PBL1015 CONSTITUTIONAL LAW

The European Law Students' Association

MALTA

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INTRODUCTION

Chapter 1 of the Constitution contains the DNA of the Constitution of Malta.
The law of the constitution; the constitution of the state.
Every sovereign country has a constitution.
For a country to be a country it has to have a constitution.
Organs which constitute the state are the **legislature**, the **executive**, and the **judiciary**.
The separation of powers – powers as much as possible should be left separate.

The legislature – the main law-making body (parliament)
The executive – the government governing the country; applying the laws.
The judiciary – magistrates preceding over the lower courts and judges preceding over the superior courts; they apply and interpret the law in a case.

Constitutional law will deal with these 3 organs of the state.
Definition: the law which regulates:

1. The functions and the composition of the three organs of the state.
2. The relationship of the three organs of the state between themselves
3. The relationship of these three organs of the state with the private individual.

(1) The Maltese constitution deals with these three organs of the state. Chapter 6,7 & 8 of the Constitution deal with these organs respectively. Therefore, the constitution deals with each one separately and the proportional representation system is adopted by Malta.
In Malta, we have a **unicameral** legislature, voted by the proportionate representation system. Moreover, we follow the **Westminster Model (**a democratic system of government that incorporates three arms of government - the executive, the legislature and an independent judiciary. It also refers to a **parliamentary system**—a series of procedures for operating a legislature). Moreover, our executive is part of the legislature. **For the Prime Minister to be a Prime Minister, he first has to be a member of parliament**. **The government requires the confidence of the House**, and even if it loses it by one vote, the government has to resign or call another election.
In Malta we have only one chamber (**unicameral**) known as the House of Representatives (Kamra tad-deputati).
Under the **1921** constitution, Malta had a bicameral legislature (two chambers). This is the start of modern constitutional history in Malta. This lasted up until 1933.

(2) *What is the relationship between the legislature and the executive? Between the executive and the judiciary?* And so on…
When we come to the judiciary, in all democratic constitutions, it is kept apart from the other two organs. In totalitarian systems this is not the case. This was the case under Nazi Germany. When it comes to the relationship between the legislature and the executive, constitutions differ. Generally speaking, one can divide the constitutions of the world into two families: **the parliamentary system** (mostly based on the Westminster system which all EU countries follow this except for Cyprus) AND **the presidential parliamentary system**.
Article 80 of the Constitution states that an individual can only become a minister if they are already a member of parliament. Therefore, in the parliamentary system the relationship

between the legislature and the executive is very close. If the executive (government) loses the confidence of the legislature (parliament), then in Maltese we say 'waqa l-gvern'. In this case, either the prime minister resigns, or we have an early general election. In the Maltese parliamentary system, the legislature must enjoy the confidence in the executive.

On the other hand, the American system is the opposite. A member of the executive CANNOT BE a member of the legislature. The legislature is called Congress in the USA and this is **bicameral**. These are two wings: **The Senate** (two senators from each state) and the **House of Representatives**. They have two chambers for a very historical reason: when the USA drafted their constitution in 1789, a problem arose between the large states and the small states until they reached the great compromise: two chambers in Congress will be elected on equal representation whilst the other will be proportional in the size of the population. Moreover, a law has to pass from both chambers.
In the U.S., the President = the executive.

Examples:
John F Kennedy was a senator from the state of Massachusetts. Therefore, when he was elected as the President of the USA he had to resign as the senate.
This was the same case for Barack Obama.

In the United States, the President can exist without a majority in congress.

(3) Chapter 4 of the constitution of Malta – Human Rights Law

DIFFERENT FORMS OF CONSTITUTIONS

Written Vs Unwritten

A written constitution is the one in which all the rules and regulations are written in a well-documented form and at one place. This is of particular advantage as proof is available in order to back any claim relating to the functioning of the government.
On the other hand, an unwritten constitution pertains to a constitution in which the rules are not strictly documented in one place. This fact leads to confusion and conflict.
The difference between the two is that a written constitution has all its principles consolidated in a precise matter, whereas an unwritten constitution has scattered principles.

In the **UK, Israel & New Zealand,** they do not have a written constitution but have a constitution, nonetheless. In this case, parliament is supreme not the constitution. Therefore, there is no court which can declare a law passed by parliament to be unconstitutional because parliament is supreme.
Once a country reaches its independence, it needs a constitution.

When the constitution is unwritten, it cannot be supreme. On the other hand, the problem of whether it is necessarily supreme if it is written arose in America.
Even though there was no provision in the United States Constitution stating that it is supreme, the U.S. courts of **Marbury v. Madison** and the Chief Justice **Marshall** justified why even though there was no provision which stated that the constitution of the United States is supreme it was supreme just the same.
The United states supreme court declared a law passed by congress to be unconstitutional and invalid.
The concept of supremacy means that you can sue parliament, judiciary or government.

Parliament is supreme so long as it does not go against the constitution, and in that case, the constitution is supreme.
On the other hand, in Malta's case, the constitution is written and is supreme.
Article 6 of the constitution of Malta – *Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.*

Rigid Vs Flexible

A rigid constitution is one that is **not easily changed**. There may be a procedure that will be followed, but it is generally burdensome.
In Malta, **article 66**, regulates the way you can amend the constitution. Usually, the most important parts can be amended only by a 2/3rds majority by ALL the members of parliament whether they are present or not.
On the other hand, a flexible constitution is one that is **readily changeable**, where amendments might be as easy as passing a normal piece of legislation.
Some examples:

- Malta's constitution is rigid.
- The United States also has a rigid constitution. In America, the Constitution requires broad consensus to change. Generally, the process that is actually used is where both the House of Representatives and the Senate must each pass legislation by a 2/3rds majority, and then 3/4ths of the states must agree as well for a change to be enacted.
- In the UK, they have a flexible constitution. **In Britain, Parliament is all powerful**. All laws come from Parliament, and ultimately **power comes from the House of Commons** (the lower house of the Parliament of the United Kingdom).

Federal Vs unitary

Federal constitutions involve two levels of government (a federal level and a state level) whereby political power is shared amongst the two. Moreover, there are two different types of law (central & state laws). For example, within each state of the USA, there is a state legislature, executive and judiciary. Each state has different criminal codes.
In the case of 9/11, however, the federal police (FBI) would investigate. Thus, federal police investigate crimes which affect the entire country such as terrorist attacks and assassinations of presidents.
Examples: Germany, China, and the USA, amongst others.

On the other hand, unitary means you do not have a federation. In this case, there is only ONE level of government (central/national government) whereby political power is held by central government only. Moreover, there is only one set of law for the whole country. It is important to note that local governments do not mean that the state is a federal state. Therefore, the fact that there is a devolution of power does not necessarily mean the structure is federal, such as in the case of Malta which unitary with a slight devolution of power.
Examples: The United Kingdom, China and France.

SOURCES OF MALTESE CONSTITUTIONAL LAW

i. The Constitution

The most important source of constitutional law in Malta is the constitution. Once we have a constitution, it is easier to find what our position is on the function of the three organs of the state. For example, if one would want to know whether Malta is a Monarchy or a Republic, one must look at **Article 48** of the Maltese constitution.
In Malta, the constitution is written and supreme.

ii. Statutes/Ordinary laws

The second source of Maltese constitutional law is **statutes/ordinary laws**, which of course are not part of the constitutional document but are an important segment of Maltese constitutional law.
For example, **a member of parliament resigns/passes away** – *how do we choose a substitute?* This is not found in the constitution, but the method will be found in the general elections act of 1991 which is an ordinary act of parliament. In this way, the principle is found in the constitution but the details of how the system works in practice is found in an ordinary law. This is the case in order to keep the constitution concise and so **whilst the principle is unchangeable (2/3rds majority), the details can be changed.**

Until 1971 all the candidates on the ballet sheet, irrespective of their party, where listed alphabetically mixed together. In 1976, the ordinary law was changed, and the candidates were divided in separate boxes for the respective party. Since these changes are details and are not contained in the constitution but in the electoral law, there was no need for a 2/3rds majority in order for this amendment to gain force. But electoral law is still part of constitutional law. **Not all laws are a source of Maltese constitutional law but only those laws that fit in the definition of constitutional law (constitutional in nature)**.
For example, in Malta we have the dogs act of 1985 which is an act of parliament but is NOT a source of Maltese constitutional law. It could be a source of criminal law, if say, the dog bites or kills someone but not of constitutional law.
On the other hand, **The European convention act of 1987**, chapter 319 of the laws of Malta, is a source of Maltese constitutional law even though it is not part of the constitutional document. It guarantees fundamental human rights along with those fundamental human rights of the Maltese constitution (chapter 4).
The difference is that ordinary laws can be changed by an ordinary majority whilst constitutional laws cannot.

iii. Subsidiary legislation

Along with laws, there is also **subsidiary legislation/regulations**. These are sort of 'mini laws' but are laws just the same. Moreover, these can only be enacted if there is a parent act. These are merely published in the government gazette.
These are a source of constitutional law if they are constitutional in nature.
Some are constitutional in nature such as article 46(7) which allows the enactment of rules of court to regulate the procedure of human rights actions – for example the time to appeal in a human rights case. These questions of procedure are found in rules of court.
The **standing orders of the House of Representatives** are another example. These regulate the procedure within parliament.
Mintoff v. Borg Olivier, 1970 – decided that the court can inquire in whether a law was enacted according to the standing orders.

For example, wearing a mask is a regulation but not constitutional in nature. It can be criminal in nature for example, if one chooses not to wear it.

- A regulation has the force of law.
- Legal notices are subsidiary legislation.

iv. English Common Law

Another source of Maltese constitutional law, under certain conditions, is **English common law**. This is a source even after Independence (1964).
English common law = The law which has emerged throughout the ages through the English courts.
Conditions:

1. **This is not English statute**, but English common law. A British statute does not apply to Malta. Even when we were a colony they did not automatically apply to Malta unless it specifically said so.
2. It is applied in Malta where we have a **lacuna** in our public law (constitutional law is part of public law. In private law we inherited the continental system based on Roman law while the public law is based on English tradition). With that being said, if we have our own law on a particular matter of constitutional law, our courts MAY OR MAY NOT, apply English common law. Usually, they have done so.
3. It is **not obligatory**, and it only applies in **public law**.

v. Conventions

A convention is a rule of political practice considered to be binding by those to whom it is intended to apply but which is not enforceable in a court of law. Moreover, it does not have a legal sanction but a political one.
In the UK, they have a lot of written conventions since they do not have a written constitution. If an act goes against the convention, the individual cannot be taken to court because a convention is a 'tradition'.

With that being said, there are still constitutional conventions in states that have a **written** constitution such as in the United States. Legally, one can break such a convention, but there is a political sanction if one those so. In other words, it is a rule of political practice.

In the United States it was a convention/tradition not to contest for a third term, and this was broken in 1940. In the case of Roosevelt, he could not be taken to court as it was just a convention. With that being said, the political reaction to this breaking of tradition was so strong that the constitution of the United States was amended. Therefore, something which was a convention was promoted to being part of the constitution.

In Malta we do have conventions – the electoral commission **Article 60(3)** of the Constitution of Malta – *the members of the electoral commission are appointed by the President acting in accordance with the advice of the prime minister given after he has consulted the leader of the opposition* – a convention arose in Malta that when the Prime Minister gives advice to the President on **the appointment of the members in the electoral commission** he does it by suggesting half the members in whom he has full confidence and the other half who enjoy the confidence of the leader of the opposition. This is done not because the constitution says so but because this convention gave another interpretation to the constitution. The Prime Minister, legally speaking, can choose not to abide by this and decide himself however, he is politically bound to do so. Therefore, if he chooses to break it, he cannot be taken to court because a convention is not enforceable in a court of law.

Conventions can evolve. For example, in the UK, under Queen Victoria, a Prime Minister could be chosen either from the House of Commons or from the House of Lords. With the turn of the century, the convention changed so that ministers could be appointed from either house but the Prime Minister, according to the convention, must be chosen from the House of Commons (the elective chamber).
Therefore, **a convention can be strong even though it is not legally binding**.
Constitutional conventions must not be confused with European conventions. We are referring to something being conventional (according to practice/tradition) and not to a convention where a document is signed (treaty).

vi. Judgements of the courts

In Malta we do not have the doctrine of **judicial precedent** meaning judgements are not binding. In this way, a lower court can refuse to abide by the judgements of the Constitutional Court. The judgements of the Constitutional Court do not bind the Constitutional Court itself and does not bind the lower courts either. However, they have a **strong pervasive value**.
Marbury v. Madison in the United States decided that the constitution of the United States, once it is written, is supreme. This is a judgement of the constitutional court which throws light on the interpretation of the constitution.

Until 1973, there were states which allowed abortion, and others which did not. In 1973, in the United States, the Unites States Supreme Court in a case **Ro v. Wade**, challenged the Texas law which did not allow abortion. The United States supreme court wrote that in the first 3 months of a pregnancy, no state can prohibit abortion. It is argued that in this case, the judges did not interpret the law but wrote it.
In Malta, we have a number of **judgements interpreting the constitution**. Moreover, most judgements of the Constitutional Court have dealt with human rights. Besides national judgements, there are also judgements of the European court of Human Rights. We have had occasions when we had to amend our laws in the light of judgements given in the European courts. For example, **Demicoli v. Malta** decided by the European court in 1991.

vii. EU law

If that EU law is constitutional in nature. For example, EU laws on the rights of refugees.

viii. The writings of authors

Mostly, they are British authors and a particular Indian jurist **Bazu** who wrote 10,000 pages on the constitution of India. Bazu is a source because the first country to become independent, leaving the British empire in 1947, was India. When other colonies started becoming independent, the British used to take parts of the constitution of India and transfer them to the constitution of these newly independent countries.
For example, Karen Reid has been quoted on several occasions by the Maltese courts of constitutional jurisdiction.

THE DOCTRINE OF THE SEPARATION OF POWERS

As the title suggests, this doctrine implies a separation between the three organs of the State discussed hereunder:

1. **The Legislature** – or Parliament in Malta – is the organ/institution responsible for the enactment of laws. Its main function consists of the promulgation of new laws, and

the amendment or abrogation of existing laws. (In the US the senate and the House of Representatives as opposed to the President and House of Representatives).

2. **The Executive** – or Government – deals with the execution of such laws and the framing of government policy. In other words, the Executive branch *applies* the laws enacted by Parliament. The functions of the Executive have increased greatly over the years and now include the regulation of a vast system of social services apart from the original functions of supervising 'defence, order and justice, and the finance required thereof'.
3. **The Judiciary** – courts – has the task of interpreting the law, applying its provisions to the particular case brought before it, establishing which laws are inconsistent with the Constitution, and enforcing judgements. In other words, the Judiciary has the power to decide upon the application of the law, including the enforcement of the human rights and fundamental freedoms of the individual.

Montesquieu

Ever since the Greek times, it was felt that a balanced constitution should have the right balance between these three organs of the state. According to Aristotle, if all these elements are in good order, then the whole constitution will also be in good order. However, Locke also mentions the danger of having one person occupying powers.

Charles de Secondat, Baron of Montesquieu an 18th century French writer, advocated the doctrine of the Separation of Powers in his book entitled *L'Esprit des Lois* (1748). He divided the powers of the State into the abovementioned three organs and advocated that each of these diverse branches should individually carry out separate and distinct functions. It was only in this way, he believed, that there could be no abuse of power, thus guaranteeing political liberty.

Moreover, the founding fathers of the United States constitution were influenced by Montesquieu and others who were advocating Separation of Powers. The motivating idea behind this doctrine was that absolute power would lead to tyranny since there would be abuse of power, and citizens' rights could be violated without a remedy. In his book, he said when the Legislature and Executive powers are united in the same person there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical law to enact them in a tyrannical manner.

Moreover, the most important separation in a democratic state is that between the judiciary and the other two organs. In no democratic constitution are these three powers kept in watertight compartments. What we do have rather than complete separation of powers is a system of checks and balances, but the three powers remain separate and distinct from each other's but are not completely separate from each other. (David Attard)

In the Maltese Constitution, chapter 6 is on the Legislature, chapter 7 is on the Executive, and lastly, chapter 8 is on the Judiciary. Therefore, even the way the chapters are numbered and ordered in the Constitution reflects such separation. Having said this, **the three organs of the state are not completely separate** as they influence each other. What is important in a democracy and is a characteristic of every democratic state is that **the judiciary is kept as separate as possible from the other two powers of the state.**

The 2020 amendments in the Maltese Constitution

Up until July 2020, judges and magistrates (members of the judiciary) used to be appointed by the President on the advice (which is therefore binding) of the Prime Minister. Moreover, after July, this no longer remained the case. In line with such amendments, the Chief Justice

shall now be appointed by a resolution of parliament, but that resolution has to be supported by the votes of at least 2/3rds of ALL the members of parliament.

Refer to **Article 96(3)** *The Chief Justice shall be appointed by the President acting in accordance with a resolution of the House supported by the votes of not less than two-thirds of all the members of the House*.
Article 96(1) *The judges of the superior courts shall be appointed by the President acting in accordance with the recommendation made by the Judicial Appointments Committee established by article 96A of the Constitution.*

Whereas before there was no complete separation because the legislature is appointing the Chief Justice (judiciary), now, due to these new amendments, **the Separation of Powers in the Maltese Constitution between the executive and the judiciary has become more pronounced**. Besides this, one can now apply to become a judge or magistrate (keeping in mind that before one could not apply, they were simply chosen). With that being said, there are certain requirements and a list of qualities one must have in order to apply to become a judge or magistrate.
As a result of these new amendments in the Constitution, the Executive no longer has control like it did before over the appointment of either the chief justice or magistrates and judges.

Now, **the Judicial Appointments Committee** (refer to **Article 96A*** **(1)**) propose 3 names to the President of Malta and then the President of Malta acting alone will choose one. Keeping in mind, the President rarely acts alone. **Prerogatives of the President** are not the powers of the President but the powers of the President when he acts alone, and this is one of them which was introduced in July 2020 in addition to those he already has.
***Article 96A**.
*(1) There shall be a **Judicial Appointments Committee**,*
hereinafter in this article referred to as "the Committee", which
shall be a subcommittee of the Commission for the Administration
of Justice established by article 101A of this Constitution and
which shall be composed as follows:
(a) the Chief Justice;
(b) two (2) members elected for a period of four (4) years
by the judges of the superior court from among
themselves;
(c) one member elected for a period of four (4) years by
the magistrates of the inferior courts from among
themselves;
(d) the Auditor General;
(e) the Commissioner for Administrative Investigations
(Ombudsman); and
(f) the President of the Chamber of Advocates

The Auditor General and the Commissioner for Administrative Investigations are included in the committee because they are 2 out of 4 offices in Malta where you need a 2/3rds majority to appoint them. So, one presumes they have the approval of both the opposition and the government.

Article 96B (1) *Whenever a vacancy occurs in the office of judge or magistrate, the Minister responsible for justice shall issue a public call for applications open to persons who have the*

necessary qualifications and experience required to be appointed to the office of judge or magistrate. Generally, a vacancy comes about either because a member of the judiciary resigns or because he reaches the retirement age of 65 or because he passes away.

Refer to: https://timesofmalta.com/articles/view/the-appointment-and-removal-of-the-judiciary-tonio-borg.852548

Security of tenure

Even when the government used to appoint members of the judiciary, once appointed, the government could not remove that member. This is still the position today.
Article 101B of the Constitution which was amended in July 2020. Thus, there were amendments not only to how the judges are appointed but also to how they are removed.
The old procedure is as follows:

1. Disciplinary proceedings against a judge or a magistrate
2. The **Commission for the Administration of Justice** examines the case – if it is not approved it stops there.
3. The case is sent to parliament and parliament by a 2/3rds majority decides whether to remove the judge or not. Having said this, if *"following prima facie consideration of the complaint and of the reply, the Committee considers that there are not sufficient grounds to commence disciplinary proceedings, the Committee shall refrain from further consideration of the case"*.

Now, with the new amendments, a member of the judiciary is **removed by the commission** by giving binding advice. This is done by a majority of one keeping in mind the judiciary has the majority in the commission (absolute majority). Then the judge/magistrate has a right of appeal to the constitutional court.

There are two other factors of this separation (judiciary & the other two) besides the Security of tenure and the way they are appointed:

1. **The salaries of judges and magistrates are a direct charge on the consolidated fund**. All revenue of government all go into one fund and each time government wants to withdraw funds, you need parliamentary approval which is given in the budget. Indirectly, the salaries technically need the approval of parliament. Therefore, if the university budget is not approved by parliament, the university cannot pay their employees. However, when it comes to judges and magistrates, **even if the budget is not approved, they will get paid just the same**.
2. Another guarantee is that **their salaries can never be reduced only increased**.

The point where most democratic states differ is the relationship between the Executive and the Legislature.
There are two families: **The parliamentary system** (close) and the **Presidential system** (more separate).
In the Parliamentary system, there are three areas which show how close the relationship is – **Article 81**.

1. Following the British model, to be a Prime Minister you have to be a member of parliament and then you must be the person best able (according to the President) to command the support of the majority of the House.
2. Moreover, the moment the Executive loses the support of Parliament even by one vote, that government falls, or the prime minister will resign and someone from his party who enjoys the majority will take his place. This means that the Executive must enjoy the confidence of the Legislature.

3. The third point is that in this system, usually, the Prime Minister may dissolve parliament. Therefore, the head of the executive can at any moment in time give advice to the President to dissolve the legislature.

In a Presidential system (United States), the main differences between the parliamentary system are:

1. **The Legislature and Executive are almost completely separate**. While in the UK and Malta, the members of the executive have to be members of the legislature, in the United States a member of the executive CANNOT be a member of the legislature.
2. **The Executive does not need a majority in Congress** (the support of the legislature). This because the Senate and the House of Representatives are elected separately.
3. While the Executive in Malta can dissolve parliament and choose the date of the election, in the United States **the elections are held on a fixed date – fixed term elections**. The first Tuesday after the first Monday of November of every 4 years.

The three organs of the state are so separate that Americans vote 3 times – President, House of Representatives and for 1/3rd of the senate.
However, there are examples of contact such as the fact that in the United States, a law passed by the legislature can be vetoed by the President. But then a 2/3rds majority of the senate and house can overrule the veto.

Parliamentary	Presidential
Executive is part of legislature	Executive not part of legislature
Sits in Parliament Responsible to Parliament – **characteristic of any parliamentary system – it has to enjoy the confidence of the legislature (Article 80 & 81)**	Executive not responsible to Legislature
Prime Minister can dissolve Parliament	Executive cannot dissolve Legislature
Voters choose legislature	Voters choose Executive and Legislature in separate Ballots.

Following the Westminster model, Article 80 of the Constitution provides that both the ministers and the Prime Minister have to be members of the legislature. Moreover, when it comes to the appointment of the Prime Minister, the President acts alone, but when it comes to the appointment by the President of the ministers, the President is bound by the advice of the Prime Minister – "***acting in accordance with the advice of the Prime Minister****, appoint the other Ministers from among the members of the House of representatives".*

Note that the concept that in order to be a member of parliament, one must also be a member of the legislature is not the case in every country. For example, in Italy, it is not necessary that the members of the executive are necessarily members of the legislature.

In the British traditional system, the Prime Minister had to be a member of parliament (traditionally, the House of Commons) and so do his ministers.

Motion of no confidence

According to the Constitution, the government must enjoy the confidence of the House and if it loses that confidence even by one vote (motion of no confidence), the Prime Minister either advises a dissolution (*jaqa' il-gvern*) or the Prime Minister resigns.

In the American system, the executive is not responsible to the legislature. In other words, the executive is not responsible to Congress. Therefore, it does not need a majority in the legislature, it would prefer this case, but it is not needed. These two organs of the state are so separate that the executive can be from one party, and the legislature can be dominated from another party. In fact, currently in the United States, the Republicans seem to have regained control of the Senate even though the people have voted a Democrat as President, meaning the Democrats have won the presidency. In the United States the people vote for the President and for the legislature (thus, they vote twice). Moreover, the senate cannot pass a motion of no confidence; it does not have the power to do so. Impeachment is a different matter completely.

In Malta a 2/3rds majority is needed to remove the President and the same is for America and impeachment.

The executive is not responsible to Parliament, but it does not reply to questions of the legislature, unlike in Malta where the ministers reply to questions.
In the British traditional Westminster model, the Prime Minister can dissolve Parliament – at any moment in time, the President, acting on the advice of the Prime Minister can dissolve parliament. This is not possible in the American system.

ELECTIONS IN USA

2020	2022	2024	2026	2028	2030
PRES	-------	PRES	------	PRES	-------
HOR	HOR	HOR	HOR	HOR	HOR
Senate	Senate	Senate	Senate	Senate	Senate

In the Parliamentary system, voters vote for the legislature and not directly for the executive. If the party to whom the candidate I have voted belongs gets a majority of the seats in parliament, that party will form the executive (government). In the American system, voters have two separate votes – President every 4 years and the legislature (the House) every 2 years and 1/3rd of the Senate every 2 years also. In this way, they vote directly for the President. Moreover, if something happens to the President, the Vice President takes the position of President. Since the voters have two separate votes (one for the executive and one for the legislature) it could well happen that the executive and legislature are controlled by the two opposing parties.

In America there is **a system of checks and balances**. The ministers (secretaries) who Biden will appoint have to be approved by the Senate. In practice, unless there are very serious reasons, the senate will approve the ministers of a democratic President even though the Senate is Republican. This is a very important check and balance that the president in order to appoint his own team, will first have his team to be approved by the Senate and the Senate is entitled to ask questions.
Another point of contact in the presidential system of the United States is that laws are passed by Congress but if the President of the United States does not like a particular law, he may veto that law and the bill will not become a law. However, that veto can be overturned by a 2/3rds majority of the legislature. Therefore, even in a Constitution where there is almost a complete Separation of Powers there are these points of contact between the powers and there are these checks and balances such as in this case.

In the case of Malta (copies the UK), the Head of State has a duty to sign a law passed by Parliament – **Article 72(2)** – in Malta the President is bound by the Constitution to give his assent. This rule is from the UK but in the UK, it is not written anywhere that the Queen has to sign a bill passed by parliament, it is simply a convention (not enforceable in a court of law yet politically binding). Here we have a situation where because of a tradition, the sovereign in the United Kingdom will always sign a bill.

In Malta it is written down. *But what will happen if the President refuses to give assent?* According to persistent rumours, towards the end of **George Abela**'s presidency, he was not happy with the civil union bill and was not prepared to sign it. The rumour is that the Prime Minister at the time postponed the passage of the bill from parliament and waited for a new President to be appointed who signed the bill, since George Abela was nearing the end of his presidency.
In Malta if the President does not sign a bill which is was approved by parliament, **one cannot sue the President in the court of Malta**, so the President has to be removed. Until July of this year, one could remove the President by a mere simple majority (of one) while now after July, the President can only be removed by a 2/3rds majority of all the house making it **more difficult to remove the President**. So even though the constitution says he has to sign, it remains a question as to what would happen if he refused and whether it would be possible to sue the President before the court. Keeping in mind this has never happened up till now.

The two notions of **Separation of Powers** and the **Rule of Law** are very closely linked. Even a Parliamentary system, in spite of the fact that we have followed the Westminster model and the government and legislature are close, they are still 2 separate entities.
Miller case number 2 (September 2019) – even in a country without a written constitution, a court decided that a decision of the government to suspend parliament for a limited period of time was in breach of these unwritten rules one of them being that the executive is responsible to parliament.

Another example in the Maltese Constitution - The executive does not legislate, it governs. However, it can pass subsidiary or delegated legislation (when it comes to the details you won't usually find them in a law, but the law will allow the executive to issue regulations). The executive can only issue these regulations, which have the force of law, after authorised by Parliament. If the executive where to exceed the powers granted to it by parliament through the parent act, an action can be instituted against the minister for ultra vires. Those regulations will be declared by a court of law invalid.

THE RULE OF LAW

Adam Thomkins – *"In English public law the rule of law has at its core a single simple and clear meaning. It is a rule that concerns the power of the executive of government. The rule of law governs the relationship of the executive to the rule of law. it provides that the executive may do nothing without clear legal authority first permitting this action."*

Even totalitarian states have laws, but the problem is that in these countries, you do not have rule of law but rule by law. In the case of rule by law, everything needs to be done only if it is authorised by law and therefore, there is too much law. On the other hand, the rule of law is a political concept and a legal concept. In a democracy, everything should be done according to

law and if one of the three powers does something beyond the powers of the law there should be a system which puts the three powers in check.
In modern times, **Dicey** made this doctrine popular. He said that there are **3 principles of the rule of law**:

1. **Everyone is bound by law**: no one is punishable except when in breach of the law. Therefore, there can be no criminal offence without a law.
   Entick v. Carrington (18th century): law enforcement officers raided the house of a person who had written articles against the king to cease his papers. This journalist sued the government because there was no law which allowed such raid and the defendant said they were sent by the King, which is not enough. This shows that there has to be a law which allows the king to do so and therefore this was a violation of private property.

2. **Everyone is equal before the law**: no one is above the law.
   There are some exceptions to this. Members of parliament cannot be prosecuted, or no legal action can be taken against them for anything which they say in parliament. This is the **'parliamentary privilege'** and is an English tradition. In Italy, this privilege extends to any criminal action against a member of parliament whereby he/she can only be prosecuted if parliament gives consent. In Malta, a member of parliament cannot be prosecuted for something he/she says in parliament and that's it. This is done for the simple reason that on a number of occasions, scandals have been revealed thanks to interventions in parliament.
   Judges are excerpt. No one can sue a judge for damages.
   There have been cases where public authorities tried to argue that they are exempt for judicial review such as in **Joseph Said Pullicino v.**

3. **In England, the rule of law is guaranteed by tradition and conventions**: This last point is extremely controversial.

Note: although Dicey made this doctrine popular, do not limit yourself just to what he said since he lived in Victorian times. Even though the first formulation of this doctrine in modern times was made by Dicey, so many things have happened since then that this doctrine has been revised to mean much more than these three principles particularly since the third principle is very much controversial (UK, Israel and New Zealand only do not have a written Constitution). Since then, we have realised that a democracy does not only exist because it adheres to formal rules, but you need certain supporting institutions to guarantee a democracy. Afterall, he did not even mention free elections.
The general principles of the constitution are with us as the result of judicial decisions determining the rights of private persons, meaning we do not need a written constitution – let the courts decide what the rights of the citizens are – it shows a mistrust in the American concept of a written constitution.
We rely on common law for the protection of the rights of citizens – but all the other countries in the world have followed the American model of having a written, supreme constitution.
The UK have dented this principle – in 1951 they became a party of the European Convention, therefore, the executive bound itself to observe Human Rights according to the convention. In 1988 it incorporated the European convention of Human Rights in English legislation.

The declaration of New Delhi

The rule of law means also the independence of the judiciary.

The Delhi Congress gave rise to **three important elements in the concept of the Rule of Law**:

- First, that the individual is possessed of certain rights and freedoms and that he is entitled to protection of these rights and freedoms by the State;
- Second, that there is an absolute need for an independent judiciary and bar as well as for effective machinery for the protection of fundamental rights and freedoms; and
- Third, that the establishment of social, economic and cultural conditions would permit men to live in dignity and to fulfill their legitimate aspirations.

Following WWII, it was felt that one should enshrine certain fundamental human rights enforceable in all the constitutions. Such as the right to life, freedom of expression, the right to a fair trial and so on. Moreover, these are universal.
The New Delhi declaration emphasised that in a country governed by the rule of law you need an independent and impartial judiciary.

Human rights stop at the frontier of human duty, in order to restrict a fundamental human right, you have to prove that **"it is reasonably justifiable in a democratic society".**

- Remember that the executive is the most powerful organ.
- If you do not abide by the rule of law funds can be suspended by the European Union – such as what is happening in the case of Poland & Hungary.

Examples of how the executive is put into check

1. **Entick v. Carrington**
2. **The case of Miller number 2** – UK has decided to leave the European Union. In fact, there were 2 Miller cases. The leaving of the UK from the EU triggered off article 50 of the treaty of EU. The UK government, without referring to parliament triggered off article 50. A certain Gina Miller along with Mr Santos, filed the Miller number 1 case where they said a government of the UK cannot trigger off Article 50 unless they go to parliament and change the law and not just ignore it.
   The second case was the Miller number 2 case – in the UK, Boris Johnson before the 2019 election did not have an absolute majority in parliament. Therefore, he relied on small parties and he wanted to move a resolution so that the government leaves the EU (the withdrawal from the union bill). Since he did not have a majority and some of his old members of parliament where rebelling against his tactics, he postponed parliament for a month and a half. This was done to avoid parliamentary scrutiny and the supreme court decided that this could not be done. Even though there was nothing written in the law, there was a strong tradition that the executive is accountable to parliament (the executive replies to parliament and if it loses its majority in the house it has to hold new elections). Therefore, they said that this is such a strong principle of the British unwritten constitution that if the executive tries to avoid scrutiny by not allowing parliament to meet then it is null and void. The decision to prorogue parliament was declared not to be legal.

Joseph Raz – The Rule of Law and its virtue (1977)

1. All laws should be prospective, open and clear.
2. Laws should be relatively stable.
3. The making of particular laws should be guided by open, stable, clear and general rules.
4. The independence of the judiciary must be guaranteed
5. The principle of natural justice must be observed
6. The Courts should have review powers over these principles
7. The courts should be easily accessible.

Tom Bingham - The Rule of Law (2010)

1. The law must be accessible and so far as possible intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them, in good faith, fairly, and for the purpose for which the powers were conferred without exceeding the limits of such powers, and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay bona fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the State should be fair;
8. The rule of law requires compliance by the State with its obligations in international law as well as in national law.

How the rule of law is reflected in the Maltese Constitution

The constitution of Malta is **supreme** and therefore the three organs are subject to it. In order to change the constitution, the government usually needs a 2/3rds majority – **Article 66** of the constitution explains which provisions need a 2/3rds majority. The most important things such as fundamental human rights need a 2/3rds majority to change.

1. **The supremacy of the Constitution**: If government or parliament pass a law or a subsidiary legislation (parliament delegates to government the power to make regulations) that goes against the constitution, **the constitution prevails**, and those laws will be **null and void**.

2. **The independence and impartiality of the judiciary** is guaranteed in the constitution of Malta.

   There are 3 main elements which guarantee it:
   1. Security of tenure.
   2. Their salaries cannot be reduced.
   3. Their salaries are a direct charge on the consolidated fund
   4. & now, the ways judges and magistrates are appointed – the prime minister has no say, but a committee decides.

3. **The holding of free elections**: Malta incorporated the European Convention of Human Rights in Maltese legislation and in it is the right to free and fair elections.

   <u>Some examples of how elections are free:</u>

a. Elections whether for local, general or European parliamentary are **run by the electoral commission**.
b. The ballet has to be secret.
c. The political parties have a right to supervise the electoral process.

4. **Corrective mechanisms** for proportionality: We have fine-tuned that system that the number of seats in parliament of each party whether it loses or wins the election, reflects the votes cast.

5. **How laws are approved** (remember at each parliamentary stage they vote)

Any member of parliament can present a bill but usually it is the minister.

i. First, he presents a first reading where the only thing that is read is the title of the new law that the individual is proposing (new or amendment),
ii. After it is published in the government gazette so anyone can have a look at what is being proposed,
iii. Then there is the second reading whereby the parliamentarians discuss only the scope and objects of the bill – why it is being proposed and the minister will make an introductory speech explaining this and has to reply to any points raised,
iv. Then the act goes before a committee stage – there is a special committee and depending on the nature of the bill, the members change – they examine the bill clause by clause and vote for as many clauses there are – amendments can be presented, once the bill is approved after taking a vote on each section of the bill, the chairman of the committee will tell the speaker whether the bill was approved with or without amendments,
v. Then the minister will present the third reading which is the final approval by parliament – the bill would have changed so much during its passage that members of parliament may change their vote – it is also important because when we change the constitution, you need a 2/3rds majority at this final reading ONLY. All laws need only a majority of 1 unless they change the constitution.
vi. The bill is then sent by the speaker to the President of Malta who is obliged to sign the bill
vii. Then the bill is published in the government gazette (therefore, published twice first as a bill and then as an act of parliament – one cannot be found guilty of breeching a bill; once it becomes an act of parliament and is published then no one has an excuse). The final version of the bill is published in the government gazette.

This is relevant to the rule of law because it goes to show how **transparent** this process is. An example of when there was something irregular in the passage of the bill is in the case of **Mintoff v. Borg Olivier** (05/11/1970) where Mintoff alleged that a bill had not been regularly passed through parliament and the government said that whether we have abided by the internal parliament procedures is not a matter of the court, but the constitutional courts said they do have a right to examine this. Laws must be published; parliament is governed by the standing orders and the courts have a right to examine whether such procedural rules were followed in the passing of any law.

- The committee for the consideration of bills.
- **No law can be binding unless it is published in the government gazette**.
- Standing orders – a book of rules on the procedure.

6. **Human Rights**: The Constitution & the European Convention on Human Rights. If the individual loses the case in Malta, only the individual **can appeal to the European Court of Human Rights in Strasburg**, the government cannot. Therefore, the individual has 3 chances (court of first instance, appeal to the constitutional court and appeal to the European Court of Human Rights) while the government has only 2 (court of first instance & appeal to the Constitutional Court).

Further explanation of some points raised above

A constitutional court can decide that another court violated the constitution because **the constitution is supreme even over the courts**. For instance, when the court does not decide a case within a reasonable time.

For something to be declared unconstitutional, there is **no automatic system to do so**, but someone has to take the first step. So, someone files a case to declare that a law is unconstitutional. **So long as no one does anything, that law will be deemed to be constitutional, even though it is not**. Therefore, once a law is enacted, it is presumed to be constitutional. Only a court of law, in this case the constitutional court, has the power to declare something as going against the constitution, be it a law passed by parliament or a decision taken by the government. **Malta falls under both the European court of Human Rights and the European court of justice**. The European court of Human Rights has become the ultimate court of appeal in Human Rights matters.
In several aspects, this **rule of law** is reflected particularly since we have a constitutional court, even though the term 'rule of law' is not found in the constitution.

