PROCEDURAL ANOMALIES IN CONSTITUTIONAL CONTROVERSIES

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I. WIDENING SCOPE OF SUCH CONTROVERSIES

Since the creation of the Constitutional Court in 1964, the number of lawsuits concerning the Constitution and its Fundamental Rights sections has been very limited. This may reflect well on the drafting of the Constitution and also on the absence of violations of the guaranteed Fundamental Rights, but it may also be due to an insufficiency of awareness on the part of the population in general, as to the full implications of the standards imposed by the constitutional provisions and the types of remedies ensuing therefrom. It is incumbent upon everyone, and especially the members of the legal profession, to question even long accepted practices and to apply to them the tests resulting from the constitutional provisions. For example, according to long standing practice, an arrested person is not given a written statement of the charges for which he is placed under arrest. The charge is read out in Court and copies can be taken by the accused or his lawyer. However, the Constitution requires that the accused be supplied with a written chargesheet and, had it not been for the exclusion of the basic Codes from the purview of s.47 of the Constitution, the procedure that had normally been followed might well have been held to be unconstitutional(1).

Let us take another example. Being confronted with a claim for additional tax comes within the experience of probably the majority of taxpayers. As the Income Tax Act gives the Commissioner an administrative discretion in regard to the imposition of such additional tax, it has unfortunately been the practice of the Board of Special Commissioners not to interfere with the circumstances and reasons leading to its imposition(2). In 1964, up the enactment of the Constitution which guaranteed a fair hearing by an impartial body on all matters concerning the determination of civil rights(3), any form of discretion on the part of the Commissioner on a matter which is really of a judicial or quasi-judicial character became unconstitutional. The result is that either the Commissioner has lost his discretion or, alternatively, the Board will have to investigate the fairness or otherwise of the imposition of the additional tax(4).

Nothing contained in or done under the authority of the provisions of the Civil Code, Commercial Code, Criminal Code, Code of Police laws, Code of Civil Procedure(5) and the Land Expropriation Laws (as obtaining in 1964(6)) can be regarded as being in violation of the Human Rights provisions. The exclusion of these Codes or Laws from the application of the Fundamental Rights provisions may have been due to a fear that the task of modifying the basic codes would have been too much and too dangerous to complete within the period of three years imposed by the Constitution for the amendment of Laws for the purpose of making them conform to the Constitution. There was only one case(7) in which it was alleged that a provision of one of the basic Codes (namely the Criminal Code) was

in conflict with the Constitutional provisions. There are undoubtedly other cases of conflict, but there is no reason why one should harbour any special fear that the removal of the special treatment accorded to the basic Codes would lead to undue confusion and change. If an individual claims that the Human Rights sections of the Constitution are being violated by the provisions of these codes, he should be at liberty to raise the matter for the Court to apply the appropriate remedy. The position of the Land Acquisition Ordinances may present a different case, as it is known that the compensation awardable under those Ordinances is in most instances less than reasonable and adequate compensation and a Court would certainly hold them to be unconstitutional. It seems, therefore, that these Ordinances should be examined and discussed on their own particular merits and the necessary changes should be effected by legislation(8).

It has been officially stated that the individual petition to the Commission and Court of Human Rights of the Council of Europe is going to be recognized by the Government of Malta. This is a welcome step, but one must appreciate that such a right is naturally restricted within the margins of the European Convention of Human Rights. The same liberal tendency should have the effect of eliminating the basic Codes from the entrenched position which they possess at the present moment and also to liberalize the Constitution or correct the defects which have so far appeared(9).

The above suggestions may possibly increase the numbers of lawsuits involving constitutional issues. In the limited number of cases we have had so far, doubts have arisen on the extent of the Constitutional Court's jurisdiction in relation to that of the Court of Appeal and a greater incidence of such lawsuits will undoubtedly have the effect of highlighting the difficulties on jurisdiction and the inadequacy of the procedure when such difficulties arise. It is therefore necessary to rectify the position also from the purely procedural angle.

II. Jurisdiction of Constitutional Court

According to s.96(2) of the Constitution, the Constitutional Court has jurisdiction to hear and determine:—

(a) Such questions as are referred to in s.64 of the Constitution, namely any question whether—

(i) Any person has been validly elected as a member of the House of Representatives.

