In Search of a Remedy

A critical analysis of remedies granted in human rights cases

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In this article, Dr **Tonio Borg** assesses the discrepancies in human rights remedies given by the Constitutional Court, comparing and contrasting different decisions with the written word and spirit of the law.

TAGS: Human rights law; Law courts

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gfhsl olj online law journal

Human rights actions are supposed to be heard and decided as expeditiously as possible. It is a legal norm, respected more in breach than observance. What is even worse as shall be seen, is that when an applicant succeeds in proving that his fundamental rights were breached by Government or a public authority, he still faces an uphill struggle to get a remedy which remains as elusive as anything – owing to a wrong interpretation of the law by our Courts. The Constitution in Article 46 grants wide remedial powers in cases of breach of the rights listed in Chapter IV. To what extent have these powers been used to redress such infringements of the supreme law of the land?

The Courts have not always made full use of the powers granted to them by the Constitution, or have misunderstood the extent of such powers. An example of such lack of creativity in granting a remedy following a human rights infringement was that of ***Louis Apap Bologna vs Calcedonio Ciantar***[1] regarding the issuing and execution of a requisition order under the Housing Act 1949. A requisition order had been issued on the applicant's property in 1976. In 1987, the applicant discovered that persons who were not covered by the Order were residing in the premises. When, as owner, he protested with the housing authorities, the latter merely issued another Order in 1988 allocating the property to the current occupier. The authorities since 2003, for some reason or another, were not paying rent to the owner and in any case according to the owner, the rent was a mere pittance. The owner instituted litigation in Court alleging an excessive burden to his detriment, considering that the Order had been in force for twenty years. Before the Court, a technical referee stated that the current rental value of the premises was €2,850 *per annum*. The rent of the requisitioned premises had been fixed by Government at €93 p.a. The Court of First Instance decided that the order had been issued in the public interest, but the compensation offered in the form of annual rent was derisory. It awarded moral damages to the applicant but did not declare the order null, nor did it fix the amount of annual rent which should be paid in the current circumstances. The Constitutional Court on appeal refused to budge from this conservative, and in my view, erroneous attitude. It referred to another judgment[2] where the Court had stated that its remedial powers 'were not unlimited but confined to the legal system of Malta (*ordinament ġuridiku Malti*)' and therefore, it could not spontaneously increase the rent or oblige respondent to pay rent more than that imposed by law;

> The task of this Court is that when it finds a breach it orders the payment of adequate compensation for the breach of the fundamental right concerned.

[1] 57/09 *Louis Apap Bologna vs Calcedonio Ciantar,* Constitutional Court (CC) 24 February 2012.

[2] 54/05 *Carmen Cassar vs Director Social Accommodation et*, CC 12 July 2011, where the Court had stated that its remedial powers were not unlimited but confined to the legal system of Malta and therefore it cannot spontaneously increase the rent or oblige respondent to pay rent more than that imposed by law. The task of this Court is that when it finds a breach it orders the payment of adequate compensation for the breach of the fundamental right concerned.

The wide powers granted by the Constitution to issue writs, give such orders and make such directions as necessary to redress a human rights breach, were whittled down to this self-imposed restriction.

Besides, a reference was made by the Constitutional Court to the ***Amato Gauci v Malta*** case[3], where the European Court of Human Rights had decided that a requisition order issued decades ago was in breach of the right to property. No remedy had been awarded except just satisfaction consisting of non-pecuniary damage. What the Constitutional Court failed to state was that the European Court as a rule only declares that there has been a violation of an article of the Convention and stops there, apart from granting just satisfaction. It never annuls laws or measures of national governments. It is up to the political organ of the Council of Europe, the Committee of Ministers, to monitor the follow up and ensure that the member state mends its ways in the light of the judgment. To refer to such a case to justify the failure to grant of an effective remedy, in my view can best be described as cynical. And that is too mild a word.

In the ***Apap Bologna*** case[4], one can understand the reasoning of the Court to the effect that once the order had been issued in the public interest and accommodation provided to a person with special needs, the Order should not have been annulled; however, to avoid a situation where a social service is being financed by a private person, the respondent government should have been ordered to pay the normal rent for such premises at current rental value.

