DEBONO vs SALVINO BUGEJA NOE ET[1] AN EXERCISE IN JUDICIAL RESTRAINT

ALFRED GRECH

FOLLOWING the decision of the Civil Court 1st Hall in 'Debono vs Salvino Bugeja noe et' those who are not prepared to accept the tunnel vision of the 1st Hall must be at pains to grope for a better appreciation of the problem of controlling administrative action in Malta.

The Housing Secretary had issued a requisition order on a particular tenement which was duly served on Debono on the 26th March 1974. Debono had taken the tenement on lease, on the 11th March 1974 and went to live in it with his family on the 12th March. On eviction, the plaintiff retired to his private van as a protest and immediately instituted action against the Housing Secretary. He alleged that he was unlawfully evicted from his dwelling and that the alternative accomodation offered by the Housing Department was too small to live in.

As a preliminary objection, the Court had to decide, whether the other defendant, the then Parliamentary Secretary responsible for Housing, had a 'locus standi indicii' in the case. The court decided in the negative '(billi) tilliberaħ mill-ħarsien tal-ġudizzju'.

On the merits, plaintiff asked the Court to annull the requisition order due to substantial irregularity, a process which involved the examination of the merits of the administrative act and decide whether extraneous considerations had been taken into account by the issuing authority, making that act incorrect according to the enabling powers – in short the court had to exercise judicial review.

Materially this was what plaintiff asked. But the wording of the claim was rather confusing. In the first place, it was submitted that the Housing Secretary had not observed the rules of natural justice. The meaning of 'natural justice' in this context is not clear. Because if plaintiff referred to the non-observance of the rules of natural justice as a test of control upon the administrative act, the phrasing is rather unhappy, if not improper. Natural Justice features as a test for control in Judicial or quasi-judicial[2] functions

[1] 1st Hall – 14th August, 1974.

[2] Vide comments on the distinction between Judicial and Quasi-Judicial.

of administrative bodies, where the elements of adjudication as laid down in the Report of the Committee on Ministers' powers[3] can be detected. In the present case, the Administrative action in issue is purely 'administrative',[4] and the Housing Secretary is nowhere required by law to adjudicate upon the facts in exercising his discretion.

Again, reference to the action being 'ultra vires' can lead to, perhaps, unfortunate conclusions, because this is a term normally used in that part of Administrative Law dealing with delegated legislation. But if 'ultra vires' is to be broadly interpreted then it could mean any exercise of power beyond authorisation. In that case the action of the Housing Secretary may be impugned either because it is an action which the law does not empower, or because it has been done for a purpose which the law does not contemplate. One is formal the other is substantial.

Be that as it may, plaintiff challenged the reasonableness of the requisition order having regard to the provisions of section 4 of the Housing Act, that the requisition order is to be issued by the Housing Secretary 'in the public interestor for providing living accomodation to persons or for ensuring a fair distribution of living accomodation'. When reasonableness is the question the adjudicating authority has to go behind the facts and incidents which determined a particular decision or action, and decide whether the conclusions reached compare with the given standards. The text of the law is not very helpful in this, because it is clearly evident that the vague diction is intended to confer the widest possible power (a blank cheque) on the administrative authority in exercising its discretion. But there is at least the 'public interest' qualification of section 4 and any requisition order may be reviewed accordingly, however vague and ambiguous the meaning of the term.

The Court was not even prepared to go as far as that however. The decision of Mr. Justice Xerri was plain and categroic. Section 4 of the Housing Act empowers the Housing Secretary, 'if it appears to him to be necessary or expedient in the public interest, or for providing living accomodation to persons or for ensuring a fair distribution of living accomodation', to requisition 'any building'

[3] Committee on Minister's Powers Report 1932 p. 71 et seq.