(ii) Any member of the House has vacated his seat therein or is required by the Constitution to cease to perform his functions as a member

(iii) Any person has been validly elected as Speaker from among persons who are not members of the House, or having been so elected, has vacated the office of Speaker.

(b) Appeals from decisions of the First Hall of Her Majesty's Civil Court under s.47 of the Constitution, which is the section granting an action for the enforcement of the provisions protectinng the Fundamental Rights and Freedoms of the Individual. It should here be noted that if an action had already been made under a previous Constitution in order to enforce some Human Rights section, an appeal from the relative judgment is to be made to the Court of Appeal and not to the Constitutional Court, (10) because the Constitution in this sub-section refers specifically to Fundamental Rights Actions based on the 1964 Constitution.

(c) Appeals from decisions of **any Court of original jurisdiction** in Malta

on questions as to the interpretation of the 1964 Constitution. It must be noted that the First Hall of the Civil Court is not the only Court of original jurisdiction. The provision certainly includes the Commercial Court and the Courts of Gozo in their superior jurisdiction. Would the Inferior Courts be included? They are Courts of original jurisdiction; it is true that they have a jurisdiction severely limited by value but a question of interpretation of the Constitution may arise as an incidental matter to a lawsuit within their jurisdiction.(10a)

(d) Appeals from decisions of **any Court or original jurisdiction** in Malta on question as to the validity of laws. The same comment made in respect of (c) applies here too.

In both sub-paras. (c) and (d) we find an exclusion as to those decisions which may fall under the Fundamental Rights sections of the Constitution. It seems that this exclusion is introduced merely for the purpose of avoiding duplication. In fact, all appeals from decisions on actions made under those sections will go to the Constitutional Court in accordance with sub-para (b).

III. Division and proliferation of actions

Even a cursory reading of s.96 shows that in regard to sub-para. (c) and (d), the Constitutional Court will be called upon to deal possibly only with one aspect of a particular lawsuit. For example, in the Broadcasting Authority Case, (11) the action was based on s.122 of the Constitution and on s.7 of the Broadcasting Ordinance. Questions on interpretation of the former would have to be decided upon by the Constitutional Court, while questions on the interpretation of the latter would have to be decided by the Court of Appeal. It often happens that in one action various legal grounds are put forward, with the result that if one of them happens to be a provision of the Constitution needing some form of interpretation for the purpose of applying it to the particular case, the Court of Appeal will find itself without jurisdiction to determine the issue.

With regard to actions based on the Fundamental Rights provisions of the Constitution, from a procedural point of view, it may appear that there is no dificulty. In fact all actions based on s.47 must be commenced by means of an application filed before the First Hall of the Civil Court (12) and appeal therefrom is to be made again by application to the Constitutional Court (13). However, even here it may happen that a plaintiff may wish to base his claim on various grounds, some based on the ordinary law and some based on the Fundamental Rights provisions. In such a case, it is necessary to make two separate actions: one by means of a Writ of summons and the other by means of an application. Although they are filed before the same Court, it is very often the case that they are heard by different Judges, unless a specific order is given by the Court to have the two cases dealt with together; (14) however, the existence of two separate actions invariably causes difficulties of precedence and delays in the hearings. Two separate cases lead to two separate appeals and, for the reasons mentioned later, two separate cases may easily proliferate into three or four separate appeals.

Actions based on the Fundamental Rights sections are normally intended to be made use of only in default of other rights of action based; if a person has a right of action under normal law, he is expected to avail himself of that right of action before resorting to the Fundamentnal Rights sections (15). The difference in the pro-

cedure may perhaps be intended to underline this difference between these two remedies. However, the rule that a plaintiff should not resort to the Fundamental Rights action, if he possesses other actions or until he has exhausted his other remedies, is not a binding rule in accordance with s.47 but only a rule of guidance to the Court which has a discretion not to grant the remedy under s.47 if it is satisfied that other remedies are available.

Certainly it would be quicker, less expensive and more practical for the same Court to hear all the evidence and submissions in one and the same case and then decide whether to make use of the discreteion which the law confers upon it. The effectiveness of these remedies very often lies in their being given quickly and it is imperative that procedural complexities be eliminated as much as possible.

