TIMES MALTA

An irreconcilability

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Opinion

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The Constitutional Court's judgment of May 29, 2015 relating to the two seats in the House of Representatives being claimed by the Nationalist Party has attempted to square the circle with the end loser being the Constitution.

The court held that there exists a parallel jurisdiction between the Constitutional Court under the Constitution and the Civil Court, First Hall, under the European Convention Act, to determine cases related to membership of the Houseof Representatives.

The Civil Court endorsed this reasoning in its May 26, 2016 judgment. I find this interpretation of the Constitution unconstitutional. An action related to the membership of the House cannot be proposed before any court of first instance once it runs counter to sections 63 and 95(2)(a) of the Constitution, which vest exclusive jurisdiction to determine such questions uniquely in the Constitutional Court.

The latter court had already pronounced itself on March 13, 2013, on the two seats being sought by the Nationalist Party. From a constitutional viewpoint the matter has been finally and conclusively determined without the possibility of reopening it again under any pretext whatsoever, be it a retrial or a human rights issue.

Section 95(2)(a) grants sole jurisdiction to the Constitutional Court as a court of original instance in cases instituted in terms of section 63 of the Constitution. Being a court of final instance, Constitutional Court decisions delivered in terms of the Constitution (as opposed to those delivered in terms of the European Convention Act) are not reviewable by any other court, be it

foreign (such as the Judicial Committee of the Privy Council in the past or the European Court of Human Rights at present).

Nor can it be reviewed by a court of civil jurisdiction such as the Civil Court, First Hall, sitting in its constitutional competence, as the Constitution does not grant such latter court jurisdiction to hear cases under sections 63 and 95(2)(a) of the Constitution.

Even the European Convention Act validates this reasoning, which derives from the supremacy provision of the Constitution (section 6).

This enactment provides that fundamental rights and freedoms as enshrined in the European Convention on Human Rights and Fundamental Freedom (ECHR) reproduced in the First Schedule of that Act and which comprises the right to free elections in Article 3 of the First Protocol to the ECHR, can be enforced under that enactment only in respect of any ordinary law but not of the Constitution.

> *"The Civil Court, by allowing two additional seats to the Nationalist Party, by way of remedy under the European Convention Act, is contravening the Constitution"*

Although Malta has ratified the First Protocol to the ECHR and although the European Convention Act has granted jurisdiction to the Civil Court, First Hall, to determine cases under the First Protocol, and, on appeal, to the Constitutional Court, the European Court of Human Rights, is by an express provision of the Constitution precluded from ruling on questions related to the membership of the House under the said protocol. Otherwise, the Constitution’s finality of decision-making in relation to membership of the House conferred solely upon the Constitutional Court is brought to naught.

Indeed, if the Nationalist Party loses the case before the Constitutional Court and seeks redress before the Strasbourg Court and the latter finds a breach of Article 3 of the First Protocol, the latter court would be reviewing the Constitutional Court's decision contrary to section 95(2)(a) of the Constitution. But the Constitution resents such revision.

In 1930, the Court of Appeal declared that the Senate was not constituted according to law and that all laws made by the bicameral legislature were null and void. The Imperial Parliament intervened and enacted a law to validate the annulled laws.

The Privy Council also declared that once the Constitution had conferred jurisdiction upon the Court of Appeal, only it could determine such issue and the Privy Council, though a hierarchically superior court to the Court of Appeal, desisted from reviewing the domestic court's decision. The Privy Council held:

"The clause of the Letters Patent which deals with this matter is Section 33, and is in the following terms: all questions which may arise as to the right of any persons to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by our Court of Appeal in Malta."

To their Lordships, these words appear to be clear and distinct. They direct that all questions touching the membership either of the Senate or Legislative Assembly created by the Letters Patent themselves shall "be referred to and decided" not by the First Hall of the Civil Court, or any court of first instance, but by the Court of Appeal of Malta, the highest judicial tribunal of the Island.

Even if their lordships had in this matter been without authority to guide them, they would have been led by the words themselves to the clear conclusions that His Majesty had advisedly designated his Court of Appeal in Malta finally to determine all these questions.

It appears to their lordships that the section being found in Letters Patent, in which His Majesty's own words are used, gains in this respect an added significance, the force of which ought to have full effect givento it.

The Civil Court, by allowing two additional seats to the Nationalist Party, by way of remedy under the European Convention Act, is contravening the Constitution which allows only the Constitutional Court to rule on these matters.

This is a classic case of where the Constitutional Court should have applied the legal maxim of civil procedure selecta una via non datur recoursus ad alteram.

If one chose one remedy (that under section 63), then one cannot resort to another remedy (that under the European Convention Act) if one has lost the first action.

The remedy under the European Convention Act is not additional to the constitutional remedy: it is in contravention thereof. The solution to such legislative conflict is parliamentary not judicial.

The law has to be amended to ensure that the Constitution and the European Convention Act are brought in unison together.

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