[4] Vide the Housing Act 1949, which does not require any save procedure save that the Housing Secretary 'may in his absolute discretion' and 'in the public interest' issue a requisition order.

and 'may give such directions as appear to him to be necessary or expedient in order that the requisition may be put into effect or complied with'. This absolute discretion vested in the Housing Secretary in 1949 was never since restricted neither by law nor by the Courts of Law. Nor was there any variation in interpretation by the Court. So all the Court can do is, to ascertain that the form prescribed by law has been followed, and that the official issuing it was vested with the proper authority. The discretion of the Housing Secretary is not subject to review by the Courts. The Court was satisfied that in the present case the Housing Secretary acted according to law with the formalities prescribed and therefore plaintiff's claim could not be accepted.

This decision is typical of the attitude the Maltese Courts have taken towards the exercise of Administrative discretion. The line of judgements upholding the unrestricted exercise of administrative action dates back to the decision given by the First Hall of the Civil Court in 'Demarco vs Turner'[5] where it was held that:

> 'ove gli attori avessero fatto domanda per la revocazione dell'atto compiuto dal Direttore dei servigi veterinari per non essersi costui mantenuto nell'orbita delle sue attribuzioni non abbia ecceduto i limiti posti dalla legge, questa autorità giudiziaria avrebbe potuto esaminare la legalità del provvedimento emanato da quell'ufficiale pubblico, e la questione insorgente da tale domanda, e negare qualsiasi effetto giuridico all'atto compiuto, senza averne la facoltà di complierlo, o in eccesso di tale facoltà, o senza aver osservato le forme e le procedure all'uopo necessarie; ma essi attori pongono come base delle altre loro domande quella per la revoca del giudizio emesso da quell'ufficiale, e questa quistione sfugge al potere, giudizionale di questo tribunale Civile, il quale non puo censurare i criteri che hanno ispirato detto Direttore, nel fare quella dichiarazione, senza che esso Tribunale venga ad invadere il campo che non è suo.'[6]

So long as the statutory requirements for validity of form and procedure are observed, the Courts would not interfere with the exercise of Administrative Action, even where the Administrator has erred in law or in fact. Justification for this line of defence

[5] Vol. XXVIII-II-455.
[6] Ibid at p. 458.

was sought in the outmoded concept of Sovereign immunity and infallibility,[7] together with the complementary conception of executive action in terms of power and 'imperium'.[8] It found a solid foundation in the doctrine of double personality which placed the administration beyond the control of the Courts when acting 'iure imperii'. Practical considerations must have played their part as well. Examining the substance of a purely Administrative Act may involve the Courts in a perilous adventure to the depths of political argument. And the courts may indeed be unprepared to wet their finger tips.

Also, the administrative official may not have given a reasoned answer in the exercise of his discretion. It might be impossible to overrule his action from the attending considerations. This was the problem which the British Judges had to face in developing an effective theory of judicial review. On the one hand they had to tread cautiously not to limit the powers conferred by Parliament, however wide and absolute, if they were to be exercised in the national interest, while on the other 'Judicial self-preservation may (have) alone dictate(d) restraint'.[9]

The issue may be tinged by the doctrine of Ministerial Responsibility to Parliament on questions of policy. But it must be realized that Parliament does not have the material opportunity to discuss, let alone control the sporadic actions of the various officers down the administrative echelons. Nor can Parliament reverse decisions or grant remedies to injured individuals. The ultimate control remains with the Judiciary.

In England the implications of the unrestricted increase in administrative powers were fully realised when Parliament and the Executive started to make improper encroachments on the territorial preserves of the Courts. 'Lyanage vs R.' (1967) was the occasion for Parliament to attempt a reversal of a decision given by the House of Lords with retroactive effect. It was argued that if the Judges ought not to set themselves up as politicians, the politicians ought not to set themselves up as Judges. 'The Government manifests its non-partizan approach to a matter of public concern, the judges manifest their sense of obligation towards the Welfare

[7] The Doctrine that the Crown can do no wrong.
[8] Vide Gulia 'Governmental Liability'.
[9] Per Parker C.J. 'Recent Developments in the Supervisory Powers of the Courts and inferior tribunals'

of the State'.[10] Over the past ten years there has been a growing tendency to invoke judicial review, and the courts have been found ready to intervene. They are growing more and more aware of the dangers inherent in absolute power.