In criminal cases and in civil cases in Malta, one has a right that the adjudicating authority whether it is a court or tribunal has to be independent and impartial. **In the case of criminal cases, only a court can decide your case**. In any case they have to be independent (not controlled by government or any authority) and impartial (they have to abide by certain norms of procedural fairness). We also saw that this independence of the judiciary is guaranteed in Malta in 3 main ways: security of tenure of magistrates and judges, their salaries cannot be reduced, their salaries are a direct charge on the consolidated fund.

If the constitutional court, for some reason or another, is **not composed** and a period of time elapses, then **automatically, the three most senior judges will take up their positions in the constitutional court**. If the government does not compose the constitutional court, then it composes itself automatically. The most senior judge will declare himself to fill the vacancy if there is one. **The constitution now guarantees at any moment in time, the constitutional court is always composed**. This is a reaction to the crisis between 1971 and 1974.
We have the constitutional judicial review, and we also have the administrative law review. In public law we have 2 actions – the constitutional and the administrative law action (this will be dealt with in second year).
The first time we introduced Human Rights in Malta in the constitution was not in 1964 but in 1961 under the 1961 constitution. Even though we were a colony, the British gave us a constitution.

Another point which is reflected in the constitution as regards the rule of law, is the holding of free elections. Free elections are guaranteed in the constitution and **elections are not held by the government but by an electoral commission** which is set up in **Article 60**. This electoral commission is composed of the chief electoral commissioner and the other members

who are appointed by the President on the binding advice of the Prime Minister after consulting the leader of the opposition. In actual fact, a convention has evolved that when the Prime Minister submits the names to the President, half the members should be **members who enjoy the confidence and trust of the government** and the other half enjoy the trust and **the confidence of the leader of the opposition**.
As regards the chairman, the two political parties try to reach an agreement. This convention goes to show how the elections are fair, at least from a legal point of view. Moreover, if there are widespread irregularities, the Constitution allows the electoral commission to suspend the election if it feels this was the case.
Demarco v. Barren: the case was instituted in 1976. *What happens if the electoral commission do nothing despite widespread irregularities?*

Another point is **the system of corrective electoral mechanisms**. In 1981, we had a situation where a political party got 51% of the votes but had 3 seats less than the other party. Following a constitutional crisis, the constitution was amended in 1987 so that anyone getting an absolute majority (50% plus one) of votes was guaranteed a majority of one parliamentary seat over the other party. Therefore, in the case of 1981, the party with more votes would have been given an extra 4 seats to guarantee 1 extra seat.
Today we have fine-tuned that system that the number of seats in parliament of each party whether it loses or wins the election, reflects the votes cast.

Malta has signed a number of international treaties such as that of the abolishment of the death penalty. We have signed also a **Council of Europe convention** allowing our prisons to be inspected by a committee. We have also signed a number of conventions of the United Nations. Therefore, there are a number of rules which bind us internationally. Our membership of the European Union – such as the controversy right now that the if a country does not abide by the rule of law, it can have its EU funds suspended. Poland and Hungary have blocked the EU budget.

THE OFFICE OF THE PRESIDENT OF THE REPUBLIC OF MALTA

CHAPTER 5 OF THE CONSTIUTION

The President of Malta is the Head of State and the first President to be elected was Sir Anthony Mamo in 1974. Between Independence and the Republic, Malta was a monarchical system of government whereby the head of state was a monarch, the queen of the UK represented in Malta by the governor general. After 1971, that governor general was Maltese (Sr Anthony Mamo) who then became president of the Republic.

Article 48: Regulated by **article 48** of the constitution, there shall be a President of Malta who shall be appointed by a resolution of the House of Representatives supported by the votes of not less than 2/3^{rds} of all the members of the house.
This has been in affect since July 2020. Prior to 2020, the resolution of the house appointing the President of Malta did not need a special qualified majority of 2/3rds, it only needed a majority of one of those members present. **As a rule, anything to be decided by parliament needs only a simple majority, unless the Constitution otherwise indicates**. A simple majority is **a majority of one of those who vote** (those that are present).
The President was chosen by a simple majority resolution by parliament which therefore meant that the government chose the President because it has a majority in the house.

Following the July 2020 amendments, the Constitution was changed with a 2/3rds majority (of all members not only those present), so that from now on, **the next President of the Republic will be chosen only if there is a 2/3rds majority in his favour**.
The problem arose however, in the case of *what would happen if there is no 2/3rds majority?* Here the agreement was going to collapse. In the original bill proposed by the government there was a provision that if after two rounds a candidate submitted by government does not get a 2/3rds majority, then the candidate could be chosen by a majority of one which means that the government would choose. There was going to be a disagreement but at the last minute **it was agreed that if there isn't this majority, the previous President will continue in office until this majority is reached**. This is an exception to the rule enshrined in the Constitution that you can only serve as President once for **5 years.**

Article 123: In Chapter 5 of the Constitution, you do not find any provision which states that a President cannot be re-elected. The answer is not found in chapter 5 but is strangely found in one of the last provisions, **article 123**, in the Constitution which states that any person when he vacates
an office may be re-appointed. But then there is 123(2), which says, 123(1) shall not apply to the office of President.

The President of Malta has to be Maltese. Secondly, you are disqualified if you hold or have held the office of judge of the superior courts. Magistrates are not excluded. Even if you are no longer a judge, you are **disqualified for your lifetime** for serving as President of Malta. (Relevant books: Il-manwal tal-President & Kif sirna Repubblika)
An exception was made to the first President of Malta who was Chief Justice.

Articles 109, 118 & 120: If you are not eligible for appointment, one cannot become President. Examples of those not eligible: members of parliament, candidates for election, member of a local council, public officers and so on.

The office of President lasts for 5 years. Prior to July 2020, a President could be removed by a simple majority so he used to be appointed by a simple majority and would be removed by one too. Incapacity or misbehaviour did not have to be proved; allegation was enough. After the July 2020 amendments, to appoint/remove the President you need:

1. 2/3rds majority
2. In order to remove the President, have to prove the 2/3rds AND that he is being removed for **proved incapacity or proved misbehaviour**.

Moreover, the Constitution states that until the 2/3rds majority is reached to appoint a new President, the previous president remains in office.

Article 49: When the President goes aboard, we appoint an **acting President**. According to a convention, the person appointed is usually a person of trust/enjoys the confidence of the opposition. Of course, this is a tradition and not a law. The acting President appointment is regulated by Article 49.

Before the President assumes office, he/she has to take an **oath of office**. Since usually they are taken before a President, the oath of office is taken before the speaker of the House of Representatives.

What powers does the President have?

Technically, the President has a lot of power. In actual fact, however, he has few if any. He might sign but **always on the advice of the government** whereby law does not allow him to intervene. He can **warn, advise, encourage** but he does not have the power to take decisions except in a very short list called the **prerogatives**. They are those few instances where the President **ACTS ALONE** and not on the advice of the government of the day. This principle is reflected in **article 85 of the constitution**.

The fact that the President is given power to say on the advice of the government of the day is automatic unless the constitution or the law expressly state that the President can act alone.

Following a general election, the government presents his programme to parliament. In the UK, the Queen reads out the speech which is the legislative programme of government for the next years. In Malta we do it once every 5 years not once every year. The speech the Queen reads is written by the Prime Minister. In Malta, when the President reads out the speech, it is written by the government. To make it obvious that the government wrote it, in Malta we have this strange practice that the Prime Minister goes and delivers the speech to the President in front of everyone in execution of **article 85**. So, besides these exceptions, everything which the President does, he does it on the advice of the government. There are six exceptions. For instance, appointing the leader of the opposition and the appointed of the Prime Minister.

The rule is that unless the Constitution or any other law states that the President acts alone, the President always acts according to the advice of the government of the day. According to British constitutional writers and experts, the sovereign (in our case, the President) can **advise, warn and encourage**. The President cannot act in an executive way – **Article 85** - *the President shall act in accordance with the advice of the Cabinet or a Minister*. **It is taken for granted that the President acts on the advice of the government and not vice versa. THEREFORE, HE/SHE IS ACTING ALONE ONLY WHEN EXPRESSLY STATED IN THE LAW/CONSTIUTION.**

Article 93(1)(a): the prerogative is not of the President because when you read article 93 along with article 85, the President has to act on the advice of the government of the day. The President cannot give a pardon when not acting on the advice of the government. Here it does not say that he acts alone therefore he acts according to the advice of the government of the day.
The prerogative of mercy is not a presidential prerogative.

MAJORITIES

1. A **<u>simple majority</u>** is 50% plus one of those who actually vote. This is the normal procedure to vote in parliament according to Article 71 of the Constitution. Unless the Constitution otherwise provides, anything decided by parliament is decided on the basis of a simple majority. Before July 2020, the President of Malta would be elected by the resolution of parliament which needs only a simple majority. Now, you need a qualified majority (2/3rds of all the members of parliament) to appoint a President and also to remove the President. Note that you need to prove that the President is either incapable or that he is guilty of misbehaviour apart from the 2/3rds majority to remove the President.

2. An **absolute majority** on the other hand is also 50% plus one but of all the members of parliament whether they vote or not. So, if there are 67 members of parliament and so 34 are needed. While in the simple majority, if 15 vote you need only 8. An absolute majority is needed when there is a motion of no confidence in the government – so while all other decisions by parliament are taken by a simple majority, when it comes to this you need an absolute majority. Another example of when an absolute majority is needed is when parts of the constitution are amended that do not need a 2/3rds majority (Article 66 has a list of those parts of the constitution which need a 2/3rds majority to amend).
3. A **qualified majority** is a 2/3rds majority. The more important parts of the constitution need a 2/3rds majority. Another example is to remove the ombudsman and to appoint it you need 2/3rds.

What happens if the government and the opposition do not agree on the appointment of the President and therefore, the 2/3rds majority if no obtained?

In the original bill proposed by government it was laid down that if there was no agreement, then after two rounds of voting, the President is elected by an absolute majority (the government appoints him/her) and at a last-minute compromise reached in parliament, **it was agreed that if no agreement is reached on the 2/3rds, until such agreement is reached, the previous President continues in office** (the proviso to article 48 (1)). Here there is an exception to the rule that the President serves only for 5 years. If in the case of the President after 5 years, refuses/resigns/passes away it is possible for **government to appoint enacting President** (Article 49). This also applies if the President dies in office.

PRESIDENTIAL PREROGATIVES

ARTICLE 85(1)

In which cases does the President enjoy a prerogative; in which cases does he act alone?

The Constitution describes this acting alone of the President as "**in accordance with his own deliberate judgement**".

1. **Paragraph a:** Usually, the power to dissolve parliament is in the hands of the Prime Minister whereby the President simply accepts the advice of the prime minister to dissolve parliament. In 3 situations however, the President can act alone. In the first 2 situations he orders a dissolution of parliament without the need of the advice of the Prime Minister and in the third the Prime Minister advises for a dissolution, and the President blocks it.

   These three situations are exception, and they denote a crisis:

   (a) The first situation is if the House of Representatives passes a vote of no confidence in the government and the government within 3 days does not resign nor does he advise a **dissolution**. The President cannot dissolve parliament just because the government has been defeated in parliament in a motion of no confidence – only if following the government's defeat in parliament, the Prime Minister does not resign nor advise dissolution within 3 days can the President act alone and dissolve parliament. **The President has no right to dissolve parliament or to remove the Prime Minister unless the Prime Minister has lost the majority in the house**. Therefore, **the defeat in the house and the inertia of the government** is needed for the President to exercise his/her prerogative. Therefore, the Prime Minister has an option once defeated in the house by a motion of no confidence: resign or go for a general election. They appeal to the country generally.

(b) The office of Prime Minister is vacant, he reigned or passed away, and **within reasonable time there is no chance of parliament agreeing on a new Prime Minister**. If within a reasonable time there is no prospect of appointing a new Prime Minister who has the support of a majority of the house, the President orders a dissolution. This is a situation of **political stalemate**. The office of Prime Minister is vacant, and the coalition cannot agree on a Prime Minister. In this case, the President, realising that there is a political stalemate will order a new election without the advice of the Prime Minister because there is no Prime Minister.

(c) This is the opposite of the other two – in the first two the President orders a dissolution. In this case, the President blocks a dissolution. There is a Prime Minister who wants to have a general election and the President blocks him. BUT there are two conditions, and these **have to exist together**

i. The President must feel that it would not be in the interest of Malta to have a fresh general election AND

ii. There is an alternative government which has a majority in parliament.

July 1998 – after 2 years from the previous general election (1996), the labour government lost a motion of confidence. Premier Sant according to tradition, went to the President to ask for a dissolution after only 2 years. Mintoff made it absolutely clear that he would not be supporting the nationalist party to be chosen as the alternative. Mintoff was never ready to support the opposition to become government. The second condition therefore did not exist, and the President could not block the dissolution requested by Dr Sant and appoint the leader of the opposition to become Prime Minister. The only solution was to go for a general election.

Therefore, it is not true that the President can remove the Prime Minister just because there is a crisis.

2. **Paragraph b**: article 80 deals with the appointment of the Prime Minister whereby the President acts alone - *in his judgment, is best able to command the support of a majority of the members of that House*. This situation arises after every general election or the resignation of a Prime Minister. Here he acts alone. When it comes to the appointment of the Prime Minister, the President acts alone. On the other hand, when it comes to the appointment of the ministers, the president acts on the advice of the Prime Minister. Therefore, the President cannot block the appointment of ministers. One of the strengths of the Prime Minister is the right to hire and fire ministers.

   The first ever Prime Minister was not the leader of the party. In the 1921 general election, 4 parties were elected to parliament and none had a majority. The governor, therefore, chose the leader of the **Unione Politika Maltese** which had the relative majority (biggest party in government but does not have an absolute majority). The governor chose Mr. Howard, but he was not leader of the party as the leader did not want to be Prime Minister. This prerogative might sound simple today but there could be difficulties. In 1950, the nationalist party came first but if all the parties in the opposition where to unite against it, it would fall.

   The removal of a Prime Minister - **Article 81 (1)** – the President cannot remove a Prime Minister just because he has lost the confidence of the House. He can only remove the Prime Minister if he loses the confidence of the House AND refuses to resign having lost the confidence of the house.

3. **Paragraph c:** If the President wants to appoint acting Prime Minister and it is impracticable to obtain the advice of the Prime Minister as to who should substitute him. It's generally always the deputy prime minister. But if the deputy prime minister cannot then someone else has to appointed. In a situation where the Prime Minister cannot give advice owing to illness, then the President has to act alone.

4. **Paragraph d:** The appointment and the removal of the leader of the opposition. Usually, this happens when the leader of the opposition changes. The removal of the leader of the opposition is also in the hands of the President.
5. **Paragraph e:** The prerogative is that he has a right of veto over any employee sent to his office. For example, they send a public officer as his secretary who he does not want, he can block the appointment. So, it is not the appointment that is the prerogative.

6. **Paragraph f**: refers to the new power to choose a judge/magistrate out of the 3 names. The way a President appointed magistrates and judges has been changed. Before he would act on the advice of the Prime Minister of the day. The judicial appointment committee in which the members of the judiciary have a majority will submit three names to the President and the President will choose one and will also have to publish the names who were not chosen by the President. In the choice of magistrates and judges, the President acts alone but has to choose from the 3 names submitted by the judicial appointment committee.

Any other power which the President has under this constitution or any other law is performed on the government of the day.

Further information on the President

The President acts alone only in certain cases. The president cannot remove the Prime Minister just because he loses the confidence of the House, he has to continue governing as usual for the President to remove him.
It is not the President who decides when to hold an election in Malta, but it is the prime minister who decides when the elections are held. This is a tool in the Prime Minister's hands. He can hold an election earlier than the 5-year term if he thinks he is going to win. The power to dissolve parliament is of the prime minister as the President is bound by his advice.

The President has a right to advise, to encourage and to warn a government but these are not executive powers. Only when it comes to the prerogative powers that the President acts completely alone. In this context, it is interesting to know that there is a provision, Article 85, which states that when the President is to act on the binding advice of the prime minister or someone else, the question whether he has received that advice or has acted to that advice cannot be inquired in any court of law. This provision is found in sub-article 2 *Whereby this Constitution the President is required to act in accordance with the advice of any person or authority, the question whether he has in any case received, or acted in accordance with, such advice shall not be enquired into in any court.* If the President were to abuse of this section, he could increase a number of prerogatives. If he does not act on the advice of the Prime Minister, that cannot be examined in a court of law. This also is the case for the Prime Minister. The only way to go about such a situation would be to remove the President but nowadays it is no longer easy to do so.

The 2/3rds majority needed to amend the constitution is needed in the third reading. Following the approval of the draft bill in the third reading, then the bill goes to the President for signature. Article 72(2) of the Constitution regulates whether the President is bound to sign this. The Constitution does not state that he 'may', but he 'shall' sign. This brings about the question: *If the President does not want to sign due to strong objections to the bill, which is in breach of the Constitution, can you sue the President in court saying he is acting in breach of the constitution?* The question of whether the President is bound to sign lies in whether it is enforceable or whether it is still a convention, like it is in the UK.
There are so many procedural difficulties, that some professors believe that this is still a convention because it would be very difficult to enforce it in a court of law.
The only remedy is a political one – remove the President. But while until July 2020, you only needed a majority of one to remove the President, now you need a 2/3rds majority, making it harder to remove him.

In brief: 1. The bill won't become a law if the President does not sign, 2. You can't sue the President in a court of law, 3. Now, you need the oppositions approval to remove the President.

- If in breach of the Constitution, the President does not sign the bill, the bill DOES NOT become a law.
- If it is not enforceable in a court of law, it tends to be a convention.

There is another provision, taken from British conventions, article 87 which states that the Prime Minister has to inform the President of the general direction of the government of Malta and must give the President information on any matter relating to the government of Malta. In practice, this has taken the form of a meeting whereby every fourth night a meeting is held between the Prime Minister and the President. Moreover, this is taken from the British tradition and an important rule is that these meetings are covered by **strict confidentiality**. The Queen in the UK has regular meetings and what is said in those meetings is completely confidential. So, if asked in parliament, the Prime Minister has a right to refuse to say what they spoke about.
These rules apply in the UK and probably apply to Malta too, obviously in Malta's case these apply to the President of the Republic and not the Queen:

1. **The sovereign has the right and duty to council, encourage and warn.**
2. **Whatever her personal opinions may be, she is bound to accept and act on the advice of her ministers**. In public she always has to defend the government.
3. **The sovereign is obliged to treat communications with the Prime Minister as entirely confidential**. Therefore, neither the Queen nor the Prime Minister can reveal what was said. These meetings are kept informal & confidential.

The prime minister on his own initiative and not because he is requested to do so, has to inform the President at these meetings.

CHAPTER 1 OF THE CONSTITUTION

Chapter 1 is the DNA of the Constitution of Malta.

Article 1

Article 1(3)(e) notes that Maltese shipyards may be used for civil purposes and its use will be denied to the military vessels of "the two superpowers" with this article giving rise to an opinion by the Attorney-General after the Maltese dockyard was requested to repair a vessel

of the United States. When the government wanted to enter into a lucrative contract to repair US Navy vessel USS La Salle, the Attorney General wrote a letter to the Prime Minister and gave his blessing.
The second incidence occurred in June 1988 – the Prime Minister of Malta had invited the royal navy of the UK to pay a curtesy visit to Malta. The question arose, *does a mere curtesy visit by foreign military ships amount to a concentration of foreign forces in Malta?* The Courts decided that this was not a concentration of foreign forces since it was only temporary. It goes to show that these provisions are enforceable in a Court of law.
The neutrality provision was therefore interpreted on two occasions: when the USS La Salle came to Cospicua for repairs, and when, in 1988, the Prime Minister of Malta had invited the Royal Navy to pay a courtesy visit to Malta's Grand Harbour. A group of NGOs attempted to stop this visit by invoking this article and the question arose, does a mere courtesy visit by foreign visit by foreign warships constituting a concentration of foreign military force in Malta? Whereby the courts argued that this was not so as this concentration was only temporary. The problem then arose as to whether the NGOs had juridical interest in the case with the courts holding that they did not.

One needs to prove a direct personal interest in the case.

Article 2

Article 2 is the provision relating to religion and it states that the religion of Malta is the Roman Catholic Apostolic Church. It affirms the right and the duty of the church to teach what is right and what is wrong. There is a constitutional duty of government to make sure that all state schools have to teach this religion. *The question is, is this provision, particularly the first one, merely declaratory or can rights and obligations derive from this provision?* There are two other countries in the European Union who declare state religion, Ireland and Greece. From a legal point of view, does this have any constitutional significance? We only have one judgement – **Wahid v. Prime Minister** – Mr Wahid in 1988, murdered 4 people and was condemned to life imprisonment. He tries every strategy to be released from prison and finally files a constitutional case saying that the fact that a person condemned to life imprisonment cannot be granted parole is unconstitutional because it is inhuman. Wahid put forward the argument that the religion of Malta is the Catholic religion (article 2), the Roman Catholic religion is based on mercy and therefore, since it is based on mercy you should allow parole to someone condemned to life imprisonment. This was the first time someone tried to use article 2 for his benefit and the court had to give an interpretation of article 2. He won the case on European Court Judgement, but he didn't win on interpretation of article 2. The constitutional court stated that *Article 2 of the constitution is not a source of subjective rights but gives legal recognition to a state of historical fact…it is not bound in its judicial role by what is thought by the said religion*. Professor Kevin Aquilina wrote an article in the Times of Malta in 2015 where he argues that since this is part of the DNA of the country/Constitution how can you permit the vilification of the Catholic Religion? Therefore, there are still issues whether it is just a statement of fact or else it means something more.

Article 5

Article 5 states that in Malta we have only one national language, Maltese. With that being said, we have two official languages, Maltese and English. Each time a law is published it is published in both languages. The Constitutional Court has said that if the law was enacted after Independence, it is the Maltese text which prevails. If the law was passed before Independence, then it is the English text which prevails. While we have two official

languages, if one writes to the Administration in Maltese, that person has a right that the reply be in Maltese as well and vice versa. However, the language of the courts is only Maltese only.

Article 6

Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Article 6 gave rise to its own share of legal problems. Before 1974, the amendments of the Republic, this provision was not entrenched; it was not included in the list of those articles of the constitution which required a 2/3rds majority. Therefore, article 6 was not included in the 2/3rds list of article 66.
In **Marbury v. Madison** there was no provision in the American constitution which stated that it was supreme, but the court decided that the constitution of the United States is supreme.
Cremona stated that one should note that properly speaking, this principle of supremacy does not need to be expressly declared.
In **India**, they don't have a supremacy clause except for the Human Rights chapter. The supreme court said that in spite of this, they shall declare all the constitution to be supreme.
In **Malta** we have a supremacy clause and we decided that it is not supreme through the fact that article 6 is not entrenched. Today, this has been settled.

Article 6 of the Constitution has given rise to a number of issues over the years. Prior to becoming a Republic, this provision was not entrenched in the Constitution. Therefore, the government argued that it would amend the Constitution and, if the opposition does not agree, the government shall amend article 6 with a majority of one. However, in spite of an agreement between the government and a majority of the opposition, a referendum was also necessary to change Malta from a monarchy to a republic. However, no such referendum was held as Parliament repealed article 6, introduced the republican amendments, and reintroduced article 6 before entrenching it. Some argue that article 6 could not have been amended by a simple majority of one, referring to the case of Marbury v. Madison, whereby Chief Justice John Marshall argued that a written Constitution is automatically considered to be supreme. Chief Justice Cremona argued that the Constitution was supreme of its very nature, and that this principle of supremacy does not need to be expressly declared. He noted the absurdity of the situation by pointing out how in the United States there is no such supremacy clause, but the courts declared their constitution supreme, whereas in Malta there is such a supremacy clause which the government argued was not supreme. Today, this has been settled as the question now is merely academic, with most writers arguing that what happened in 1974 is a break of legal continuity. Jurists remain divided on this issue. One must ask oneself; can one change the supremacy of the Constitution or is such supremacy an unalterable part of the DNA of the Constitution? A strictly positivist approach would argue that since article 6 was not entrenched, it could be so amended.

THE OFFICE OF THE PRIME MINISTER
CHAPTER 7

The Prime minister is the kingpin in the parliamentary system.

Chapter 7 deals with the executive in the Constitution of Malta.
According to article 78(1) '*The executive authority of Malta is vested in the President*' but according to article 85, the President of Malta always acts on the advice of the government of the day (except in those powers which are called the prerogatives of the President). The prerogatives of the President are those powers which the Constitution assigns to the President, they are what is left of those absolute powers that belonged to the sovereign in the United Kingdom. An absolute monarchy became a constitutional monarchy.

The Executive (the cabinet)
The cabinet consists of the Prime Minister and such number of other ministers as may be appointed by the Prime Minister. Furthermore, there is no limit of ministers composing the cabinet. In other words, there is no capping on the number of ministers – technically, the Prime Minister could appoint his entire parliamentary group as ministers. **The Constitution does not impose any restriction on the ministers who may be appointed to cabinet**. So, **article 79** relating to the executive established the cabinet.
Article 79 (2): it has the general direction and control of the government and secondly, it is collectively responsible to parliament. Responsible not in a moral sense but it responsible legally and politically.

1. The Cabinet has the ***general direction and control of the Government***: it meets practically every week, and it discusses the business of government. Usually, it is the ministers who attend Cabinet (the junior ministers do not have a right to attend Cabinet). If a minister presents his/her proposal to cabinet, it no longer remains his/her proposal but becomes a cabinet decision.
2. The cabinet is ***collectively responsible therefor to parliament***: this doctrine of **ministerial responsibility** – i.e., if there are 17 ministers, we do not have 17 governments, but we have one. From outside, the government should appear **united and one**. So, as a minister, I can discuss in Cabinet. As a minister, you know what is going on and what will happen in the future. Collective responsibility means that in Cabinet ministers discuss everything **but once a decision is taken within cabinet, even if a minister disagrees with that decision, he/she has to support it**. This is what is meant by collectively responsible to parliament. If a minister does not want to support it, he/she can either resign from Cabinet or else the Prime Minister removes him/her from office.
   E.g. Prime Minister Blaire
   E.g. Minster Lino Spiteri who resigned because he did not agree with the government on policy. Once he resigned even though he still supported the government, he could criticise the government policy (he could not do so when he was a government MP who is part of the government). If you resign and retain your parliamentary seat, you have every right to criticise the government.
   Can this rule be suspended?
   Yes, it can but only the Prime Minister can authorise a suspension – in 1975, in the UK, there was the first referendum whether Britain should remain part of the EU. Within the labour government there were those who were in favour of being part of the common market and those against it, so the Prime Minister, during the

referendum, allowed ministers to be in favour or against but they were allowed to do so because **they were authorised by the government.**
This rule is there so that we won't have as many governments as there are ministers.
Once government decides you have to abide by that decision.

Collective ministerial responsibility

Cabinet is collectively responsible to parliament. Therefore, in a parliamentary system, the government is responsible to parliament and this is what distinguishes a parliamentary system from a Presidential system (Trump is not responsible to the legislature). The legislature cannot pass a motion of no confidence in the government in the United States. On the other hand, in the parliamentary system, the legislature can pass a motion of no confidence in the government. If they pass a motion of no confidence in the Prime Minister either the entire cabinet resigns, or they hold for a general election. This is what we mean when we refer to the doctrine of **collective ministerial responsibility**. It also means that the executive, being collectively responsible to parliament, cannot ignore parliament, the executive in our system sits in parliament. Both the Prime Minister and the ministers have to be members of parliament, so they sit in parliament and are responsible to it.
In the first 30 minutes of any parliamentary sitting, there is question time. When the Prime Minister replies to your question, you have a right to ask a supplementary question. The Prime Minister will not know what the supplementary question will be whilst he will know the first. During the parliamentary questions, you grill the ministers – usually the opposition asks but any backbencher (government MPs who are not ministers) can ask a question also.

In short, Collectively responsible:
1. Cabinet is united/one 2. Cabinet is responsible to Parliament

Individual Ministerial responsibility

Apart from collective ministerial responsibility, there is also individual ministerial responsibility which is not expressed in the Constitution but implied. A minister is also individually responsible to parliament. **If a motion of no confidence is passed in government or in the Prime Minister, the entire government falls but when it is passed in a particular minister, only that minister will resign**. If that minister is supported by the government, the government may consider it to be a motion of no confidence. This happened in 2012 with the Justice Minister but there is still controversy on whether the government should have considered it a motion of no confidence in the government.

How is a Prime Minister appointed?

ARTICLE 80 of the Constitution

To be a Prime Minister, you have to be

1. A member of the House of Representatives and
2. In the opinion of the President, you must be best able to command the support of a majority of the members of the House.

In appointing the Prime Minister, the President acts alone. When it comes to appoint Ministers, the President acts on the advice of the Prime Minister. But even the ministers have to be members of parliament.

Nowhere in the Constitution is there any reference to leader of a political party. In the appointment of the Prime Minister, the President is only bound by the requirement that the Prime Minister has to be a member of parliament and therefore not necessarily the leader of the political party (it would be madness to appoint someone other than the leader of the party however). We are influenced by the fact that for the past 65 years (since 1955 with the exception of 1962) we have had only two parties in parliament – one in government and one in opposition so it is very easy to appoint a Prime Minister.

In the first election under self-government, four parties were elected to parliament however, no one wanted to form a coalition. The governor at the time called the leader of the largest party to form a government but the leader happened to be a Roman Catholic priest who refused to serve as Prime Minister. Therefore, the governor chose, on the advice of the leader, someone else who was a member of the party.
E.g., In Italy, the Prime Minister is not leader of any party.
The Constitution does not require that the Prime Minister appointed has to be leader of the party because it could very happen that two parties form a coalition (when a government is composed of different parties - Malta had a coalition government between 1950 and 1955) but the junior partner says that he would join so long as the Prime Minister is not the leader of the party.

In the opinion of the President, the appointed Prime Minister is best able to command a support of the members of the House. 'Best able' – it could well happen that no one wants to form a coalition government and the government will have to be a minority government. Such as Borg Olivier who formed a majority government.

Historical background of the Prime Minister in the United Kingdom

The historical background to the office of the Prime Minister in the UK – 1721 – the sovereign in the UK were German speaking. The first Prime Minister was also first Lord of the treachery. Initially, this Prime Minister was a **primus inter pares** (a first amongst equals) whereby the government was cabinet but then one of them was slightly more important than the others as he would communicate to the King and was called Chief Minister or Prime Minister.

Therefore, in the beginning he was only a primus inter pares. But today, his powers are such that he is much more than this.

What makes the Prime Minister more than a *Primus Inter Pares?*

The first matter which makes him much more important than an ordinary minister is that according to the Constitution **he has the power to hire and to fire ministers** (so how can he be considered an equal? – he can't). First of all, he hires them and his only limitation according to the Constitution is that they have to be members of parliament. In 1964 the Prime Minister in the UK appointed two ministers who were not members of parliament, but the convention was two strong that this was temporarily suspended. If the Prime Minister has the power to hire, then he is far from equal. This is an absolute power but in practice there could be difficulties – if you form a coalition government you have to hire ministers from party B not only from party A. Another limitation is if a government MP has been elected from two electoral divisions.

These are the considerations which the Prime Minister will take in account having won the general election when forming his cabinet,
These are practical limitations:

1. Popularity
2. Loyalty
3. Competence
4. Geographical distribution

In the same way as one can be hired to be a minister, one can be fired. If you fire too many people you are creating a cluster of ex ministers against you.
The Prime Minister is so strong in this regard that actually he would suggest to a minister that it is better to resign rather than simply firing him/her. By resigning, you sort of protect yourself that you were not fired and that you may be reappointed if you resign.
This power to fire is absolute but, in practice, it has severe political limitations. If you are in a coalition government, and you start firing the ministers of the junior partner, the junior partner may leave and the coalition collapses. Secondly, if you fire too many people, you are risking that those people will turn against you. **A Prime Minister is always more powerful than an individual minister, but he is never more powerful than a cabinet united against him.** This is what happened to Mrs Thatcher who lost the confidence of her ministers. Even though Mrs Thatcher never lost a general election, she had to resign. The same thing happened to Mr Blair. Although this power to fire is absolute, it could be severely restricted owing to political circumstances.

What happens if a minister refuses to resign?

In this case, the Prime Minister goes to the President and advises the President to remove a minister. Therefore, in the same way ministers are appointed by the President on the binding advice of the Prime Minister, the same applies for the removal of ministers. The only time a minister was formally removed since Independence was in 2015 when Minister Emmanuel Mallia refused to resign and therefore the Prime Minister went to the President and on the advice of the Prime Minister the President appointed Carmelo Abela and removed Emmanuel Mallia. Therefore, the power to hire and fire has to be dealt with wisely.
Note that when a new Prime Minister is appointed either following a change in government or even if the same government is elected, the Prime Minister is given a clean slate and starts appointing his ministers. Therefore, if you were a minister and is not called, you are no longer a minister.

The second advantage the Prime Minister has is that **he presides over the Cabinet**. The Prime Minister decides when cabinet meets and decides which decision shall be taken by cabinet and which decision, he takes himself. In 1992, Prime Minister Fenech Adami went to the President, dissolved parliament and then went to cabinet ex post facto and told them he dissolved parliament and is to hold a new general election. In contrast, in 2003, he informed the cabinet that the following week he was going to dissolve parliament. Therefore, it was completely his decision to dissolve parliament and similarly, it was completely his decision whether or not to inform cabinet.
At law, the Prime Minister is entitled to ignore a decision of the cabinet. However, if he does this on a regular basis, he risks the cabinet teaming up against him. So, he ignores cabinet decisions at his own risk, but he can do so at law. So, the ministers are really a team of advisors. **Although the Prime Minister is so strong constitutionally that he can ignore decisions of Cabinet even if they vote, he does not usually do so.**

Another strength of the Prime Minister is the power to dissolve parliament. According to the Constitution (article 76(5)), this is in the hands of the Prime Minister (in truth it is the decision of the President on the binding advice of the Prime Minister).
So, when Prime Minister Fenech Adami in 1992 held the election about 8 months before the maximum period of time, under this section he had every right to do so. They do so generally if they feel it is better to have an election then because all the indications are that they would win. However, the party can always lose – *victory has many fathers, but defeat is an orphan* – so when someone wins everyone assumes the paternity of his victory but when the election is lost no one says it is his fault. Therefore, the ministers would argue that they had more time in government had the Prime Minister not decided to dissolve parliament.

The role of Prime Minister evolved very gradually. In the UK it evolved as a matter of convention. It evolved in the UK because it was during the term in office of the first Prime Minister, Sir Robert Walpole, that this idea of a prime minister who must enjoy the confidence of the House emerged. Malta started considering the prime minister who at the time was a *primus inter pares*.

Two important factors which strengthen the position of the Prime Minister according to Article 80

1. Member of parliament
2. Enjoys the confidence of the House – best able.

- He is also the head of the party although this isn't forced by the Constitution.

The Civil Service is there to support the government of the day. In 1999 the government of the day proposed that Malta should join the EU – the Civil Service supported that proposal not necessarily because all the civil servants agreed with the government but once that is the position of the government, they have to support that position. Therefore, once I am a civil servant, I have to support the government of the day.
In 1996, we had a new government which did not want to join the EU, so the same civil servants who once supported this, started supporting the policy of the new government that did not want to join the EU.
In 1998, the previous government was re-elected. So, the same civil servants went through three phases in a matter of a few years.
This gives a lot of power to the Prime Minister.
Shadow ministers would be of the opposition shadowing the minister of the government. For example, the shadow minister of education.

Stanley De Smith, Constitutional and Administrative law – '*hardly anyone today will make out a case for the proposition that the prime minister is merely a primus inter pares.'*

Primus inter pares does not mean that he is strong just because of the word 'pares'. If he is so, you are implying that he is not all that important and is only a bit more important than others – a first amongst equals. **The Prime Minister is much more than a *primus inter pares*.**
In the parliamentary system, since the government depends on the confidence of the House, it will not appoint opposition members of parliament to cabinet. How could these ministers be considered to be equal to the Prime Minister if the Prime Minister appoints them and removes them. Article 80 states that when it comes to the appointment of the Prime Minister, the President acts alone (because there is no PM – there is a vacancy) but when it comes to the appointment of the ministers, the President acts on the binding advice of the Prime Minister.

In the second part of article 80, the President does not act alone. 'Advice' in the constitution is binding.

The only 'limitation', since there isn't even a limitation on the number of the ministers, legally he can appoint all the government MPs to be ministers. **All government ministers are members of parliament but not all members of parliament are government ministers**. MPs are members of parliament supporting government but are not necessarily ministers. This power to appoint ministers puts the Prime Minister in a very strong position because if I am a member of parliament and want to become a minister I will refrain from criticising government in public or more so in Parliament. If I as Prime Minister have the right to hire, that gives me a very strong measure of control over my own MPs. In fact, when governments have a slim majority, it is politically wise to appoint a large cabinet because once you include someone in the cabinet, he becomes bound by the doctrine of collective ministerial responsibility. Sometimes ministers have become appointed because of this.

When it comes to the power to hire, there isn't even a capping on numbers. Moreover, apart from giving the Prime Minister the power to appoint ministers, the Prime Minister can even appoint junior ministers (parliamentary secretaries not to be confused with permanent secretaries) who also are bound by the doctrine of collective ministerial responsibility. Therefore, **the Prime Minister appoints both ministers AND junior ministers.**

Practical realties

With that being said, this seemingly absolute power to hire in practice is restricted by political realities. For instance, the first thing the Prime Minister will do once he won the general election is to go to his office and start forming his government. How does he do that? He has the absolute right to consult or not to consult anyone. If the government has a majority of one, the Prime Minister has to be very careful how he forms his cabinet due to blackmailing.

Another historical example is when in 1951, Borg Olivier formed a coalition with the Malta workers part of Boffa, it was natural that once it was a coalition (government composed of more than one party) members from both parties had to be appointed and not just of one party. In this circumstance, the Prime Minister is not the absolute Prime Minister with the absolute powers like when the government is composed of one party.

The position of the Prime Minister is so strong that he would not even dismiss the minister but instead, direct him to resign. There was an exception in 2015 in the case of Dr Manuel Mallia who refused to resign and so the Prime Minister went to the President and removed him.

In spite of this absolute power to hire and fire, this power is restricted by these political realities. This is what happened to Margaret Thatcher – she fired so many people that the cabinet united against her. **A Prime Minister is always stronger than an individual minister but never stronger than a cabinet united against her**.

