The Independence of Constitutional Judges

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I would like to share with you some thoughts about constitutional courts, a type of judicial institution that originated in Europe and came to be adopted in countries all over the world – including, since 2010, the Dominican Republic –, and how their role as guardians of constitutional values entails a particular understanding of the relationship between judicial independence and judicial ethics – in other words, how the theme of this panel plays out with respect to this peculiar and pervasive judicial institution.

As you well know, judicial review of legislation was not part of the institutional architecture of European public law following the liberal revolutions of the late 18th and the early 19th century. The European legal culture of that time was one of legality, faithful in the wisdom of a representative legislature and in the moral infalibility of the legislative form. In the Declaration of the Rights of Man and the Citizen of 1789, the holy grail of modern constitutionalism, the French word for statute or piece of legislation – *la loi* – occurs nine times in a slender document with only 17 brief articles. For the great constitutional thinkers of the time, such as the Marquis de Mirabeau and the Abbé Sieyès, the protection of fundamental rights and the promotion of the rule of law had as a necessary and sufficient condition the principle of legality, that is to say, the submission of the executive and the judiciary to laws that were general by virtue of their impersonal form – addressed to abstractions such as creditors, promisors, owners, plaintiffs, wrongoders, and so forth – and their authorial pedigree – an assembly of representatives of a nation of free and equal individuals.

This legalist optimism died out with the great social transformations and political tragedies of the second half of the 19th and the first half of the 20th century. Allow me to highlight three factors that contributed decisively for the erosion of this culture of legality. In the first place, the fragmentation of the body politic into social classes and interest groups, which in turn informed the creation of mass democratic political parties with

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relatively stable constituencies – such as industrial workers, small landowners, liberal professionals, and confessional groups – exposed the preferences, compromises, influences, contingencies, and even sordid dimensions of politics that were formerly concealed by the impersonal form of the great civilian codes. In the second place, the growing need for the intervention of public authority in spheres of social life previously left unregulated or subsumed under the law of obligations and property law – spheres such as labour, housing, industrial accidents, mergers and acquisitions, public utilities or agricultural production – subverted the generality of legislation, asked to perform increasingly technical and contextual tasks. In the third place, the passivity of parliamentary systems in the face of the predatory use of their mechanisms and principles to sponsor the political takeover by antiparliamentary, antiliberal, and antidemocratic movements evinced the insuficiency of ordinary legality to protect constitutional values of paramount importance, such as fundamental rights, the separation of powers, judicial independence, and democratic pluralism.

The most significant and symbolic institutional innovation in the post-war reconstruction of constitutional democracy was precisely the constitutional court – the assignment of the power to review the constitutionality of legislation to a specialized judicial body endowed with political legitimacy. If you allow me a cheeky theological metaphor, constitutional justice was established to redeem the constitutional sins of legality − a manifestation of the rule of law which, while conceived in the image of juridical perfection, tasted the forbidden fruit of partisan politics, was expelled from the garden of innocence, and fell into the corrupted state of original sin. Since legislation is imperfect − it may violate rights, generate inequalities, licence arbitrariness, and undermine expectations − its constitutional salvation is contingent upon the incarnate and sacrificial grace of a constitutional justice capable of limiting it, correcting it, guiding it, and justifying it.

But this is where the theological allegory breaks down. Constitutional judges are not simultaneously human and divine – they are solely human, all too human, prone to the very degeneration which their existence is meant to remedy. In order to neutralize or at least mitigate this risk, their office is structured in a particular way and they are called upon to cultivate a particular set of virtues. Let us call these the external and the internal dimension of the ethics of a constitutional judge. As to the former, I should like to point out that the office of a constitutional judge embodies a balance between the political and the judicial: they are politically appointed but judicially independent. A court that has the

power to strike down democratic legislation should be reflective of the political pluralism that informs the legislative process, but it should not be hostage to the very politics that it seeks to contain and civilize. The standard expression of this delicate balance is that constitutional judges are selected by the political branches and serve for a single continuous and untouchable term considerably longer than the ordinary legislative cycle.

As to the internal dimension of the ethics of a constitutional judge, allow me to mention the four cardinal virtues that they should seek to cultivate and which embody a particular conception of judicial independence. First, ungratefulness: the good constitutional judge is prepared to disappoint those who chose them, at least insofar as they expect any form of obedience or fidelity. Second, self-restraint: the good constitutional judge resists the temptation of using the office as a political platform, walking graciously the fine line between personal politics and constitutional law. Third, abnegation: the good constitutional judge is willing to sacrifice their ego for the greater good of the institution which they are duty-bound to serve. Fourth, love of wisdom: the good constitutional judge is a perpetual student and thinker of the law, contributing to enlighten ordinary politics with the grandeur of principle. How would we best characterize a constitutional judge who is an example of ungratefulness, self-restraint, abnegation, and love widsom? In a word: independent.

Thank you for your patience.