The Maltese courts do not seem to be influenced by this movement or similar trends on the Continent where the individual may seek redress against the executive in special Administrative Courts. They have been lost in the wilderness of a judicial labyrinth, by the inconsistent, and by now rejected doctrine of the double personality of the state.[11] And in one judgement at least the notion of 'ius imperii' was even extended to the legislative Acts of parliament,[12] an absurd conclusion which even a bare knowledge of Constitutional interpretation can put to scorn.[13] 'Debono vs Salvino Bugeja noe et' is typical of the restrictive view nothing of which kind is found ranging in the Administrative Courts of the Continent and the ordinary Courts of England. The judicial milestone in 'Sciberras vs The Housing Secretary et'[14] was indifferently discarded and Mr. Justice Xerri decided the case on the strict interpretation of the law. So long as the requisition order was issued according to the formalities and by the authority prescribed by law, the object of the Court was exhausted. A cursory orientation in the practice of judicial review would clearly mark out the difficulties of this conclusion. It is difficult to control administrative action merely by form and authority. It must be conceded that power may be legally vested in an authority and its exercise be unlawful. A right may be abused though not infringed. This was Plaintiff's contention in the case, and the Court was asked to decide on the basis of 'Sciberras vs Housing Secretary noe et'.

The doctrine of the double personality of the State for long in disfavour with the more advanced legal opinion was thrown overboard by the Court of Appeal in 'John Lowell et vs Onor. Dr. Carmelo Caruana et'.[15] It was the pillar on which the long line of de-

[10] De Smith 'Judicial Control of Administrative Action', 3rd ed. p.30.
[11] Lowell vs Caruana C.A. 14th August, 1972.
[12] Vide 'Neg. John Coleiro ne vs. Onor. Dr. Giorgio Borg Olivier'. Vol. XLI-II-1045.
[13] Vide now 'Buttigieg vs Borg Olivier'. Vol. XLVII-I-I
[14] Per Sammut J. First Hall 21st July, 1974.
[15] C.A. 14th August, 1972.

cisions upholding the immunity of Executive action had rested. Once the deep seated foundations for that attitude had been destroyed the Court was able to lay down the principle that where the exercise of administrative acts is in question, the principles of English Law on this point are to be adopted. This is in conformity with 'Cassar Desain vs Forbes'[16] and subsequent decisions.

Three principles from English Public Law were enumerated.

(a) The Court may interfere where the exercise of discretion was not according to the conditions provided by Statute, or, in other words had violated the basis of the power granted by statute – excess of power;

(b) The exercise of administrative discretion may be controlled where the power has been exercised for a purpose for which it was not conformed. That is to say, when it is used for any other purpose or on considerations extraneous to the legislation which conferred the power – abuse of power.

(c) An authority entrusted with a discretion must not in the purported exercise of its discretion act under the dictation of another body or person.[17] An authority who is vested with a discretion cannot act according to the directions or instructions of his departmental superior, without exercising his independent judgement. Any action or order so made would be invalid.[18]

The Housing Secretary was thus acting illegally when he was directed by the Ministers – a case of failure to exercise a discretion,[19] and when it appeared from the circumstances of the case that the requisition order was issued to circumvent a judgement by the Rent Regulation Board ordering eviction – a case of improper purpose. The Court took the plunge and ordered the restitution of the requisitioned building to requisitionee. That was enough for a first step. Subsequent cases could go on to develop more fully the inner matrix of the doctrine of judicial review and provide the individual with a long needed remedy against the unscrupulous intrusion by beurocratic functions on the checked domain of individual rights.

