## BOOK REVIEW

## Achieving Certainty, Clarity and Stability through the Law of Procedure

Chief Justice Emeritus Professor Giuseppe Mifsud Bonnici, *Constitutional Procedure relative to Fundamental Rights and Freedoms*, Sta Venera, Midsea Books Ltd., Essex, UK, Pearson Education Limited, second revised edition 2012, xiv +198.

**Reviewed by Professor Kevin Aquilina**

Chief Justice Emeritus Professor Giuseppe Mifsud Bonnici had published the first edition of his book on *Constitutional Procedure relative to Fundamental Rights and Freedoms* in 2004. It covered the salient judgments delivered by the Civil Court, First Hall, and the Constitutional Court during the period 1964-2000. The second revised edition published in early 2012 now covers an additional ten years of fundamental rights and freedoms' judgments, from 1964 to 2010.

The book starts off by emphasising the centrality of the laws of procedure within the realm of the law, in particular, in the field of fundamental rights and freedoms. The right to a fair trial, both under the Constitution of Malta and the European Convention of Human Rights and Fundamental Freedoms, are amongst the most rights resorted to. Certainty of the law is a must in any legal system and this book analyses human rights case law with a view to contributing to the consolidation of that certainty much needed in the law. Clarity and stability are two further values which the law of procedure strives to achieve. Knowledge of the law of procedure is identified as the first ingredient to look for successful candidates for judgeship for once a judge has mastered procedural law s/he can decide the matter immediately or within a short period of time. This, in turn, ensures a speedy decision.

The book adopts a con-

structive critical approach to a discussion of constitutional human rights judgments delivered by our courts during the period under review. The author does so to identify conflicting judgments in order to bring order within a chaotic jurisprudential world. The end result is that the efforts Professor Mifsud Bonnici's has invested writing the first edition of this book have not been in vain: the second revised edition has demonstrated that the courts have made good use of the Chief Justice Emeritus' first edition such that it can be observed that the conflicts in case law has been drastically reduced.

In so far as the book format is concerned, it is divided into seven chapters. The author discusses the history of fundamental rights and freedoms, how they evolved in the 1961 Constitution with no concomitant right of action to enforce such rights. The right of action was introduced in article 46 of the 1964 Constitution and extended in 1987 by the European Convention Act. This chapter then discusses the sources of the right of action and that previous judgments do not have binding force as in the United Kingdom. This is because the Maltese legal system, in this respect, belongs to the Civil Law tradition. The composition of the Constitutional Court as it changed over the years is discussed during with the automatic constitution of this court when the government fails to appoint it as well as the doctrine of necessity enunciated in the 1985 Archbishop Mercieca v Prime Minister case. The court made the point that if further challenges were to be accepted to the composition of the court, it would not be in a position to hear the case. Hence it was necessary that the court remained constituted to dispose of court proceedings pending before it. The final point raised is whether the Civil Court, First Hall, may review a judgment of the Constitutional Court. Professor Mifsud Bonnici does not agree with this line of procedure because it is always possible to request the same court to retry that judgment or else take the case before

the European Court of Human Rights. By allowing the Civil Court, First Hall, to sit to judge a Constitutional Court judgment would be to topple on its head the hierarchy of the court where in our juridical system it is the Constitutional Court which hears appeals from the Civil Court, First Hall, and not vice-versa.

The right of action is then discussed. It is referred to as a 'new' right of action which goes beyond the ordinary rights of action provided in the Code of Organization and Civil Procedure. This is because the new right of action contemplates not only an actual violation of a human right but also a potential threat of such a violation. Further, whilst in the Code it is possible to appoint a curator to represent the intents of a defendant, under the 'new' right of action the court can appoint a third person as an applicant in a human rights case. Moreover, the court can also decline to exercise jurisdiction if ordinary remedies exist whilst under the Code once a court is seized of a case it has to bring it to its natural conclusion and not avoid deciding the dispute. This chapter discusses what constitutes 'merely frivolous and vexation' and the conflicting court judgments as to whether to allow a retrial of a human rights judgment. It was only in 2007 that the legislator intervened to clarify that there can be such a retrial.