By referring back the case to be decided under the law of lease, the Court was condemning the successful applicants to years of legal contestation; for in virtue of the laws, even as they stood at the date of the judgment in 2012, the rent for residential purposes was severely restricted and capped.[5]

In the ***Carmen Cassar*** case,[6] a requisition order was issued in 1993 over the applicant's property to provide temporary premises to another person until repairs were affected in his ordinary residence. In 2005 the said person was still occupying the requisitioned premises and in 2002, government had called upon the owner to recognize such person as tenant at the rent of Lm13 p.a.

The lower Court[7] in ruling that Article 1 of Protocol I had been infringed, had actually provided a remedy, namely that while affirming the lawfulness of the requisition order, it ordered the Government to pay real adequate rent considering the locality of the requisitioned premises, rather than the Lm13 or €30 per annum which Government was paying. The Court ordered:

> [T]he aforesaid Director to initiate those necessary proceedings

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[3] *Amato Gauci v Malta* App no 47045/06 (European Court of Human Rights (ECtHR), 15 September 2009).
[4] 57/09 *Louis Apap Bologna vs Calcedonio Ciantar,* Constitutional Court (CC) 24 February 2012.
[5] The law in Article 1531C of the Civil Code introduced by Act No. X of 2009, still controls the rent of residential premises contracted prior to 1995 linking increase in rent to an Inflation Index on the basis of an imposed minimum annual rent of €185 *per annum*.
[6] 54/05 *Carmen Cassar vs Director Social Accommodation et*, Constitutional Court (CC) 12 July 2011.
[7] ibid First Hall of the Civil Court (FH) 30 April 2008 (Hon. Mr Justice J. Zammit Mckeon).

> within one month from today, in terms of Article 8(1) of Chapter 125 so that applicant recognizes Anthony Tabone as tenant, as the case may be, *and this by offering to her just compensation consisting in an increase in the rent by an amount which has to be equivalent to rent for similar premises in the same area*.[8]

The Constitutional Court reversed this judgment ruling that:

> The remedy ordered by the Court of First Instance is vague and uncertain in its consequences in a way that it cannot be anticipated whether such remedy would obtain the result of restoring the balance desired, or whether it would leave everything to remain the same, and this because of lack of evidence in the records regarding the rent which is paid for premise similar to the those requisitioned.

The Court then added that once the order pursued a legitimate purpose, the rental value did not need to be equivalent to the *market* value.

However, are these considerations strong enough to quash a remedy decided by the lower Court? Uncertainty and vagueness, in my view, are more evident in the situation created by the apex Court in Malta. At £13 *per annum*, the owner would only have a copy of the judgment to show for his years of litigation in Court – litigation which was successful in outcome only in theory, but not in practice. Besides, the argument that once the order was issued for a legitimate aim, the rent for the premises did not need to be equal to the market value, could have been a consideration in fixing the proper rent, not in excluding the remedy itself.

On other occasions, Courts have sometimes silenced their conscience in providing a proper remedy by awarding damages at public expense. In ***Philip Grech vs Director Social Accommodation***[9], premises at Santa Venera were requisitioned and allocated by the Government to the party in government to be used as a club. This was in 1975. The owners were then forced by law to recognize the party in government as tenant of the premises. The Court concluded that such order was not in the public interest and therefore, substantially in breach of the Convention. Instead of ordering the return of the premises to the owners, it ordered Government to pay the amount of €75,000 in damages as just satisfaction, obviously from taxpayers' money; and the club remained in the hands of those who had abusively used the public power and the Housing Act to cater for a party political club at the expense of private owners. The fact that in 1975, Maltese jurisprudence had not yet decided that taking possession of private property for purely politically partisan ends was anything unlawful was not deemed as to be a sufficient reason justifying the reluctance of the owners to institute legal action then, and was used as an argument by the Court to reduce the amount of compensation decided by the lower Court (from €75,000 to €60,000). The fact that the owner, in view of such jurisprudence,

[8] Emphasised by the author.
[9] 60/06 *Philip Grech pro et ne vs Director Social Accommodation*, CC 7 December 2010.

had only contested the constitutional validity of the requisition order in 2006 was also used as an argument to attenuate the amount of damages.[10]

Once the decision of the Court was that the Order was unlawful *ab initio*, it should have annulled the requisition order *and* ordered the payment of damages for the period during which owners were deprived of their property.