The other strength of the Prime Minister apart from hiring and firing is he presides over the cabinet. He decides when cabinet is to meet, where it is to meet and so on. There are least **2 legal consequences** to this –

(1) The Prime Minister decides what to put on the cabinet agenda, which questions to refer to cabinet and which decision are taken without referring to cabinet.

(2) He not only presides over cabinet, but the decisions of cabinet are not binding on the Prime Minister. The cabinet is like a meeting of advisors so even though a majority would be moving in a certain direction, the Prime Minister legally can go in a different direction. Even though he can ignore cabinet, he is playing with fire if he does so. In such a situation it could well happen that the cabinet would rebel against the Prime Minister.

In the United States, following at least one year of political campaigning, there is a process by which the two main political parties propose their candidate for the general elections. For example, the Democrats chose Biden but there were other candidates. In America there is this process by which each party proposes one candidate. In the UK and Malta, the electoral campaign technically should mean only that we vote for our representatives in parliament but in actual fact, when we vote we are choosing our Prime Minister because if party X in our system has a majority seats in parliament, then the leader of that party will become Prime Minister. In other words, we know that we are choosing a Prime Minister by voting for representatives. Even our parliamentary elections have been transferred into a Presidential election. This gives the Prime Minister a certain strength because he can boast that he is the choice of the electorate. **These so-called parliamentary elections with the passage of time have assumed the character of Presidential elections.**
Therefore, in Malta we vote only for the legislature but indirectly we vote for the executive also. We vote for the composition of the House of Representatives.

Another advantage for the Prime Minister is that he is in the news. If he says something, everyone listens, and it will be reported in the news. Since we joined the EU every 5-6 weeks there is the so-called European Council & the Prime Minister goes to represent Malta. When there is an important meeting between governments, the Prime Minister goes. He has certain exposure in the media and the media gives the correct impression that he is the leader of the country. When Malta joined the EU, the Prime Minister signed the Treaty. He represents the government.

The power of patronage

This refers to the power which the law gives to the Prime Minister in appointing holders of important positions. All the important appointments, even Ġieħ ir-Reppublika, are decided by the Prime Minister. No minister in his right senses would appoint someone in an important position without consulting the office of the Prime Minister. E.g. the chairman of MEPA. As minister of MEPA, he would seek the Prime Minister even if he does not need to. Even if those matters where the Prime Minister by law does not have the power of appointment, he is still usually consulted. This means that the Prime Minister has a certain hold on Ministers but also on the person aspiring to hold a public position (such as the Maltese high commissioner in London for example). This gives him a certain control.
As stated in the Constitution, the powers of the Prime Minister here are that he gives advice to the President to appoint the members of the public service commission, the electoral commission (section 60 of the constitution), the chairman of the employment commission and the members of the broadcasting authority. This person who was initially only a primus inter pares appoints all these people. Except the employment commission.
According to conventions, even though the constitution gives the power to the Prime Minister to appoint all these people, a convention evolved whereby the Prime Minister appoints half the members of persons in which he trusts and others which enjoy the confidence of the leader of the opposition. This is simply a convention, however. AT LAW it is the Prime Minister who appoints them and the President simply signs.

To summarise:

1. Power to hire and fire.
2. Power to preside over cabinet, decide its agenda and interpret what the cabinet decision is.
3. The power to dissolve parliament, the most important person of the executive can dissolve the legislature (unlike the American system – first Tuesday after the first Monday of November). The PM chooses when to hold the general election – he can choose the right time in the party's interest. There does come a time when you cannot postpone the general election anymore – 5 years. But there is nothing to stop the PM from dissolving parliament earlier.
4. The power of patronage
5. The fact that he is leader of the government and of the party so the party knows if the PM is unpopular the party would be unpopular as well and if he is popular the party will be popular too.
6. The support of the civil servants as leader of the government
7. Exposure as being the representative of the country

De smith describes others who said that the PM as 'the keystone of the cabinet arch, a sun around which planets revolve, an elected monarch, a President…'
All these powers in theory can be severely restricted in practice for a number of reasons

1. Political realities relating to a coalition
2. Relating to the popularity of the PM and his parliamentary strength the stronger he is the more he distances himself from being a primus inter pares.

CONSTITUTIONAL AUTHORITIES – THE 5 COMMISSIONS WHICH ARE ESTABLISHED IN THE CONSTITUTION

The electoral commission is important because it runs, conducts, and supervises all elections in Malta - local, European, and general. It also drafts the electoral boundaries of the electoral divisions. **Gerrymandering** is drafting the electoral boundaries in such a way that you give an advantage to one political party. If a third party is elected sometimes the corrective mechanism does not apply.
In 1974, the constitution was amended so that it can stop an election if there are widespread irregularities taking place. If it does not act in spite of this, any voter, ex post facto, within 3 days from the publication of the official electoral result can challenge the result of the election by going directly to the constitutional court (because it is an emergency). They have to be so widespread that it affects the result.

The broadcasting authority which is supposed to ensure impartiality not only in public broadcasting but in all broadcasting. It has taken the practical decision that the two-party political stations neutralise each other.

The employment commission was set up to hear cases of political discrimination in the place of work.

The public service commission is extremely important – it will ensure that everything is fair in the recruitment of public officers – the civil service only. it does not involve itself in public corporations but only public service. It recruits, disciplines and promotes members of the public service.

The Commission for the administration of justice

Article 86 of the Constitution: if for example, the public service commission recommends to the Prime Minister to dismiss a public officer or to promote one or to recruit one, the Prime Minister is bound by that recommendation in virtue of article 86(1) of the Constitution.
Article 86(3): The Constitution first sates that when the Prime Minister is to act on the recommendation of an authority, he is bound but that recommendation but then no one can go to court to inquire into whether he actually abided by the recommendation.
Another example: The electoral commission is appointed by the President on the advice of the Prime Minister after consulting the leader of the opposition. Let's assume the Prime Minister does not consult him, he cannot be taken to court.
Therefore, even when the Constitution obliges the Prime Minister to act according to the recommendation of someone else or he must consult the leader of the opposition, he cannot be taken to court on suspicion that he did not. Moreover, a recommendation is binding, a consultation is not however you cannot go to court to check if he is acting in accordance with that recommendation or if he even consulted the opposition in the first place. The rule that I am bound as a Prime Minister to act in accordance with the recommendation of someone else is not enforceable in a court of law.

Article 87: this article is taken lock, stock and barrel from the British Constitution. They are kept confidential so that the President can encourage, warn and advise in a confidential manner. Otherwise, except for the prerogatives, the sovereign of the UK and the President of Malta cannot do anything. He cannot take executive action except in those prerogative powers. This is shrouded in secrecy so that **there will be a free discussion between the Head of State and the Prime Minister**. In practice, this takes the form of a lunch between the president and the Prime Minister. The obligation is for the Prime Minister to see to it that he informs the President every now and then of **the general conduct of the Government of Malta**, something taken from the British tradition.

Article 88: this article deals with Parliamentary Secretaries who are politicians, and they are appointed by the President on the advice of the Prime Minister. Moreover, Parliamentary Secretaries are junior ministers and of course, members of parliament. These must not be confused with Permanent secretaries who on the other hand are civil servants, the top civil servant in each ministry.

The office of the leader of the opposition is found under the chapter of the executive. In the UK, the position of leader of opposition is a political one but the Queen does not appoint a leader of the opposition. The speaker in the House of Commons, after a general election, will see which is the largest party and the leader of that party is recognised by the speaker as the leader of the opposition.
In Malta the leader of the opposition is appointed by the President. Moreover, he is a constitutional figure and a political figure. For example, When Dr Sant lost the general election and therefore became the leader of the largest party in opposition in 1988, the President appointed him leader of the opposition and gave him a warrant. The Constitution requires that the leader of the opposition has to be consulted in certain matters by law, therefore, it is important to know officially who the leader of the opposition is and due to this, so he/she is given a warrant.
In Malta and other countries of the Commonwealth there is a formal appointment of the leader of the opposition – *the leader of the party which is the largest party in opposition to the government of the day* (constitution definition). It is important to have a formal

recognition of the leader of the opposition because on just one occasion he gives a recommendation to the President which is binding. In our system the leader of the opposition is not only a political figure but also a constitutional figure expressly recognised by the constitution.

The Attorney General

The office of the Attorney General since independence has always formed part of the chapter in the Constitution relating to the executive. The Constitution guarantees his independence by treating him for constitutional purposes as if he were a judge. In order to guarantee this independence, apart from giving him security of tenure like judges and magistrates, article 91(3)(a) provides that he has the right, after examining the facts, to order a *nolle prosequi* (do not prosecute – the discontinue in the constitution).

As guaranteed by the Constitution, The Attorney General is independent and in practice, from the constitutional point of view, he is considered to be a judge. In the recent amendments, the method of selection of the Attorney General has been changed. Moreover, apart from the Constitution we also have a law which regulates the functions and the office of the Attorney General – chapter 90 of the Laws of Malta – the Attorney General Ordinance. The Attorney General is still appointed by the President on the binding advice of the Prime Minister but today there is a call for applications.

In the recent amendment, the method for selecting the Attorney General has been changed as apart from the Constitution there also exists a law that regulates the function and office of the Attorney General. The fact that previously the Attorney General was appointed by the President on the advice of the Prime Minister still remains the position however, now there is a call for applications. Before, the Prime Minister tenders his advice, he in turn receives non-binding advice from an appointments commission appointed by the Minister for Justice. The Prime Minister will give his advice to the President, but his advice is not bound by the recommendations of the Appointments Commission.

Up to 2019, the Attorney General had two functions

(1) The chief prosecuting officer in Malta taking independent decision on whether to prosecute someone in Malta.
(2) At the same time, he was also the chief legal advisor to government. His second capacity created a conflict of interest because as chief legal advisor each time someone institutes an action against the Government, the government always used to be defended by the Attorney General who in his same role decides to prosecute anyone in Malta.

State Advocate

Now, following an amendment in 2019, we have two separate offices whereby the Attorney General deals only with criminal prosecution and we have created the office of the State Advocate. So, now when you file a Human Rights action against the government, the State Advocate will be defending the government and not the Attorney General.

Article 91A has been introduced which states that the State Advocate is also given security of tenure. Like the Attorney General, he can only be removed by a 2/3rds majority of all members of the House on proved inability to perform his function or misbehaviour.

The functions of the State Advocate are contained in article **91A (3)**

> **(3) The State Advocate shall be the advisor to Government in matters of law and legal opinion. He shall act in the public interest and shall safeguard the legality of State action. The State Advocate shall also perform such other duties and functions as may be conferred upon him by this Constitution or by any law. In the exercise of his functions, the State Advocate shall act in his individual judgment and he shall not be subject to the direction or control of any other person or authority.**

Therefore, he is the one to guarantee that the actions of the government are lawful. This means that he is something more than just a lawyer, he guarantees the legality of state action, he is not subject to any direction and he exercises his functions according to his individual judgement. No one can interfere with his functions. Both the Attoreny General and the State Advocate have to retire at the age of 65. We have a compulsory retirement age for judges, for magistrates, for the Attorney General and one for the State Advocate.

The Constitutional Court

We have a chapter on the judiciary according to the separation of powers doctrine. We have superior courts & inferior courts. The superior courts are presided over by judges. The inferior courts are presided over by magistrates. Moreover, one of the superior courts composed of 3 judges shall be known as the Constitutional Court. Under the original 1964 constitution, there were 5 judges.

What does it do?

In some matters it is a court of second instance, whilst in other matters it is a court of first and last instance.

Court of Second Instance

In most matters I can only go to the Constitutional Court as a court of appeal. If I file a Human Rights case say against the government, I do not go directly to the Constitutional Court, but I first go to the court of first instance called the Prim Awla' of the Civil Court presided over by one judge. If then I lose the case I appeal to the Constitutional Court composed of 3 judges. So, if in a Human Rights case I go directly to the Constitutional Court my case will be thrown out. There it is a court of second instance.

Court of First Instance

Exceptionally, there are cases where u can go directly to the Constitutional Court in urgent cases. In this case, the Constitutional Court is a court of first and last instance. Moreover, these instances are found in article 95(2) of the Constitution.

Article 95 of the Constitution

The two instances where the Constitutional Court is a court of first and last instance are listed in sub-articles (a) and (b) of article 95(2):

1. Article 63 of the Constitution: this deals with questions relating to **the election of members to the House of Representatives or disqualifications**. If a question arises as to whether a member of parliament has been validly elected or relating to disqualification, the question is directly taken before the Constitutional Court.
2. Article 56(3) of the Constitution: This relates to when there are **widespread irregularities in the holding of general elections**. In such a case, the Electoral Commission can suspend the election. So, in such a case the Constitution requires that when the Electoral Commission suspends an election, it has to refer the case directly to the Constitutional Court and it will decide whether to endorse the suspension or not. Article 56 grants the right to any registered voter within 3 days to file an action

directly to the Constitutional Court following a General Election to annul an election because of widespread irregularities.

In these 2 cases (a) and (b) the Constitutional Court is a court of first and last instance.

Article 95(2)(c): The Constitutional Court can hear appeals from decisions of the Civil Court First Hall under article 46 (the enforcement of Human Rights in Malta). 98% of all the cases before the Constitutional Court fall under of 95(2)(c).

Article 95(2)(d): Again, the Constitutional Court acts as a court of appeal. These are appeals on the interpretation of the Constitution other than human rights. For instance, neutrality provisions. The Constitution does not consist only of Human Rights. For example, someone challenged a government decision as going against neutrality found in article 2 of the Constitution. Under this article, could that individual appeal to the Constitutional Court.

I can challenge a law constitutionally on two grounds

1. If it breaches chapter 4 of the constitution (Human Rights)
2. It goes against a provision of the Constitution.

Mintoff v. Borg Olivier was an appeal from a court of constitutional jurisdiction regarding a law which was being challenged by Mintoff as being in breach of the constitution (it had not been approved by the laws of procedure in the House of Representatives), and not of Human Rights.

If a law is challenged as going against the Constitution other than Human Rights, it is regulated by **article 116**. In that case, the Constitution states that *a person bringing such an action shall not be required to show any personal interest in support of his action.* This is not the case for Human Rights actions where you have to prove a direct personal interest.

Article 95(f): Hybrid actions: this refers to when you have a mixed action which is an action dealing with ordinary law and at the same time an interpretation of the Constitution. In this case, you appeal to the Constitutional Court just the same. The Constitutional Court will decide both the constitutional issue as well as the non-constitutional issue.

The composition of the Constitutional Court

In 1974, there was introduced the automatic composition of the Constitutional Court. Before 1974, the government had refused to appoint to fill a vacancy in the Constitutional Court with the consequence that for about 2 years the Constitutional Court was not composed. Today, if the Constitutional Court is not composed because there is a vacancy that has not been filled, then automatically the most senior judge will fill that vacancy.

There are some other roles given to the Constitutional Court in laws other than the Constitution. The most important is **the European Convention Act** which is not part of the Constitution. One can go to the European Court after having appealed to the Constitutional Court.

When signatures are collected in order to hold an **abrogative referendum** (a referendum to abrogate a provision of the law), before it is held the matter has to be referred to the Constitutional Court so that it examines whether the matter which is subject to a referendum, is one listed in the referendum act. There is this sifting role of the Constitutional Court when an abrogative referendum is proposed.

CONSTITUTIONAL AUTHORITIES & COMMISSION MENTIONED IN THE CONSTITUTION

The Electoral Commission

ARTICLE 60

The Electoral Commission is established by **article 60** of the Constitution. In Malta, all elections are conducted not by the government of the day but by an Electoral Commission which conducts all elections in Malta whether general, European parliament or even local.

What are its functions?

(1) It conducts the elections, it ensures that everything is done properly, it supervises the counting of the votes and so on. If it sees there are some irregulates which hare serious and widespread it can refer the matter to the Constitutional Court to suspend an election.

(2) The drawing of the electoral boundaries/divisions: if the electoral boundaries are not properly drawn up, they can give an advantage to one political party at the expense of the other. This is called **Gerrymandering** (the drawing up of the electoral boundaries in such a way that they favour the government of the day). In our electoral system, it is possible to draw up the electoral boundaries in this way. It makes it more difficult for the party in opposition to elect candidates. It is possible for a party to waste more votes than the party in government and this can be partly due to the fact that electoral boundaries are drawn up in such a way that the opposition wastes more votes than the government. Gozo however, always remains a separate electoral division on stand-alone basis. The Constitution, in order to prevent having large electoral divisions and small electoral divisions provides that the difference between the largest electoral division and the smallest one as regards voting population cannot be more than 10%.

Article 60(3): This provision states that the Electoral Commission shall be appointed by the President acting in accordance with the advice of the Prime Minister given after he has consulted the leader of the opposition.

In the past 20 years, a constitutional convention practise has evolved. Even though it is the Prime Minister who decides who the members of the Commission should be, in practice he appoints 50% of the members chosen from amongst persons who enjoy the confidence of the leader of the opposition and the other 50% enjoy the confidence of the government. If he does not do this however, the Prime Minister cannot be taken to court. At any moment in time, the Prime Minister can ignore this convention & the leader of the opposition.

Another part of this convention states that the chairman of the Electoral Commission should be appointed by consensus. In the past 2 appointments of the Electoral Commission, the first part of the convention was abided by but there was no agreement on the chairman. The Prime Minister applied **article 60(3)** and appointed the chairman himself.

The Commission for the Administration of Justice

ARTICLE 101A

It has recently been amended by act 45 of 2020.

The members of the judiciary hold a majority of membership in the Commission for the Administration of Justice. Moreover, it is independent as it does not subject itself to any other authority.

Members
There are 9 members

1. The President
2. Chief justice
3. 2 judges
4. 2 magistrates
5. 2 members one appointed but the Pm and one by the leader of the opposition
6. The President of the chamber of advocates

5 of these members are members of the judiciary. This Commission has an important function regarding the discipline of judges and of the legal profession. Because it has such a delegate function, the Constitution provides that the members of the judiciary always have a majority within the Commission.

Functions & the 2020 amendments
Article 101A(11): The functions of the Commission. Its most important function rests in **the removal of judges and magistrates**. Following the July 2020 amendments, judges are no longer removed by a 2/3rds majority of the legislature but by a majority of members of the Commission. Following the decision of the Commission of the Administration of Justice, there is right of appeal
Besides removal, the Commission can also exercise discipline on judges and magistrates such as suspension, issue a reprimand and so on. Therefore, not all discipline leads to removal.

This Commission as we shall see has an important role as regards the discipline of members of the judiciary as well as the removal of members of the judiciary.
Up to the year 2020, a judge or a magistrate could be removed by a resolution of the House of Representatives supported by at least 2/3rds of all the members of the House on proved inability to the judge to perform his duty and/or misbehaviour.
The notion of **impeachment** exists only in those countries which have a bi-cameral legislature thus we do not use it in Malta when it comes to removing a judge/magistrate. Actually, impeachment means the approval of indictment in the House.
Up to 2020, a judge or magistrate in Malta could be removed in this manner:

1. A member of parliament presents a motion to remove the judge/magistrate on certain charges.
2. That motion used to be sent to this commission and if the Commission of the Administration of Justice thinks that prima face there is a case, the case goes back to parliament and parliament by a 2/3rds majority decides whether to remove the judge or not.

After 2020, parliament is no longer involved.
Now, I have to go either to the Minister of Justice or else to the Chief Justice and only those two persons can start the process of removing the judge and those two persons can then delegate this power to a committee of judges and magistrates.
It has become easier now to remove a judge then before. Now, a majority of 1 in the Commission of Administration for Justice is enough for removal.

The judge or magistrate who is removed by the Commission for the Administration of Justice has a right of appeal before the Constitutional Court. The chief justice is usually a member of the Constitutional Court, so this brings problems – the 3 judges who sit in the Commission cannot then sit in the Constitutional Court.

A case of discipline against a member of the judiciary which however does not lead to removal
Until 2016 it was either black or white whereby a judge or magistrate is either removed or not. After 2016, it is possible for a judge not to be removed but to be disciplined. For example, the judge is given a reprimand or else they could impose a pecuniary fine however such fine **cannot exceed 10% of his salary** according to **Article 101B**. If the Committee does not feel that the case is serious enough to remove the judge but serious enough to impose some kind of sanction or punishment, it can issue a warning or it can impose a pecuniary penalty.
In these proceedings, the commissioner may appoint a prosecutor.

Can the judge be suspended?
Article 101B(10)(b): Yes, he may be suspended for a period of not more than 6 months in which case he will receive only half his salary. In practice, this has never happened as in such a case, such judge would resign. However, constitutionally, it is possible.
If they decide to remove him during the proceedings, can the commission suspend the judge? Yes. If the judge is acquitted, the judge gets back the half salary lost during his suspension.

Therefore, there are 2 kinds of suspension
As a punishment or while his case for removal is being debated. In both cases, the members of the judiciary receive only half their salary but in the second case, if the judge is not removed, and therefore acquitted, he will receive half the salary which he lost.

The Constitution also states that in the exercise of their functions the members of the Committee shall act on their own individual judgement and shall not be subject to the direction or control of any other person or authority. With that being said, **article 101A(14)** excludes inquiry by a court of law into whether the Commission for the Administration of Justice has validly performed any function it has. This is a controversial provision – it is often called the ouster clause (this provision exists also as regards the public service commission**).**

Appointment of judges
Following the July 2020 amendments, the method of appointment of judges and removal has changed. Prior to July 2020, a judge or magistrate could be appointed by the President acting on the advice of the Prime Minister. After July 2020, this power of the Prime Minister has been removed and the government has no say at all. There is a call for applications and any person who is qualified can apply. The judicial appointments committee decides to present 3 candidates to the President of the Republic (a new prerogative) and he/she has to choose who to appoint. He then has to publish the name of the two others who he did not choose. Therefore, the judicial appointments committee proposes and the President acting alone chooses one.
Article 96B(2): It is also interesting to note that when it comes to the appointment of judges, there is a list of criteria which the judicial appointments committee should follow in the selection of judges. This again raises a problem – *are these criteria enforceable in a court of law? If I am not chosen, can I seek regress in a court of law?*
Some criteria are very vague – *can I sue the judicial committee of appointments if I am not selected and I prove that I have knowledge of the law, integrity and so on?*
Are these criteria which should be included in the constitution? This is the problem when too much detail is included in the Constitution.

All these criteria have been included in the Constitution and the wording is very mandatory – the wording is ***no person shall be entitled to be appointed*** – therefore, this can give rise to judicial action. However, this has never happened up till now.
This all happened because of the Venice commission. In America, Switzerland, the UK, the organs are involved so why is this not the case in Malta? Moreover, the Attorney General and State Advocate are still removed by parliament.

It also exercises discipline on the members of the legal profession. In this case there is a sub-committee which will hear the cases of discipline against the members of the legal profession.

Other functions - It draws up a code of ethics for the members of the judiciary

The Public Service Commission

ARTICLE 109
This was created formally before we became independent. But before 1959, there was always a public service commission created administratively. In 1959, it was enshrined in the Constitution, appeared again in the 1961 Constitution and then it was enshrined in the 1964 constitution.

Members
This Commission is composed of a chairman, deputy chairman and 1-3 members. Moreover, the members of the Public Service Commission are appointed by the President acting on the advice of the Prime Minister after consulting the leader of the opposition.
These do not have security of tenure because a member can be removed by the President acting on the advice of the Prime Minister but **only** for disability or because of misbehaviour. *If someone is removed by the President on the advice of the Prime Minister on a false claim can he take the matter to court?* This question has never arisen. If he is removed not on the grounds the Constitution states, then he can challenge this to court.

Article 110: recruitment in the Public Service Commission, discipline in the Public Service Commission, dismissals in the Public Service Commission and promotions have to be approved by the Public Service Commission. Say, a teacher at a secondary school who is part of the Public Service Commission is going to be dismissed, he/she can only be dismissed through the Public Service Commission. On the other hand, a lecturer at the University of Malta can be dismissed without reference to the Public Service Commission because **the Public Service Commission applies only to Public officers** (those employed by the government of Malta). In the case of police, the Commission has delegated the power of discipline on minor charges to the commission of police.
Do not include the armed forces of Malta - the armed forces of Malta are not in the service of the government of Malta in a civil capacity but in a military capacity
Employees of public corporation and public companies do not need the Public Service Commission.

What are the functions?
It assumed its present form in the 1959, 1961 and 1964 constitution.
Article 124: definitions of 'public office', 'public service' and so on.

Article 115: *The question whether the PSC has validly performed any functions vested in it by or under this constitution…shall not be enquired into in any court.*

Several judgements have bended the absolute nature of this clause

i. **Dr Frank Cassar v. Public Service Commission** decided by the first hall civil court decided in 1976: In this case, a public officer who was being disciplined alleged that the Public Service Commission had not abided by its own regulations. The public Service Commission argued that article 115 does not allow the revision of the Public Service Commission's decisions but the court declared that it could inquire into whether or not it abided by its own rules.

ii. **Ċensu Galea & Carmel Cacopardo v. the Minister for Public Works** 21st January 1985 Constitutional court (found in volume 69 Part 1 page 1). These are two separate cases.
Cacopardo and Galea were public officers as they were architects with the government. Moreover, they decided to contest the elections with the party in opposition and started writing articles against the government in the opposition newspapers. At that time, the disciplinary code included that public officers cannot engage in such things. Therefore, the public works department instituted proceedings for their removal since they were engaging in political activities in violation of the code of discipline. They filed two separate constitutional actions alleging that these discipline proceedings were in violation of their right of protection from political discrimination as there were other officers who were writing in favour of the government and nothing happened to them which amounted to political discrimination. They did not challenge the code of discipline and the prohibition of public officers from engaging in political activity, but they argued that if the government is going to take action against them, then it has to take action against those public officers as well who too were writing.
The question arose: *if applicant alleges that the Public Service Commission violated his fundamental human rights enshrined in the Constitution* (protection form political discrimination) *doe article 115 of the constitution apply?*
The court of first instance decided that it did apply. Therefore, it applied also to allegations of breaches of Fundamental Human Rights. The court argued that the question whether the Public Service Commission has validly performed its functions includes also whether it has abided by the Human Rights provision of the Constitution. The Constitutional Court therefore reversed the judgement of the lower court.
The Constitutional Court said that the basic argument in this courts view is that if one were to accept that a decision of the Public Service Commission is never subject to court review not even if in the most brazen manner it infringes a Fundamental Human Right, that would amount to the fact that for the Public Service Commission, the Constitution of Malta starts with article 110 and ends with article 115.
Therefore, what the Constitutional Court is saying is that **although article 115 exists, there also exists the human rights provisions where there is no exception for the Public Service Commission**.
"The Constitutional Court cannot accept that beyond what is provided in chapter 4, there is any person or any authority for who such chapter had never been promulgated." Therefore, **Chapter 4 applies to everyone and article 115 does not give some protective cover to the Commission to chapter 4**.
With all this being said, there is a significance still for article 115 for ordinary actions performed in the Commission whereby there is no appeal.
However, if it violates Fundamental Human Rights or does not abide by its own rules, then the court of appeal has the power to review it.

iii. **Portelli & Gatt v. Prime Minister**: it transpired that when the Public Service Commission recommended to the Prime Minister to dismiss these two police officers it had not abided by its own regulations. The Commission had dismissed them without hearing them. It had acted contrary to the regulations which it itself had promulgated, therefore the court ruled that article 115 did not apply to this case.

Therefore, any court of law will try and avoid any ouster clause which prevents it from reviewing the actions of the executive. **A law can say there is no appeal, but it can never say there is no review particularly if that review is from constitutional review**.

Anisminic Limited v Foreign compensation commission (House of Lords)(1969): This is a similar judgement to the Ċensu Galea & the Portelli Gatt case but is a British judgement of the House of Lords. At that time, the House of Lords was the highest court of the land. Moreover, this case regarded the Suez Canal crisis. The law provided that any decision of the commission shall not be called in question in any court of law. If the decision of the foreign compensation is contrary to law, the House of Lords rules that the ouster clause did not prevail over the British courts power to review their actions when they were illegal.

In these 3 commissions, there is always a provision that the members & authority for the commission shall act according to its judgement and that its members are not subject to the direction of any other person or authority. These commissions are not subject to the direction or control of any other person or authority however, this does not mean that they are not subject to court review. You are autonomise from intervention from the legislature or executive, but the judiciary always has the right to conduct judicial review and you cannot use any such provision in order to prevent judicial review.

Article 124(10): The Constitution is expressly stating that the phrase that an authority is not subject to the direction or control of any other authority **does not include the law courts**. The courts ARE NOT any person or authority.

Let's take for example, the question of presidential assent, article 72(2) – *he shall without delay* – what happens if he does not give his assent? The bill does not become a law. We do not know whether you can take the President to court because it has never happened. The procedural difficulties in enforcing this provision are so strong that Professor Refalo for example, contends that this is still a convention and not a law as there are only political sanctions.
In the same way, if you are not chosen as a judge, you can probably sue the committee and not the President.

Broadcasting Authority

ARTICLE 118
This does not have a chapter dedicated to it but is included under chapter 11 and is established by article 118 of the Constitution.
A convention has developed whereby when the Prime Minister gives his advice to the President, he will do so as regards to two members which he chooses from amongst persons who enjoy his confidence and another two which enjoy the confidence of the opposition. This convention has given a new meaning to the law, but the Prime Minister can still go against it. You cannot take the Prime Minister to court if he breaches a convention because a convention is not justiciable (**justiciable = enforceable in a court of law)**.

They can be removed by the President acting on the advice of the Prime Minister but only for inability to discharge his functions or misbehaviour. That word 'only' is justiciable so I can take the Prime Minister to court on this matter.
Article 118(8) does not exclude judicial review.

Functions
Article 119

> **119.** (1) It shall be the function of the Broadcasting Authority to ensure that, so far as possible, in such sound and television broadcasting services as may be provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.
>
> (2) The function of the Broadcasting Authority referred to in sub-article (1) of this article shall be without prejudice to such other functions and duties as may be conferred upon it by any law for the time being in force in Malta.

Till now, we have examined the Electoral Commission, the Commission for the Administration of Justice (involved in the appointment & removal of judges, also exercises discipline over judges and magistrates and over the members of the legal profession), the Public Service Commission (exercises discipline over the public service but is also involved in the recruitment, promotion and removal of public officers) & the Broadcasting Authority (regulates broadcasting in Malta and its functions are regulated by article 119 of the constitution).

The employment commission

ARTICLE 120
This is the last commission which is established in the Constitution and was introduced in 1974.
What is unique in this Commission is that while the other authorities and commissions are appointed by the President acting on the advice of the Prime Minister after he consults the leader of the opposition, in this case, 2/5 members of the Commission are appointed by the President on the binding advice of the leader of the opposition. Therefore, he is not only consulted but actually gives binding advice.
In Malta, the leader of the opposition is not only a political figure but also a constitutional figure. **He is also given a warrant because in some cases, the President has to act on the advice of the leader of the opposition** (this is the only case). Nowhere in our legal system is there an appointment which relies exclusively on the advice of the Prime Minister.

Members
1. The chairman: appointed by the President on the advice of the Prime Minister.
2. 2 members: appointed by the President on the advice of the Prime Minister.
3. 2 other members: appointed by the President on the advice of the leader of the opposition

Before the introduction of this provision, parliament passed a law known as the employment commission act which regulates the details of how you present an application.

(Side note whilst speaking of the Miscellaneous section: article 123 sub-article 1 & 2 regarding a President cannot serve 2 terms but only 1).

The office of the Ombudsman

This is regulated by 2 instruments of law: The Constitution in article 64A and by the Ombudsman act chapter 385 of the Laws of Malta.

History

The first time the office of Ombudsman was introduced in Malta was through an ordinary act of parliament in 1995. This idea of an Ombudsman was created slightly before because after the 1887 general election parliament passed a law called the investigation of injustices act of 1987. What is novel in this act of 1987 was that for the first time a law was passed by parliament granting regress not only to acts of parliament which were unlawful but also if they were unjust. Up till 1987, you could only sue the government in a court of law only on breaches of a law (it could be an unjust law, but it is still a law). When this act was introduced, it set up a commission which examined cases not only of illegalities but also if the action was unjust. Something which is perfectly lawful could be unjust as it creates unjust consequences.

The Ombudsman (means Representative in Scandinavian), who is a parliamentary officer, does not cover only cases of acts of the administration which are unlawful but also acts of the administration which although perfectly legal are unjust as well. Therefore, something could be lawful but is unjust just the same.

In 1995, we passed the Ombudsman Act.

How is the Ombudsman appointed?

In 1995, the law, when approved by parliament, provided **for the very first time** the holder of an office was to be appointed by at least a 2/3rds majority of the members of the legislature. This in practice mean the opposition has a veto. Since then, we have extended this 2/3rds appointment to other offices such as the **Auditor General and the deputy Auditor General** (1997), **the Commissioner for Standards in Public Life** (2017) and **the President of Malta and the Chief Justice** (2020). Currently we have 6 offices where you need a 2/3rds majority to **appoint** them (to remove them we had already). The first being the **Ombudsman**.

When was the office of the Ombudsman inserted in the Constitution?

Until 2007, it was exclusively regulated by the Ombudsman act. In 2007 the office was included in the Constitution, but the details of appointment and removal were left in the Ombudsman act. The only two things enshrined in the Constitution where that we have to have an Ombudsman so you cannot remove him and secondly that he investigates complaints against the government. In July 2020, an amendment was introduced whereby the way he is appointed and removed were also enshrined in the Constitution. Now it is entrenched in the Constitution and 2/3rds is needed for change.

To understand the powers of the Ombudsman depends on the answers to 3 questions

1. Which acts does the Ombudsman have jurisdiction over?
2. Who are the persons or authorities whose actions are liable to be investigated by the Ombudsman?
3. What are the legal effects of an Ombudsman's decision?

The Ombudsman may investigate an action of the public administration which (article 22 of the Ombudsman Act)

PROCEDURE AFTER INVESTIGATION

22. (1) The provisions of this article shall apply in every case where, after making any investigation under this Act, the Ombudsman is of opinion that the decision, recommendation, act or omission which was the subject-matter of the investigation -

(*a*) appears to have been contrary to law; or

(*b*) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a law or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

(*c*) was based wholly or partly on a mistake of law or fact; or

(*d*) was wrong.

(2) The provisions of this article shall also apply in any case where the Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

Article 22(1)(d): "*or was wrong*": any act which though lawful performed by the administration is **wrong** (wide meaning) you can file a complaint to the Ombudsman. **'Maladministration'** is used when something is lawful but wrong.

The functions of the Ombudsman are much wider than those of a court of law which decides only if something is lawful or not. The Ombudsman can say something is lawful but is wrong.

Which persons or authorities fall under the Ombudsman?
Any organ, section, part, agency of the government. In any entity where government is involved, the Ombudsman has the right to investigate the acts of that entity.
This includes the public corporations (university of Malta, local councils, infrastructure Malta, Mcast and so on) and companies in which the government has a majority of shares such as Air Malta.
The Ombudsman has appointed 3 commissioners to assist him: **on education**, **on environment** & **planning and Health**.
There has been only one case where the Ombudsman took the government to court and this was when it was not allowed to investigated promotions in the armed forces of Malta and won the case on the 31st of October 2016. As regards promotions the Ombudsman had jurisdiction over such important organ of the state.

N.B: If a private company performs a public function that does not fall under the Ombudsman. It has to be part of the government or administration. The Ombudsman has protested for the amendment of this.

He can investigate either if someone files a complaint or else, he can conduct an investigation on his own initiative.

Rules

1. The complaint has to be filed within 6 months however in special circumstances the Ombudsman can examine a complaint even if it is field after 6 months.
2. The Ombudsman can decide not to investigate if the subject matter is trivial, if the complaint is frivolous or if the complainant does not have sufficient personal interest in the subject matter.
3. The moment the issue in front of the Ombudsman is the subject of the court case, the Ombudsman stops investigating.

Characteristics

He is a **parliamentary officer**, appointed & removed by parliament. Every year, the Ombudsman will present an Ombudsman plan. If you are in the opposition, when he comes before the House Business committee and submits his budget for next year, the obvious question you would ask relates to what the effects of the Ombudsman decision are.

His decisions are not binding. Even though the decisions are not binding, they could be politically embarrassing. Not everything which is binding necessarily has a legal sanction. When the Ombudsman then appears before Parliament to present the budget, he will be asked in which serious cases the government did not abide by his recommendations. **Just because the decisions are not binding it does mean that they do not have a pervasive value.**

If they were to be legally binding, the Ombudsman would become a super minister, Prime Minister and Chief Justice. There would be no need to go to a court of law. How can someone who is not a court of law decide and his decision is binding on the Prime Minister? Only the court of law can declare an action of the Prime Minister to be invalid. All the Ombudsman can do is state that what he did is unjust or unlawful.

Because his office is one of those whose holder requires a 2/3rds majority to be appointed, **he has been given roles beyond the Ombudsman role**, the most important being that he is a member of the **Judicial Appointments Committee** (the judiciary has the majority: article 96A) under the Constitution which submits the name of 3 persons/candidates to fill the vacancy of a judge or magistrate. In fact, the Auditor General is also part of this committee for the same reason that of having both the approval of the government & of the opposition as he is appointed by a 2/3rds majority. Therefore, not because they have legal qualifications (the current Ombudsman is not a lawyer) and yet they have this important function.

The Commissioner for Standards in Public Life

In the UK, following a scandal relating to expenses by members of Parliament, something had to be done to discipline members of Parliament. A member of parliament legally remains in office unless he is serving a term of imprisonment of a year or over. We had to create something whereby if a member of parliament abuses of his rights, there will be some kind of remedy.

For example, every member of parliament enjoys the so-called **parliamentary privilege** (does not extend to criminal law), taken from the British. What this refers to is that anything which is said in parliament cannot be the subject of criminal or civil proceedings. Therefore, the moment a member of parliament gets out of the chamber and says the same thing then he/she is liable to proceedings. **This is good because a lot of scandals under different administrations would not have been revealed in parliament if a member of parliament would be liable to proceedings.**

This power/immunity can be abused of and therefore that would be the excellent reason for filing a complaint – now, the commissioner for standards of public life.

What does this parliamentary commissioner do?
He supervises the actions of members of parliament.
It was a white paper in 2012. The bill was published in 2014 and in the bill the law extended the jurisdiction also over persons of trust in the private secretariats of ministers and parliamentary secretaries. It was approved in 2017 as chapter 570, The standards in Public Life Act. It only came into force 18 months later. The commissioner can only investigate matters which occurred after the 30th of October 2018.