A human rights case is instituted by one or more parties against another or more parties representing the state. Chapter three thus addresses who are the parties to a human right cause. One might think that this should be a straight forward exercise but as Professor Mifsud Bonnici demonstrates, this is far from being the case. The applicant can be both a physical person as well as a moral person. The latter has included the Catholic Church, various kinds of civil and commercial partnerships, political parties, trade unions, etc. on the other hand the defendant is normally the state in its various manifestations, the defendant par excellence being the Prime Minister. Where

there is no identified head of a government department, the Attorney General is the default defendant.

The Constitution allows any court to refer a human rights case to the Civil Court, First Hall. However, the author opines that where a human rights question is raised before the Civil Court, First Hall, and the Constitutional Court, they need not request the applicant to refer that application to the Civil Court, First Hall, but should decide it themselves. Moreover, case law has not always be consistent as to which authority can make a reference. Difficulties have arisen in the case of whether tribunals such as the Small Claims Tribunal and the Land Arbitration Board may refer a human rights case to the Civil Court, First Hall. Professor Mifsud Bonnici is of the view that the guiding principle to be followed is whether the registry of that tribunal is the same registry as that of the courts of civil jurisdiction. judgments relating to reference by a first court Civil Court, First Hall, are classified into five categories and discussed at length. These are when an application is filed simultaneously with the raising of the same question in the first court; when an application is filed after the first court has decreed the question raised to be merely frivolous or vexatious; where an application is filed but no question is raised in the first court; where an application is filed in the Civil Court, First Hall, before proceedings commence in the first court and other cases where both a reference and the application somehow come into play. The correct procedure to be followed, in Prof Mifsud Bonnici's view, is that the first court may either refer the question to the Civil Court, First Hall, and suspend the proceedings before it or declare the raising of the question to be merely frivolous or vexatious. Essentially the first court has to ask: will the finding of an alleged violation of fundamental rights and freedoms in any way effect the proceedings before it? This implies that the first court cannot abdicate from

deciding this question. Nor may it have recourse to other proceedings not mentioned in article 46 of the Constitution.

Article 46(2) contains a proviso which essentially states that before filing a fundamental rights and freedoms case one has first to exhaust ordinary remedies. Prof Mifsud Bonnici examines this provision and sets out four requirements: the remedy has to be effective; the procedure is not futile when attempted; the proviso is not automatic; and a judiciously prudent approach is applied so as not to bring about an injustice to the applicant if the proviso is applied.

The final chapter deals with the time-limit within fundamental rights and freedoms cases are dealt with. In so far as appointing these cases within the established period, the times established by rules of court have been observed and respected. However, the same cannot be said for deciding such cases within an expeditious time. On the contrary there have been quite a number of cases which have taken more than six months to be decided at first and appellate instance: some have taken up to eighteen months; others to two years and others more than two years. One case took eight years to be decided. This trend has continued till the present day.

Although the first edition consisted in 184 pages and the second revised edition in 198 pages, it would constitute an injustice to the author of this monograph if one were to conclude that the only work involved in drawing up the second revised edition was the writing of 14 extra pages. This is far from the truth! This is so because Prof. Mifsud Bonnici had to patiently go through all the Civil Court, First Hall, and Constitutional Court fundamental rights and freedoms' judgments delivered in the last ten years. This is no mean feat. In the second revised edition the author comments on not less than 122 judgments and at most times these judgments have to be trebled as they comprise those of the first court,

the Civil Court, First Hall, and the Constitutional Court and this – apart from cases of retrial. Professor Mifsud Bonnici's work makes valid points which ought to be legislatively addressed whilst others should sound the bells for the judiciary especially where the mistakes he highlights in his book continue to be committed over and over again. It is thus recommended reading to Members of Parliament, the judiciary, the advocacy and persons interested in fundamental rights and freedoms as well as their adequate and proper enforcement.

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