Klass* judgment in the Constitutional Court's judgement when the latter court should have decided the appeal before it, primarily by reference thereto and application thereof as the court of first instance correctly did. Worse still is the fact that the Constitutional Court is not jealous to safeguard its own constitutionally established judicial independence and has no qualms in offering John the Baptist's head on a platter to Salome as it has done in this judgment in full disrespect of the constitutional provision on its own independence.

Nor is the Constitutional Court respectful of the separation of powers doctrine that mandates that judicial functions should not be appropriated by non-judicial organs of the state, and of the rule of law doctrine that mandates that the legislature should not subvert the judicial power of the state or that the executive exercises judicial functions. We all know what the European Court of Human Rights had to say in the Demicoli case when Parliament – acting as a quasi-judicial tribunal rather than as a political institution – appointed itself judge, jury, prosecutor, witness, and victim to try Demicoli with no regard to judicial independence and the Constitutional Court had no difficulty with this. Were it not for the European Court of Human Rights, the Constitutional Court would still be ap-

“We all know what the European Court of Human Rights had to say in the Demicoli case when Parliament – acting as a quasi-judicial tribunal rather than as a political institution – appointed itself judge, jury, prosecutor, witness, and victim to try Demicoli with no regard to judicial independence and the Constitutional Court had no difficulty with this.”

plying its own skewed version of the Demicoli judgment, an interpretation that flies in the face of both the Constitution and the European Convention on Human Rights.

Telling are the below extracts from the European Court of Human Rights *Klass* judgment conveniently laid aside by the Constitutional Court:

“50. The [European] Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law...”

55. Review of surveillance may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safe-

guarding the individual's rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8-2), are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

56. ...The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge. Nevertheless, having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. The Parliamentary Board and the G 10 Commission are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise an effective and continuous control. Furthermore, the democratic character is reflected in the balanced membership of the Parliamentary Board. The opposition is represented on this body and is therefore able to participate in the control of the measures ordered by the competent Minister who is responsible to the Bundestag. The two supervisory bodies may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling.

But whilst in the *Klass* judgment, the European Court of Human Rights noted that there two supervisory bodies that were independent of the executive and that could ‘exercise an effective and continuous control’, in the case of Malta the situation is worse as there is no such body or bodies.

If the Constitutional Court is not itself jealous to safeguard its constitutional independence, who will?

Kevin Aquilina is Professor of Law at the Faculty of Laws of the University of Malta