There is a long list of what he is allowed to investigate and as in the case of the Ombudsman he does only examine cases over whether an action of a member of Parliament was lawful or not but also of whether he was in breach of the code of ethics.

1. **The declaration of income or assets of members of parliament**
2. **Whether there has been a breach of any statutory or ethical duty** – the jurisdiction is not only over the law but also over an ethical duty. Attached to the Act there is a code of ethics for members of Parliament.
3. **He checks the register of absentee members**
4. **He can monitor the lobbying activities or issues relating to the acceptance of gifts for instance or misuse of public resources.**

Commissioner can start an investigation either because of a complaint (there is no restriction on who can complain – before a court of law you can only present an action if you have a juridical, personal, actual interest in the case. When it comes to the Ombudsman, he can refuse to hear a case if there is not sufficient interest. In the case of the Commissioner for Standards in Public Life, there is nothing. **Anyone can file a case**).
He has the right to close the case in relatively minor matters. In more serious cases, he can report the case to the Standing or the Permanent Committee for Standards in Public Life of the House of Representatives. Unlike the Ombudsman, here we have a parliamentary standing committee which examines those cases where the commissioner did not reach an agreement and he make a recommendation to this parliamentary committee. It is the only committee in which government does not have a majority. In this case, the membership of government and opposition are equal in number - 2 members for each party and the chairman.

What can the Committee do?
If the Committee feels that the allegation appears to be correct and that therefore there is a violation of the law, or that a discretion has not been exercised in a regular way or that there is a breach of ethical duty, the parliamentary commission can take a number of actions – it can request an apology, but it can also fine a member of parliament. If there is a breach of criminal law, it can refer the case to the commissioner of police. In Malta, parliamentary privilege applies mostly to speech in parliament. Therefore, if I commit a crime, I am not exempted from prosecution just because I am a member of parliament.
It can demand the member of parliament or the member of trust, it can recommend that the member of parliament makes an apology or pays back sums which he improperly used – for example if I use my travel expenses for my wife also.
The final one is that it may recommend that the House of Representatives takes any other measure it may deem fit. *Can it recommend suspension of the member?* In the original bill, there was a provision which allowed parliament to suspend a member of parliament for a

maximum period of one month but in the act, you do not find this provision but ‘any measure it may deem fit’.
This law was criticised because ultimately, in democratic countries, it is parliament which takes the decision on the member of parliament and not the commission. This is unfair because in all parliaments, the power to discipline the members of the legislature remain in the hand of the legislature. You cannot delegate this power to a commissioner. The ultimate sanction of discipline rests within parliament.
Finally, since October 2018, there have been 21 cases concluded, some in favour and some against the member of parliament or person of trust.

Sometimes his recommendations are not abided by, but he still acts as a watch dog of the workings of parliament and the behaviour of members of parliament and the persons of trust. Moreover, the commissioner can always give advice to a member of parliament on ethical matters.

MARTINA CAMILLERI

Human Rights Law
Dr Tonio Borg

"Human Rights stop at the frontier of human duty" – no right is absolute. Not even the right to life. One cannot abuse of their rights. These rights can be restricted either to protect the rights and freedoms of others or else they can be restricted in the public interest.

To understand Human Rights law in Malta, one must understand also the idea of the supremacy of the Constitution. We have in Malta chapter 4 of the Constitution which deals with a list of Human Rights and those Human Rights listed are enforceable in a court of law; they are justiciable. But they only make sense in the light of Article 6 which proclaims the Constitution to be the supreme law of the land. Human Rights prevail and the laws measured, or decisions made by public authorities which are in breach of these provisions will be declared by the Courts to be unconstitutional and therefore, invalid. This is fundamental to understand Human Rights law. They would make no sense if they were not superior to ordinary law.
A fundamental aspect is that in the Maltese legal system we have a double protection as regards Human Rights:

2 sources
Chapter IV of the Constitution
The European convention on HR of 1950.

CHAPTER IV OF THE CONSTITUTION
In our constitution, we have two chapters on Human Rights. The first is Chapter II which is a declaration of principles such as the right to work, from articles 7-21. However, Article 21 then tells us that these rights, in Chapter II, are not enforceable in a court of law, but the principles are nevertheless fundamental to the governance of the country and it must be the aim of the State to apply these principles in making law. Our Courts have been very reluctant to use this chapter. Even though it is not enforceable in a court of law, in case of doubt in terms of the interpretation of chapter IV, then the Courts can apply these principles when a provision in chapter IV is not clear.
Basu: the Indian supreme court has used chapter II to interpret chapter IV.

The first time we had a chapter on Human Rights in our constitutional history **was not in the 1964 Constitution but in the 1961 Constitution**, the so-called Blood constitution. The Constitution of 1961 for the first time in our constitutional history introduced a chapter on Human Rights and if any law, decision, or measure was in conflict with these fundamental rights one could seek regress in a court of law. Prior to this we had human rights, but they were scattered in the different ordinary laws. So, in 1961 they were enshrined in the Constitution. Since there was no Constitutional Court because we were still a colony, the ordinary courts decided ordinary cases under the 1961 Constitution.
In 1964, practically all the Human rights were transferred from the 1961 constitution lock stop and barrel into chapter IV of the Constitution of 1964 and some rights were added in this Constitution as well.

After 1987, and following the ratification of the individual right of petition to the Council of Europe human rights organs, this Chapter is supplemented by the European Convention Act (Chapter 319) which incorporates the Convention in the local legal system and which proclaims, in words identical to article 6 of the Constitution, that "where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and

Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency be void." Besides, any human rights action in Malta can be based on allegations of contravention of both the Constitution and the Convention, and this in the same lawsuit.

ARTICLE 32 IS THE PREAMBLE

Chapter IV starts with a preamble which gives a very short summary of rights protected.

> **32.** Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (*a*) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (*b*) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (*c*) respect for his private and family life,

This preamble highlights two main points:

1. Any person in Malta

The Constitution refers to "*every person in Malta*" and not to 'every citizen'. Therefore, to enjoy such rights, the individual could be of any nationality. Any person in Malta enjoys these fundamental rights and freedoms.

Consequently, unless the Constitution otherwise provides, these rights are enjoyed by any person in Malta irrespective of residence or nationality. There are two human rights which belong only to Maltese citizens: freedom from deportation and freedom of movement. As a rule, however, even someone from Zimbabwe enjoys these rights and fundamentals.

2. Rights belong to *Person* not to *Individual*

While the title of the Chapter refers to the fundamental rights and freedoms of the *individual*, implying that these are rights belonging to physical persons, the preamble refers to "*any person".* In other words, the rights and freedoms are called of the individual but then in the substantive provision, the Constitution does not say 'whereas any individual in Malta' but 'any person'.

'*Every person'* raises the question as to whether 'person' only includes physical persons or whether it also includes legal persons. The First Hall Civil Court in 1984 decided that persons include legal persons as well, unless the context of the right indicates that it applies only to physical persons. Therefore, the notion of person is much wider as it included both legal and physical.

This interpretation has been repeatedly confirmed by the Constitutional Court. Consequently, most of the rights protected under Chapter IV belong to legal persons as well, such as the right to a fair hearing, the right to compensation in cases of deprivation of property, freedom of expression, association and assembly, protection from discrimination, while other relate exclusively to physical persons such as the right to life or freedom from unhuman or degrading punishment or treatment.

And issue which has arisen every now and then is whether the rights and freedoms contained in Chapter IV can be invoked only against the State and its agencies, or else whether they are applicable even against private individuals.

It makes it very clear that the rights listed under Chapter IV are:

> freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

The preamble, although it is not justiciable, declares that the rights are fundamental, can only be restricted for specific reasons mentioned in the Constitution, and that a balance has to be maintained between the rights of the individual and those of the community.

Mon Sinjur Phillip Calleja v. Inspector Darris Balzan: Illustrates the conflict between rights of the individual and public interest. Should the right of the individual or of the community prevail?

Context: In 1975, a new marriage law was introduced in Malta whereby for the first time, Catholic marriages started being governed also by civil law and not exclusively by Canon law. At that time, at Mosta, the Mosta community decided to celebrate the feast of the Assumption of our Lady by inserting a crown on the titular painting of the church (the painting behind the main alter).

Mon Sinjur Phillip Calleja who was a firm objector to this new law, took the decision to organise a small protest during this religious ceremony. He distributed posters to a number of people and when they proceeded to go to the square so that the ceremony would take place, Calleja and some other people held these posters, without uttering a single word, for everyone to see. A group of people from Mosta thought that he was introducing politics in this ceremony and he had no right to do so. In the interest of public order, Balzan went up to Mon Sinjur and tried to stop him, to his refusal Balzan snatched the poster and tore it.

Mon Sinjur constituted a constitutional action against Balzan for breaching the right of freedom of expression.

Which should have prevailed: the right to freedom of expression or public interest?

There were 2 conflicting judgements from two different courts.

EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECHR preceded our 1964 constitution, so it is evident that when the Constitution of Independence of Malta was drafted, it relied a lot on the European convention. For the first time in Europe, after the experience of the atrocities committee in world war II, a group of Western European States decided to sign a treaty regarding certain fundamental rights. This did not regard all fundamental rights but just those which are needed in a democracy based on freedom and that are needed for the individual to develop his/her personality.

The core of Fundamental Human Rights was enshrined in an international instrument. The difference with this convention was that they created a regional enforcement machinery whereby any State which is part of the Council of Europe and therefore signed the European Convention, (not the EU – **not all members of the council of Europe are members of the EU. All the members of the EU are members of the council of Europe, however**) could institute a case against another State which signed the Convention but was not observing its provisions. One State could sue another State before a European court of Human Rights. This is the revolution, that a State could sue another State. Examples include Cyprus v. Turkey and Ireland v. United Kingdom.

This was revolutionary. Moreover, a country could sue another country (of course, so long as they both signed the European Convention) not only if for instance Greece infringes the

human rights of English citizens in Greece but also if Greece infringes the human rights of Greeks in Greece. There was an inter-state case following a codetta which occurred in Greece. A group of Scandinavian countries filed an action against Greece not because Scandinavian citizens were being tortured in Greece but because Greek citizens were being tortured in Greece by the Greek police.

Therefore, an individual in this revolutionary regional mechanism has the right also to institute an action against his government or against the government where he is physically present. This is called **the right of individual petition**.
Allowed a government to sue a government but also an individual to sue a government of the Council of Europe.

In 1953, the UK signed this Convention and also extended its application to its colonies. Since Malta was a British colony, the convention applied to Malta between 1953-1964. When we became independent, we joined the Council of Europe in 1965 (We joined the EU in 2004). Therefore, some years later it signed and ratified the Convention, but it made two exceptions: we did not accept the right of individual petition and we did not accept the compulsory jurisdiction of the European Court.
20 years later, Malta ratified the right of individual petition and also article 46 whereby we accepted the compulsory jurisdiction of the European court.

Therefore:

i. **1965:** members of the council of Europe
ii. **1967:** accepted the EU convention except those 2
iii. **1987:** Malta ratified these 2 however in Malta when you sign a treaty, that treaty does not automatically become part of the laws of Malta. So even though in 1987 we ratified individual petition, in Malta, a Maltese court could not apply the European convention unless there is an act of parliament incorporating it in Maltese law. Therefore, in august 1987 through act number 14, the European convention act, Malta incorporated the European convention in Maltese law with the argument being that if a Maltese citizen can take the government of Malta to the European court you might as well incorporate it in Maltese law so it could give him a remedy.

PARALLEL PROTECTION
So, we have a double, parallel protection as regard human rights in Malta. This means that it is possible to file one human rights action on the basis of two human rights instruments: chapter IV and the European convention on Human Rights. It is better to do so because there is a better chance that you will win. Also, it is convenient to do so because in some respects the Maltese Constitution gives a better protection to the individual (in the case of a right to a fair hearing for example) whereas in other areas the European Convention provides better protection (such as a right to family life).

Legal issues have arisen as a result of this parallel protection.
What happens if there is a conflict between the two laws?
Which law shall prevail?
Can a provision which is wider in its protection than the Constitution be applied, nonetheless?
You apply the wider protection. Therefore, the matter has now been settled by the so-called doctrine of wider protection.

For example, in our Constitution, in **article 47(9)** there is a provision which states that all laws which existed in Malta prior to 1962 cannot be declared to be in conflict with the right to property. The Constitution itself is saying an ordinary law created before 1962 can never go against the right to property. When however, in 1987 we incorporated the European Convention, the European Convention includes a right to property. So, all of a sudden, the owners of property which had been expropriated, for example, could under the Convention but not under the Constitution file a human rights case based on the European Convention. Since 1987, owing to this parallel protection certain restrictions present and certain rights missing in the Constitution now under the European Convention these rights exist, and these restrictions do not apply.

It is not unconstitutional to add, by means of an ordinary law, to the rights listed in Chapter IV, or to provide for a wider interpretation. What an ordinary law cannot do is afford less protection than what is provided in Chapter IV. So, the compromise, in practice, has been to apply the widest protection to the individual whether under the Constitution or under the European Convention Act which remains, up to the present day, only an ordinary law, albeit a special one, which however can always be amended or repealed by a simple majority in the House.

The Right to Life

CONSTITUTION
ARTICLE 33

Key words:
- **Intentionally**
- **Save**
- **Sentence of a court**
- **Reasonably justifiable**
- **Any person**
- **The defence of property**
- **Lawful act of war**

33. (1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence under the law of Malta of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this article if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -

(*a*) for the defence of any person from violence or for the defence of property;

(*b*) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(*c*) for the purpose of suppressing a riot, insurrection or mutiny; or

(*d*) in order to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war.

EUROPEAN CONVENTION

Our Constitution has followed very closely to article 2 of the European Convention.

ARTICLE 2

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

PROTOCOL 6

ARTICLE 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

There is a certain ranking in human rights, of course on the basis of the argument that if you do not have the right to life, it is useless to have the other rights as well. In other words, the right to life is first to be mentioned in Chapter IV and this is not a coincidence. The right to life is the first to be mentioned in most human rights legal instruments. For instance, in the European Convention it features as Article 2.

THE DEATH PENALTY

In the very first proclamation of the first right, the Constitution immediately introduces an exception (this right was introduced in 1964 where we still had the death penalty in our Criminal Code). So, the first exception is the death penalty. Article 2 of the Convention also introduces an exception to the right to life.

The first thing to note is that the Maltese Constitution refers to conviction of a criminal offence – which includes contraventions, apart from crimes – while the Convention refers

only to 'crime'. There is no doubt that imposing the death penalty for a mere contravention would breach the proportionality principle and amount to inhuman or degrading punishment. At the time of the promulgation of our Constitution (1964) and the European Convention (1950) the death penalty was still on the statute book of most European countries. Therefore, the death penalty which existed in most European countries when the European Convention was promulgated, was introduced as an exception.

Since then, Malta has abolished the death penalty, first in 1971 for civilians only and retained it for members of the armed forces, then in 1989, it was abolished even for the members of armed forces in times of peace but retained in times of war and finally, in 2000, we abolished it at all times even in times of war.
If there is no law in Malta allowing the death penalty, you cannot use the Constitution to say that it recognises it as it only recognises it so long as there is a law.
Besides, Malta has ratified **Protocol Six** of the European Convention which abolishes the death penalty and Malta has signed this. So, even though technically it is possible for the Maltese Parliament to reintroduce the death penalty as this would not go against the Constitution, provided that there is a law providing for such a penalty, it will be in breach of Protocol Six which we have signed internationally, and is therefore, an international obligation.

DEPRIVATION MUST BE INTENTIONAL
Note also that this right protects intentional deprivation of life.

POSITIVE OBLIGATION TO PROTECT LIFE
The wording of article 33 is in the form of a prohibition. This right, however, it has been interpreted to include a positive obligation to protect life. So, if a State fails to comply with its procedural obligation to investigate a killing, then it becomes responsible under Article 2. Therefore, there isn't not only the prohibition of state organs or officials from killing someone unnecessarily and unreasonably.
The European Court has also held that positive obligation means that States have to take appropriate steps to safeguard the lives of those within their jurisdiction. From this flows a primary duty on the state to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishing of such offences.
Here, we have had in the last 14 years, 3 important cases:

i. **Caterina Cachia v. DG Health** (CC) (8 January 2007): does this provision require that a state guarantees access to its citizens for proper health care?
Ms Cachia was dying from cancer. There was a very expensive drug against cancer which would not have cured her but would have prolonged her life for a few months. The applicant claimed that as a taxpayer she was entitled to this cancer drug. Ms Cachia expected the government to provide this drug free of charge. The Court said that although there is a positive obligation to protect life and the government should provide a good health service, this does not mean that all financial obligations should be ignored. The Constitutional Court remarked that the supply of free drugs could not be maintained at any costs and irrespective of circumstances and even referred to financial restrictions as a justification for the fact that the drug was not freely given under the National Health Scheme at that time.
ii. **Brincat v. Malta** (EcrtHR) (24 July 2014): For a number of years, the Malta Drydocks was a public entity. When it was still run by the State, asbestos caused

serious diseases to the workers as a result of their exposure to it. The question arose did the State provide the right to the Drydock workers? These workers lost the case in Malta, however, the European Court ruled in their favour. Concluding that the Maltese Government knew or ought to have known of the dangers arising from the exposure to asbestos at least from the early seventies, it reiterated its view that this positive obligation to protect life "must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities which by their very nature are dangerous".

iii. **Caruana Galizia v. Commissioner of Police** (CC) (5 October 2018): in that case, the family of Daphne Caruana Galizia objected to the fact that a particular police officer was in the investigation team of the murder and this officer had been heavily criticised by the murder journalist and also was the husband of a government minister. The family argued that this is not an independent and impartial investigation and for the first time ever, the CC decided that the positive obligation to protect life included an obligation by the state to ensure a fair and independent investigation.

ABORTION

Not only is there this exception but the problem has arisen: is abortion prohibited under article 33? In other words, does **the wilful termination of a pregnancy** amount to a violation of the right to life?

Two approaches:

1) Those who view abortion as a right of a woman to decide what to do with her own body (*pro-choice*),
2) Those who view the matter from the standpoint of the right to the life of the unborn child (*pro-life*).

USA

Until 1973, every state in the USA was free to allow abortion or to prohibit abortion. Then, in 1973, the US Supreme Court in Roe v. Wade, established, that at least for the first three months of a woman's pregnancy, there was an absolute fundamental right to abortion; and therefore, any law in any state of the US which violated this principle was unconstitutional.
Roe v. Wade (1972): A pregnant woman sued the secretary of the State of Texas which prohibited abortion alleging the fact that the State did not allow abortion went against her right to privacy. The United States Supreme Court ruled that there is a fundamental right to abortion within the first three months, dividing pregnancy into 3 trimesters. States could **regulate** wilful termination in the second trimester and prohibit abortion in the final trimester. Note that in the second trimester, you cannot prohibit but only regulate. This decision applies only to the USA. Of course, this is an extremely controversial decision.

The Council of Europe

The European court of Human Rights has left the matter within the discretion of the Member States of the Council of Europe. It has decided that voluntary abortions do not go against Article 2, but at the same time did not establish a right to abortion under Article 8 namely the right to privacy of a woman. Consequently, the Strasbourg organs have granted a wide margin of appreciation to contracting states as to when human life begins.
Till now, Malta, which still prohibits abortion, has not faced any litigation before the European court, and probably in such a case, the European court would not intervene since till now, they are respecting the sovereignty of Member States. Till now, the European Union as not intervened. The EU cannot intervene on matters of abortion however the European

court has intervened if in those countries where abortion exists, the government has discriminated or made it difficult for some to get an abortion.

Malta

Till now, abortion is a criminal offence, in other words, the Maltese legal position is definitely pro-life. The crime of abortion is still on the Statute book, but there has been no definitive court pronunciation as to whether the word "person" in article 33 applies also to unborn children.

The only case which clearly recognised the rights of the unborn child and which constitutes a precedent for future legal issues regarding the question as to when life starts, at least for legal purposes, is that of **Emilio Persiano v. Commissioner of Police** (FH) (24 August 2000): **in this case a warrant of prohibitory injunction was actually issued against the Principal Immigration Officer preventing him from expelling a pregnant foreign national even though she was illegally residing in Malta.**

A Maltese taxi driver's partner fell pregnant and while she was pregnant, the police were going to expel the mother-to-be from Malta since she was illegally residing in Malta. Emilio Persiano filed an action to stop the police from deporting the Moroccan partner on the basis that if his partner is deported, one would be deporting a potential Maltese citizen because if the father is Maltese, then the child is also Maltese. The difficulty is that this child had not yet been born so the question arose whether the unborn child has rights. The natural father and partner of the foreign would-be mother, who was a Maltese citizen, alleged that article 2 of the Immigration Act included unborn children as dependants of their parents, and since he was a Maltese citizen, such dependant enjoyed exempt status. If the mother were to be expelled, then the unborn child who enjoyed such status would be illegally deported.

The Court, even though the circumstances which led to the child being conceived were in breach of the provisions of the Immigration Act, for the mother was residing in Malta illegally, ruled that "*The unborn child was not an accomplice in such lawful actions and therefore cannot be prejudiced by them*" The judge ordered the police not to deport the partner of Persiano. Therefore, the unborn child had rights as much as a born person.

THE USE OF REASONABLE FORCE

This is an exception to the right to life, other than the death penalty. The condition is that

> been deprived of his life in contravention of this article if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -

Here, the **test of reasonableness** ('*reasonably justifiable')* makes its first appearance. When you restrict a right, that restriction has to be a reasonable one and, in this case, the force which you use resulting in the death of someone will not be unconstitutional if it is reasonably justifiable in the circumstances of the case.

Exceptions:

a. Self-defence: The first exception, subject to this reasonable force test, is self-defence "for the defence of any person from violence or for the defence of property". So, the plea of self-defence can be made not just when one defends oneself but also when one defends others who are in danger, or even for the defence of property. So, say I am with my father and someone is trying to kill him, I can protect him by killing that person. The reaction, of course, has to be immediate and reasonably justifiable. If someone simply punches him, I cannot kill that person in self-defence. The criminal code allows for self-defence under justifiable homicide. The danger must be **real,**

one's reaction has to be **proportionate,** and it must be **immediate**. This is also called justifiable homicide.

b. Affect lawful arrest/prevent the escape of a person lawfully detained: again, subject to the reasonable force test, there is no deprivation of the right to life if death ensues in order to affect a lawful arrest or to prevent the escape of a person lawfully detained. This restriction would be acceptable only if it is proved that the person whose death ensues, was a violent or armed person or had committed a violent crime. Similarly, an exception to the right to life exists when, in the process of suppressing a riot, insurrection or mutiny or in order to prevent the commission of a criminal offence, death ensues. **The burden of proof is on the State to show that the force used was reasonable or necessary**.
c. Death as a result of "a lawful act of war": this is not found in the European Convention.

The Protection from Arbitrary Arrest and Detention

ARTICLE 34

34. (1) No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say -

(*a*) in consequence of his unfitness to plead to a criminal charge;

(*b*) in execution of the sentence or order of a court, whether in Malta or elsewhere, in respect of a criminal offence of which he has been convicted;

(*c*) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of the House of Representatives punishing him for contempt of itself or of its members or for breach of privilege;

(*d*) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

(*e*) for the purpose of bringing him before a court in execution of the order of a court or before the House of Representatives in execution of the order of that House;

(*f*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

(*g*) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(*h*) for the purpose of preventing the spread of an infectious or contagious disease;

(*i*) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or

(*j*) for the purpose of preventing the unlawful entry of that person into Malta, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Malta or the taking of proceedings relating thereto or for the purpose of restraining that person while he is being conveyed through Malta in the course of his extradition or removal as a convicted prisoner from one country to another.

Our right to liberty is not absolute. As a rule, we should be free, but there are certain situations where our freedom can be restricted. The most common being when one is sent to prison. Freedom is one of the most fundamental rights to the extent that imprisonment is the most common criminal sanction to enforce law and order and punish transgressors.
Man being a social animal, finds himself in an unnatural environment when he is precluded from socialising and communicating with others. It is for this very reason that this freedom has to be scrupulously protected in practice and its restrictions implemented with caution. At the same time, there are **situations which warrant detention**, even before definitive judgement, **owing to the gravity of offence committed and the danger of the perpetrator committing other crimes against others or society or fleeing from justice**. From the very moment the individual is no longer free to go wherever he pleases; the person is under arrest.

Most decided cases in Malta have hovered around three main issues

(a) The lawfulness or otherwise of arrests made by the Police,
(b) The granting of bail and legal restrictions to such right,
(c) Detention of irregular migrants who enter Malta illegally.

POLICE POWERS OF ARREST

The most common exception to this fundamental human right is sub-article (f), '*upon reasonable suspicion of his having committed, or being about to commit, a criminal offence'.* This encompasses the police's powers of arrest, but they can only arrest us upon reasonable suspicion.

Every Police Force in a democracy must have the right to investigate; and before deciding whether there is a case against any criminal suspect, it is important that such person is interviewed. To do so, the Police have a right to arrest suspected persons and to deprive them of their liberty.

Without limitations it would be arbitrary arrest, so the Constitution and the Criminal Code lay down certain important rules namely:

a. **Reasonable suspicion** of having committed a crime; no arrest may be made in relation to crimes under the Press Act. Another exception are the offences arising from the Press Act and this safeguards the freedom of the press.
   Exception: arrest is possible for some contraventions e.g. refusing to obey order of Police or if contravention is in preparation for commission of a crime.

b. As a rule, the police need an **arrest warrant** issued by a judicial authority, the Duty Magistrate, and a copy of the warrant has to be given to the person arrested.
   Exceptions: In urgent cases, e.g. the *corpus delicti* is about to be destroyed, if someone is caught either red-handed, *in flagrante delicto* or if someone is caught immediately after the crime is committed or is about to commit the crime, or an escaped prisoner is caught, no warrant is needed.

c. The arrested person, at the moment of arrest, must be informed that he is under arrest and be given the **reasons for the arrest** (this does not mean the charge. They must give the reasons the moment the person concerned is no longer free to go where he pleases). The Constitutional Court, in Tonio Vella v. Commissioner of Police et, insisted that even though the entire details of the case need not be communicated, yet the arresting officer had to inform the arrested person of the general reason behind such arrest.
   The question of giving reason is a legal obligation but also because you cannot be arrested for certain criminal offences, such as, for parking illegally.

d. Police detention cannot exceed the period of **48 hours** but if the arrested person can be released before, the Police have a duty to do so. So, the 48 hours is a maximum. When the 48 hours come to an end, the Police have to decide either to release such person, or else arraign him under arrest in court and charge him.
   - **Frank Mifsud v. Commissioner of Police** (CC) (7 March 1990) was released before the 48 hours, but they could have released him before. The Constitutional Court ruled that where a person is arrested on the ground of reasonable suspicion that he committed an offence, the persistence of such a condition is a necessary condition for the validity of his continued detention.
   - **Police v. Joseph Galea et** (Court of Magistrates) (4 March 1981): the police arrested Galea and after 48 hours they release him, only to re-arrest as soon as he came out of the police headquarters. The Court of Magistrates said this is unconstitutional. After 48 hours, there has to be an effective release and an interval has to elapse before any further arrests. There has to be a reasonable interval between the first and second arrest.

While the Constitution says, 'criminal offence', the criminal code specifies that someone can only be arrested for having committed a 'crime'. Of course, there are some exceptions for contraventions, for instance, if that individual refuses to obey the order of the police, then the police can arrest him/her. Or else, if the contravention is in preparation for the commission of a crime. As a rule, no arrest can be made for contraventions, unless the commission of the contravention is a first step towards the commission of another offence, or a person is detected in the very act of committing the offence provided that one of the following conditions is satisfied:

(a) There is doubt about the identity of the offender, or false particulars are given to the Police, to protect a child, or if the arrest prevents a person from doing harm to himself or to others, or causing damage to property, or committing offence against decency, or blocking a public road; or
(b) Refusing to obey the lawful orders of the Police.

REASONABLE SUSPICION

Suspicion is not proof, if Police have proof, they may as well arraign the person in court. Suspicion means that there are circumstances leading to an indication which is not conjectural but reasonable. The suspicion must relate to a criminal offence. That suspicion has to be reasonable to arrest. Arrest is not illegal provided there was a reasonable suspicion, even if the person is in fact, innocent.

Tonio Vella v. Commissioner of Police et (CC) (5 April 1991): **a landmark judgement.** In this case, a person with a disability had his residence searched by the police, after receiving information that Mr Vella was involved in the possession of illegal firearms. A search was effected in his residence which did not prove any results. Despite this, Mr Vella was arrested. The Constitutional Court decided that there was no reasonable suspicion, with the argument being that if the search proved negative, the police could have at least verified the information received though the anonymous informer instead of arresting Tonio Vella. ruled as follows: '*it would appear that the police did not draw a distinction between interrogation and arrest, it did not realise that* ***for there to be suspicion there has to be at least some concrete indication resulting from the investigation*** *which had started.'*

Darryl Luke Borg v. Attorney General et (CC) (29 May 2015): in this case, the police arrested Mr Borg, and in the meantime, another police officer solved the crime by arresting someone else. The problem was the fact that they did not immediately release the innocent person. The Constitutional Court states that, '*Reasonable suspicion presupposes the existence of facts or information of the kind which satisfied an objective observer that the person concerned* ***could have*** *committed an offence.*

RIGHTS WHILE POLICE INTERROGATION

These rights are not found in the Constitution but are found in the criminal code.

i. **The right not to remain incommunicado**: I have the right to inform a relative or friend that I have been arrested. The law says a 'relative' or a 'friend' because perhaps I do not want to inform my mother or father but at least I have the right to inform a friend that I am under arrest. Apart from the right to challenge any arrest made not on the basis of reasonable suspicion, a person in police detention has the right to have a relative or friend of his to be informed of the fact of his arrest and his whereabouts.
ii. **The right to be medically examined by a doctor of choice prior to investigation**: This right exists so that if a doctor of my own choice examines me

and certifies that I am in good health, if after the 48 hours this no longer remains the case, it shows that the police did something to affect his health. He also has the right to be examined while in detention by a medical doctor of his own choice.

iii. **The right to legal assistance by a lawyer**: this right was first limited to consultation prior to interrogation. In virtue of EU law, a lawyer was given the right to be present. With that being said, he cannot interrupt proceedings and may only ask questions after the Police finish the interview.

RIGHT TO BAIL

After 48 hours, a person may be arraigned in court under arrest. In other words, after the 48 hours, the police have to decide either to release you or arraign you in court. In serious cases, they will arraign you in court under arrest. At that moment, if you are the lawyer, you will try and obtain freedom under certain conditions, known as **bail**. This is found in art. 34(3) of the Constitution of Malta.

> (3) Any person who is arrested or detained -
>
> (*a*) for the purpose of bringing him before a court in execution of the order of a court; or
>
> (*b*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,
>
> and who is not released, shall be brought not later than forty-eight hours before a court; and if any person arrested or detained in such a case as is mentioned in paragraph (*b*) of this sub-article is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The question arose <u>are these alternative rights?</u> That is to say, the vice-versa would be if a person is tried within a reasonable time there is no need to release him.
A superficial reading of this sub-article (3) would lead to the conclusion that so long as a person is tried within a reasonable time, such person is not entitled to be released on bail. This interpretation was challenged in the landmark case of Dr L Pullicino v. Commissioner Armed Forces.

Pullicino v. Commander AFM (CC) (5 April 1991) (Vol LxxV.105): **In the Pullicino case, no law can a priori prevent the court from granting bail.**
Pullicino, a former commissioner of police, was arraigned in court in 1987 and charged with wilful homicide of a person who was arrested at police headquarters. At that time, the Criminal Code used to provide that anyone charged with murder could not be granted bail. At the same time, the Constitution of Malta used to say that anything contained in the Criminal Code cannot go against human rights. Mr Pullicino challenged this under article 5(3) of European Convention, identical to article 34(3) of the Constitution, arguing that these provisions did not mean that a person could either be tried within a reasonable time or be granted bail, but he enjoyed both rights, i.e. a trial had to take place within a reasonable time, whether the accused was granted bail or not; and that bail is to be granted if the detention of the accused is no longer necessary. An *a priori* total exclusion by law of the granting of bail was *per se* in contravention of Article 5(3) (the court agreed). **In brief, applicant argued**

that a court always had to be given the right and authority to release a person form detention if it considered that any such detention was no longer reasonable and surpassed the parameters laid down in the permissible statutory derogations listed Article 5. The Constitutional Court said these are not alternative rights No law can prevent a Court from granting bail a priori. In other words, you have to allow that discretion to remain in the hands of the Court. Therefore, in the Pullicino case the Court did not say you have to grant bail to Dr Pullicino, it simply said **he has the right to request it**. After the Constitutional Court judgement which allowed the Court to decide whether to grant bail or not, Pullicino was granted bail under reasonable conditions.
What the Pullicino case said was that the Court, even in murder cases, must always be allowed to decide whether to grant bail or not. The Constitutional Court said you cannot by law prevent a Court from deciding even in murder cases whether to grant bail. **Of course, it can refuse bail**. Therefore, an individual can be tried within reasonable time AND granted bail. If court feels that pre-trial detention is no longer justified, bail has to be granted.

Conclusion:
A person detained on remand has the right not to be detained beyond a reasonable time and this involves
(a) The right to be released if there ceases to be adequate grounds for his detention,
(b) If he is not released, the right to be brought to trial within a reasonable time.
(c) DISCRETION ALWAYS IN HANDS OF COURT: NO PRIORI EXCLUSION.

LEGAL ASSISTANCE DURING POLICE DETENTION
Article 355AT of the Criminal Code provides that a criminal suspect in police detention shall have the right to consult privately with a lawyer in person or by phone for a maximum period of one hour. The Police have a duty to inform such suspect of this right.

The most important question which has arisen in the past years is do I have a right to a lawyer when I am in police detention? For a number of years, the answer was no, and the argument was that according to the Constitution you have a right to a lawyer **once you are charged with a criminal offence** and therefore not in detention as this is simply the pre-trial stage. The European Court of Human Rights put forward the argument that what happens before you are arraigned in court **can influence the question of whether your hearing is fair or not**. In other words, it is true that the right to a lawyer is guaranteed only once you are charged before a court but if you are denied the right to a lawyer in the pre-trial stage, that can affect the fairness of your criminal trial. This applies even more so when the arrested person is a vulnerable person, for instance, a young man.

In 2002, Parliament passed a law whereby the arrested person can consult a lawyer before the police interrogation, therefore, the lawyer does not enter the room. Moreover, this law was only put into force in 2010 because there was strong resistance from the police. Therefore, according to law, the consultation take place *prior* to the interrogation not during such an interview.

The legal issues which have arisen relate to whether the absence of legal assistance in the pre-trial stage should be only one factor to be considered in the wider context of a fair trial, in order to assess whether such absence prejudiced the fairness of the hearing as a whole; or whether the question of legal assistance at the pre-trial stage has been raised to a stand-alone fundamental right?

Victor Lanzon et noe v. Commissioner of Police (CC) (29 November 2004): Lanzon, a minor, was interrogated by the Police without access to legal assistance and in the absence of his legal guardian. During the interrogation he admitted to dealing in cannabis even though there was no other evidence but his statement which supported such fact.
The Court took the view that the trial had to be viewed in its **entirety**. The question which had to be put was whether the absence of legal assistance in a particular case vitiated the fairness of such hearing. Indeed, the Court ruled that the trial had to be considered as a whole and one should not focus separately on any particular incident.
At the time, in 2004, that was also the legal position prevailing in European case law.

DEVELOPMENTS IN EUROPEAN JURISPRUDENCE
The Salduz case brought about a development regarding legal assistance in pre-trial stages.
Salduz v. Turkey EcrtHR (Grand Chamber) (27th November 2008) (36391/02): in this case, the European Court of Human Rights ruled that "*In order for the right to be a fair trial to remain sufficiently "practical and effective" article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right".*
Compelling reasons would be that the lawyer isn't available for example.
The Salduz judgement marked a shift from the trail-as-a-whole concept. Even here the case revolved around a minor being interrogated by the Police in Turkey, on state security offences, in the absence of a lawyer. The European Court referred to several legal instruments both of the Council of Europe and the United Nations such as the 2003 Recommendations if the Council of Europe Committee of Ministers which stated that when minors are interrogated "they should in principle be accompanied by their parent/legal guardian…they should also have the right to access to a lawyer."
The Grand Chamber of the European Court of Human Rights, in reversing a judgement of the court of first instance, which had rejected applicant's claims on the basis of the trial as whole concept, remarked that:
"Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer…is one of the fundamental features of a fair trial." & "early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination."
The Court concluded that:
"Article 6(1) requires that as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the Police, unless it is demonstrated in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right."
The Court here clearly stated that it would consider the absence of access to a lawyer as an irretrievable prejudice to the fairness of a trial.
So even though it did not completely jettison the trial as a whole approach, it stated that as a rule, unless there is strict justification, absence of access to a lawyer shall be a *faux pas*, so serious that it prejudices the fairness of a trial even considered as a whole. This interpretation was confirmed by the Maltese Constitutional Court in the case of **Charles Steven Muscat v. Attorney General**.
In other cases, the Constitutional Court did decide that, when there was no evidence of any vulnerability of the suspect or other circumstances indicating irregularity then the fact that the statement had been given voluntarily, even in the absence of legal assistance, did not amount to a breach of Article 6.

In virtue of a European Union law, and this goes to show how much European Union law has become a source of Maltese constitutional law, a lawyer now has the right to be present during interrogation. In 2016, we had to change our law so that a lawyer would not only consult his client before the police interrogation starts but that he will be present, maintaining that he cannot interrupt.

MALTESE JURISPRUDENCE ON VALIDITY OF STATEMENTS

The question arises:

(a) Are statements made without any legal assistance prior to the introduction in 2010 of the right to such assistance valid? In other words, are those statements which were made without legal assistance when there was no law requiring legal assistance valid?
(b) Are statements made after consulting a lawyer but without having the lawyer being present during interrogation, valid?