'Debono vs Housing Secretary' did not follow these steps, and

[16] Vol. XXXIV-1-43.
[17] De Smith, Judicial Review of Administrative Action, 3rd Edn. p. 273.
[18] Basu: Commentary on the Constitution of India, Vol. 1, p. 318.
[19] Vide De Smith op. cit. p. 263 et seq.

rejected all that had laboriously been said. It was a case of sheer backsliding, unmasking an impending fear to move forward with the spirit of the changing times. But the conservative mentality in judicial circles cannot be upheld to the point of legal sophism and legalised injustice. Judicial lethargy to the immediate problems which arouse public concern cannot be glossed over so easily, simply because the common public is unable to follow the subtitles of legal argument.

This is part of the function of the Courts, as guardians of law, to safeguard the rule of law, not necessarily manifest in positive legislation. They should be keen sentinels, prompt to mark the first shoot of social injustice which rears its head on any possible occasion in a democratic society hypnotised by the ideals of liberalism:

> 'Jekk il-Qorti bħal f'pajjiżi demokratiċi oħra, jipprovaw jaqdu l-funzjoni mportanti u xejn faċli ta' *review* assenjata lilhom dana mhux dovut għal xi vellejità jew xi xewqa li tiġi kkritikata l-Amministrazzjoni jew il-leġislatura, iżda huwa dovut biss għan-neċessità tad-disimpenn ta' dmir espressament impost fuqha mill-istess kostituzzjoni. Dan hu partikularment il-każ rigward id-drittijiet u l-libertajiet li dwarhom il-Qorti ġiet Kostitwita bħala sentinella tal-qui vive...'[20]

The matter did not stop there. The decision was appealed from. Before the Court of Appeal, Defence Counsel sought to unearth the penetrating ramifications of judicial practice in England where an administrative action is being contested. The crucial issue was where to draw the line between individual and public interest, and how far are the courts expected to interfere in the exercise of discretion to protect the former. But more important was the reference to the rule of law, and the principle that when the rights of the private citizen have been infringed the Courts should grant a remedy. The reasons for granting a remedy seemed (according to the opinion of the present writer) to outweigh the excuses for administrative immunity. It could be said that this was a case where the deeds themselves spoke loud and clear. But the Court of Appeal did not pronounce itself, because that would have involved an

[20] Buttigieg v. Borg Olivier. C. of Appeal 10th January, 1964. But the reference 'review' in this quotation refers to the Judicial Review of *Legislative* action under the Constitution.

adventurous expedition to those unsafe regions of terra incognita (it was alleged). It could neither refuse to deliver judgment and deny justice. Tactfully it suggested a Compromise.

It was reported afterwards that plaintiff was given a lease hold by the Housing Department instead of the requisitioned building and appeal was abandoned. The dictates of justice were hardly satisfied in this case. But what is more disquieting is the complete failure of the courts to develop a sound system of judicial review which is by now, long overdue.

THE MEANING OF THE 1971 PARIS CONVENTIONS ON COPYRIGHT*

J. A. MICALLEF

MANY complex problems in the field of International Copyright arise because the matter is governed by two different conventions. While most of the European States continued to adhere to the International Conventions signed in Berne in the 19th Century, the United Nations had signed soon after World War II another international instrument known as the Universal Copyright Convention. An attempt has now been made in Paris to bring into closer association these two international agreements and setting up of an international centre as a link between publishing houses and the developing countries.

It was no doubt a unique occasion to observe delegates from so many different countries attending simultaneously two international conventions, and make it clear that they had come to U.N.E.S.C.O. House at Place de Fontenoy, Paris, with the spirit and zeal to revise two conventions simultaneously, albeit in separate gatherings, and to create greater harmony and co-operation between them.

*The Original copy of this Article was sent to Dr. Arpad Bogsch, Deputy Director of the World Intellectual Property Organization who deposited it at the Library of W.I.P.O. at Geneva. A Memo-Study was sent to the Maltese Ministry of Trade and Industry after the Paris Conferences and the matter was the subject of a Public Lecture given under the auspices of the Law Society at the Aula Magna, on April 25, 1972.