It must be stated that on other occasions the Court has been more audacious. In one case[11] relating to delay in obtaining written evidence from witnesses residing abroad, the Court fixed a term within which Government had to ensure that such evidence was procured reserving to take further orders in the future. It ruled that:

> This Court therefore […] is directing and ordering the Commissioner of Police who is conducting the compilation proceedings against the accused and who made the request for an examination of the witnesses or other acts by a foreign authority according to Article 399 of Chapter 9, that if and when the Magistrate issues the necessary order for such purpose, the said Commissioner ensures that such examination is concluded not later than six months from the date of such order; and if within such period such procedure would not have been concluded and the Commissioner of Police still considers such evidence as indispensable, then he should refer the matter to this Court and submit the reasons for such failure, so that the Court will consider whether to extend the time period […].

And in the ***Walid*** case[12], where the non-existence of parole for persons serving life in prison was deemed to be unconstitutional, the Court laid down a specific period of time for Government to move the necessary legislative changes in Parliament and reserved to take action after that date if nothing was done to remedy the situation. It stated:

> [O]rders that if up to four months from the date of this judgment, no mechanism is established for the revision and possible reduction of the life imprisonment sentence imposed by the Criminal Court in the abovementioned judgment which is in conformity with what is envisaged in this judgment, this appeal will be eligible for re-appointment on the request of the interested party so that this Court may take further measures if necessary.

When, at the end of such period of four months, it resulted that no

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[10] 'In the determination of compensation today, this Court must keep in mind the fact that more or less what the Government of the day did then was considered valid by these very Courts […] if the person concerned failed to seek a remedy at the right moment and let time pass, he cannot then sue for damages equivalent to civil damages (which he would have let be extinguished by prescription). The failure by applicant for thirteen years to act in view of the circumstances arising after the issuing of the requisition order militates against the awarding of compensation as determined by the Court of First Instance'. A similar conclusion was reached in 15/16 *Philip Cauchi et vs Commissioner of Land*, CC 5 October 2018, where the Constitutional Court reduced the non- pecuniary damages from €40,000 to €25,000.

[11] Vol. LXXVI.I.46 *Police vs Charles Ellul Sullivan*, CC 24 January 1991.

[12] 60/13 *Ben Hassine Ben Ali Wahid vs Hon. Prime Minister et*, CC 7 November 2016.

legislation had been enacted in conformity with this judgment, the Constitutional Court ordered that:

> In view of the fact that applicant has already served twenty five years of his sentence of life imprisonment, this Court with the aim of not allowing a breach of Article 36(1) of the Constitution to continue, orders that applicant be brought before the Parole Board as today constituted and established in virtue of Article 8 of the Restorative Justice Act (Chapter 516) of the Laws of Malta; and in virtue of this judgment the Board shall have:
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> 1. The power to hear on oath administered by the Chairperson the applicant and all other evidence which it may deem opportune, amongst which that of hearing the family members of the victims
>
> 2. Determine whether any significant change has occurred in applicant and whether any progress towards rehabilitation has been registered which renders him no longer dangerous to other individuals and to society
>
> 3. Determine in the light of the results of such investigation and their evaluation whether the further detention of applicant is still justified.
>
> 4. Therefore by a motivated decision which would be communicated to applicant, the Attorney General and the Director of Correctional Services the Board will state whether applicant should be released unconditionally and if not within which time a reconsideration of the punishment as the case may be, may be made on the lines outlined herein.[13]

It does not seem that the Constitutional Court in both cases was excessively troubled by creating a new remedy which was not in line with the '*ordinament ġuridiku*'.

In ***Anthony Debono et vs Attorney General et***[14], a law relating to protection of tenants was challenged. The Court ruled that the application of the Reletting of Urban Property Ordinance (Chapter 69) and of Act No. X of 2009 regarding the premises in question, amounted to a breach of the Convention (Article 1 Protocol I).

