COMMENTS AND LETTERS

Abdication of constitutional responsibility

KEVIN AQUILINA, AUSTIN BENCINI, GIOVANNI BONELLO and TONIO BORG

The courts of constitutional jurisdiction, namely the Civil Court First Hall and the Constitutional Court, are entrusted with the enforcement of the Constitution in our country. This responsibility is onerous, essential and cannot be renounced. Unfortunately, that is what is happening.

Allow us to explain how. When a human rights issue arises before a court which is not one of constitutional jurisdiction, the presiding member of the judiciary is not empowered to decide the issue – his only power is to refer the case to the courts which are designated by the Constitution to deal with the matter, namely the superior courts of constitutional jurisdiction presided over by judges.

This is what happened, for instance, in 1964, when a group of Labour supporters were criminally charged before the Magistrates' Court with breaching a proclamation prohibiting demonstrations. They raised the issue regarding the constitutional validity of the proclamation as breaching freedom of assembly. The Magistrates' Court rightly referred the case to the courts of constitutional jurisdiction. The reference brought about the staying of the criminal proceedings until the constitutional human rights issue was decided.

The same happened in 1985. Massimo Gorla was criminally charged with violation of the controversial Foreign Interference Act 1982. He contested the constitutional validity of the law. The magistrate referred the case to the courts of constitutional jurisdiction. Consequently, the criminal proceedings, which were stayed owing to the reference, were halted.

According to the Constitution, a reference may be refused if the court before whom the matter is raised (that is to say, the court which does not deal with constitutional cases), is of the opinion that the raising of the human rights issue is "merely frivolous or vexatious". This refusal of a reference cannot be appealed.

The fact that the reference is refused means that the proceedings in which the human rights issue was raised are not stayed. It should not, however, prevent the aggrieved party from filing a separate human rights action before the court of constitutional jurisdiction, the First Hall of the Civil Court.

This was the position until 1990 when, in one case (Alan Mifsud), the Constitutional Court ruled that, once there was no possibility of appeal from a decision by, say, a magistrate, that the raising of the human rights issue was frivolous and vexatious, then one lost the right to file a separate human rights action.

Now, one of the distinctions in the island's judicial system refers to the exercise of constitutional authority. This is cleanly subdivided in two: on the one hand, those courts that have constitutional powers to determine human rights issues (the Civil Court and the Constitutional Court) and, on the other hand, those courts that have zero constitutional powers.

The recent judgment of the Constitutional Court has, in effect, determined that those courts with zero constitutional authority can wipe out, fatally, irrevocably and without appeal, your constitutional human rights (by just uttering "frivolous and vexatious", without giving reasons), while the decision of a court enjoying full constitutional authority is subject to revision, reconsideration and appeal. The victims of human rights violations would be delighted to have this irreconcilable paradox explained to them.

In spite of such pronouncement by our apex court in 1990, our courts, particularly the courts of first instance in human rights cases, have, on occasions, valiantly ruled that a refusal of a reference does not block the avenue to file a separate human rights action. (Muscat 2014).

Some months ago, however, the Constitutional Court again revived the "reference or human rights application" dilemma (Farrugia 2023).

The court is, in simple words, saying: choose – either file a separate human rights application or request a reference; if you choose the latter, beware: if this is refused by a non-constitutional court, you are perpetually prevented from having your human rights determined by a court. Human rights issues are demeaned into constitutional games of chance.

Let's see how this works in practice through a simple example, which can, and has, in fact, happened. Titus sues Sempronius in the Magistrates' Court. The case is assigned to Magistrate Caius, who is the father of Sempronius. Titus expects Caius to recuse himself, as he should not be sitting in judgment over his own son. Caius does not recuse himself. Titus requests the matter to be referred to the Constitutional Court. Caius refuses the reference on the grounds that Titus's complaint is "merely frivolous and vexations".

According to the Constitutional Court, that is the end of the matter. Titus has absolutely no remedy. He has to grin and bear it.

This is in clear contempt of the most sacred and non-derogable principle of our Constitution – that Malta is a republic founded on respect for the fundamental rights and freedoms of the individual (Article 1). According to the Constitutional Court, Malta is a republic based on the unfettered and unreviewable whims of adjudicators devoid of constitutional authority.

This can only be described as an abdication of responsibility. When one files a human rights action in the superior courts, one enjoys the benefit of a double examination of the case, first by a court of first instance presided over by one judge vested with constitutional powers, and, then, by the Constitutional Court composed of three judges (not to mention the Strasbourg remedy as well).

The recent ruling of the Constitutional Court means that if one requests a reference, he gets only one chance. It is like frequenting a casino, an aleatory exercise in trying your luck. If you lose, you pay the penalty of having been so reckless as to have asked for a remedy provided for in the Constitution.

This is the polar opposite of what the Constitution intended. No court or other authority can substitute the power and jurisdiction of the courts of constitutional jurisdiction. The supreme law of the land has empowered no one else to decide the merits of a human rights controversy. They should fondly cherish such power, not offload it.

Kevin Aquilina is a law professor and former dean of the Faculty of Laws. Austin Bencini is a senior lecturer at the Faculty of Laws. Giovanni Bonello is a former judge of the European Court of Human Rights. Tonio Borg is an associate professor of public law at the Faculty of Laws.

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