IV Interpretation of the Constitution

With regard to the exclusive jurisdiction of the Constitutional Court to interpret the Constitution, from a theoretical point of view there may seem to be no difficulties but in practice we come across the problem as to what is really meant by 'interpretation of the Constitution'. Surely, a mere reference to a provision of the Constitution or a mere application of it is not 'interpretation'. Interpretation in the strictly technical sense of the term comes into play only when there is a matter of doubt as to the meaning of a particular provision or as to its extent or mode of application to a particular case. It is, however, obvious that the line of demarcation, where mere reading and understanding end and interpretation in the proper sense begins, is an extremely uncertain line and very often depends on the subjective criteria of the particular Judge. It is to be expected that, if a Judge feels that a provision of the Constitution is not clear and calls for interpretation, he should say so clearly, and, if he has jurisdiction, decide the point separately; alternatively, if he does not have jurisdiction to decide the issue, then one of the parties will be given a time-limit to make the appropriate proceedings. In either case, an appeal to the Constitutional Court is possible.

The Constitution refers to the case in which a point of interpretation of the Constitution arises 'for the first time before a Court of second instance'. What do the words, 'for the first time' really mean? The point may have been referred to, directly or indirectly before the Court of first instance, but neither the parties nor the Court may have considered that the question raised an issue of interpretation properly so called. More importance may be given to the issue when the matter is discused further after the judgment. Would the point have been raised for the 'first time' when it is discussed again before the Court of Appeal and the Court of Appeal feels that, strictly speaking, interpretation by the Constitutional Court is called for? The reply to the question may bring about effects of considerable practical importance. In fact, if there is some point of interpretation, then an appeal should be made not only to the Court of Appeal on the merits of the case but also to the Constitutionanl Court on the question of interpretation of the Constitution. Failure to make such a second appeal may mean that the question cannot be raised again as that part of the judgment would have amounted to an implied 'res judicata'. After all, the Court of Appeal would not be able to say that the question had arisen 'for the first time' before it and, therefore, it would not be in a position to give the

reference which is provided for in s.47 (3) of the Constitution. The position can produce serious hardship and unfairness and should not be allowed to stay as it is.

The three appeal judges are normally also three of the judges sitting in the Constitutional Court. It is often very dificult to take a point of interpretation in isolation from the merits of a case or at least some of the main facts of the case. In the judgment of the Constitutional Court there may be certain expressions of opinion reflecting on the merits of the case. Would the judges of the Court of appeal be able to continue the hearing before the Court of Appeal or would they find themselves debarred from continuing the hearing on the grounds of some expression of opinion in the Constitutional Court's judgment reflecting on the merits? This depends on the details of each case but if they have to abstain, there will be obvious practical difficulties by reason of the small number of judges on our bench.

V. Conflicts of Jurisdiction

With regard to the exclusive jurisdiction of the Constitutional Court to decide on questions of validity of laws, much the same difficulties that have been encountered in regard to the interpretation of the Constitution can arise. A problem has arisen in a case which wil probably remain unique(16). There is still pending before the Court of Appeal a Human Rights action instited on the basis of the 1961 Constitution. The Act impugned was Act I of 1963 enacted on the 15th February 1963. As the action was not a Fundamental Rights case based on s.47 of the Constitution, it obviously did not fall within s.96(b) of the 1964 Constitution but it did involve the question of the validity of Act I of 1963. Therefore, the dificulty arose as to whether it came within s.96(d) referring generically to questions of the validity of laws without any limitation. Two appeals were made and quite a long time had to elapse before the hearing of the case could actually commence, in order to discuss which of the hearings should take precedence. Ultimately it was decided that, although one of the points at issue was the validity of a law still that point arose as part of a Human Rights action based on the 1961 Constitution. The Constitutional Court declared itself to be incompetent and the case was held to fall within the sole jurisdiction of the Court of Appeal. Both parties to the case favcured the adoption of such a solution because at least it terminated the uncertainty that had prevailed and the necessity of dividing the actions into two parts with unavoidable confusions and delays.