The Court then referred to the case of ***Cedric Mifsud et vs Attorney General***[15] wherein it was stated that:

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[13] On 24 May 2017, the Parole Board in line with the Court's judgment refused release after considering all the facts and circumstances of the case as indicated by the Constitutional Court and ruled that further reconsideration could be made within five years. On 6 June 2017, applicant then filed a judicial review action before the First Hall Civil Court, namely 509/17 *Ben Ali Wahid Ben Hassine vs Parole Board et*. On 15 November 2018, the Court ruled that the decisions of such Board did not amount to a reviewable administrative act under Article 469A Chapter 12.

[14] 89/18 *Anthony Debono et vs Attorney General et,* FH 8 May 2019, Hon. Mr. Justice L. Mintoff.

[15] 34/10 *Cedric Mifsud et vs Attorney General*, CC 31 January 2014; 'It has already been stated that *adducere inconveniens non est solvere argumentum*. Apart from that, the decision in this case affects the relationship between the parties in this case and not the other families mentioned by defendants. Every case has to be examined within and in the light of its own particular circumstances. Even if there is the danger that a situation as envisaged by defendants might arise, it is the duty of the legislative organ to avoid such situation by enacting laws which respect

> [I]f it only orders the payment of damages and let the law continue to have effect between the parties, the court would be effectively allowing this unconstitutional state to continue [...] instead of ending this breach of fundamental rights, the Court would be permitting such situation to continue with the condition of the payment of damages; when what the law which protects fundamental rights wants is that these rights be protected indeed, and are not continued to be infringed so long as damages are paid, as if the payment of damages is a licence for continuous infringement of fundamental rights.

The Court, however, agreed with the lower Court and ruled that it was not its duty to state how the law should be amended or what amount of rent was to be paid but that the law as it stood was invalid and without effect.[16]

It therefore ruled that respondent tenants were not to rely on the protection offered to them by the said law, declared to be unconstitutional, in order to occupy the premises in question.[17]

Similarly, in ***Nationalist Party vs Electoral Commission***[18], the Constitutional Court in finding that, owing to an error in the counting of votes at the general elections of 2013, the Opposition had been deprived of two parliamentary seats, it created a new remedy in virtue of its powers under Article 46 by adding two seats to the opposition party rather than deducting two from the Government side; it also established a co-option system according to which the candidate from that party who came closest to being elected would take over the additional seats – even though there was no such provision in Malta's electoral laws.

The argument which obviously follows is: if the apex Court in Malta created a remedy to reduce the gap of difference in parliamentary seats between government and opposition, could it not fix the rent at current values for requisitioned premises as a result of which an excessive burden had been imposed on the owners?

Conclusion

Everything seems to hinge on the compatibility with the Maltese legal system criterion. It is a subjective one, subject to various nuances and interpretations. The Constitution allows the Court a wide discretionary power to redress a human rights breach. It has no bounds. It does not

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the fundamental rights and freedoms; it is not the duty of the Court to avoid such a situation by allowing the breach of the rights of a party to the case. Incidentally, this shows how wise the interpretation is of not applying the *erga omnes* rule to judgments as the one delivered today regarding the compatibility of an ordinary law with the fundamental rights and freedoms, and shows the danger of an interpretation which requires such *erga omnes* effect, by which a party who was never allowed to air his views is adversely affected.'

[16] 'This Court therefore agrees with the Court of First Instance when it stated that "it is not the duty of the court to say how such balance has to be kept between the interests of the private party and other interests"; that duty belongs to the legislator; the duty of the court is to ensure that any law which does not respect such balance be declared without effect.'

[17] See also in this respect, and for a similar conclusion and remedy 57/09 *Louis Apap Bologna vs Calcedonio Ciantar,* CC 24 February 2012.

[18] 26/13 *Nationalist Party vs Electoral Commission*, CC 25 November 2016.

configure in any particular legal boundary. Additional parliamentary seats have been created, parole proceedings changed, laws of procedure adapted. In other cases, the courts have failed to be audacious and true to the spirit of the law which entrusted them with granting remedies to victims of human rights violations. There is no need of any particular legislation in this respect. What is needed is the courage to live up to the commitment towards human rights observance which members of the judiciary are bound to maintain and cherish.


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