In the beginning the Constitutional law used to say it depends: such as was the person a minor? Was the person vulnerable? Did the person have special needs? In which case the absence of a lawyer would invalidate the statement.
Moreover, one must keep in mind that when the only piece of evidence is the statement of the accused, the moment it is invalidated, he will be acquitted.
In **Borg v. Malta** (EctHR0 (12 January 2016) (375237/13)**,** a legal earthquake shook the Maltese legal landscape, Maltese jurisprudence has to move in a different direction in order to be consonant with that of the European Court.
The European Court ruled that:
*"In order for the right to a fair trial to remain sufficiently practical and effective, article 6(1) requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the Police unless it is demonstrated, in the light of the particular circumstances if each case, that there are compelling reasons to restrict this right…**the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction*** (emphasis by author).
One can note that up until what is written in bold is the same as the **Salduz** case. What the text in bold is saying is that if you use a statement, even if it is voluntary, which was taken in the absence of a lawyer, and you use that statement to convict someone, then the rights of the defence will in principle be irretrievably prejudiced. This therefore means that **if a statement, even if it is voluntary, is taken in the absence of legal assistance then it is not admissible in a court of law**.
The explicit reference to incriminating statements made without access to a lawyer as irretrievably prejudicing the rights of defence also cast a long shadow on the validity of pre-2020 statements released to the Police.

THE FORBIDDEN FRUIT THEORY

The question arises what happens if the police do not allow this legal assistance? Will a statement signed by a detained person in the absence of his lawyer be valid? In Malta, we never accepted the forbidden fruit theory. This is a theory which evolved in the United States which states that if the police, in investigating the crime commit a breach of the law, it cannot be used in court.
As above mentioned, we do not accept the forbidden fruit theory.

Article 349(2) of the Criminal Code provides that:

> (2) The omission of any precaution, formality or requirement prescribed under this Title shall be no bar to proving, at the trial, in any manner allowed by law, the facts to which such precaution, formality or requirement relates.

Besides, Rule 19 of the Code of Practice for Interrogation of Arrested Persons in the Third Schedule to the Police Act (chapter 164) states that:
"*The lack of observance of any of the provisions of this Code will not invalidate the statement taken, unless such non-observance nullifies the voluntariness of the statement. However, disciplinary proceedings may be instituted against persons who do not observe the provisions of this Code."*
Therefore, if I do not, for instance, allow a lawyer to be present during the interrogation but the arrested person voluntarily gives a statement and signs it, that statement is still valid.

FORBIDDEN FRUIT THEORY INTRODUCED?
Two years after the judgement of Borg v. Malta, there was the case of **Christopher Bartolo v. Attorney General** (5 October 2018) (92/16): Mr Bartolo had signed a statement without legal assistance (the police did not allow the lawyer to be present in the interrogation) and the Court of First Instance did not only annul the statement, but it also annulled the admission of guilt before a court of law. For clarity, Mr Bartolo first signed voluntarily the statement without a lawyer being present, then he was arraigned in court and when asked, the accused replied that he was guilty. On appeal, the Constitutional Court **allowed the admission of guilt to stand** since it decided that there was no necessary link between the statement and the said admission. However, it still ordered that no notice be taken of the statement made without the presence of a lawyer during the interrogation. Here the court was creating **exception to the forbidden fruit theory**.
The Court of First Instance had annulled not only a statement, but also an admission of guilt before a court of law, when the accused was not assisted by legal counsel, arguing that the two were intimately linked. Besides, the court did so not because no legal assistance was offered but because such assistance had not been provided for during the interrogation, a legal duty which was not in force at the time of the taking of the statement in 2013.
On appeal the Constitutional Court allowed the admission of guilt to stand since it decided that there was no necessary nexus between the statement and the said admission. However, it still ordered that no notice be taken of the statement made without the presence of a lawyer during the interrogation.

CONCLUSION

1. As a rule, legal assistance should be available from the veery beginning of any police interrogation. This is implicit in the right to a fair hearing since occurrences happening before the hearing itself can influence the fairness of the subsequent hearing itself.
2. Lack of such legal assistance creates a presumption that something of prejudice to the criminal suspect has occurred.
3. Usually once a breach of the right to a fair hearing has occurred and is confirmed by the court, the statement would be considered vitiated.
4. According to recent jurisprudence, the mere fact that there was lack of legal assistance does not automatically bring about a breach of the right to a fair hearing; one had to look at the entirety of the hearing, and in most cases, this can be done only when the proceedings come to an end. *

5. In certain cases, the Court has, prior to the conclusion of criminal proceedings, and as a preventive measure to avert a breach of article 6, ordered that a statement taken without legal assistance be ignored by the court of criminal jurisdiction.
6. Factors to be taken into account to gauge whether lack of legal assistance amounts to breach of the right to a fair hearing include whether the suspect was a vulnerable person, whether there was other evidence incriminating the accused apart from the statement, whether the court took into account such statements, whether the accused attempted in his evidence or submissions to challenge the contents of his statements.

*There are some judges who are saying I will still decide something which vitiates the statement by looking at the entire background of the case and not just whether the lawyer was present or not.

Forced labour

ARTICLE 35

35. (1) No person shall be required to perform forced labour.

(2) For the purposes of this article, the expression "forced labour" does not include -

(*a*) any labour required in consequence of the sentence or order of a court;

(*b*) labour required of any person while he is lawfully detained by sentence or order of a court that, though not required in consequence of such sentence or order, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained or, if he is detained for the purpose of his care, treatment, education or welfare, is reasonably required for that purpose;

(*c*) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;

(*d*) any labour required during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community.

In article 35, our Constitution prohibits the imposition of labour against one's will.
There are two main elements constituting forced labour:

(1) The work must be done involuntarily,
(2) The work is unjust and oppressive or involves avoidable hardship.

EXCEPTIONS
Such as,

1. any labour required in consequence of the sentence or order of a court.
2. labour required of a lawfully detained person which is reasonably necessary for reasons of hygiene or maintenance of the place where he is detain.
3. Labour required as part of a rehabilitation programme etc.
4. Labour required of a member of a disciplined force that is to say the Army, the Police or the Prison service in pursuance of one's duties.
5. Sub-article (d) which was the subject of two landmark judgements in one year (1977).

TWO 1977 CASES

George Mula v. Minister for Trade (FH) (21 March 1977): **A shortage of Maltese bread owing to strike action by bakers was considered an emergency threatening life or well-being of society**.

In short, the Bakers' Union had ordered a strike owing to the low price of bread. Consequently, the Minister of Commerce ordered all those on strike to open their bakery and if they refuse to do so they will be arraigned in court with the possibility of being arrested. The bakers refused to stop their strike and did not obey the Ministerial Order. Consequently, some striking bakers, amongst whom the applicant, were arraigned before the Criminal Court and charged with contravening the Order. Mula therefore filed a constitutional case saying that the Order was a form of forced labour. Government replied by citing article 35 (2) (d) of the Constitution which allowed forced labour in cases of an emergency or calamity that threatened the life or well-being of the community. So, the question was: did a strike by bakers amount to an "emergency or calamity"?

The Court ruled that in this case a situation had arisen where for some reason or another, the supply of bread, an essential commodity, was being seriously threatened and that this amounted to an emergency. Besides even after the Order the bakers could still continue to perform their same work as before. The Order was therefore not punitive. It is to be noted that the emergency mentioned in this judgement is not "*the period of public emergency*" which according to article 47(2) of the Constitution exists either when Malta is in a state of war, or when an order is issued by the President, or when the House by a two-thirds majority declares that there exists such an emergency. This is an emergency which had to be defined by the Court as one which "threatens the life or well-being of the community".

Dr Walter Cuschieri et v. PM (CC) (30 November 1977): **Striking government doctors were by law prohibited from exercising their profession in private hospitals.**
In this case, the Medical Association of Malta (MAM) registered an industrial dispute with the government and ordered partial strike action in the government hospitals. The members of MAM were allowed to enter the hospital, but they were ordered by their union not to perform the full range of their duties, particularly not to attend the outpatient's department. It also said that if there is an emergency it will still give assistance. The government reacted by locking out the striking doctors from government hospitals, saying either you come and perform the full range of duties or I shall lock you out, which it did keeping in mind that doctors wanted to perform their duties just not those related to the out-patients. Then, government passed a law whereby it prohibited private hospitals from engaging the services of striking government doctors. This was the law challenged in this case, with the argument that just because the striking doctors had an issue with the government, that same government should not impose a law prohibiting the private hospitals from using the services of the striking government doctors. Therefore, the question arose: Can a government pass a law imposing an obligation in private hospitals not to engage doctors just because there was an industrial issue at the state hospitals? The applicant doctors they alleged, among other things, that this was a form of forced labour - If you do not work with me, you cannot work anywhere. The Court of First Instance decided that here there was an emergency. The question was, however, who caused the emergency the medical union or the government? The striking doctors who were obeying a legitimate order of their trade union, or the Government which had locked out the doctors from the entire hospital? After all, argued the applicants, their strike action only applied to the outpatient department. It was the lock out which had created the emergency.
The doctors appealed to the Constitutional Court and the Constitutional Court rather than entering into this question decided that the law in actual fact was not forcing the doctors to work but forcing them not to work. It argued that our Constitution does not prohibit **indirect** forms of forced labour because the article in question, unlike the European Convention, prohibits only **forced** and not **compulsory** labour. And therefore, only **direct** forms of forced labour are prohibited. It then argued that the law provided for the prohibition of labour in private hospitals and was not a form of forced labour. The argument of the doctors was you are forcing me not to work and as a result I will have to renounce my strike action and work with the government. The court said that only forced labour is prohibited in Malta and not compulsory labour. The court said this was a form of indirect forced labour which does not only fall under forced labour. Therefore, the court distinguished between *Compulsory* (ECHR) and *Forced* (Maltese Constitution). *'Forced'* covered only direct forms of Forced Labour.
The Court ruled, *"The challenged amendment properly speaking considering its own wording, imposes non-labour in private hospitals to those who elect not to do what it prescribes; and if appellants state, as they are stating, that this brings about forced labour for them in Government hospitals, the connotation of what is compulsory for purposes of*

forced labour, in its intention and raison d'etre, is so indirect, apart from other considerations regarding the nature of forced labour, that, in the opinion of the Court, it clearly does not fall under the prohibition as formulated in article 36 **(today 35)** *of our Constitution".*

Apart from these two cases there were two other interesting cases:
Not Joseph Abela v. Hon Prime Minister (CC) (18 May 1994): a notary who tried to argue that he is being forced to collect taxes from the government.
Zarb Adami v. Malta (EcrtHR) (20 June 2006): this regards normal civic obligations which is not a form of forced labour. However, if the jurors' services are discriminatory, this no longer remains the case.

Inhuman or Degrading Punishment or Treatment

ARTICLE 36

> **36.** (1) No person shall be subjected to inhuman or degrading punishment or treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Malta immediately before the appointed day.
>
> (3) (*a*) No law shall provide for the imposition of collective punishments.
>
> (*b*) Nothing in this sub-article shall preclude the imposition of collective punishments upon the members of a disciplined force in accordance with the law regulating the discipline of that force.

Article 36 prohibits inhuman or degrading punishment or treatment.
So, there are 4 prohibitions in one.

i. Inhuman punishment and inhuman treatment
ii. Degrading punishment and degrading treatment.

The article also prohibits any law which imposes collective punishments though there is an exception when such punishment is meted out to members of a disciplined force according to a disciplinary law of that Force.

Something could not be inhuman but is degrading. For example, torture is an aggravated form of inhuman treatment. **The Greek Case (5 November 1969)**: The first time that the words 'inhuman' and 'degrading' were interpreted by the ECrtHR was in 1969 in the so-called *Greek case*. When a right-wing dictatorial regime was installed in Greece, they started arbitrarily arresting people and also torturing them. A group of European States filed a case against Greece. In that case, the European Commission of Human Rights (before you would go to the commission not the ECrtHR) said that:
*"the notion of inhuman treatment covers at least such treatment as **deliberately causes serve suffering**, mental or physical, which in the particular situation is **unjustifiable.** The word torture is often used to describe inhuman treatment **which has a purpose** such as the obtaining of information or confessions or the infliction of punishment, and it is generally **an aggravated form** of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it generally humiliates him before others or drives him to act against his will."*

Of course, there are obvious violations constituting physical ill-treatment like torture. Torture constitutes an aggravated and deliberate form of cruel inhuman and degrading treatment or punishment.

AN OBJECTIVE AND SUBJECTIVE TEST
In order to decide whether an ill-treatment is unhuman or degrading there are certain tests: an objective test and a subjective test.

The courts have decided that the standard of proof in cases of ill-treatment is not that of beyond reasonable doubt but on the balance of probability. Of course, there has always to be a certain measure of severity. But the courts have also adopted a subjective test to assess

whether a treatment is inhuman. In the case **Ireland v. UK** (28 January 1978), Ireland was alleging that the UK in Northern Ireland, was illtreating IRA prisoners.
The European court said:
*"It depends on **all the circumstances** of the case such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and in some cases, the sex, age, and state of health of the victim."*

Joseph Ellul Grech v. Attorney General (CC 19 April 2016): *"For a treatment to fall within the parameters of Article 3 it is necessary that such treatment reaches **a minimum level of severity**: such assessment is necessarily a **relative** one and depends on all the circumstances of the case such as the **nature** of the treatment, its **context**, the **method** of execution, the **duration**, the **physical and moral effects**; and, in certain cases, the **sex**, **age and state of the health** of the victim may also be relevant"*. So, the same act committed against a male would be illegal but not necessarily inhuman while the same treatment vis-a-vis a female would be both inhuman and illegal.

At what point does ill-treatment become inhuman or degrading? In Malta we had an important case on this issue. The same test applied in the Ireland v. UK case was applied in this case.
Tonio Vella v. COP (5 April 1991): in this case, Tonio Vella was subject to several acts of ill-treatment during his interrogation. During the interrogation the Police hit Mr Vella at the back of his neck, threatened to hang him, and they used obscene language, among others. Vella was a young person suffering from Polio. The Court remarked that the applicant was a frail diabetic person suffering a handicap. This meant that the Police had to use special care.
The court said,
"*in the opinion of the Court, considered on their own, none of the incidents is grievous enough to amount to inhuman and degrading treatment; but the cumulative effect of all the mentioned incidents on the particular person of applicant, was in the Court's view, sufficiently serious as to amount to inhuman and degrading treatment."*
Therefore, the Court is not saying that if someone is hit by the police on the back of his neck it does not constitute a criminal offence, but does this amount to inhuman or degrading treatment? The court said none of the incidents is grievous enough but the **cumulative effect** of all the mentioned incidents on the **particular person** (he was suffering from Polio) was in the Court's view sufficiently serious as to amount to inhuman or degrading treatment. So, both the objective and the subjective method are used.

NON-PHYSICAL ILL TREATMENT
This refers to when inhuman or degrading treatment are applied to a non-physical case.
The question is: can this article be extended to cover treatment which is not physical?

Ellul Sullivan et v. Housing Secretary (FH) (15 June 1976) (Mr Justice G. Schembri):
Eviction from one's own home was degrading treatment.
A requisition order had been issued under the Housing Act 1949 whereby premisses belonging to the Ellul Sullivan family, where a University medical student and family member Mr Tilney was residing, was taken possession of. They based their claim on inhuman and degrading treatment. The Court rules that the effects of eviction from one's own home, according to Maltese family values amounted to degrading treatment.
One can say that this is the first occasion where our Courts started widening the effects of this right to include non-physical ill treatment. What is meant by non-physical is that in this case, the individual was not treated in an inhuman or degrading manner as a result of being

punched or hit, for example. This was the first attempt to extend the article to cover not only physical but mental and psychological ill-treatment.

This trend with housing cases was followed in the *Antonio Pace* case and *Lucrezia Borg* case.

Antonio Pace v. Minister for Housing and Land et (CC) (17 October 1988) (Kollezzjoni Vol. LXXII.I.82): In this case, the Court again said that if you are evicted from your own home that amounts to inhuman or degrading treatment.
The court said that,
*"A family who is **evicted from its only dwelling house**, which also constituted a source of its income, necessarily suffers serve suffering, mental as well as physical, of a certain degree of gravity."*

A similar case is **Lucrezia Borg v. Housing Secretary** (FH) (2 September 1986)

However, the requisitioning of property needed for airport expansion and better security, with smaller alternative premises being offered, did not amount to degrading treatment in **Gaetano Testa v. Albert Attard noe et** (CC) (15 November 1989), where the Court proclaimed:
"The Court cannot see how the fact that a person is forced to get out of premises, following a requisition order issued in the public interest, and ordered to live in smaller premises, amounts to inhuman and degrading treatment. If at all, this is just inconvenience."

CONDITIONS OF DETENTION
The protection covers also the **physical** conditions of places of detention.

Joseph Azzopardi v. Commissioner of Police (CC) (14 December 1994) (Kollezzjoni Vol. LXXVIII.I.256): The Constitutional Court in 1994 ruled that the conditions of detention in the lock-up of the Police Headquarters, wherein the plaintiff had been kept in custody for more than 24 hours, were so poor and substandard that they constituted a violation of article 36. The Court also considered as an aggravating element, the fact that the plaintiff had called for help while he was in the cell, but no one went to check on him to see what was happening. He was not physically illtreated, no one assaulted him, but the fact that he was kept in a substandard police cell amounted to inhuman treatment.

FURTHER EXTENSION OF PROTECTION
The development continued as the Court started giving an even wider interpretation to inhuman treatment. Perhaps the widest interpretation of this article is found in the *Vassallo Gatt* case.

J. Vassallo Gatt v. Wilfred Cassar ne (FH) (19 March 1987): in this case, the party in opposition ordered a civil disobedience campaign, ordering its supporters to abstain from work. Consequently, the government-owned company reacted by dismissing all workers who did not attend work on that day. Mr Gatt did not attend work and was dismissed from his work. Government offered to reinstate him on the condition that he signs a declaration of apology, and that he will not obey any other civil disobedience campaigns. Applicant filed a human rights action.
The court said,
"the punishment imposed on him could only be considered as cruel for what he had done, and humiliating, since the sanction of dismissal is usually applied for faults which are so grievous as to come to unlawful if not criminal actions…the condition that he be required to

sign a declaration was unnecessary and has to be considered as being ***debasing both in his own eyes and those of others.***

Victoria Cassar v. Malta Maritime Authority (CC) (2 November 2001): Ms Cassar had challenged a regulation which provided that a port worker's license could be inherited only by male descendants. She filed an action based on both inhuman treatment and gender discrimination and won both. The Constitutional Court said, therefore, that this discriminatory treatment amounts also to degrading treatment.
The Court said,
*"This Court considers that this discriminatory treatment against a woman amounts to degrading treatment since it is the result of a false premise namely that a woman, just because of her gender, is not capable of engaging in this particular work…****provisions of this kind debase the dignity of women*** *and are altogether degrading towards her person and status".*
This case is similar to that of *Vassallo Gatt* in the sense that it too was a liberal interpretation.

EXTRADITION AND DEPORTATION
Can this provision be applied to prevent the deportation or extradition of a person to his country of origin or another country if he might face inhuman treatment?
An interesting development has been the application of the right against inhuman or degrading treatment or punishment to deportation and extradition. Firstly, one must make a distinction between the two. Deportation is the case where someone is here in Malta illegally and he is arrested and sent back to his country of origin. Extradition, on the other hand, means that someone has committed a crime, say in the UK, and he escaped to Malta and then the British police request his extradition to face trial in the UK. He could be a Maltese citizen. **We can extradite a Maltese national but cannot deport them.**

Soering case v. the UK (EcrtHR) (7/7/1989): **Extradition or deportation may amount to breach of article 3.**
In this case, the son of a German diplomat together with his girlfriend, murdered his girlfriend's parents. Upon having murdered the parents, Soering fled to the UK and as a result, the US authorities requested his extradition. The lawyers of Soering raised the plea that if he is to be extradited to Virginia, he will face not only the death penalty but the **death row** whereby until he is executed a number of years would elapse which is considered to be inhuman treatment. Therefore, they did not argue that the death penalty was inhuman treatment (because it was accepted in all states by the European Union) but that **the death row was inhuman**. The European court said a European country cannot argue that if I send someone out of Europe it is no longer my problem keeping in mind that the argument from the UK was that it was not their fault that they are sending him back and as a result of it being Virginia, he may face death row. The Court said a European state can be found to be guilty of unhuman treatment if it sends someone outside of Europe to a country where he can face inhuman treatment.
The court said,
"having regard to the ***very long period of time spent on death row*** *in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty and to the personal circumstances of the applicant,* ***his age and mental state*** *at the time of the offence".*
Soering was extradited on the basis of an agreement with the US government that the death penalty will not be imposed.

Deportation from Malta

Hassan Abdulle Abdul Hakim et v. Minister of Justice and Home Affairs (CC) (28 June 2013): In this case, Mr Hakim was going to be sent back to Libya, his country of origin. Our Constitutional Court said it is true that under the Convention there is no right to political asylum however the removal of a person can give rise to an issue under article 3. The Maltese Constitutional Court here, was following the Soering judgement.

When does the removal of a person give rise to an issue under art 3? When there are substantial reasons to show that such person, if removed, will face a real risk of being subjected to treatment prohibited by article 3 and in such cases, there is a duty that such person is not expelled. **Article 3 is an absolute right therefore, the government cannot argue that the individual entered Malta irregularly**. The Court will have to evaluate the conditions. Mr Hakim had to prove that the ill-treatment he will face will reach a certain level of severity.

The Constitutional Court said, *"because of the absolute nature of this right, this may apply also where the risk may arise from actions of persons or group of persons who are not public officers."*

If there is a state of chaos in my country of origin to the extent that my human rights may be breached by private individuals, because the country cannot maintain public order, then any other Council of Europe Member State should not extradite or deport me.

The Maltese Constitutional Court remarked,

"Under the convention and its Protocols, there is no right to political asylum. However, the removal of a person can give rise to an issue under Article 3 of the Convention when there are substantial reasons to show that if such person, if removed, will face a real risk of being subjected to treatment prohibited by Article 3. In such case there is a duty that such person is not expelled. Article 3 is an absolute right and there is no possibility that the risk of ill treatment be balanced by other reasons justifying such expulsion. The assessment as to whether there are substantial reasons indicating that there is such a real risk, the Court has to evaluate the conditions, and gauge them in the light of article 3, in the country to which such person is going to be removed. This test requires that the ill treatment to which such person may be subjected reaches a certain level of severity to enter within the parameters of the said Article 3. For the purposes of such examination all circumstances have to be taken into account."

The European Court, applying the special powers it has to order a precautionary measure, issued a prohibitory injunction against the Government of Malta to stop such deportations.

Right to Property

37. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition -

(*a*) for the payment of adequate compensation;

(*b*) securing to any person claiming such compensation a right of access to an independent and impartial court or tribunal established by law for the purpose of determining his interest in or right over the property and the amount of any compensation to which he may be entitled, and for the purpose of obtaining payment of that compensation; and

(*c*) securing to any party to proceedings in that court or tribunal relating to such a claim a right of appeal from its determination to the Court of Appeal in Malta:

Provided that in special cases Parliament may, if it deems it appropriate so to act in the national interest, by law establish the criteria which are to be followed, including the factors and other circumstances to be taken into account, in the determination of the compensation payable in respect of property compulsorily taken possession of or acquired; and in any such case the compensation shall be determined and shall be payable accordingly.

(2) Nothing in this article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property -

(*a*) in satisfaction of any tax, rate or due;

(*b*) by way of penalty for, or as a consequence of, breach of the law, whether under civil process or after conviction of a criminal offence;

(*c*) upon the attempted removal of the property out of or into Malta in contravention of any law;

(*d*) by way of the taking of a sample for the purposes of any law;

(*e*) where the property consists of an animal upon its being found trespassing or straying;

(*f*) as an incident of a lease, tenancy, licence, privilege or hypothec, mortgage, charge, bill of sale, pledge or other contract;

(*g*) by way of the vesting or administration of property on behalf and for the benefit of the person entitled to the beneficial interest therein, trust property, enemy property or the property of persons adjudged bankrupt or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons, or bodies corporate or unincorporate in the course of being wound up or liquidated;

(*h*) in the execution of judgments or orders of courts;

(*i*) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;

(*j*) in consequence of any law with respect to the limitation of actions, acquisitive prescription, derelict land, treasure trove, mortmain or the rights of succession competent to the Government of Malta; or

(*k*) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon -

(i) of work of soil conservation or the conservation of other natural resources of any description or of war damage reconstruction; or

(ii) of agricultural development or improvement which the owner or occupier of the land has been required and has without reasonable and lawful excuse refused or failed to carry out.

(3) Nothing in this article shall be construed as affecting the making or operation of any law so far as it provides for vesting in the Government of Malta the ownership of any underground minerals, water or antiquities.

(4) Nothing in this article shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate which is established for public purposes by any law and in which no monies have been invested other than monies provided by any legislature in Malta.

In view of the rise in price and value of property in Malta, in the last 40 years, this right has been interpreted in a number of constitutional judgements and European Court decisions.

Here we have two rights,

1. one right under Article 37 of the Constitution and
2. one under Article 1 of Protocol 1 of the European Convention (found in an amendment in 1952).

The first thing one has to understand, with regards to the right to property is that, under the Maltese Constitution, **we do not have a right to property**. Article 37 does not say 'the right to property', but it says that once your property has been taken by the State, then you are entitled to certain human rights, such as adequate compensation and the right to appeal. Therefore, under the Constitution **one cannot challenge the actual taking of his/her property**.

THE RIGHT TO PROPERTY UNDER THE MALTESE CONSTITUTION
ARTICLE 37
What our Constitution protects is not the right to property per se but that once the government has compulsorily taken possession of my property, I have the right/I am entitled to

(1) the payment of adequate compensation (so long as the compensation does not depart too much from the market value. If it is too distant from the market prices, it is no longer adequate),
(2) legal access to an independent and impartial court or tribunal to contest such compensation and
(3) a right of appeal from any decision to the Court of Appeal.

Therefore, **one cannot contest the taking of property by the state**. What is guaranteed is the right to compensation rather than the right to property *per se*. Under this article one cannot challenge the fact of the expropriation or the taking possession of property, but only the **amount of compensation**.

Two ways in which the State can take one's property

(1) **Expropriation**: Either the government takes your property to open a road, build a new school, hospital and therefore an **expropriation order is issued**, today by the Lands authority.
(2) **Requisition**: In the past, up until 1995, the government could also **requisition your property**. What the Constitution is safeguarding is not the right to retain your property but that once it is taken away by the state, you are entitled to compensation. Under the Constitution, when it was the only protection of Human Rights, no one could question why the State is taking one's property.

Article 47(9) of the Constitution
All pre 1962 laws exempted

(9) Nothing in article 37 of this Constitution shall affect the operation of any law in force immediately before 3rd March 1962 or any law made on or after that date that amends or replaces any law in force immediately before that date (or such a law as from time to time amended or replaced in the manner described in this sub-article) and that does not - (a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;(b) add to the purposes for which or circumstances in which such property may be taken possession of or acquired;(c) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or interested in the property; or (d) deprive any person of any right such as is mentioned in paragraph (b) or paragraph (c) of article 37(1) of this Constitution.

Under the Constitution of Malta, one cannot argue that the government did not take away his/her property in the public interest but to accommodate a particular person or that government had its own property and that instead of building on its own property, it built it on mine. Not only is it limited to the question of the payment of adequate compensation and contesting that compensation with a right of appeal to the Court of Appeal, but also that article 47(9) of the Constitution states that all laws enacted **prior to 1962**, as they stood on Independence Day, cannot go against the right to property. So, before we introduced the European Convention of Human Rights, (1) my rights were only limited to the 3 rights provided in the Constitution, and (2) I couldn't even use this limited right to property – the right to compensation – as regards laws enacted prior to 1962.
So, all pre-1962 laws, including the main law relating to expropriations namely the Land Acquisition (Public Purpose) Ordinance of 1936, cannot be in breach of article 37, they cannot be challenged under this provision This section still exists today. Article 37 contains a long list of exceptions. Note that the proviso does not refer to adequate compensation, but to compensation (the main argument of the government in the Church property case).

Why 3rd March 1962? In February of 1962, we had a general election whereby Dr George Borg Olivier became Prime Minister. Dr Edgar Mizzi, the Commissioner of Land at the time, informed the Prime Minister that the 1961 Constitution must be amended quickly because if the right to property is to be introduced, or the right to compensation, there will be a great number of cases since the British government had just expropriated thousands of acres of private property. They amended the 1961 Constitution and introduced this article, which was then reproduced in the 1964 Constitution. **This article is still in the Constitution, which is why it is so important that we have ratified the European Convention**. The only case before we enacted the European Convention act which was lost by the State and won by the applicant was ***the Church property*** **case.**

THE PROVISO
In 1974, Parliament introduced this proviso in article 37:

> Provided that in special cases Parliament may, if it deems it appropriate so to act in the national interest, by law establish the criteria which are to be followed, including the factors and other circumstances to be taken into account, in the determination of the compensation payable in respect of property compulsorily taken possession of or acquired; and in any such case the compensation shall be determined and shall be payable accordingly.

THE CHURCH PROPERTY CASE
This brought about the case **of Mgr G Mercieca noe v. the Prime Minister** (FH) (24 September 1984), the proviso found in article 37, was the subject of an important landmark judgement of the Constitutional Court.
In 1983, Parliament amended the Constitution so that it can lay down the criteria to determine the compensation. It enacted Act no. X pf 1983, the Devolution of Certain Church Property Act whereby it expropriated a large chunk of the immovable property of the Catholic Church. Under this law, all immoveable property belonging to the Roman Catholic Apostolic Church and acquired through accusative prescription, that is to say, that property for which it does not have documentary evidence, automatically becomes State property. Moreover, the State had the duty to use the proceeds from the sale of such property for the purpose of securing free education to all. By law, the State took possession of this property and then, applying

this proviso, the government established the criteria for compensation in general and specific terms. In truth, it was obvious that the criteria were laid down in the law so that government takes over the property of the Church at a very low price. The criteria included the fact that the government was only obliged to give compensation based on the value of when the property was acquired, instead of giving the Church the value of the property of today. Since a good part of the property of the Church goes back to the Middle Ages, this meant that not only a good part of the property of the Church would be expropriated but the compensation determined according to such criteria would be a pittance in relation to the current market value.
Therefore, the Church filed a Constitutional Human Rights case. Government justified this under the proviso to article 37(1) arguing that there was no need to pay adequate compensation because this was a special case, and the proceeds of that property were to be assigned to free education. So, government argued it was in the **public interest**, and it also argued *ubi lex voluit dixit* **(**what the law wants to state, it states it), that the proviso simply provides for compensation and not **adequate** compensation.
In this case the Court decided that this proviso, when it refers to 'compensation', is referring to the 'adequate compensation' in article 37. The Court ruled that the proviso allowed Parliament to establish the criteria, but the criteria should lead to an adequate compensation and not one which was ridiculous or inadequate. And by adequate it had to be as close as possible to the fair market value. In other words, it did not agree with the position of government that 'compensation' provided in this article of the Constitution means that the compensation to be given would be less than that which would have been awarded had there been no proviso.
The criteria established by the law, expropriating most of the Church' property did not lead to adequate compensation. This law was enacted after 1962, and therefore the Church could challenge it. Today it would have challenged it also under the European convention too.

N.B: There is no judgement of the Constitutional Court because during the appeal, there was a change in administration and the government withdrew this law.

THE RIGHT TO PROPERTY UNDER THE EUROPEAN CONVENTION

ARTICLE 1 PROTOCOL 1 ECHR

ARTICLE 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Following the European Convention Act of 1987 (Chapter 319), the right to property in Malta is also secured by the European Convention.

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions': no longer is the right restricted just to compensation, but, as a rule, I am entitled to keep my own property. This does not only include property ownership, but it could be lease, usufruct, emphyteusis, and so on.

'No one shall be deprived of his possessions except in the public interest': while under the Constitution of Malta I cannot challenge the taking away of my property, under the Convention I can challenge the taking away of my property if it is not in the public interest. For instance, the government requisitions private property and awards it to the party in government.

In Sporrong and Lonnroth v Sweden, the European Court stated:
"*This provision comprises three distinct rules. The first rule, which is of a general nature enounces* ***the principle of peaceful enjoyment of property****; it is set out in the first sentence of the first paragraph. The second rule covers* ***deprivation of possessions and subjects it to certain conditions****; it appears in the second sentence of the same paragraph. The third rule recognises that* ***the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose****; it is contained in the second paragraph*".

PUBLIC INTEREST PRINCIPLES ESTABLISHED IN MALTESE CASES

The European Convention allows an owner to contest not only the compensation but also whether the property was taken in the public interest or not. However, states enjoy a wide margin of appreciation in determining what is in the public interest, and court scrutiny of such element take place only where there are manifest cases of lack of public interest.
At least, now we can challenge what is in the public interest or not & also, under the European Convention, the taking of the property must be subject to the conditions provided for by law and the general principles of international law, which include adequate compensation.

It is legitimate to query the public interest in an expropriation order if the proper exercise to find government property in the area which could serve the same purpose was not made.

Galea v. Holland (Court of Appeal) (29 January 1980): The Court said that there is nothing irregular in assigning private property to political party clubs since it is in the public interest. 30 years later, in Phillip Grech v. The Housing Department, the party in government granted requisitioned property to its own party, was declared not to be in the public interest.

The best definition of public interest is found in the case of **Dr Carmelo Vella v. Housing Secretary** which interpreted the phrase "public interest" in the context of the Housing Act 1949. In that case, government requisitioned property from the Vella family twice – once in 1956 to grant the San Leonardo Band Club of Kirkop premises to run a band club and then in 1986 so that the club could build a hall for rehearsals. The Vella family challenged this second requisition order. **Vella v. Malta** (Administrative law case not a Constitutional case): in 1955, government had issued a requisition order on private property and awarded the property to the band club of Ħal Kirkop to use as a rehearsal hall at the expense of the Vella family who were the owners.
The Court decided in favour of the Vella family:
"The public interest on the basis of which these decisions and measures are taken by the public authorities, cannot at any time refer to any private interest. An interest is always private when it does not have any general application to the citizens at large, and to the universality of the general public in the State…The particular interest of a political party, of any cultural or sports association or club, such interest being private cannot be identified with the common public interest for the very reason that a public interest cannot be reduced to a particular interest."

The court declared that once the club is a private club, you cannot award in the public interest private property to a private club. This doesn't mean that just because the property is given to a private entity it is automatically not in the public interest, the project has to be looked at. A private hospital, for example, can be considered to be in the public interest.

Most of the property cases refer to the European convention because since our laws, even of today, were enacted before 1962, you cannot challenge the right to property under the Constitution. After the European Convention became part of Maltese law, dispossessed owners, for the first time, could challenge even expropriation orders or requisition orders made under pre-1962 laws. The European Convention does not have an exemption for pre-1962 laws of Malta so everyone started challenging everything.

PROPORTIONALITY AND FAIR BALANCE

The European Convention has made an enormous difference to the protection of property in Malta. It established the rule of public interest but also the rule of proportionality. This latter principle requests that a fair balance be struck between the demands of the general interest of the community and the protection of the individual's right to property; therefore the circumstances of the case must show the existence of a reasonable relationship of proportionality between the means employed and the aim sought. Such fair balance is not struck where the individual has been made to bear an excessive burden. The compensation need not be the market value but must be reasonably related to the value of the property taken. A fair balance is also impaired where there is a long delay in the payment of compensation.

The first Property cases which came before the European Court on the right to property against Malta:

(1) **Fleri Soler v. Malta** (EcrtHR) (26 February 2006): this was a case of private property that was requisitioned in 1946 and a forced lease of indefinite duration had been imposed. The property was requisitioned to be used as a government department, therefore, there was a public interest. But once it is was in requisition, the rent was fixed at 1939 prices by the Government, as opposed to rent prices of 2006.
The court said this is **disproportionate**. The Court took into consideration the low amount of **rent**, the fact that the premises had been requisitioned for 65 years and therefore, **not being able to retrieve your property forever** and the absence of sufficient procedural safeguards to come to the conclusion that no fair balance had been struck. This property had been requisitioned in 1946, the owner could not request it back not even if he needed it personally, he could not raise the rent or change the conditions of the rent.

So, if you prove that as a landowner you are carrying an excessive burden, then that would be in breach of the right to property, not under the Constitution of Malta, but under the First Protocol of the European Convention.

(2) **Ghigo v. Malta** (26 September 2006): regarding a similar requisition order, the Court ruled that there was no fair balance since the controlled rent did not reflect in any way the market value, and the owner had little or no influence on the choice of the tenant or the conditions of the lease. In this case, having regard to the extremely low amount of the rental value fixed by the Land Valuation Officer, and the fact that the applicant's premises had been requisitioned for more than 22 years, as well as the restriction of landlords'' rights, the Court found that a disproportionate and excessive burden had been imposed on the applicant. The applicant had been requested to bear most of the social and financial costs of supplying housing accommodation on third parties.

(3) **Amato Gauci v. Malta** (15 September 2009): in a similar case to that of Fleri Soler, an important law for the protection of tenants was struck down. This law dealt with the protection of emphyteuta. When a contract of emphyteusis (ċens) comes to an end, the emphyteuta (*ċenswalist*) has to vacate the premises. That is why to avoid the stringent rent laws, most landlords used to grant premises on emphyteusis rather than lease. In 1979, Parliament passed a law, whereby at the end of the emphyteusis if the premises were occupied by a Maltese citizen as his ordinary residence, them the emphyteusis was *ex lege* transformed into lease; the rent would be increased according to an inflation index, but never more than double the original ground rent (*canone*); every fifteen years the rent was to increase accordingly – but never beyond double the amount. The lease could be extended 'ex lege' *ad infinitum.*

The European Court remarked:

> In cases concerning the operation of wide-ranging housing legislation, that assessment (of fair balance) may involve not only the conditions of the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable.
>
> Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner.[172]

Since there was no available effective remedy to evict the tenant or obtain an adequate amount of rent, a disproportionate burden had been inflicted on the owners, and that protective provision of 1979 law was declared to be in violation of Article 1 Protocol 1. The Court took the following considerations into account to decide in the *Amato Gauci* case whether a fair balance had been achieved between the interest of the community and those of applicants:

"In the present case, having regard to low rental value which could be fixed by the Rent Regulation Board, the applicant's state of uncertainty as to whether he would ever recover his property, which has already been subject to this regime for nine years, the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades, the Court finds that a disproportionate and excessive burden was imposed on the applicant (principle of proportionality). *The latter was requested to bear most of the social and financial costs of supplying housing accommodation to Mr. and Mrs. P. It follows that the Maltese State Failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property.*

DE FACTO EXPROPRIATION

The power station case of Delimara: Mintoff v. Prime Minister (CC) (30 April 1996) (Vol LXXX.I.206): Mr Mintoff had a residence at Delimara. Government decided to build a new power station next door to Mr Mintoff's residence. So, it did not expropriate his residence, but it built a power station next to his house. Mr Mintoff filed a human rights case, based on the European Convention, saying that even though *de jure* there was no expropriation, there was however a **de facto expropriation** because the building of this power station rendered his property practically useless. For the first time, the Constitutional Court decided that the building of a project next to a private residence which reduces considerably the value of that

residence is a breach of the right to property because you are reducing the value of the property and not giving compensation.
The Court accepted this argument and said that:
"As a direct consequence of the Power Station there is no doubt that the property lost almost its entire objective value, and its subjective value to the applicants in absolute terms for they cannot continue using it for any residential purpose for which it was originally meant and regularly used."