VI. Conclusion

Most of the difficulties to which I have referred have already been encountered. There is no doubt that there are other latent ones. The main suggestions that arise from the observations made in the present paper are the following:

a. The basic Codes should be removed from their present entrenched position.
b. Any judgement of the Constitutional Court on the question of jurisdiction or extent thereof, should be binding on any other Court and, in case of conflict of judgements on such matters, the judgement of the Constitutional Court should prevail.
c. The procedure in constitutional matters should be more flexible. Particularly, the Court should have authority to give relief in cases in which time-limits for the making of appeals are deemed

to have lapsed on account of the procedural difficulties animadverted upon. This amounts to the "restitutio in integrum" which traditionally existed in our procedural system but which was recently held to have been tacitly abrogated(19).

d. In the cases in which the prescribed procedure before the Court of First Instance is by application, the procedure by writ of summons should be equally valid. In this way the incidence of duplication of actions will be diminished. In s. 164 of the Code of Civil Procedure there is a precedent for alternative modes of procedure and the Court is given a wide discretion.

e. Greater procedural flexibility for references to the Constitutional Court directly or to the Civil Court should be introduced.

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(1) Police-vs-Francesco Certo decided by the Constitutional Court on the 14th August 1968.

(2) Decisions Nos. 23/66; 31/66; 16/70 decided by the Board of Special Commissioners for Income Tax and Tax Cases Nos. 29, 42, 57, 84 delivered by H.M. Court of Appeal.

(3) S.40(2) of the Constitution.

(4) The point was raised in a 1971 income tax appeal. However, it was not decided by the Court, because the additional tax was cancelled by the Commissioner of Inland Revenue.

(5) Vide First Schedule to the Constitution and s.48(7) of the Constitution.

(6) S.48(9) of the Constitution.

(7) Police-vs-Certo supra.

(8) The hardship arising from the application of the provisions of the Land Acquisition Ordinances was the cause of an appeal to the Judicial Committee of the Privy Council in the case Depasquale noe. et vs Aquilina et disposed of by the Judicial Committee on the 11th March 1971. The Judicial Committee agreed with the Court of Appeal's rigid and literal interpretation of the provisions of the Ordinances in contrast with the liberal interpretation followed by the First Court.

(9) One example of a serious defect that has been encountered in practice relates to s.87(3) where by the Constitution the Prime Minister is required to perform any function in accordance with the recommendation of or, after consultation with, any person or authority, the question whether he has in any case received, or acted in accordance with such recommendation or whether he has consulted with such person or authority shall not be enquired into in any Court. This provision in reality stultifies the guarantees afforded by other provisions of the Constitution. During the pre-Independence talks, this provision was criticised by the Malta Labour Party which suggested that it should be restricted only to the cases in which the Prime Minister is required to consult with any person or authority, but should not apply to the cases in which he is required to act in accordance with the recommendation of any person or authority (Vide p. 99 of "Malta Independence Conference 1963 - M.M.S.O. Amend 2121)
Such a suggestion was fully justified and it is strange that it was not adopted in 1964.

(10) Ganado noe.-vs-Borg Olivier noe. and Ganado noe.-vs-Felice noe. decided by the Constitutional Court on the 10th March 1971.

(11) Mintoff noe.-vs-Montanaro Gauci noe, decided by the Court of Appeal on the 22nd May 1971.

(12) s.2 of the Fundamental Rights and Freedoms Rules of Court 1964 (L.N. 48 of 1964)

(13) s.2 of H.M.'s Constitutional Court Rues of Court 1964 (L.N.49 of 1964).

(14) Such an Order was given by the First Hall of the Civil Court in the case Mintoff noe. - vs - Montanaro Gauci noe. which was ultimately withdrawn before the Constitutional Court on the 24th June 1971.

(15) The proviso to s.47(2) of the Constitution.

(16) Ganado noe.-vs.-Borg Olivier noe. and Ganado noe.-vs.-Felice noe. which are pending before the Court of Appeal.

(17) s.776 et seq. of the Code of Civil Procedure.

(18) The possibility of both Courts declining jurisdiction arose in a Gozo appeal. With regard to the decision of a particular point of procedure both the Court of Appeal in Malta and the Gozo Court of Appeal held themselves not to have jurisdiction (vide Compagno noe vs. Bajada et. decided by the Malta Court of Appeal on the 23rd February 1962).

(19) Vide Judgment of H.M. Court of appeal (in its Inferior Jurisdiction) in case "Misrahi vs. Cassar" of 10th June 1965.