

Debate & Analysis



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An interesting decree delivered by the Court of Magistrates as a Court of Criminal Inquiry by Magistrate Dr Marse-Ann Farrugia on 30 August 2023 is that in the names of *The Republic of Malta v. Abner George Aquilina*.

Briefly, the accused was transferred from Mount Carmel Hospital to the Forensic Unit that is physically situated next to Mount Carmel Hospital. However, whilst the Forensic Unit falls under the responsibility of the Director of Prison and, therefore, under the ministry responsible for home affairs, Mount Carmel Hospital falls under the ministry responsible for health.

After the accused had been sent to the Mount Carmel Hospital by court order, the Chief Executive

Officer of Mount Carmel Hospital ordered that the accused, around two months later, to be transferred to the Forensic Unit. The question which this decree had to answer was whether such order was legal or not.

Without going into all the details and argumentation of the court in its decree that space limitations do not allow, the Criminal Code mandates in terms of articles 402(4) and 623(1) that when court experts (psychiatrists) conclude that an accused person was insane at the time of commission of an offence, the court must order that he be detained at Mount Carmel Hospital. The court correctly pointed out that the Criminal Code did not allow the court to order that he be kept at the Forensic Unit or in any other place but only in the said Hospital.

Now it happened that up till 2018 the said Hospital was licensed as a Hospital that could receive insane persons but from 2019 onward this licence condition was removed. Hence, according to the Hospital's CEO, insane persons could no longer be kept at Mount Carmel Hospital.

This administrative measure – the removal of the condition to hold insane persons at Mount Carmel Hospital – was in breach

of the two provisions of the Criminal Code that expressly required insane persons to be kept only at the Hospital. What therefore happened was that the health minister was abrogating the provisions of the Criminal Code when he had no power to do so. Parliament's direction was brought to nothing through an administrative ministerial measure. The Court was therefore correct to point out that the minister had exceeded his powers.

Irrespective of the licence issue, even if the minister had removed such condition, Mount Carmel Hospital was and continues to be – by virtue of the Criminal Code – authorised to detain insane persons by operation of law. Hence, strictly speaking, there was no need for such a condition to be inserted in the Hospital's licence for it is the law itself, *ope legis* (by operation of law), that is authorising Mount Carmel Hospital to be a hospital for insane persons without the need of any further authorisation or ministerial licence. It is only Parliament, through an amendment to the Criminal Code, that can oblige the court to have insane persons detained at the Forensic Unit rather than at Mount Carmel Hospital.

Another interesting part of this decree concerns the *quid unum*

“Irrespective of the licence issue, even if the minister had removed such condition, Mount Carmel Hospital was and continues to be – by virtue of the Criminal Code – authorised to detain insane persons by operation of law.”

or *quid unum* doctrine, that is, that the government is one whole entity irrespective of its component parts that gives rise to the principle that one government department cannot sue another government department once they both are part of government. In this case conflicts between disputing departments are sorted out at a higher level. Thus, if the departments in question are assigned within the same ministerial portfolio, it is the competent minister who rules on the matter should there be a conflict between two departments of government. If the

departments are assigned under different ministries and the competent ministers do not arrive at an amicable solution, then it is the Cabinet that decides.

That this decree is important for the study of Constitution Law (*quid unum*) and of Administrative Law (judicial review of administrative action) is undoubted. But the problem about decrees is that contrary to court judgments they are not always published and therefore sometime remain unknown except to the parties thereto. Sometimes a decree is more important for the study of the law than the judgment itself. In a previous contribution a few weeks ago, I had also referred to a seminal decree by Mr Justice Toni Abela on the supremacy of the Constitution of Malta.

Hence, the need for all decrees of this nature to be published on the internet site of the Courts of Justice. Unless this is done, and I cannot understand why this is not the case, the academic community and the population at large will not only know of these decrees let alone study them so as to make the case law accessible to one and all.

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