The Court did not decide that the power station had to be dismantled but that they had to pay compensation for the loss of value of the property. It introduced for the first time, applying the jurisprudence of the EcrtHR, the **principle of proportionality**.

The Court also cited the *Sporrong case*: This principle of proportionality was based on an important case of the European court of **Sporrong and Lonroth v. Sweden** (ECrtHRE) (23 September 1982) where the European Court ruled that (cited by the Maltese Court),
"Some notion of fair balance should be struck between the demands of the general interest of the community and the requirements of the individual's fundamental rights. It cannot find this balance if the person concerned has to bear…an individual and excessive burden."

In the *Mintoff* case, Mr Mintoff was carrying an individual and excessive burden, therefore, the government action was not proportionate. Now one could challenge, for instance, a requisition order not because it should not have been issued, since most are issued in good faith, but **because it is at the expense of the owner**. That is to say, the owner has to be paid a proportionate compensation.

THE CRITERIA THE EUROPEAN COURT APPLIES TO DECIDE WHETHER SOMETHING IS PROPORTIONATE OR NOT
THE RULE OF PROPORTIONALITY
No European Court or Maltese court has said that Government cannot protect families from being evicted or for providing living accommodation to persons, but you have to pay a price for that, and that price cannot be shifted on the owner but must be carried by the Government. So, there has been no case where the Court ordered the eviction of a tenant because the rent is low. It solely stated the rent must be increased, otherwise you would be breaching, as a Government, the rule of proportionality.

Criteria
(1) The amount of rent – is it reasonable?
(2) It is uncertain as to whether the owner could ever reacquire this property.
(3) The lack of procedural safeguards – there are safeguards in favour of the tenant, but none for the owner.
(4) The rise in standard of living in Malta over the past decades. What was happening was that wages were rising, the cost of labour was rising, and the rents remained frozen. Sometimes, the owner would have to, by law, undergo repairs in the rented house but this would be not at 1939 prices but at 2009 prices.

DELAY AND ARTICLE 1 PROTOCOL 1
The delay in payment of compensation can also amount to a breach of Article 1 Protocol 1. In **Vassallo v. Malta** (EcrtHR) (11 October 2011), the European Court ruled that the fact that land was expropriated for a social housing project which did not materialise after 28 years

made the public interest element week and was in violation of Article 1 since the property value rose and the owners did not benefit from such increase in value.

In **Frendo Randon v. Malta**, the fact that compensation had not been awarded after forty-two years in itself amounted to a violation of Article 1.

OTHER CASES

Galea Tesaferrata v. Prime Minister (FH) (3 October 2000): in 1979, Parliament passed a law whereby if a Maltese citizen is occupying premises as his residence, under title of emphyteusis, if it was for more than 30 years, so it is a temporary emphyteusis, at the end of the 30 years you multiply the ground rent by 6 and it becomes a perpetual emphyteusis.

> "It cannot be said in this case that the increase by six times of the ground rent, that is to say from Lm8 to Lm48 amounts to adequate compensation for a property which has been comprehensively valued, at Lm44,000, even if in that amount is included the value of the *directum dominium* which includes the right to receive the miserly sum of Lm49 per annum. Such an amount can barely be described as compensation let alone *adequate* compensation. "

Louis Apap Bologna v. AG (CC) (29 March 2019): This case involves restrictions on increasing rent of commercial premises at Republic Street. A shop in Republic street was being rented at €707/year. At that time, the law of commercial leases stated that you could not increase the rent if it exceeded **40% of what it would have fetched in rent in 1914**. This was considered to be unreasonable, and the Constitutional Court said that:

> The respondent Attorney General seems to claim that once the measure was taken by the State in the general interest , this is sufficient to make the measure lawful. The same applies to the submissions made by respondent Flores . However, both are failing to give consideration to the disproportionate burden put on the owner, even one may say excessive, considering the fact that there was no measure in place which could lighten such burden such as some form of State aid to applicant Apap Bologna intended to correct the current imbalance. Neither does it result to the court what rights respondents Flores had if at all to benefit from a rent much lower than what the market dictates, which according to the technical referee reached the sum of 86,540 euros a year while the annual rent being received today is 707.40 euros.

Anthony Debono v. AG (FH) (8 May 2019): the court said, the court is also of the opinion that applicants, as owners, for a long period of time, carried alone the social burden through their property without being assisted in any way by the State which on the one hand, legislated for the social needs of the country with the introduction of protective laws, like chapter 69 of the Laws of Malta, to ensure that persons like respondents would have a residence where to live, but it failed, in the same way, to protect and safeguard the rights of owners **in such a way that an imbalance was created between the rights of the owners on the one hand and the public interest on the other**. It should never be that private individuals are requested to carry alone the burden of social measures intended to protect and safeguard other citizens, unless they are adequately compensated for doing so.

> In vista ta' din il-ġurisprudenza li toħroġ mill-ġurisprudenza kostanti tal-Qrati fejn ġiet rikonoxxuta l-applikabilità tal-artikolu 37 tal-Kostituzzjoni għal sitwazzjonijiet bħal dik mertu ta' din il-kawża, il-Qorti tqis li l-intervent leġiżlattiv li wassal biex ir-rikorrenti ilhom **imċaħħda mill-proprjetà tagħhom** għal diversi snin, u biex ikun hemm **kontrolli** fir-rigward kemm tal-introjtu li rrikorrenti qua sidien jistgħu jipperċepixxu mill-kirja ta' din il-proprjetà, kif ukoll fir-rigward tar-**ripreża** tal-istess fond, jammontaw għal leżjoni tad-dritt ta' protezzjoni ta' proprjetà privata kif maħsuba fl-artikolu 37 tal-Kostituzzjoni.
>
> Inoltre l-Qorti hija tal-fehma wkoll li r-rikorrenti qua sidien għal snin **twal ġarrew waħedhom piż soċjali** bil-proprjetà tagħhom mingħajr ma ġew megħjuna jagħmlu dan mill-Istat, li minkejja li min-naħa l-waħda ħa ħsieb jilleġiżla għall-ħtiġijiet soċjali fil-pajjiż bl-introduzzjoni ta' liġijiet bħalma huwa l-Kap. 69 tal-Liġijiet ta' Malta sabiex jiġi assigurat li persuni bħall-intimati jkollhom dar fejn jgħixu, madanakollu naqas milli bl-istess mod jaħseb biex jissalvagwardja l-jeddijiet tas-sidien, **b'mod li nħoloq żbilanċ bejn il-jeddijiet tas-sidien min-naħa l-waħda u l-interess ġenerali min-naħa l-oħra. M'għandu qatt ikun li individwi privati jintalbu jġorru waħedhom il-piż ta' miżuri soċjali intiżi biex jipproteġu u jħarsu ċittadini oħra, sakemm ma jiġux ikkumpensati għal dan b'mod xieraq.**

Right for Privacy of Home or Other Property

Under the Maltese Constitution, there is privacy but there is no Right to Private and Family Life. That right is mentioned in the preamble in article 32 (c), but not found in the Constitution and is not enforceable in a court of law. On the other hand, in the European Convention, article 8 deals with the Right to Private and Family Life and therefore, we can quote from it.

ARTICLE 38

Protection for privacy of home or other property.

38. (1) Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision -

(*a*) that is reasonably required in the interest of defence, public safety, public order, public morality or decency, public health, town and country planning, the development and utilisation of mineral resources, or the development and utilisation of any property in such a manner as to promote the public benefit;

(*b*) that is reasonably required for the purpose of promoting the rights or freedoms of other persons;

(*c*) that authorises a department of the Government of Malta, or a local government authority, or a body corporate established by law for a public purpose, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property or installation which is lawfully on those premises and which belongs to that Government, that authority, or that body corporate, as the case may be; or

(*d*) that authorises, for the purpose of enforcing a judgment or order of a court, the search of any person or property by order of a court or entry upon any premises by such order, or that is necessary for the purpose of preventing or detecting criminal offences,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

REQUISITION OF PROPERTY

This provision (articles 38) has mainly been interpreted in the context of requisition orders under the Housing Act of 1949. This right of Government to issue requisition orders was abolished in 1995 but pre-1995 requisition orders are still in force under the old law. a requisition order divests the owner of the possession of his property, and allows Government to allocate it to third parties; as a consequence a forced lease *ex lege* is imposed over the property in favour of such party. The most controversial judgement in Malta's constitutional history was one instituted by Edward Ferro.

Ferro v. Housing Secretary (19 June 1973): Ferro was going to get married, and government issued a requisition order on his property in St Julian's. The Housing Secretary, in virtue of this order enters the premises and changed the key of the main door. Ferro argued that such an order went against his right under article 38 not to be subjected to the search of his property or the entry by others on his premises. Ferro challenged the law, i.e. the right if the Housing Secretary to issue requisition orders. The Constitutional Court, rather than siding with Ferro, sided with the government on the basis of the fact that a requisition order under the housing act of 1949 (a convenient act which was constantly renewed),

> has the effect of depriving the requisitionee of the possession of the property so that from the moment the order comes into force until it remains operative, the possession of the requisitioned premises and its disposal are no longer in his hands... the authority that in virtue and according to that law takes over that possession may naturally make use of such right by entering the house whose possession by law is vested in it without in any way breaching the right to privacy of one`s home.

This case is saying that when the Housing Department enters the property by force, it will be entering its own property because it issues the requisition order.
Today, government cannot requisition property anymore but the old requestion orders are still in force. Gradually, we started reducing the effects of this judgement…and gradually article 38 started being interpreted as protecting ones right to a **home**.

Anthony Caruana v. Housing Secretary (FH) (18 August 1973): a requisition order was challenged which had evicted the Caruana family from their **home**. It was argued that this is unconstitutional since it is a home. It was argued that the Housing Act is constitutionally valid, but the exercise its powers under certain circumstances such as eviction from one's own *home* – as distinct from property – could amount to violation of article 38. The case was won on the basis that the Caruana family had been evicted out into the street. The Court ruled that the Constitution protected one's own home. Any arbitrary eviction of one's own home was a breach of article 38. The same was confirmed in Antonio Pace. It took 24 years for the Constitutional Court to inform us Maltese that we have a right to our own home.

This attempt had already been made with some success in a previous case, where the principle was enunciated; but the facts showed that the requisitioned premises did not constitute the home of the applicant. In **Carmela Caruana v. Housing Secretary** (FH) (18 August 1873)
The Court said:

> Home is that place (or even part of it) where one normally and effectively resides. The concept of home is altogether distinct from that of property or possession, even though usually the two are vested in the same person... therefore the existence or otherwise of a title for the occupation of the premises is not a determining factor to decide whether the premises are one's home. Title is certainly a factor which has to be taken into consideration, but the determining factor is the effective and regular occupation as a residence. If premises constitute a home to any person, it remains his home until the individual concerned remains regularly and effectively residing in it; and it ceases to be his home when that individual goes to reside somewhere else where he starts regularly and effectively residing.

Antonio Pace (17 October 1988) (Vol LXXII.i.82)

THE RIGHT TO PRIVATE AND FAMILY LIFE
This is a right usually closely linked to privacy of home. But it is not guaranteed in the Constitution. Under the European Convention everyone has the right to private and family

life, his home and his correspondence. Of course, there are exceptions in the public interest. In 1987, Parliament passed the European Convention Act which today is chapter 319 of the Law of Malta. This why we have a double protection; a protection arising from the Constitution of Malta and also that of chapter 319. Therefore, it was only with the incorporation of the European Convention in our legal system that this right became justiciable in Malta through article 8 of the Convention.

Most cases in Malta have hovered around the meaning of family, the rights of children born out of wedlock, the right of fathers to dispute the paternity of a descendant, child custody cases and the rights of transgender persons.

(1) **Mizzi v. Malta** (EcrtHR) (12 January 2006): **action of disavowal (denegata paternita')**
This relates to the action of disavowal and ended up before the ECrtHR. Under our Civil Code, a child born in marriage is presumed to be the child of the married couple. If the father wants to prove that even though a child was born in a marriage, he is not the father, he files an action of disavowal of maternity. Since the law favours legitimacy, the law used to make it difficult for the father to file such an action. To do so, he had to prove not only the adultery of his wife but also that the birth of the child was hidden from him. So, if my wife did not hide the birth from me, I could not vow the paternity of the child. Mizzi filed a case arguing that this goes against his right to life and private life. The strict requirements to dispute the paternity of a child were considered to be an unreasonable and disproportionate interference with the right to family life.

(2) **Genovese v. Malta** (EcrtHR) (11 October 2011): **Citizenship at birth to children born outside wedlock**
A Maltese Law on citizenship which used to discriminate between children born in marriage and children born outside marriage whereby if the child was born outside marriage, that child automatically become Maltese only if the mother was Maltese was deemed to be a breach to right to family life. This was not deemed to be *per se* in violation of Article 8, but in breach of Article 14 in conjunction with Article 8.

(3) **M.D v. Malta** (EcrtHR) (17 July 2012): **no automatic loss of parental rights in case of criminal conviction.**
In spite of the fact that the mother was found guilty of serious offences causing her to automatically lose her parental rights over her child, the European Court said there cannot be by law an automatic loss of parental rights; the Court must be allowed the discretion.

(4) **Gilford v. Dir Public Registry** (CC) (9 October 2011): **transgender could have annotation on birth certificate.**
The fact that Maltese law did not provide for the possibility that the fact that a person has changed his or her sex is registered in the act of birth at the Public Registry, was considered to be a breach of Article 8. A transgender case where, for the first time, the Constitutional Court ordered the public registry to make an annotation in a birth certificate to change the name from Mario to Maria.

(5) **Diane Abdila v. FS Mifsud** (CC) (26 June 2015): **DNA test on 88-year-old.**
The taking of a genetic test in civil proceedings relating to paternity, even if it involved an eighty-eight-year-old man, was not a breach of Article 8.
She argued that she was the daughter of Mr Mifsud and requested that he submits himself to DNA testing and he said it goes against his right to private and family life. The court replied:

Diane Abdil;l;a v FS Mifusd (CC) (26 June 2015) DNA test on 88 year old: This Court recognizes the right of applicant to establish her paternity even by scientific means and recognizes as well the validity of the reasons put forth by her in support of her position, namely the safeguarding of her interests, moral and proprietary… the interference with the private life of respondent, as a result of the articles applied in his regard, is justified, since it is intended to establish the personal identity of applicant and safeguard her proprietary interests towards respondent so long as the DNA tests indicate that he is her biological father.

Ms Abdila had every right to request a DNA testing on her 88-year-old father.

Other cases involve the right to marry & expulsion of aliens.

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

When it comes to this right keep in mind: the Court takes into consideration whether any concrete or substantial hardship or determent to the public interest had been demonstrated.

Securing Protection of the Law: The Right to a Fair Hearing

Under Maltese law, this right is guaranteed by article 39 of the Constitution along with Article 6 and 7 of the European Convention, and Articles 1 to 4 of Protocol 7 to the European Convention of 1984.

This is one of the most interpreted rights in the Constitution and in the European Convention. From 1987, by virtue of Act No. XIV and therefore the incorporation of the European Convention into our domestic law, the main Codes of our legal system no longer retained their immunity as such immunities did not apply to the provisions of the Convention and consequently, anything contained in these Codes could be challenged as being in breach of the Convention.

Article 39 of the Constitution is divided into 11 sub-articles. The first two sub-articles deal with the right to a fair hearing in criminal proceedings and the right to a fair hearing in civil proceedings, respectively. It is to be noted that the words **'fair hearing' are not defined**. Since it is not defined, we have to rely either on jurisprudence (case law), or each time one feels that there has been a procedural irregularity or the procedure has not been fair, one can always allege that his/her right to a fair hearing has been breached. Of course, there are certain golden rules like *nemo iudex in causa propria* or *audi alteram partem* or that a judge must give reasons for his decision, particularly if there is an appeal from such decision.

The hearing has to be fair. There is no definition of 'fair'. For example, in the past, the son or daughter of a judge could defend cases before her/his father or mother. The argument was that as long as the parties are not related to the judge. Another example is that on one occasion, the court postponed a case for submissions and instead of hearing submissions, it delivered the judgement without hearing the submissions. Fair hearing applies not only to criminal cases but also to civil. The difference is that in criminal cases, the fair hearing has to be by a court and in criminal cases, it can be by a court or adjudicating authority.

From article 5 onwards, the Constitution lays down certain important principles/specific rights which are applicable only in criminal proceedings. Therefore, in criminal proceedings, one does not only have the general right to a fair hearing but also specific rights which are so important that they are enshrined in the Constitution. On the other hand, as regard civil proceedings, the Constitution only provides for a general right to a fair hearing. Naturally, one can always argue that the certain rights which are specifically granted in criminal proceedings, belong to the realm of a general right to a fair hearing such as the right to a lawyer which is specifically guaranteed in criminal trials but not mentioned in civil proceedings.

SUB-ARTICLES (1) & (2)

> **39.** (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Article 39(1): Criminal offence can be a crime or contravention.

> (2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

Article 39(2): This is a sub-article dealing with civil proceedings.

The difference between the two sub-articles apart from the fact that article 39(1) deals with criminal proceedings and Article 39(2) deals with civil proceedings is that while in the case of criminal proceedings, only a court can decide my case, in the case of civil proceedings, it can be **a court** or **other adjudicating authorities**. Of course, in both cases, they must be independent and impartial. While in criminal proceedings, I have a right to appear before and independent and impartial court, in the case of civil proceedings, it can be an independent and impartial court or other adjudicating authority.

This was established in the landmark judgement **Police v. Emanuel Vella** (CC) (28 June 1983): in this case, Mr Vella, a meat seller, was charged with a criminal offence namely, selling meat at a price higher than the one fixed by law. Instead of appearing before a Court, he appeared before a tribunal composed of a magistrate and two lay persons. The Constitutional Court said that unlike the European Convention, which deals with criminal and civil proceedings conjointly, our Constitution deals with them in two separate sub-articles **because they are different**. In non-criminal cases there can be a tribunal to decide a case, but when it is a criminal offence, then I have a right to appear only before a court which is presided over by a judge or magistrate. Therefore, the Court said that 'court' means that presided over by a judge or magistrate and therefore the proceedings were deemed to be unconstitutional.

Gradually, this protection that in criminal proceedings only a Court can decide criminal proceedings, was extended to cover also stiff or hefty administrative penalties. In other words, Article 39(1) has been extended by the Constitutional Court to cover also heft administrative penalties.

THE NATURE OF A CRIMINAL CHARGE

What amounts to a criminal charge remain within the discretion of the European Court. Even where an offence has been depenalised, the European Court has retained the right to verify whether the nature of the depenalised offence and the penalty still retain their penal character, in which case Article 6 still applies.

Federation of Estate Agents v. Director General Competition (CC) (3 May 2016)

A hefty and punitive administrative penalty is still a criminal penalty.

The Constitutional Court ruled that an administrative penalty can still be considered as a criminal sanction. Instead of being given a fine, which if not paid will be converted into imprisonment, if you do not pay an administrative penalty, the government can sue you. Therefore, they are considered to be a criminal sanction and can be decided by someone who is not a judge or magistrate. The problem arose when the government started depanelizing certain offences, but the administrative penalties were stiff.

In this case, the Constitutional Court said that if it is a **punitive** administrative penalty, that Administrative Penalty, even though it is not called a fine and even though you cannot be sent to prison for it, if it is **punitive/hefty/harsh**, it is still a criminal sanction. If it is a criminal sanction, then only a Court can impose an administrative sanction.

This protection is only found in the Constitution of Malta and not in the European Convention. This is one of the rare occasions where **the Constitution of Malta provides a wider protection than the European Convention**. The European Convention allows this as seen in article 53, which states that Member States of the Council of Europe can grant more rights than those contained in the European Convention, but it cannot grant less than the European Convention. So, here the Constitution provides more rights than the European

Convention. The extra right is that while in the European Convention criminal proceedings can be decided by not only a court but by an adjudicating authority, in the Maltese Constitution criminal proceedings can only be decide by a court.

Rosette Thake v. The Electoral Commission (CC) (8 October 2018): The Constitutional Court ruled that even at first instance, in criminal penalties, including administrative penalties, only a Court can impose them.
What are civil rights and obligations? Civil rights not in the sense of the Civil Code only but even Human Rights cases.

ACCESS TO A COURT
Anthony Frendo v. AG (CC) (30 November 2001): at that time, around 15 years ago, if you received an *ex officio* on value-added tax which is what Mr. Frendo received, according to the VAT law at that time, if you wanted to appeal from such an assessment, you had to deposit a percentage of the undisputed tax. So, I am suing the VAT Commissioner and in order to do so, I have to deposit a percentage of the tax in dispute. This is a situation where the other party fixes the amount which I need to pay in order to sue it.
The Constitutional Court, in this case, ruled that (1) this falls under sub-article 2, so one has a right to a fair hearing even in tax disputes and (2) if you create obstacles when it comes to the access to a court, that is a breach to the right of fair hearing. The Government argued that the dispute has not yet arrived before the Court of Appeal. Therefore, their argument was that the right to a fair hearing starts when the hearing starts and here it has not yet started. The Constitutional Court said if you block access to a court, you are just the same blocking someone from a fair hearing. Therefore, **access to a Court is part of the right to a fair hearing**. The right to a fair hearing does not start only from when the hearing starts, **but pre-trail incidents can affect the right to fair hearing**. If a law blocks you access to a court, even though the hearing has not yet started, that is a breach to the right of a fair hearing. This principle was **first proclaimed by the European Court**.

IMPARTIALITY OF A COURT OR ADJUDICATING AUTHORITY
Demicoli v. Malta: a case which started in Malta before the First Hall of the Civil Court, proceeded to the Constitutional Court and then to the European Court of Human Rights. This was the first case of Malta before the ECrtHR. In this case, Mr Demicoli was the editor of a satirical newspaper called '*mhux fl-interess tal-poplu'* in which he published a satirical article about two Members of Parliament from the government side. At that time, it was possible for any Member of Parliament who felt slandered for what he said in the House of Parliament to raise a breach of privilege before the speaker and rather than going to court, the editor was arraigned before Parliament. The question arose if a private individual like Demicoli, rather than being charged before a Court, is charged before Parliament, is Parliament an impartial and independent court? The European Court of Human Rights said that, once Demicoli was not a Member of Parliament, and once the victims, the two Members of Parliament, would actually vote on whether Demicoli is guilty or not, here you have a situation where Parliament is not independent and impartial because **the very victims were also going to act as judges and prosecutors**. This meant that, not only was the trial unfair, but that Parliament was not an independent and impartial institution to decide a criminal case. The European Court of Human Rights said what is criminal or not irrespective of what Parliament states, irrespective of what the Government sates, will be decided by the European Court and not by the Government.

REASONABLE TIME

As to the definition of what amounts to reasonable time – a requirement applicable to both criminal and civil cases – no definition is found. Everything would depend on the nature of the case, such as any delays caused by the applicant himself *etc.*
Several cases before the European Court against Malta have been decided in favour of the applicant on the basis of the reasonable time guarantee.

THE RULE OF PUBLICITY

SUB-ARTICLES (3) & (4)

> (3) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.
>
> (4) Nothing in sub-article (3) of this article shall prevent any court or any authority such as is mentioned in that sub-article from excluding from the proceedings persons other than the parties thereto and their legal representatives -

The rule of publicity of hearings and trials applies to both criminal and civil proceedings. The publicity of hearing refers to the rule is that a court hearing of a case is public. One has a right as a member of the public to be present, subject to some exceptions. This rule is not absolute. The Court, according to sub-article (4), may decide to hear the case behind closed doors *"where publicity would prejudice the interests of justice"*; however, the rule remains that a trial or a hearing is always open to the public.

SPECIFIC PROCEDURAL RIGHTS OF THE ACCUSED

SUB-ARTICLES (5) – (11)

The following sub-articles of article 39 lay down certain golden rules regarding procedure which the legislator felt should be specifically guaranteed, in criminal proceedings, over and above the general right to a fair hearing in article 39(1). Therefore, these deal only with persons charged with a criminal offence. Those who are charged with a criminal offence have both **a general right** to a fair hearing under article 1 (fair hearing is not defined), and **specific rights** which are listed in the rest of article 39 in the Constitution, such as the right to a lawyer. These belong solely to the accused in a criminal case. On the other hand, in civil proceedings, I only have a general right to a fair hearing within reasonable time by and independent and impartial court or adjudicating authority. Moreover, here we have the rights of someone who has been charged in a court of law. Therefore, here the hearing has started.

PRESUMPTION OF INNOCENCE

> (5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:
>
> Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-article to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

Sub-article (5) sets down the principle of *presumption of innocence* of the accused. This *presumption of innocence* means that **it is up to the prosecution to prove that the accused is guilty** and not vice-versa where the defence has to prove that the accused is innocent. This shifts the main burden of proof of guilt on the Prosecution. The prosecution in a criminal case, has to prove the case against the accused **beyond reasonable doubt**. If there is reasonable doubt, the judge will have to acquit the accused, even if the judge personally feels that probably the accused did, in fact, commit the offence; *in dubio pro reo* (in case of doubt,

one has to acquit not convict). However, a law can impose upon any person charged the burden of proving particular facts. So if a person pleads *alibi*, that is to say, that at the moment of the offence he was somewhere else, the proof of that particular fact rests on such person; but the general proof that the accused is guilty rests with the prosecution. The Constitution says that the law can impose that the accused has to prove certain particular facts. The accused may have to prove **particular facts but not his/her innocence**.

There are three types of burdens of proof, or *onus probandi*: possibility, probability and proof beyond a reasonable doubt (*ċertezza morali*). In truth there are four if one is to include certainty, but the level of certainty is never required in a Court of law. *Possibility* is not allowed as a proof in any branch of law. for possibility can mean two things: it is possible that one did something in the same way as it is possible that one did not. A balance of probability, i.e. it is probable that the accused committed the offence, is accepted but only in civil proceedings. In civil proceedings, if I prove that on a balance of *probability* you caused me damages, then you need to pay me for those damages. On the other hand, in criminal cases the burden of proof is *beyond reasonable doubt*, not beyond any doubt, but beyond *reasonable* doubt. Therefore, **the burden of proof in criminal proceedings is greater than in civil proceedings**. The fact that a person is acquitted of a criminal charge for there is no proof that he committed a crime beyond reasonable doubt; but in a civil case he is ordered for the same action to pay damages because on a balance of probabilities he did commit a crime, has led to different judgements on the same case such in the case of O.J. Simpson.

THE RIGHT TO BE INFORMED OF CHARGE IN WRITING AND TO LEGAL ASSISTANCE

> (6) Every person who is charged with a criminal offence -
>
> (*a*) shall be informed in writing, in a language which he understands and in detail, of the nature of the offence charged;
>
> (*b*) shall be given adequate time and facilities for the preparation of his defence;
>
> (*c*) shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense;

(a) The right to be informed in writing of the nature of the offence charged. If the accused does not understand the Maltese language, we have to translate the charge of which he is being accused and in detail.
(b) The right to be given adequate time and facilities for the preparation of his defence. This ensures that the trial does not start say, the day after the crime was committed.
(c) The right to be permitted to defend himself in person or by a legal representative. One has a right to a lawyer. Article 6 of the European Convention provides that one has a right to legal assistance of one's own choosing. The right has to be applied according to reason and correct practice.

Can the state interfere with this right to choose a lawyer? **Police v. Hon Michael Falzon** (26 September 1989): a law was passed in 1978 prohibiting lawyers who were Members of Parliament from defending certain cases. In this case, the Court said that once I am ready to pay the services of a lawyer, Government cannot interfere into the matter as to whom I shall choose. Even though the Constitution does not say 'lawyer of your own choice', if I am ready

to pay for the services of that lawyer, I have a right to choose any lawyer who has a warrant in Malta and therefore, that law was considered to be unconstitutional and annulled it. That being said, if I do not have the means, the State will provide me with the lawyer, and I cannot choose (legal aid lawyers). Therefore, the Government cannot intervene if I am ready to pay the service of the lawyer.

This sub-article also guarantees the right to *free legal assistance* to those who cannot afford to pay.

RIGHT TO SUMMON WITNESSES AND CROSS EXAMINE WITNESSES CALLED BY PROSECUTION

> (*d*) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

This right is fundamental, for in criminal trials, the defence has a right, after the Prosecution has summoned its witnesses, to produce its own witnesses in defence. Similarly, a trial would not be fair if the defence were not allowed to cross-examine witnesses. Indeed, the cross-examination exercise is an effective means of controlling evidence against the accused and testing the credibility of the prosecution witnesses.

(d) The fourth right is the right to cross-examine the witnesses brought by the prosecution. If a witness is summoned by the prosecution to give evidence against me, I have a right, through my lawyer, to cross-examine him. Only in this way can you sometimes prove that the witness is lying. Moreover, I have a right not only to cross-examine but also to produce my own witnesses.

THE RIGHT TO BE PRESENT

> (*e*) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,
>
> and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(e) The last right is that you are allowed the assistance of an interpreter. Moreover, in Malta, there is the important right that **no criminal trial can take place in the absence of the accused** (in absentia). If the accused has left the country, we request his extradition to Malta. The exception is that if the accused behaves in such a way that he has to be removed. Therefore, no criminal trial can take place in the absence of the accused except with his own consent or if he misbehaves in court in which case the accused may be ordered to withdraw.
There is a certain aversion in Maltese law to trials *in absentia*, so much so that even when the extradition is requested of a person in Malta, the Extradition Act allows Government to refuse the request where the person sought to be extradited was convicted abroad *in absentia,* and the requesting country does not give assurance that he will be tried again, this time in his presence. Indeed, as Maltese law stands today, presence is not only a right but a *duty*

Article 7 = You have a right to the have a copy of the judgement. the Constitution expressly guarantees as a specific right, that of receiving a copy of the judgement once the criminal proceedings are concluded. This right is not found in the Convention.

THE RULE AGAINST NON-RETROACTIVITY OF PENAL LAWS AND THE RIGHT TO LEGAL CERTAINTY

> (8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

This is the rule against retroactivity of penal laws; it guarantees *non-retroactivity* of penal laws. While civil laws can be retroactive, criminal laws cannot. Therefore, non-retroactivity applies only to criminal laws. If when I committed the act, the act was not an offence, Parliament can say that **from now on** the act will constitute a criminal offence, but it cannot say that it will become a criminal offence say, from two years ago. Also, one cannot be subjected to a penalty that is more severe than the one when the individual committed the offence. In this way, the penalty always works in favour of the accused. This provision does not only prohibit the application of a penal law: it also guarantees legal certainty in criminal cases. The second point which emerges from jurisprudence is that a procedural matter may be applied retroactively even in criminal matters. Therefore, it is important to note that **Substantive criminal law** cannot be retroactive, whilst **Procedural criminal law** can be. For example, the laws changed so that in matters relating to bribery, the evidence of the accomplice, the one who received the bribe or the one who paid the bribe, need not be corroborated. At that time, the rule was that for an accomplice, evidence was not enough but it had to be supported by something else. Government introduced an exception in 1988 to bribery cases, where the accomplice evidence was enough to convict you. The Constitutional Court said this did apply to cases which started before the law was passed because not a new law was passed but what was passed was simply making it easier for the police to secure a conviction.

THE RULE AGAINST DOUBLE JEOPARDY: *NE BIS IN IDEM*

> (9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:
>
> Provided that nothing in any law shall be held to be inconsistent with or in contravention of this sub-article by reason only that it authorises any court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so however that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

This sub-article guarantees the rule against double jeopardy, also known as *ne bis in idem* (never twice on the same thing) or the rule of *autrefois convict autrefois acquit*. If I have been charged with a crime and I am acquitted, even if, following the final verdict I admit to committing that crime, according to Maltese law, I cannot be tried again. Therefore, in Malta, even if there is new evidence, the acquittal of the accused will stand. This applies to any criminal offences to which the accused could have been convicted at the trial.

In one case, the Constitutional Court explained this golden rule as follows:

> What is essential for the determination of the issue as to whether the second proceedings infringed the *ne bis in idem* rule is whether the offence of which the person is accused constitutes an action having the same elements of the offence of which the said person has already been convicted. If the elements are the same or overlap each other, then the tendency and probability is that there is an infringement of *the ne bis in idem rule.* On the other hand if the action gives rise to more than one punishable offence, the taking of more than one proceeding in the jurisdiction of the same State is not in breach of this rule.

Except in the case of an exceptional intervention by the Prime Minister, and then only in the case of a conviction, once a person is adjudicated and the case becomes *res iudicata*, it cannot be *judicially* re-opened. The raising of the plea of *ne bis in idem* should be first raised I the court of criminal jurisdiction, and the constitutional action should be resorted to only once the plea is refused.

This rule applies not only if one is tried again for the same offence but also "for any other offence of which he could have been convicted at the trial for the offence". At the time of the case **Rex v. Agatha Mifsud et** (CC) (15 June 1918), adultery was a criminal offence. In this case, Agatha Mifsud performed the conjugal act, AND the act took place before minor children (defilement of minors). Therefore, the same act gave rise to two offences. The police charged her with adultery, she was convicted and then after having been convicted, they were charged with defilement of minors. They were acquitted on the basis that once they were convicted of that act, which gave rise to two offences, and they were charged only with one, they could not be charged with the other offence since **the two offences arose from the same facts**.

Article 4 of the Seventh Protocol, to the European Convention establishes the double jeopardy rule.

Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

It is to be noted that under the European Convention, the rule against further criminal proceedings applies only *under the jurisdiction of the same state*. So that principle does not apply where a person is tried by a court of a different state or by an international court of tribunal.
Unlike the Maltese Constitution provision, there seems to be no prohibition in the European Convention for a person to be tried separately twice for two offences arising from one single act.

THE RIGHT AGAINST SELF-INCRIMINATION

> (10) No person who is tried for a criminal offence shall be compelled to give evidence at his trial.

The right to silence is specifically guaranteed in the Constitution but is not specifically mentioned in the Convention. But in a case *Saunders v. UK,* the Court held that this lies at the heart of a fair criminal procedure. This is the rule against **self-incrimination**. Unlike in civil proceedings, the prosecution cannot summon the accused as a witness. He/she has a right to remain silent. Moreover, the rule applies not only to oral questions asked to the accused but to any method of forcing a person to hand over evidence to the authorities.

Adverse comments on silence of the accused

The Criminal Code provides in article 634 that *"the failure of the party charged or accused to give evidence shall not be made the subject of adverse comment by the prosecution."* The accused is not a compellable witness but is competent witness. Once not compellable, no adverse comments by the prosecution could be made if he exercised such right. **If he wants to, he can give evidence**. Because this is fundamental human right, neither the prosecution nor the judge can comment adversely on the fact that the accused did not give evidence. The judge cannot tell the jurors that the accused had every right to give evidence and did not. On appeal, that will annul that trial. The argument is that if it is my fundamental human right, how can you comment adversely on the fact that I exercised it? How can any person be penalised for exercising a fundamental human right contained in the supreme law of the land?

MEANING OF LEGAL REPRESENTATIVE

> (11) In this article "legal representative" means a person entitled to practise in Malta as an advocate or, except in relation to proceedings before a court where a legal procurator has no right of audience, a legal procurator.

Freedom of Conscience, Expression, Assembly, & Association

These are very similar and are freedoms of liberty.

FREEDOM OF CONSCIENCE

> **40.** (1) All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship.

This is usually related to religion by not necessarily. This means that I have a right to believe or not to believe in God, to belong to a religion or not to belong to a religion and also along with the freedom of conscience, one has the freedom of worship. No one can, for example, prevent an individual from going to mass or a church from organising a procession. Of course, there are exceptions for instance owing to the Covid pandemic, churches were closed. This is a reasonable restriction in a democratic society.
It is important to note that freedom of conscience does not only cover religion but also covers the freedom not to believe in any religion. So, one cannot be penalised because he/she does not believe in God. This has a semi-religious connotation.

FREEDOM OF EXPRESSION

> **41.** (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

There is no doubt that this freedom is the cornerstone of any democracy. It has been hailed as *"one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man."*
The word *'including'* means that the list is not exhaustive but inclusive. One cannot be penalised because they hold an opinion. One has the freedom to receive ideas of others and the freedom to communicate his/her ideas to others, and freedom from interreference with his correspondence (this last freedom does not apply to minors except by way of parental discipline). This is specifically described in the Constitution as the right to impart ideas and to receive ideas. Also, the right not to have your correspondence opened.

One eminent law Professor summarised the importance and necessity of such freedom by listing four reasons on which it rests

> First of all, it is a means of assuring the individual a degree of personal self-fulfilment, enabling a person to realise his or her potentialities as a human being. Second, it is an essential process for the advancement of knowledge and the discovery of truth, providing an opportunity to hear all sides of a question and to test one's judgment by exposing it to conflicting views. Third it is necessary in order to allow all members of the society to participate in public decision-making, furnishing them with information and ideas vital in reaching a common judgment. And fourth, it is a method of achieving necessary social change without resort to violence, thereby enhancing the prospects of a more adaptable and at the same time more stable society.[408]

NEWSPAPERS CASE UNDER THE 1961 CONSTITUTION

Anton Buttigieg v. Paul Borg Olivier nominee (CA) (10 January 1964): **The newspapers condemned by Catholic Church were not allowed in Government hospitals – restrictions have to be contained in a law**.

In this case, the Ministry of Health had prohibited newspapers condemned by the Catholic Church from entering government hospitals not for the patients, but for the workers. So, the workers who were in government hospitals, since they came under the jurisdiction of their employer, were issued with an order in a circular prohibiting them from entering public hospitals possessing newspapers condemned by the Catholic Church. Anton Buttigieg, the editor of one of these newspapers, filed a Human Rights action under the 1961 Constitution. The Courts ruled against the government on one argument: was this restriction contained in a law? This restriction was imposed in a circular issued by the Health Department which is not a law. For a restriction to be valid, that restriction must be contained in a law. Therefore, the Courts, applying the 'five tests', declared that the restriction ordering that the newspaper in question be not allowed inside Government hospitals was not permissible since it was not contained in a law. Of course, the Court said that neither is this reasonable in a democratic society. The court of first instance ruled that such restriction was no reasonably required since it was discriminatory in its effect.
The Court of Appeal turned on its head the respondent's argument that the restriction was not reviewable because it had no legal force and was only an administrative circular.
The government, having lost the case, appealed to the Privy Council in London which dismissed the appeal of the government and therefore, confirmed the judgements of the local courts. The Privy Council held that the appellants could have issued reasonable orders to regulate the conduct of Government employees during working hours; but the prohibition had gone far beyond such scope. It had been discriminatory because it had imposed a partial ban upon the possession of certain newspapers only. When the government tried to say this is a minor violation because only the workers couldn't take the newspapers, but the patients could, the Privy Council replied, "*the plea that what was done was not far reaching comes ill from those who reached as far as they could*".

EXPRESSION OF OPINION AND HOSTILE AUDIENCES
Mgr Phillip Calleja v. Inspector Dennis Balzan (CC) (25 June 1976): this refers to the incident at Mosta where the police had torn the poster of Mon Sinjur Calleja. The disruption of a silent expression of an opinion during a religious celebration was deemed to be in breach of article 41. The Constitutional Court said the right to hold a poster without evening outering one single word is perhaps the minimum acceptable in a democratic society to express opinion. The Court added that there could be circumstances where even holding high poster may seriously create public disorder justifying interference by the Police.

CLEAR AND PRESENT DANGER TEST
In so doing, the Court applied the "clear and present danger" test. As one US Court had stated, "there is certainly no constitutional right to disrupt a meeting, but there is a constitutional right to hold one."

FREEDOM ENJOYED ALSO BY FOREIGN NATIONALS
In **Police v. Massimo Gorla** (FH) (16 July 1986), the prohibition of foreign nationals from addressing political meetings or requiring a government permit to do so, introduced by the Foreign Interference Act 1982, was declared to be in breach of article 42 since this freedom applied to any person in Malta. The Court added that there was no reasonable *nexus* between the measure adopted and the public interest of public safety invoked by the respondent Government.

DISCRIMINATION & EXPRESSION

Adrian Delia v. AG (CC) (16 December 2019): this relates to the EGRANT report. While government had a copy of this report, the opposition was not given a copy. The Attorney General gave copies to the Prime Minister, to his lawyers, but not to the leader of the Opposition. Apart from the Constitutional Court stating that this amounts to discrimination, the court said,

> Bid-deċiżjoni tiegħu li jiċħad it-talba tal-Kap tal-Oppożizzjoni l-Avukat Generali ħoloq żbilanċ bejn is-setgħat kostituzzjonali tal-pajjiż billi xekkel lil waħda minn dawk issetgħat fil-qadi tad-dmirijiet tagħha. B'hekk warrab wieħed millelementi li l-Kostituzzjoni trid u taħseb għalihom biex ikun hemm kontrolli fuq il-poter eżekuttiv tal-istat. Għall-għanijiet tal-ħtieġa ta' proporzjonalità bejn l-interessi konfliġġenti, kien biżżejjed li r-rapport ma jiġix pubblikat; ma kienx meħtieġ ukoll illi l-Kap tal-Oppożizzjoni jiġi mcaħħad mill-għodda meħtieġa biex jaqdi r-rwol kostituzzjonali tiegħu ta' kontroll fuq l-Eżekuttiv.

Note **the principle of proportionality**. A restriction has always to be propionate. In this case the court ruled that the freedom of the leader of the opposition to receive ideas, had been infringed and refusal was not propionate. This is the first time that the refusal by the Attorney General to be given a copy of magisterial report was accepted as a violation of Human Rights.

The argument was you cannot give a copy only to the government and the government starts attacking or criticising the opposition on the basis of the report, and you do not give a copy of the report also to the opposition.

It was considered to be both discriminatory and a violation of the freedom of expression. The opposition was prevented from exercising its constitutional role. When in the public interest, it is necessary for the opposition to get a copy of a magisterial inquiry, it had every right to do so. In Malta, the leader of the Opposition is not only a political figure, but a Constitutional figure, which gave him this right.

FREEDOM OF ASSEMBLY & ASSOCIATION

> **42.** (1) Except with his own consent or by way of parental discipline no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade or other unions or associations for the protection of his interests.

Freedom of assembly and association are a further manifestation of the freedom of expression. They protect the right to express an opinion not privately but publicly along with others; either through public manifestations and activities or else by joining together in an association of like-minded people sharing a common interest or idea.

One has a right to a **peaceful assembly**, not to any assembly. Not only do I have the right to express my opinion, right to meet with others so that together we express our opinion in public, but also the right to **join an association** with like-minded persons such as a political party. Of course, there are exceptions to this rule such as that I cannot form an association to overturn the democratic structures of Malta. Moreover, there is a rule in the Constitution that prohibiting by law meetings in a town, or a city would be unconstitutional.

This means the right to assemble with others. Not only do you have a right to express a political opinion for instance, but also to intend or organise a political meeting. The police cannot say one cannot organise a meeting in a particular village. Also, the freedom to associate refers to joining an organisation of like-minded people, so long as the aim and

purpose of the organisation isn't illegal. In particular, the right to join a trade union for the protection of one's interest is specifically mentioned in the Constitution – in particular, to form or belong to trade or other union or association for the protection of his interests.

These 3 rights are not limited to Maltese citizens. In fact, all rights in chapter 4 are not limited to Maltese citizens, unless the Constitution expressly states it such as in the freedom of movement. Therefore, a foreigner can come to Malta and organise a meeting. **'No person'** and not 'no Maltese citizen'.

These are similar both in content and in restrictions. These restrictions, in technical language, are called permissible statutory derogations (exceptions).

THE *INDEPENDENCE CELEBRATIONS* CASE

Police v. Ganni Camilleri et (CC) (23 April 1965): **A proclamation prohibiting public meetings and manifestations from 16 to 22 September 1964 except for official independence celebrations. It was ruled that Police in a small country were too busy with the official events and could not cater for security at all events.**

Here you had a proclamation issues by the Governor-General, on the advice of the Government of the day, prohibiting public meetings from the 16th-26th December except for the official independence celebrations. When this proclamation was issued, the party in opposition issued a directive to its supporters to ignore this proclamation, gather at the independence arena and when the independence instruments were to be delivered to the Maltese government by the Representative of the Queen, to start booing. Therefore, in spite of the proclamation there was a demonstration by the opposition in Valletta and some people were arrested including Ganni Camilleri. When Ganni was arrested and charged before the Court of Magistrates, he pleaded that the proclamation was unconstitutional because it limited his freedom of assembly and if the proclamation is unconstitutional, it is invalid, if it is invalid, he cannot be charged with breaking an invalid proclamation. The Constitutional Court ruled that in a small country like Malta, the police force did not have enough human resources to cover both the official events, including the security of important foreigners coming to Malta. The Constitutional Court said in the interest of public order, the police were too busy with the official events and also security of all events, including manifestation by the Opposition and therefore, since the proclamation was only for a limited period of time, it was reasonably required in the interest of public order and reasonably required in a democratic society.

LACK OF POLICE SURVEILLANCE

The authorities have a *positive* obligation to protect the right against those who unlawfully intend to disrupt its exercise by others.

NO RIGHT TO DISRUPT A PUBLIC MANIFESTATION

The Żejtun meeting:

Fenech Adami noe v. Commissioner Police (CC) (9 November 1986): The Opposition had requested permission to hold a mass meeting in Żejtun, the permit was issued and then, since some people were objecting to this meeting and blockaded the road leading to Żejtun, the Commissioner of Police withdrew the permit. The Constitutional Court ruled in favour of the opposition and argued that the Police should control those who want to disrupt the meeting, and not those who want to hold the meeting. There is always a right to hold a meeting but there is no Constitutional right to disrupt it.

The Constitutional Court said,

"The Court harbours no doubt that Maltese society is organised enough to ensure the exercise of the fundamental rights of its members by preventing the abuse by who illegally tries to strangle the exercise of such rights."
So, the rule is that you have a right to exercise your freedom of assembly, and the police should protect you in this regard. The court is saying you have to protect people when they protest.

THE *DOCTORS'* CASE
Walter Cuschieri v. Prime Minister (CC) (30 November 1977): **a law disallowed private hospitals from engaging the services of striking government doctors. The Constitutional Court ruled that there was no constitutional right to strike implicit in the right to join a trade union for the protection of one's interest.**
The Constitution expressly mentions the right to join a trade union "*for the protection of one's interests"*. The issue which arose in one case was whether this right gave some kind of constitutional protection to obey a legitimate trade union directive. In this case, a law was passed by Parliament which disallowed private hospitals from engaging the services of striking government doctors. The doctors who worked at the state hospital were on strike, they were locked out by the government and government then passed a law prohibiting private hospitals from engaging the services of striking government doctors. The doctors could only work in private hospitals on the condition that they withdrew from the strike. This was a far-reaching law because this meant that just because the doctors had an issue with the government, the government sought revenge by prohibiting private hospitals, with whom the doctors had no dispute, from engaging the services of striking government doctors. When they protested that this goes against their right to form part of a trade union, the Constitutional Court ruled that there was no **constitutional right** to strike. The Constitutional Court did not say there is no legal right to strike, it said that there was no right to strike in the Constitution. So, what the Court said was that the right to strike is not part of the right to join a trade union. It decided that since the striking government doctors were still entitled to be members of their Medical Association, and resort to strike action, no breach had occurred and that they were not entitled to constitutional protection if they resorted to strike action.

In 1988, in the case of **Charles Spiteri v. Minister of Public Works** (5 October 1988) (Vol LXXII.I.71), the Minister withdrew a privilege which Gozitan government workers had of going slightly early to Gozo so that they would enjoy their weekend, just because they had resorted to strike action. The Court said punishment for resorting to industrial action is a hinderance of the right of freedom of association. This is the only Court judgement in this respect. It, up to a certain point, overturned the Walter Cuschieri case.

FREEDOM NOT TO ASSOCIATE
Philip Spiteri v. Sammy Meilaq (CC) (8 March 1995): The Constitutional Court ruled that the freedom to associate includes also the freedom not to associate. Spiteri, a dockyard worker, refused to join the general workers union. The management of the Malta drydocks did not allow him to work overtime at the dockyards since this applied only to members of the general workers union. The Constitutional Court said you cannot be discriminated for not joining a trade union. Spiteri won the case.

FIVE TESTS FOR PERMISSIBLE STATUTORY DEROGATION
These tests apply to restrict the freedom of conscience, expression, assembly & association. The restrictions to these rights are called permissible statutory derogation. The exception has to be contained in a law and for that statutory derogation to be permissible it has to satisfy

ALL 5 tests. If it fails in one of them, the statutory derogation is not permissible/constitutional. The law gives a lot of importance to these rights, so much so that they can only be restricted under specific conditions.

(a) The restriction has to be **contained in a law**
(b) **Done under authority of law**; the measure restricting the right must be validly done and authorised under such law: it is not enough to have the law; his law must not be broken.
(c) Such law must be **reasonably required**: the restriction must not only be contained in a law and done under the authority of a law, but it also must be reasonably required in some public interest expressly mentioned in the Constitution. if that public interest is not mentioned in the constitution, these rights cannot be restricted.
(d) In some **public interest expressly mentioned in the Constitution**: the government cannot create new restrictions. But only those restrictions which are reasonably required in some public interest expressly mentioned in the Constitution.
(e) Such restrictive measure must be **reasonably justifiable in a democratic society**. This is an independent test. Note that there are 2 reasonable tests (c) & (e) and they are independent from each other. So, a restriction may be reasonably required in some public interest but is not reasonably justifiable in a democratic society; it will fail the test because the statutory derogation has to pass from all five tests. If it fails from one, that restriction is not permissible and is unconstitutional. Note that this criterion introduces a political concept/test – **in a democratic society** – so, in order to satisfy this test, one has to look at democratic societies and ask whether this restriction is permissible in such societies or whether it is only applicable in a society which is not democratic. Some restrictions in our case law were deemed to be unconstitutional.

(2) Nothing contained in or done **under the authority** of any law shall be held to be inconsistent with or in contravention of sub-article (1) of this article to the extent that **the law** in question makes provision - (a) that **is reasonably required** –

(i) in the **interests** of defence, public safety, public order, public morality or decency, or public health; or

(ii) for the **purpose** of protecting the reputations ,rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, protecting the privileges of Parliament, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or

(b) that imposes restrictions upon public officers

,and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to **be reasonably justifiable in a democratic society**

(Using article 41 as an example – they are all similar)

Two tests of reasonableness

The concept of reasonableness features twice in these tests.

1. Restrictions have to be noy only required but reasonably required in some public interest expressly mentioned in an exhaustive list indicated in the Constitution. This requires a genuine *nexus* between the measure and the public interest sought. To examine whether the restriction is reasonably required in some public interest in the Constitution.
2. The derogation has to meet a political test, namely that it is reasonably justifiable in a democracy. In order to see whether the restriction is reasonably required in a democratic society.

Prohibition from Deportation

ARTICLE 43

This right, contrary to all the other rights which we have examined, **belongs only to Maltese citizens**. Maltese citizens, whatever they do, cannot as a be deported from Malta as punishment. In our history, under British rule, there have been British subjects, living in Malta and born in Malta who were deported from their own country without trial.
First case: Manuel Dimech was deported to Alexandria during the First World War. After the War, the British did not allow him to come back and he died in Alexandria.
Second case (1942): 43 British subjects were deported from Malta without trial. They filed an action before the Courts, so that the colonial government be prevented from deporting them, they were deported just the same and when they arrived in Egypt, the Court of Appeal decided that the deportation was illegal. Despite this, they remained in Egypt until 1945. These are two cases which today would be deemed as unconstitutional. You can extradite Maltese citizens, but you cannot deport Maltese citizens.

EXTRADITION

While extradition is applicable to any person, the right not to be deported appertains only to Maltese citizens. Even though this right is not enjoyed by aliens, the courts have retained the right to review whether the deportation of aliens will cause them to be subjected to serious human rights abuse; but such action is to be initiated under the provisions of article 33 and 36 of the Constitution.

Freedom of Movement

ARTICLE 44

This is the freedom to move freely throughout Malta, to reside in any part of Malta, the right to leave Malta and the right to come back to Malta. It includes the important right to freely leave Malta and re-enter the country and to reside without any hindrance within national territory.
Freedom of movement applies to Maltese citizens, to the foreign spouses of Maltese citizens, and the children of a Maltese citizen up till the age of 21.

The *Stoner* case.

The Protection from Discrimination

ARTICLE 45 OF THE CONSTITUTION, ARTICLE 14 AND PROTOCOL XII OF THE EUROPEAN CONVENTION

In view of the incorporation of the European Convention on Human Rights into the Maltese legal system through the European Convention Act 1987 this provision has to be examined and applied in conjunction with Article 14 of the European Convention.

This is a very popular right. A law cannot be discriminatory, nor can a government decision be so.

Discrimination can be either take two forms: against or in favour. For example, I can decide in your favour because of your gender or else, I discriminate against you because of your gender. Moreover, not every discrimination is unjustifiable. For example, the Prime Minister and Leader of Opposition reserve parking near Parliament. That does not amount to

discrimination. The ground must be the main reason for that discrimination. If say, I am more qualified than you, there is an objective reason to discriminate in my favour.
The Constitution of Malta doesn't allow discrimination only if it that discrimination is done by a law or by government.

Article 45 of the Constitution and Article 14 of the European Convention complement each other; but there are significant differences between them. For instance, article 45 of the Constitution contains an exhaustive list of prohibited grounds of discrimination. In Article 14 not only is the list longer, including such matters as language, political or other opinion, national or social origin, association with a national minority, property, birth or other status, but the list is *indicative* not *exhaustive* so much so that the provision of the Convention uses the words *"on any ground such as."* Protocol XII prohibits discrimination in general without the restrictions contained in article 14. The protection is no longer related to *"the enjoyment of the rights and freedoms set forth in this Convention."*

THE CONSTITUTION
ARTICLE 45

> **45.** (1) Subject to the provisions of sub-articles (4), (5) and (7) of this article, no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of sub-articles (6), (7) and (8) of this article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (3) In this article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

In the Constitution of Malta, discrimination is only prohibited if it is done by a public officer, a public functionary or a public authority or else, if it is contained in a law.

In other words, under the Constitution of Malta, you have to categorise the discrimination you are challenging as being based on one of the 8 grounds contained in the law. The list is exhaustive, only these 8 grounds are accepted as prohibited grounds of discrimination according to the Constitution of Malta and the discrimination occurs when '*persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description*.'

PRINCIPLES ESTABLISHED BY THE CONSTITUTIONAL COURT

1. For discrimination to be prohibited, you must compare **like with like**. The discrimination arises from comparable situations. So, if I have a PHD and belong to Party A and you do not have one and belong to Party B, the fact that they chose me as a lecturer and not you does not amount to political discrimination. I am being chosen not because of my political opinion, but because I am more qualified than you. **For the discrimination to be illegal it must be unjustified – it doesn't have an objective and reasonable justification**. This was proclaimed in the so-called

Belgium linguistic cases. Here, the European Court said that '*equality of treatment is violated if the discrimination has no objective and reasonable justification…*'

In **Enrietta Bianchi et v. Attorney General** (CC) (24 June 2011), the Court stated that
"Applicant must prove that he was treated in an unjust manner in comparison with other persons in an analogous situation. If the situation is not analogous, there is no duty of the State to justify a different treatment."

2. For discrimination to be proven, there is **no need to prove motive**, if from the facts before the court, there is no other plausible explanation to the difference in treatment except a prohibited ground of discrimination. I do not need to prove the malicious intention of the public authority, what I need to prove is that in two situations which are analogous, one person has been discriminated against and there is no other reason for such discrimination except one of the prohibited grounds of discrimination. Then it is up to the government to prove that there was a reasonable justification and objective.

   Saviour Gauci v. Minister for Education (First Court Civil Court) (14 July 1975): Mr Gauci was a teacher at government schools, making him a public officer. At that time, there was a strict rule in the ESTA code that no public officer, whether of a low rank or high rank, can participate in political activities. Mr Gauci started addressing political meetings of the opposition party and the Head of the Civil Service instituted disciplinary proceeding against Mr Gauci under the Code of Discipline, to which he had every right to do so. Mr Gauci replied with the argument that whilst it was true that he addressed political meetings in breach of the Code, what was also true was that other teachers and other public officers were doing the same and nothing happened to them since they were addressing political meetings in favour of the government. The argument of the discrimination is if you are going to institute disciplinary proceedings against me, you have to institute them against others who are doing the same thing as I am.
   The court said, "*it should be made clear that the court is only considering the facts as they result and is not looking at the motive of the person who commenced the disciplinary proceedings…"*

3. **Not every difference in treatment is prohibited**. If the respondent gives a plausible and reasonable explanation why the difference in treatment was required and that it pursued a legitimate aim, then such discrimination is not constitutionally prohibited.

   Tonio Borg v. Minister for Foreign Affairs et (FH) (2 May 1984): Mr Borg spotted a streamer on a museum with 'exhibition' written on it. He went inside and instead of finding an exhibition on archaeology he found a political exhibition organised by the party in government. He requested that he does the same for the Opposition. Following his meeting with the director of museum, Mr Borg found out that the director had encouraged people to organise an exhibition on the same day Mr Borg wanted to. Mr Borg won the case not because he had a right to organise an exhibition, but once that facility was given to the party in government, then that right has to be given to the opposition.

4. Another principle established in pre-1987 Maltese jurisprudence based exclusively on article 45 of the Constitution was the *quid Unum* principle, that is to say, that the Government Civil Service was to be considered as one entity. Consequently, it was not possible for a respondent government department to argue that no differential treatment was being afforded in the department, if in other departments public officers were left to their whims.

   Carmen Cacopardo v. Minister for Works et (CC) (29 Januray 1986); **Architect Vincent Galea v. Chairman Public Service Commission et** (CC) (20 February 1987): when Mr Cacopardo and Mr Galea were still architects with the government, therefore while they were still public officers, they started writing articles in favour of the Opposition at a time when this was prohibted. The Minister of Public Works instituted under the Code of Discipline, disciplinary proceedings for dismissal of these two. Consequently, both of them argued that the Public Service Commission was hearing proceedings against them while others in the public service were writing articles in favour of the government, and nothing had happened to them. The Minister put forward the argument that what happens in other departments is irrelevant, and that they were the only ones in his department writing in political newspapers. The Maltese Constitutional Court in the case of Mr Cacopardo on the 29th of January 1986 and in the case of Mr Vincent Galea on the 20th of February 1987, proclaimed the *unum quid* principle (as if they are one). Therefore, it was proclaimed that all of the departments form one of the same government, and if you discriminate in one department it is no justification to say in mine no one is in the same position.
   The Court remarked,
   "Were it not so, there would be a situation of uncertainty and confusion, highly undesirable and not in the country's interest, whereby every department would have its own regulations, and we would almost have, so to speak, an Estacode and Administrative Secretary for every department".

POLITICAL DISCRIMINATION

Most of the pre-1987 cases are based on discrimination on the basis of a political opinion, since that was the only opinion, at that time, on which one could challenge a discriminatory law decision. However, the court was strict in interpreting when discriminatory treatment could be classified as political in nature.

PUBLIC AUTHORITY

Considering that article 45 binds only officers and public authorities, the Courts have given a wide interpretation to the words "public authority", contained in article 45(2).

NON-POLITICAL DISCRIMINATION

The most important case under article 45 before we included the European Convention in our law, is the Church Property Case, i.e. **Mgr G Mercieca v. Prime Minister et** (FH) (24 September 1984). This is a rare case of non-political discrimination prior to 1987. The First Hall of the Civil Court also said that the law discriminated against the Catholic Church because the law expropriated their property which it had acquired legally, through an acquisitive prescription, while others who were not the Catholic Church, still enjoyed acquisitive prescription. Therefore, in this sense the law was discriminating against the Catholic Church.

POSITIVE DISCRIMINATION

> (11) Nothing in the provisions of this article shall apply to any law or anything done under the authority of a law, or to any procedure or arrangement, in so far as such law, thing done, procedure or arrangement provides for the taking of special measures aimed at accelerating *de facto* equality between men and women, and in so far only as such measures, taking into account the social fabric of Malta, are shown to be reasonably justifiable in a democratic society.

The Constitution expressly allows positive discrimination in matters of gender issues that is to say administrative and legislative measures being introduced to favour a disadvantaged member of a particular sex.

Introduced by Act XIX of 1991, article 45(11) is a special provision in the sense that it favours positive discrimination. Here, the Constitution is allowing positive discrimination, provided it is reasonable. The most evident application of this rule is found in the recent constitutional amendment which has been recently approved by Parliament whereby in the next general election, if the 40% threshold is not reached, a maximum of 12 additional seats can be added, 6 for the Government and 6 for the Opposition. These will be assigned to the candidates of the underrepresented sex, most likely unelected female candidates, and these will be those female candidates who were not elected from both parties but **came closest to being elected**. This amendment is a reasonable measure of positive discrimination since the additional 12 candidates will not take the place of an elected male candidate. Granted, however, If I am an unelected male candidate and got 200 votes, and you are a female candidate with 100 votes, you will get elected and I will not. Therefore, it is a form of discrimination, but it is positive discrimination under reasonable conditions which is allowed in Article 45 under our Constitution. Moreover, if a third political party is elected to parliament, this mechanism of adding the 12 candidates' seats is not triggered off.

THE EUROPEAN CONVENTION ARTICLE 14

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

There is no doubt that Article 14 of the Convention widened the horizons of protection from discrimination. Discrimination is based on differential treatment, it doesn't mean I have a right to something but if that right is being given to someone else, I am entitled to that right.

PROTOCOL 12

ARTICLE 1

General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

While in the Constitution of Malta the list of prohibitive discrimination is exhaustive, meaning you cannot add to the 8 grounds, the list in Article 14 of the European Convention is indicative. The European Convention says you cannot discriminate on ground "*such as*…" Those in the list are certainly prohibited grounds of discrimination, but there could be others.

Upon reading Article 14 of the European Convention, it would seem that under the European Convention, unlike the Maltese Constitution, discrimination is prohibited only in the enjoyment of the rights and freedoms set forth in that Convention. To fix this, Protocol 12 was added. Therefore, there is a distinction between Article 14 which says in '*the enjoyment of the rights and freedom set forth in this Convention*' and Protocol 12 which states that it is '*the enjoyment of any right set forth by law*'.

The grounds of discrimination prohibited in the Constitution of Malta	**The grounds of prohibition under the European Convention**
1. Race 2. Place of origin 3. Political opinion 4. Colour 5. Creed 6. Sex (introduced in 1993) 7. Sexual orientation/gender identity	1. Sex 2. Race 3. Colour 4. Language 5. Religion 6. Political or other opinion 7. National or social origin 8. Association with a national minority 9. Property 10. Birth or other status

The best thing is to rest your case on both Article 45 & on Protocol 12 in a discrimination case. One can always file a case under the European Convention, whose list is not exhaustive. It is simply a list of examples. The door is open for any unjustified discrimination.

LAWS IN VIOLATION OF THIS PROTECTION

i. In the past, there was a provision in our law of succession which did not allow a testator to leave a child outside marriage, at the time termed as 'illegitimate children' more than 1/3rd of the minimum which he/she could give to the child born in marriage, i.e. legitimate children. That law was declared to be in violation of the European convention. So, **you cannot discriminate against children born outside marriage.**

ii. The same applied as regards **the law of nationality**. If a person was born within marriage, then it was enough to gain Maltese citizenship at birth so long as one of the parents was a Maltese citizen. On the other hand, for a child born outside marriage to be automatically granted Maltese citizenship, the mother had to be a Maltese citizen. Therefore, if the father was Maltese and the mother a foreigner, Maltese citizenship was given to the child but at the discretion of the Minister. This was also deemed to be in violation of the European Convention.

iii. **The license of a cour**t worker by law could be inherited by one person to another provided the person who receives the licence is a male descendant of the licensee. That was deemed to be also in violation of the right to protection from discrimination.

iv. **The law of adoption**.

HUMAN RIGHTS PROCEDURE

What happens when there is a violation of Human Rights?

You can only file a Human Rights case if you can prove a **juridical, actual, personal interest** in the case. Those words in relation to him have been interpreted very strictly by the Constitutional Court. In 1982, Parliament passed a law whereby foreigners cannot address political meetings in Malta. The opposition was against this; however, it did not have a juridical interest. Therefore, even in the case of challenging a law under Human Rights, one must prove juridical actual personal interest. In 1985, the opposition invited an Italian politician to address a political meeting. The minute he was charged in court, he had a constitutional interest to challenge the validity of the law.

If, for the sake of the argument, the law of abortion was to be enacted, the Catholic Archbishop, for example, cannot institute an action. He may have a political, religious, moral interest, but not a juridical, personal, and actual interest. This has created problems.

In Human Rights cases you do not go directly before the Constitutional Court but before the First Hall Civil Court in its constitutional jurisdiction. Then if either party lose the case, both the individual and the government can file an appeal to the Constitutional Court. If you lose before the Constitutional Court, only the individual can appeal to the European Court. Therefore, the individual has 3 chances whilst the government has 2.

The Courts of constitutional jurisdiction, the Constitutional Court and the First Hall Civil Court, have wide powers to give you a remedy. The Constitution in Article 46 states that the Court can make such orders, issue such writs and give such directions to ensure the enforcement of Human Rights. Under that provision it has decide that it can also grant moral damages or non-peculiarly damages. The Court can decline to exercise its constitutional jurisdiction if it feels that you had other adequate remedies under ordinary law and you did not exhaust them. So, in Malta, before you file a Human Rights action, you must make sure that you have exhausted all our ordinary law remedies.

A Human Rights application can start from an application to the Prim Awla' tal-Qorti Ċivili, or it can well happen that an incident occurs in a Court which is not of a constitutional jurisdiction and that other Court transfers the Human Rights point/issue to the Court of constitutional jurisdiction. For example,

i. The independence celebrations case: **Police v. Ganni Camilleri**: Ganni Camilleri was arraigned before the Court of Magistrates and the lawyer of Ganni raised the question that the proclamation was unconstitutional. The Magistrates Court transferred the Human Rights issue to the Prim Awla' tal-Qorti Ċivili which ruled against Ganni and Ganni appealed to the Constitutional Court which also ruled against Ganni and it sent back the case to the Magistrate's Court who continued hearing the case. Therefore, the case started in a criminal court, a Human Rights issue arose and was transferred to the courts of constitutional jurisdiction and then once the constitutional question was decided it was transferred back to the Magistrates Courts.
ii. **Police v. Massimo G**: once he was arraigned before the Court of Magistrates, his legal team raised the question that the foreign interference act was unconstitutional because it breached Human Rights. The Magistrates Court referred the Human Rights question to the Prim Awla'. Mr Massimo won before the Civil Court and also before the Constitutional Court. the case was referred back to the Court of Magistrates who ruled that once the law is invalid the case stops here.

The only time when the court can refuse to make the reference if it feels that the raising of the question is "*merely frivolous or vexatious*" (Article 46(3)).

What powers of remedy does the Constitutional Court have?
These are very wide. In one case, following an error in the counting of the votes in the general election of 2013, the Constitutional Court added 2 parliamentary seats to the opposition so that the gap between the seats of the opposition and those of the government of the day was reduced. The Constitutional Court invented a remedy to rectify a Human Rights situation. It has a very wide range of remedies.

How do you appeal to the European court?
This court in the Strasbourg. Each and every country nominates a judge. Since there are 47 members of the Council of Europe, the European court as a body of 47 judges, never decides cases. It splits into groups.
Procedure:
The government cannot appeal to the European court of Human Rights.

i. **Round one:** Once you file the application, there are two rounds. In the first round, 3 judges examine whether the case is admissible. Therefore, at this first round, to see whether you should go forth to the second round is in the hands of 3 judges. If they decide that there is a case, you go to the second round. If, however they are unanimous that there is no case, the case stops there.
   It acts as a sifting organ to prevent cases which do not deserve consideration from going to the second round before the European Court. This committee of 3 judges sifts the application. The criterion:
   1. you have to file the case within 6 months from the last judgement of your own court,
   2. you must have exhausted all your Maltese remedies,
   3. the application cannot be anonymous,
   4. it must not be manifestly unfounded.

   If you fail one your case stops there.
   Since the tsunami of cases continued to arise, they invented a single judge committee so if the registrar thinks that your case is on the face of the record wobbly, he will not even send it to the three judges. This means, statistically, that out of every 10 cases submitted, only 1 case passes to the second round.
ii. **Round 2:** If your case is 1/10, then it goes before a chamber. There are 5 chambers of 7 judges and there is a roaster. Your case goes before 7 judges provided that one of those judges must be a judge of the respondent state or government. If I win or I lose that is the end of the matter.
iii. **Round 3 (rare):** Exceptionally, either party can request an appeal to the Grand Chamber composed of 17 judges. You can only appeal if you are given permission to appeal.

Once the case is decided, it is expected that the government abides by that decision. The Committee of Ministers is a political order, and this committee will monitor the follow up. The sanction to enforce the judgement is more political and legal. The Committee of Ministers will name you and shame you if you fail to abide by the judgement of the European Court. In Malta, when we enacted the European Convention Act, we included a provision to the effect that if the government does not execute the judgement of the European Court, you can file an application before the Constitutional Court so the Constitutional Court will enforce the judgement of the European court. This is rather ironic considering one only filed an application to the European Court having lost before the Constitutional Court.
The government cannot appeal to the European Court, but IT CAN REQUEST AN APPEAL FROM THE CHAMBER TO THE GRAND CHAMBER.

MARTINA CAMILLERI

Dr Ian Refalo
Parliament

DIRECT & INDIRECT DEMOCRACY

We live in a world of representative democracy. One has to distinguish between representative and direct democracy.

It is impossible for everybody to participate in the decisions taken by the governing class in modern day democracy. This was not even the case in the times of Greece whereby only some members of society had a right to participate in the government of that society.

In a democratic society every member is able to participate to the same extent and measure in that government of the society. The concept of direct democracy is possible in a very small society. In a society with 500,000 citizens such as in Malta this simply does not work, and of course, the same applies for even larger countries.

HISTORY

The modern state is very much the creature of the Renaissance and therefore is a relatively recent creation. Going back in time to Medieval Europe, you will find no State at all. With the creation of the State, law became territorial in nature when before it was mostly personal in nature. Moreover, laws started off by being tribal as law had become strictly tribal/personal in character in the Medieval Ages. With the Renaissance, law became principally territorial. When you speak of Maltese law for example, you speak of laws applicable to Malta and not of the Maltese people. In this way, the limits of territory define the applicability of law. **It is understood that law is a territorial and not a personal experience.**

Law is enacted through Parliament which is a strictly regulated and regimented body. Parliament is **a vehicle for the actual participation of the public at large in the government of the country**. The public at large must be both informed and able to inform itself and able to inform itself on the debate which is ongoing in Parliament.

The Government of the day should reflect a leading role in society which is reflected by the government being able to command a majority in parliament and a majority in the country. Even in Malta, it is possible to produce a dismissal of government by voting no confidence in the government. It is more probable that the government advises a dissolution rather than resigns in Malta. Such as in the case of Alfred Sant. Dr Sant could have, technically speaking, remained in government; he should have rather resigned not called for a dissolution. A vote of no confidence in the government has to secure an absolute majority of all the members thereof. Therefore, in the case of 50 members, it would have to secure at least 26 votes.

This representative democracy is such to allow people at large to participate in decisions of the Government. The politicians representing us in Parliament have acted in such a matter, especially those in bigger states, to lose the confidence of the support of the country. This has ended up in an erosion of trust. In bigger countries, one would be lucky to find a turn-out of 60% of the people voting which is relatively low. In Malta, on the other hand, we tend to have around 90%. **The lack of trust in the Government is a problem in representative democracies because it relies to a large extent on the people's participation**. Parliaments are generally recognised as being the essence of representative democracies.

PARLIAMENT

A democracy is representative through Parliament as it is made up of the people's representatives.

The existence of constitutional court has been mainly created in the European constitution where there was a clear distinction between constitutional matters and other matters, so it was thought important to introduce a constitutional court. With that being said, **the key to a representative democracy is the elections**.
The point is that the parliamentary system is an example of representative democracy and not direct democracy. Moreover, the distinction between the two is that in a direct democracy the people are able to express their position on any issue and more importantly, they will decide the issue. The problem with this lies in the fact that when society grows to a certain point, it becomes impossible to govern it through the participation of each and every person.
On the other hand, in the case of an indirect democracy, the elected representatives stand out for the members of society and are able to take decisions for that society as though they were the people themselves. This representative capacity is that they represent the interest of the people and stand for the people. This is a second best as essentially, the best would be a direct democracy, but as previously stated, it is impossible where the society becomes of a certain size.

The need for representative democracy lies in **producing an ordered society** which is important for everybody to be able to preserve his freedom in the face of more powerful elements in society. Representative society is the name of the game here and **Parliament is the main institution through which representative democracy works**. In other words, it works through elected members of parliament. English constitutional history shows us that it reflects a slow evolution of parliamentary power towards the present position of parliamentary sovereignty. At one point the king led the ability to suspend laws passed by parliament.

THE IMPORTANCE OF A WELL-ORDERED SOCIETY
You have representative democracy where the members of the society participate in the government of that country through their elected representatives.
It is important for our constitutional set up to achieve both ends – the creation of an ordered society. **In a well-ordered society, the freedom of everybody is equally protected at law**. This means that society which abides by legal principles, by law, rationally enacted law which is applied equally and impartially by the authorities. This is what is required from representative democracies whereby there are no members of society who hold an unequal position in relation to others**; the law is applied equally without partiality** by judges. So, in a representative democracy it is important to have **the representatives of the people elected by the people**. The type of election and parliament very often conditions this.

In a bi-party Parliament the structure is very different. Order in society and government is more autocratic. That is, the number of voters in society depends also on the composition of parliament which by large extent and manner depend on the structure and composition of your Parliament in a given democratic society. This is dependent on electoral processes. Therefore, these electoral processes will impinge on the composition of parliament and the governmental ability of the country.
In the UK you see a bi-party Parliament which reproduces stable majorities and therefore stable government. Stable governments can be produced even in the case of coalitions such as in Germany.
We have to look at two things: both the composition and the structure of parliament

THE STRUCTURE OF PARLIAMENT
Unicameral Vs bicameral

In article 51, the Constitution establishes a unicameral legislature. Malta experienced a bi-cameral legislature under the 1921 Constitution where there were two chambers of the Legislature, the Legislative Assembly and the Senate. The 1921 Constitution was revoked by the new 1936 Constitution which, like all subsequent Constitutions of Malta did not contain any provision for a second Chamber.

Article 52: this article first of all provides that the number of members of the Legislature is determined by law: so, there is no capping on the maximum number of members of the House. Currently this number of fixed at sixty-five by the General Elections Act, 1991. However, the Constitution requires that the number be odd, unlike the situation between 1964 and 1974, when the number (50) of members of Parliament was even. It also requires that all electoral divisions return the same number of members, and that such number may not be less than five and not more than seven. The number of electoral divisions is a minimum of nine and a maximum of fifteen. The current number of electoral divisions fixed by the General Elections Act is thirteen. Consequently, the highest number of members of the Legislature which the electoral law can provide for is 95 i.e. (15x7). However, as shall be seen the number can vary depending on the application of the corrective electoral mechanisms contained in this article which may grant parliamentary seats to a disadvantaged party!

Parliament is a structured institution; it is not simply a meeting of representatives of the people, but it is within a given constitutional structure. Parliament is established by the Constitution. In Malta, we have a **unicameral Parliament** as opposed to the UK, which has a bicameral Parliament. The unicameral structure or bicameral structure comes independently of whether you have a federal structure or not but of course, **in federal structures bicameral is easier to adopt**. There are no rules to limiting the houses of parliament to two however they are usually one or two. Prior to the French Revolution, technically speaking there were 3 houses – the Nobility, Clergy and Commons. This was all swept away by the French revolution.

A bicameral structure typically establishes two houses in Parliament: an upper house and a lower house such as the House of Lords and House of Commons. Sovereignty of Parliament arose in the 16th and 15th hundreds when the king was still a monarch who ruled and reigned. Today, the United Kingdom has a monarch who reigns but does not rule.

Pros and cons of bicameralism and *why do we have a unicameral parliament*?
Two houses mean that it is more difficult to cover, **legislation is more well thought of because it needs consent from both Houses**. If a party obtains a majority in one House, it will probably have a majority in the other. It is the elective nature of the House of Commons which has given it its pre-eminence in the Government of the country. It is very often in federal constitutions too because it is generally true that the lower House reflects the will of the people whilst the upper House reflects the will of the State. This is true for the United States; Congress is the lower house which is elected by the people of the US in a proportionate manner, whilst the Senate is not. **In federal structures, the bicameral system is more reflective of the political power distribution and gives representation to the states**.

In Malta we have a unicameral structure. In the 1921 Constitution, we had a bicameral structure and government was made of the House of Representatives and the Senate. The Senate was elected on a different basis to the lower House. Eventually, the Constitution was suspended in the 1930s because of multiple difficulties arising between the Houses. The suspension of the Constitution by the British Government was a big shock to Maltese politicians. There was the underlying feeling that the failure was a result of the irreconcilable difference of both Houses. In 1958, Mintoff resigned, and the governor of Malta asked Dr Borg Olivier to form a government but could not do so and the Constitution was suspended even though it had a one-chamber parliament which shows that the previous suspension was due to colonisation.

Should we have a bicameral parliament today? There are not too many advantages especially in a small State like Malta and therefore, it does not make much sense. This is debatable. Constitutional reform has centred around the idea that the Prime Minister has too much power in Malta. With that being said, the Prime Minister's power is needed to avoid other problems as seen, such as in Italy.

Our composition is not determined by the Constitution but by our law. Our Constitution merely lays down the parameters with which our Parliament should be composed. The Parliament must be composed of an odd number of members in order to ensure a majority. Moreover, Electoral divisions may not be more less than 7 and no more than 15. Each district shall return an equal number of members.

ELECTORAL PROCESS

The freedom of each one of us does not mean we are free to do as we please at every moment, we are free to do as we please within a system of law. As Thomas Aquinas said, we are rational beings and therefore, opens a rational society where the rule of law is present.

A Constitution is meant to produce a system of government and this system depends on the type of Parliament you have and how difficult or easy it is to form a majority in Parliament. **The more people in Parliament, the more difficult it is to govern**. There is a relationship between parliamentary representatives and the electoral process. There are certain characteristics of electoral processes which must definitely exist in all situations for the situation to be classified as democratic but otherwise it depends a lot on that parliamentary system.

Common characteristics of any electoral process

i. It must be a **free** electoral process, free from interferences.
ii. The electoral process to be democratic; it must be **secret** (a person is entitled to cast his vote in secret), he is to cast his vote freely (choosing anybody whom he wants), it must be universal (each man must have one vote – this excludes plural voting that is one person having more than one vote depending on certain qualification or on the other hand, a person having no vote).

In democratic situations, each person in a society must have only one vote and must be able to exercise that vote in secret. These are the hallmarks of a democratic Constitution. In the 1950s, the claim of the Labour Party was that the suffrage was not free. When Malta became a republic, there was a change to the General Elections Act. Generally, all systems in democratic countries have to recognise **universal suffrage on the basis of the free and secure ballot**. There are a number of ways how that suffrage expresses itself in different

electoral process. Some electoral processes have the single-transferable vote system which is meant to advantage the minorities. The electoral processes as envisaged in the Maltese Constitution would favour parties having a concentrated minority in a particular district.

The British system: under the English system, the English suffrage is divided into **unitary constituency** whereby the candidate who gets the most votes in that district will get elected to Parliament which means that smaller parties get underrepresented or penalised. This system tends to produce stable majorities. You may easily get the perverse situation where the minor party gets the most votes in Parliament. Moreover, this happened once in 1981 in Malta which gave rise to a constitutional crisis. In the proportional representational system, there are always a number of votes which are wasted votes.

How does it work the Maltese electoral system work? The Maltese system works in this manner: you mark on the ballot paper in order of preference your choice of representatives whereby one can vote all the candidates if you would like provided it is in an order of preference. The electoral quota is established. If no candidate gets the required quota, or if a candidate gets more than the required quota, the extra votes are distributed to its second preferences. If no candidate is elected, the candidate who has the least number of votes is eliminated, and his votes are distributed. This process is used until 5 candidates are elected. In 1981, the Nationalist Party had a majority of first count of votes, but the Labour Party had a majority of seats which entitled it to continue in government.

In the Maltese constitution the maximum stay of Parliament from one election to the next is 5 years. If this were not the case, a mockery would be made out of the democracy. The major problem raising the Maltese electoral system is that the bi-elections are not electoral processes at all.

It is easy to see that the type of electoral process deeply reflects the type of representation you get in Parliament. There was a very good thesis written by Dr Roberta Metsola and she said that the representation in parliament does not always depend on the electoral system but also on the political climate and the different political parties. The ultimate make-up of Parliament must take into account 3 matters: (1) the electoral system, (2) the political climate prevalent in that country, and (3) the political party organisation. The **broader the parliamentary representation**, the more autocratic and **stable** the government is. Stability of government comes at a democratic cost but is a necessity in providing an altered system of government. It is always difficult to get the just balance which satisfies everybody.

The electoral process is fundamental to have representative democracy in the State.
Malta protects our electoral process in 3 ways:

1. by providing at law a sound electoral process which has to be abided by and which satisfies the requirement of free and democratic elections,
2. it entrenches the provision relate to that electoral process,
3. it penalises any breech of that process by the creation of corrupt and illegal practices and the provision of punishment for such breaches and it established institutions which are able to regulate and see that proper electoral procedures are followed in the country.

The constitution stipulates in article 56:

> **56.** (1) The members of the House of Representatives shall be elected upon the principle of proportional representation by means of the single transferable vote from such number of electoral divisions, being an odd number and not less than nine and not more than fifteen, as Parliament shall from time to time determine.

It also provides for universal suffrage and equality for voting rights. The second point to note is that the electoral process is also **protected in the European Convention** Act by article 3 of the First Protocol which provides that:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Therefore, the law provides for free elections and establishes the free elections as a matter of constitutional rights.

In a bi-party parliament you are ensured that one party will have a majority and one will have a minority which does not allow an equal parliament. As established in 1987, following the 1981 crisis, **the party that obtains the most first-count votes gets the majority**. The Constitution does not lay down corrupt and illegal practices as they are provided for in the General Elections Act. In this act, there is one particular amendment to the corrupt practices, and this is found in article 55. The law against corrupt practices was first enacted in 1921 when Malta was granted self-government. This law remained largely unchanged and was only changed in 1973.

The Constitution protects the definition of corrupt practices and the punishments by making it impossible for Parliament to change any of these practices without obtaining a 2/3rds majority. Corrupt practices include **personation** (a person votes that of another), **votes when he may not vote**, **bribery** and so on. The electoral process must be by means of the single transferable vote. Section 56(a) is of particular relevance.

The Constitution sets up the Electoral Commission which is a Commission whose function is to organise and hold elections. It is made up of 9 members. Its first task is to split up Malta into electoral constituencies as the law provides. The Commission is also tasked with the publication of the electoral register which defines the people which are entitled to vote in the elections. The making of the electoral register is protected by law and any person who feels is entitled to be registered or who has been unduly unregistered by appeal: **Farrugia v. the electoral commission** (1996)

There were only 2 cases of importance with regards to elections:

(1) Demarco v. ____ (1976) related to the time period in which one can make an application where corrupt practices have prevailed.
(2) Thake v. the Electoral Commission

The Commission may not annul an election itself. If the commission believes that corrupt practices have prevailed during an election and have been of such an effect as to materially affect the elections of members, then the Commission is tasked, under the Constitution, to refer the matter to the Constitutional Court. If it does not do anything of the sort, any person can within 3 days bring forward their case against the Commission. The electoral process is

not only a **safeguard** by legal provision as being on the basis of free, universal suffrage, secret, proportional representation by means of the single transferable vote, but also by the **Constitution**.

General elections are held at least once every 5 and ½ years. This is the **maximum** time within which a general election may be held but can be held sooner through the defeat of government as happened in 1998. The advice of dissolution of parliament is generally adhered to in Malta. It is worth remembering that in 1958, when Mr Mintoff lost the integration referendum and when problems arose in relation to integration, Mr Mintoff had resigned without advising a dissolution and Dr Borg Olivier was called to form a majority but refused to form an alternative government.

- Universal suffrage
- Vote in secret
- Corrupt practice must be punished

THE FUNCTIONS OF PARLIAMENT
Different parliaments have different functions

Deliberative Function

The Prime Minister is stronger than his ministers but not stronger than his ministers collected against him.

By the deliberative function what is meant is the ability if parliament to determine the character of the government.
Parliament is the foremost **debating institution** in our island, and this is seen through its deliberative function. In other words, the House of Parliament is a debating house. The deliberative function is basically that, through the working of Parliament, the Government of the day gets chosen for the country. The debate in Parliament is one with the purpose of confirming the support of the Government, providing the Government of the day must at any moment in time enjoy the confidence of Parliament. This is a necessary tie in representative democracy since normally, **the majority in Parliament reflects the majority in the country**. Winning the debate means proving to the majority of your argument and losing the debate means failure to do so. In Parliament, policy is debated, and if such debate is lost, the Government of the day's survival is at stake. In fact, a budget vote is usually taken as a vote of no confidence. In this way, the survival of the Government depends on the Government winning consistently the debates in the House. If it isn't doing so, this translates into the fact that the Government is no longer able to govern and will have to either resign or advise a dissolution. **The deliberative function makes the Government accountable to Parliament**.

The deliberative function of Parliament is that Parliament forms a debating house through entities able to debate matters of public interest. Of course, this is a **disciplined debate**. Once the debate is carried out, the Prime Minister must ensure that he wins the debate in Parliament continuously if he wants to continue in government. Once he loses the confidence in government, he loses the ability to continue and must either resign or hold a dissolution. What happened in 1998 is instructive to this. There were persons who disagreed with the President's acceptance of the advice of the Prime Minister to dissolve Parliament. However, once the president is instructed by the Prime Minister to dissolve Parliament, the President has no choice but to accept such advice. It may happen that a Prime Minister chooses to

resign even though not defeated in Parliament. The choice of the President is then to appoint as prime minister the person who has the command of that party.

The debate is ordered. Therefore, members of Parliament do not simply speak. Parliamentary questions serve to highlight on a particular problem on government ministry or department. This puts public attention on the issue. Moreover, subsidiary questions can be given in reply to the answer. The Minister being asked has to give truthful information to the House, and here we are seeing the deliberative function making the Government accountable. Therefore, the Government is not only made accountable through a vote of no confidence, but the Government may also be called upon to account for its actions through questioning. Accountability to the House is ultimately accountability to the people.

Parliament has control over its own proceedings as envisaged in **article 65(2)**. Proceedings in Parliament are not debates as one may think of, but they are **ordered debates in terms of Standing Orders**. This ensures that all MPs get a fair chance to express their opinion on issues of Public Policy. In legislating, there is a procedure to be passed through. For parliament to change that procedure, it has to consciously change Standing Orders. They are enacted after 3 readings and the committee stage. Through which the bill is debated and approved by Parliament. Only after approval will it be presented to the President for his/her assent, without delay. If he feels that a bill is coming along which he cannot assent to he must make sure that there is someone else in his place to assent to it. The matter here is solved by the President going to some foreign country and enacting an acting President. The whole proceedings of Parliament are governed by Standing Orders; they reflect how the debate is to proceed. The Speaker determines who is to address the House, he moderates debates, he can call to order any person to be out of order and so on. He does this in terms of regulations which the House makes and applies. A day is devoted to Opposition affairs.

The Speaker

Article 52(2) provides that when a Speaker is appointed from outside the House he shall be, by virtue of holding the office of a Speaker, become a member of the House in addition to the other members.

The deliberative function is the most distinctive function in our parliament whereby through a majority of parliament, the Government of the day of the country is determined. This, of course, depends on the constitutional set-up of the country. For example, in the USA, the deliberative function of Congress doesn't result in the choice of government. That is, the Government is solidly in the hands of an elected president who is elected in a different and distinct manner from Congress. The President may lose the confidence of Congress, but still continue. In this way, the US Congress exercises debate simply for debating purposes and whether one loses or wins simply determines whether a law passes or not but not the lifespan of government. In the USA, the President is in full control of the Government of the day and continues to do so irrespective of whether he has majority in Congress or not. The president will remain in power so long as he is successfully impeached. It is very rare that presidents of the USA can be successfully impeached. In other words, it is not sufficient to win the debate in Congress for you to remove the President of the USA but is sufficient in the House of Representatives in Malta to remove the Prime Minister from office or the House of Commons in the UK. In Malta and the UK, it is sufficient for Parliament to defeat the government on a vote of no confidence. In 1998, the vote was not a vote of no confidence in the government but on development in Bormla. The debate was lost by the Prime Minister of the day who interpreted that loss of the debate as a vote of no confidence. **A vote of no confidence under**

Maltese law should be a vote where the majority of the members of parliament are voting against the government of the day. The deliberative function of Parliament is important in more ways than one. It has been to a large extent conditioned considerably by party discipline.

The deliberative function of Parliament is that it **debates matters with a PURPOSE**. Parliament has plenty of occasion to debate. Laws are enacted by Parliament, and it is the deliberative function of Parliament that is most apparent on debating the law or on any issue on public relevance. It is not only the debate in Parliament which the Government must win, but it is also the debate in the country. An example of this is in 2018 where Dr Lawrence Gonzi lost the majority in the country. In that occasion you will notice the flexibility of our Constitution. The deliberative function of Parliament ultimately relies on the ability and the readiness of the President to take immediate action when the majority supporting the Government is no longer there. In these cases, the debate in parliament takes place with the purpose of establishing who the Government is. The majority in Parliament must always reflect the majority of votes cast in the country. This ensures that all times, the Government running the country reflects the choice of the country.

The deliberative process is protected constitutionally as every member of parliament is free to express his opinion. It is important for the party in parliament to win both the debate in the House and in the country. It is very important that the government manages to win both debates which would have immediate serious consequences on the livelihood of the government. The debate in the country is widely reported in the press and so the people can participate in the debate by opinions being reported in the press of what happens in the House. it is what happens in the House that is legally prevalent and not what happens outside the House. Parliamentary debate is reflective of a larger debate taking place in the country. Winning the parliamentary debate but losing the same debate in the country ensures only a small amount of power. The deliberative function reflects itself in the ability of Parliament to control Government through the deliberative process. The Government must always enjoy the majority of votes in Parliament. **The electoral system and parliamentary system work to get a government answerable to the people**.

The Prime Minister is able to remain that way until he is defeated in Parliament. Once defeated, he would have **3 days** to decide what he wants to do. If the Prime Minister does not take the needed measures, the President will have a problem on his hands because he would still need ministerial advice. In 1948, **Dr Boffa** was defeated by Mr Mintoff in the election to the leader of the Labour party. When Boffa lost his leadership, it was evident that he no longer commanded the support of the labour party.

The deliberative function of Parliament is an important function because it determines your choice of parliament. It is a convention of the Constitution which we are all familiar with. Familiarity with this convention goes to the extent that in the elections we elect a Labour Government or a Nationalist Government. In choosing the representatives, the electorate is also determining the political colour of their government. This is what distinguishes us from the US constitution. Of course, there are several ways how this deliberative function is exercised.

The Legislative Function

The legislative function of Parliament is perhaps the most evident function. It makes law for the good of Malta and this has been in our Constitution since we became Independent.

> **65.** (1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.

This article is a general provision laying down the legislative power of Parliament. However, it was used in 2004 to adopt the legislative powers of Parliament to the reality of membership of Malta in the European Union through the ratification of the Treaty of Athens in April 2003.
Article 65 also establishes the supremacy of Parliament within a more supreme Constitution. parliament can make any law, so long as the Constitution is not contravened. Only if a law is inconsistent with the Constitution will such law be invalid.

This function is perhaps not as important as the deliberative function but is undoubtedly the most obvious as it is common to all parliaments of the world. In Malta, strictly speaking, the legislative function vests in the whole of Parliament. However, due to the current framework of Parliament which has been in force for a number of years now, on a deeper analysis, this legislative function is more in the hands of the Government rather than in the hands of Parliament as a whole.

The main distinction between the parliamentary system and presidential system is that in the parliamentary system, the government of the day is a necessary expression of the majority. This shows you that the present system is set to be democratic; it relies heavily however on party politics. This has become truer today than it has ever been. With the development of political parties, democracy has become both more meaningful and less meaningful in different ways. In today's framework, **the sovereignty of parliament becomes the sovereignty of the party in government**. Look at the legislation enacted by the Maltese Parliament over the last 20 years and find those laws which a government moved for adoption in Parliament which were not adopted. You will find only a couple of occasions. This means that the legislative function**, though really a function of parliament, is not in reality a function of parliament at all but one of the Party in Government**. Only apparently is this a function of parliament.

The legislative process, however, is still relevant in the nurturing of a democratic environment. Legislation gets enacted by Parliament, but very much gets enacted if the government wants. Sometimes, the debate in Parliament is sufficient to persuade the government to accept changes to the law which otherwise would have been resisted beforehand. The changes to the law are evident in the moving of amendments to the bill by the members of the government.

The resolution passed by the House is not law, because this simply pertains to Parliament. in order for a bill to become law, the President must give assent in line with article 72(2) and it must be published in the *Government Gazette,* upon which everyone is assumed to be aware of its existence. In the case that the President decides not to give assent, technically speaking, the President is in breach of the Constitution, but this cannot be enquired into in any Court of

law, which gives reason as to why many argue that this provision still retains its conventional nature. That being said, if the President does not sign the bill, that bill will not become law under any circumstances. Therefore, when we speak of laws enacted by Parliament, we speak of laws enacted by the House and the President. Of course, the President does not play any role in the process of how a bill becomes law and the Parliamentary stages involved.

Sovereignty of parliament: 3 characteristics:

1. The ability of parliament to enact the law: it is the **sole body that can enact legislation**.
2. The general jurisdiction of parliament to enact laws: its **ability to enact law is unlimited** and it may enact law on anything it deems necessary or proper. Of course, in the case that Parliament enacts a law that is unconstitutional, not only will it receive a great deal of political backlash, but the enacted law will also be struck down by the Constitutional Court in the case that a case is opened against it.
3. The requisite on which the Maltese constitution differs from the British constitution is that **the acts enacted by Parliament must be presumed to be valid and applicable in a court of law**. In the UK, the court may, under the Human Rights Act, make a declaration of incompatibility. It may not disregard the act in question or not apply the law. **In Malta, the ability of parliament to enact laws derives from the Constitution and it is limited by the Constitution** and therefore, from this is derived the court's ability to declare an Act of Parliament to be void because it is incompatible with a constitutional provision. The position here is that the legislative situation of Parliament in Malta is comparable to the UK except for this very relevant difference. A court in Malta may interfere with the parliamentary process of legislation after the law has been enacted, if they feel it is in breach of human rights or contrary to a constitutional provision.

Parliament is able, through necessary majority, to change the whole Constitution. The relevance of parliament both is both in legislation as well as in constitutional change. The Constitution is within the ownership of Parliament who can, without the intervention of the people at all, change nearly all the Constitution. The intervention of the people in order for a change in the Constitution is required in a very small area of law. Therefore, Parliament has both a legislative function and **a constitutional function** to perform.

The legislative function of Parliament is an important function. Included in this function, is the ability of **Parliament to delegate its legislative function to subsidiary authorities** acting under its authority. Delegated legislation involves 2 requirements:

(1) It must be enacted in accordance with the procedure in the enabling act,
(2) It must address the problems included by the enabling act.

Delegated legislation can be declared void because it is ultra-vires the enabling act.

EU

Parliament is not the exclusive legislator in Malta, but it is till true to say, that up until 2004, any other authority could legislative under the authority of parliament. Now we form part of the European Union. The case remains that locally, no other body can legislate unless by delegation of Parliament. With membership of the EU, the exclusivity of Parliament has been degraded considerably. EU laws are directly transposed into our legislation and no laws that go against them can be enacted. In this way, the EU imposes another limitation for Parliament when it comes to law-making. The concurrent legislative authority is found in EU institutions. The EU provides another source of creation of legislation, separate of the State

and independent of Parliament. The EU enjoys a conferred sovereignty from the Member States in certain areas.
In one case, the Constitutional Court ruled that article 65 effectively grants constitutional supremacy status to the obligations assumed by the Treaty of Accession to the European Union and therefore a law which is in breach of such obligations is inconsistent with the Constitution.

It is not only a Minister who may present legislation in parliament, but any member can. This gives rise to the possibility of **public bills** which are bills put forward for the House to adopt by a Minister of Government. **Private member bills** are advances by a Member of Parliament who is either on the government's side or on that of the opposition; they are bills presented for legislation by a private Member of Parliament. Dr Pullicino Orlando put forward the bill of separation. It was evident that when he proposed the bill, he did not have the backing of the Government of the day. When the bill eventually came to be debated in parliament, the Government of the day decided that it would have a referendum on the issue rather than adopting or dismissing the bill. After the referendum was in favour of the enactment of such legislation, it was voted in against the wishes of the Prime Minister. The Government can carry on despite the enactment of law against its wishes, but it obviously carries on at a risk.

It is to be noted that when we speak of the power to legislate, there is a formal procedure through which the law is produced. This is as much a part and parcel of the notion of democracy as the power of Parliament to make law.
How laws are approved (remember at each parliamentary stage they vote)
Any member of parliament can present a bill but usually it is the minister.

i. First, he presents a first reading where the only thing that is read is the title of the new law that the individual is proposing (new or amendment),
ii. After it is published in the government gazette so anyone can have a look at what is being proposed,
iii. Then there is the second reading whereby the parliamentarians discuss only the scope and objects of the bill – why it is being proposed and the minister will make an introductory speech explaining this and has to reply to any points raised,
iv. Then the act goes before a committee stage – there is a special committee and depending on the nature of the bill, the members change – they examine the bill clause by clause and vote for as many clauses there are – amendments can be presented, once the bill is approved after taking a vote on each section of the bill, the chairman of the committee will tell the speaker whether the bill was approved with or without amendments,
v. Then the minister will present the third reading which is the final approval by parliament – the bill would have changed so much during its passage that members of parliament may change their vote – it is also important because when we change the constitution, you need a 2/3rds majority at this final reading ONLY. All laws need only a majority of 1 unless they change the constitution.
vi. The bill is then sent by the speaker to the President of Malta who is obliged to sign the bill
vii. Then the bill is published in the government gazette (therefore, published twice first as a bill and then as an act of parliament – one cannot be found guilty of breeching a bill; once it becomes an act of parliament and is published then no one has an excuse). The final version of the bill is published in the government gazette.

Presidential assent

Article 72 is clear: no Bill becomes law until the President gives his assent and the Head of State is obliged to do so without undue delay.

However, the question arises what if the President for some reason or another does not signify his assents? There is no doubt that an unsigned bill cannot become law. In such situations, the political solution is to remove the President, or if Government wants to retain the President just the same, to arrange for the Head of State to be substituted by an Acting President by creating a temporary absence (such as absence from Malta) and then such Acting President signs the bill.

However, **from the purely legal point of view**, the paucity of precedent and the mammoth legal difficulties which arise to enforce article 72(2) in a court of law are such that in all probability this provision, culled from unwritten English constitutional conventions, and transported lock, stock and barrel to our Constitution, has still retained its original conventional character. The norm is so political in nature and content that it probably carries a political rather than a legal sanction; for assuming that it is possible to sue the President in his official capacity (article 72A provides that *"no civil proceedings whatsoever shall eb taken against the President of Malta in respect of acts done in the exercise of the functions of his office"*), so that he is ordered to sign a Bill to which he has refused assent, an even greater difficulty would be determining the content and nature of the action against the Head of State. The difficulties are so complex and open-ended that the probable conclusion is that this article is only a constitutional convention incapable of being enforced in a court of law.

Publication of Law in the Malta Government Gazette

The Constitution requires that following the Presidential assent, the Act is published in the Government Gazette and cannot come into force unless it is so published. Consequently, in practice a law is published twice in such Gazette, first as a draft law or bill following the first reading in the House and then in its final format following the Presidential assent.

An act of Parliament will usually contain a provision that the act will come into force on such date as the Minister who is responsible for that particular act may by order indicate.

The Financial Function

All parliaments have a considerable financial function, and this is the case even those Parliaments that do not have a deliberative function. The ability of Government to raise funds from the people is through representatives of the people giving consent to such funds being raised. **The Financial Policy of the country is made by Government and not by Parliament yet is controlled by the House**.

In the budget debate, a motion is made to reduce the salary of a particular minister by 1€ to show that they do not have competence in that person. Such a vote would be followed up by the dissolution of Parliament or resignation. It is important to note that in terms of law, the financial policy is the function of government. Government determines what the financial policy of the country is going to be and therefore, Parliament has not scope in this. But once government makes out its financial policy, then **approval by Parliament becomes necessary**. **If it is disapproved, that is tantamount to a motion of no confidence**. It is a defeat.

It is necessary to understand how public finance works. It works through the function of the Central Bank of the State which is the Chief banker for the Government of the day. Chapter IX, section 102 of the Constitution regulates the matter of finance. **All money which**

Government intends to pay must be drawn from the consolidated fund. In other words, all monies which are spent by the Government must come out of this fund.
There are two types of expenditure coming out of the consolidated fund:

(1) **ordinary expenditure** &
(2) **charges on the consolidate fund**. For example, the public debt of Malta is a charge in the consolidated fund. Also, the payment of the salaries of judges and other offices enshrined in the Constitution are also made on the consolidated fund – **article 107**. The salary is charged specifically to the consolidated fund **so that their operation is not debated in Parliament**. This secures the Independence of the judge in his profession and removes from Parliament the possibility of a discussion of that individual's performance because parliament may not express confidence or no confidence in that individual by reducing his salary.

Revenue to Government: rents and other payments, the ordinary sources of revenue are indirect and direct taxes.

In the **annual budget**, the **Minister responsible for finance** gives an account to Parliament of how he has raised and spent money during the previous year.
The budget is made up of two sections:

(1) one looking backwards to the last financial year and giving an account to parliament
(2) the other is prospective, establishing what money the government needs to collect in the coming year and how it intends spending that money.

EU
Monetary policy also used to be a function of Government. It is no longer a function of Government because it is now the function of the European Central Bank which controls the euro since Malta became a member of the EU. The financial policy is still made by the government but is under the control of the European authorities and it must be approved by them. Monetary policy, on the other hand, is totally under the control of the European Central Authority. Therefore, this function of Government is very **controlled**. One has to distinguish between consolidated funds and other payments. Some payments by the Government are specifically provided for in the Constitution.
You can see how the financial function is tied to the deliberative function. In British and Maltese practice, the non-approval of the budget is a vote of no confidence in Government. In the USA, where the deliberative function is not so pronounced, this will lead to the inability of the government to spend that money but that is it. The Government will continue to function.

The Appropriation Act
Parliament controls financial policy but does not make it, the Government of the day makes it. The Government of the day in its annual budget will give an account of what it has collected and spent. **The Appropriation Act** is sub-divided into a number of heads where the different expenditures will be catered for. The Government is forced to spend to bulk of the money for the purpose for which it was voted. If the budget says that so much is to be paid for A, then the Government must spend that amount on A and not otherwise. The Appropriation Act is meant to control the financial function of Government. It is the expenditure more than the revenue of the Government which is controlled by Parliament. The Prime Minister needs funds in order to continue in office. A government who no longer holds the confidence of Parliament would be forced to resign

In brief: Parliament's function is not to make financial policy, that is the function of government. It is the control of financial policy which is in the control of parliament; it approves of the financial policy being proposed by government and controls its putting into practice. Parliamentary function is a function not of the making of policy but of control of policy. Parliament ultimately controls the financial function both prospectively and retrospectively. The former by approving the Appropriation Act in relation to the annual budget and the latter by approving or not approving the budget every financial year. Every financial year, the Minister for finance presents the money the government intends to collect in the coming year. **Parliament's function is limited to either approving that policy of disapproving it**. If it is disapproved, this is tantamount to a vote of no confidence. There is no way how a Prime Minister could survive this, as what happened to Dr Gonzi. The financial function of Parliament is **limited to the approval of the financial function presented to Parliament by the Government and to the control of the proper exercise of that function**. It is up to Parliament to see whether the money has been well spent or not.

Parliament can, with difficulty, itself manage to oversee the proper exercise of the financial function of parliament. That is, the Members of Parliament do not have the power to go and check whether the Government is properly spending its money or not. Otherwise, that would quickly bring the Government to a standstill, which is undesirable. What happens is that as Parliament has to control the budget of the country through its exercise of the financial function, and this the Members of Parliament cannot do it personally, but they appoint a person who audits government accounts and reports annually to the House whether they disclose any irregularity or whether they are well kept or not. If the accounts evidence and irregularity, what the nature of it is. This is the Auditor General.

The Auditor General

The AG is appointed under the Constitution by the House to audit government accounts. His appointment is regulated by section 108 of our Constitution. This article requires the election of the Auditor General by the 2/3^{rds} majority of the members of the House, in order to provide that he functions independently from the government of the day; *ultra partes.* He is appointed by the leader of the House and the leader of the Opposition. An agreement between them would enable the House to support the appointment by 2/3^{rds} of its members. He holds office for a period of 5 years but can be re-appointed for another term. He is usually re-appointed after the expiry of the first term of office. He is removable from office like a judge of the Superior Courts, on grounds of proved misbehaviour or proved inability to perform the functions of his office and **his salary is charged to the consolidated fund**. This is meant to ensure his independence in the performance from political pressure.

The Public Accounts Committee

Today, considerable amendments have been made to the office of the AG – 1997 – provided for the establishment of an independent office headed by the AG. This office is not envisaged in the Constitution but is created through an Act of Parliament. Ultimately, he works in Parliament through the Public Accounts Committee which is another committee which has been established by Parliament to help it in performing properly its financial function. It is there to supervise public spending and public accounts. Any 3 members of the Committee can instruct the AG to carry out reports on any particular issue of public finance. This is a powerful tool in the hand of the Opposition in order to enable it to check whether the Government is acting properly, financially or otherwise. That is, in this respect, it is important to point out that the AG and his office act as the *lunge manus* of Parliament. The committee is a standing committee. The chairman of the committee is a person from the

opposition and the minister of finance may not sit in this committee. The function of the committee is to report to Parliament on public accounts. The investigation by the Committee creates considerable pressure on the Government of the day to keep its accounts in order and to keep its finance in order. That is, the whole idea here is to make it part and parcel of the deliberative function. This individual and collective responsibility is no more evident than in the matter of public finance. Parliament can exercise this function, not itself, but through the process of the AG. The function of the AG is to report honestly and correctly on public finance in order to enable parliament to take proper positions. The AG is given a number of powers under the National Audit Act: he can hear witnesses, has access to all government documentation and so on.

One particular difficulty exists in relation to the collection of evidence, that is, both the Ombudsman is able to hear evidence and to make reports on the evidence and also the Public Accounts Committee. The issue becomes complex because it can have a bearing on criminal proceedings.
The financial function of Parliament consists of two aspects:

(1) parliament approves or does not the financial policy being proposed by the government
(2) the financial policy approved by Parliament is followed properly by government. A negative report by the Auditor General may have very serious consequences on the electoral faith of the persons concerned. The report of the Auditor General to the House is a privileged report and may not be the subject of litigation for liable purposes. In a recent case, the AG received a letter from third parties who were involved in an investigation threatening liable action. The AG deemed the matter to be a breach of privilege. The matter has been concluded by the AG making a report to the House on the issue. These reports of the AG play a very important role in the financial control and function of Parliament.

Recapitulation

To recapitulate, the main function is the deliberative function, that is through this deliberation it leads to the survival of the government because government must always have the confidence of Parliament and if it fails, it is dead and has to be substituted. This is perhaps the most distinctive function of the English Parliament also. Not all Parliaments have this function to the same extent as the British parliament, and the Maltese Parliament have. If we take the USA Congress, there is no deliberative function. It debates issues and does so effectively, but the debate never matures into a vote of confidence or of no confidence in the Government of the day who is elected separately from congress. The question of which is the better system is highly debated, and perhaps there is no answer. The American system, however, seems to be a more balanced system. Different legal systems and different situations lead to different conclusions and even to different compositions. For example, the deliberative function in Italy is less pronounced since it is a coalition government. The French system is mid-way between the English system and the US system. Even here the deliberative function is important since the government of the day is answerable to parliament and must retain the confidence of parliament, but the actual head is the President who is an elected figure.

A second function of parliament is the legislative function. In the parliamentary systems, the function of parliament is not only the deliberative but there is also a legislative & the constitutional function. The constitutional function of Parliament depends on the character of the Constitution and of Parliament. For example, in the English system the Constitution of the

State is within the ownership of Parliament whereby it can on any day scrap the whole Constitution by simple legislation. There is no legislation that Parliament cannot undo. In the Maltese system also to a large extent the Constitution is in the ownership of Parliament and not of the people. If you look at the Maltese system you will see that the ownership is in the representatives of the people and not in the people as such. The people cannot change the Constitution as this is only done through their representatives in Parliament with a two-thirds majority. This means that the ownership of the Constitution is in Parliament and that Parliament plays a major role in the interpretation of the Constitution. Constitutional changes happen through parliament, and this is not only through the avenues of change listed in section 66 of the Constitution. As it largely conventional in character, as far as the workings of Parliament and its relationship with the Government of the day is concerned, this is subject to change without any change in the Constitutional document. The way the Constitution works depends on **the way it is interpreted by the principal actors**. For example, when Dr Muscat resigned – whether the president of the republic should have dismissed him. He was under no such duty because Muscat had not been defeated in Parliament and only that would entitle the president of the republic to adopt those extreme measures. Actually, what happened in that case shows that the President of the Republic had no ability to dismiss or dissolve Parliament once the Prime Minister had not been defeated. It is to the House which the President looks for exercise of his powers of dissolution and of dismissal and not to the public. The House should determine whether he should exercise his power. This underlines the deliberative function of parliament that is the whole of the Constitution is subject to Parliament ownership and to parliamentary approval. The representatives of the people in Parliament have a hold over the Constitution on behalf of the people. In certain situations, it is the people themselves who own the Constitution rather than any institution while in the English and Maltese system, as Parliament is highly represented of the Constitution, the representatives are able to change it in accordance to the circumstances.

Another function of Parliament is the financial function. The position of the Auditor General and his annual reports to Parliament on governance finance is key to a proper understanding of the financial function of Parliament. Parliament adheres to this by Annual Appropriation Acts and by raising the necessary legislation to allow the necessary taxation and raising of funds to be able to govern from day-to-day.

The Residual Judicial Function

Besides the functions mentioned, Parliament still has other functions of a rather residual character. For example, Parliament had a considerable judicial function which it could exercise at will, however, this has been eroded.

In the past, the British parliament and the Maltese Parliament could condemn any person to prison for contempt of Parliament whereby the imprisonment of a person may not be for a term longer than the duration for the parliament. In other words, with the dissolution of Parliament, the orders die a natural death and unless they are put in place by the next Parliament they are gone forever. This considerable judicial function no longer exists.

In the UK the House of Lords was the highest court of appeal, whilst also a House of parliament. So, parliament, through the House of Lords, came to exercise a considerable judicial function. These are today merely vestiges of what has been as these powers no longer belong to the House. The Maltese House never had the judicial function in the sense of hearing appeals from judgements of the Maltese courts, but it could interfere with judgements of the courts through legislation. In 1972, the Maltese Parliament had sent to 2 persons to

prison, accused of having attempted to bribe Members of Parliament. This was a breach of the privileges of parliament and Parliament was able to condemn persons who were in breach of privileges without any reference to any court of law. Today this has become impossible after the infamous ***Demicoli case***, a newspaper editor who was condemned by Parliament in 1986. He took his case to Europe and eventually won his case against Malta in the sense that he been breached of the fundamental human right of a right to a fair hearing. This led to an amendment in the law. In the past, Parliament could try the person but could not impose any monetary penalties or penalties.

Today, if Parliament wants to proceed against any person, the matter has to be referred to the Court of Magistrates who have to hear the case and come to a judgement. Parliament, in enacting the act of 1991 amending it's condemn procedure, has deprived itself to a large extent of its powers. This is sounder from a human rights point of view since when you were tried by Parliament you were tried by **dependant** and a **partial** tribunal. Handing over control completely to the courts seems to be that Parliament is to a large extent emasculating itself from its constitutional power to control the Government of the day and to control matters.
Parliament still had a residual function of a judicial character. Parliament in the UK was born as the High Court of Parliament, in the Medieval Ages it was very much a judicial body. It has retained a number of judicial functions and only recently they have been done away with. The House of Lords would sit as the highest court of appeal. Today this has been changed with the introduction of the Supreme Court.

PARLIAMENTARY PRIVILEGE

Article 65(3) – (5) lay down the most important privileges namely:

(a) immunity from civil and criminal proceedings against any member of Parliament for what is said in the House or any of its committees,
(b) freedom from arrest for any civil debt except a debt the contradiction of which constitutes a criminal offence,
(c) no court act can be served or executed within the precincts of the House.

According to article 67(1) of the Constitution, the House is entitled to regulate its own procedure. In fact, its procedure is regulated by the Standing Orders of the House of Representatives.

Parliamentary proceedings are regulated in the sense that they are not a non-structured and a non-regulated debate. It gets regulated in the form of Standing Orders. One of the privileges is that it can adopt is, in fact, its own procedure. That being said, this doesn't mean that Parliament will be able to change its own procedure without the necessary resolutions. If it desires to change its procedures, then it has to adopt a resolution which either suspends standing orders or substitutes standing orders with other standing orders. In that sense, it can regulate its own procedure, but it does so in a regulated manner. Parliament in regulating its procedure must do so sensibly and in terms of regulation which itself makes.

Parliament is free to adopt any procedure it likes but it is not beyond the ability of the Court to interfere with. This is most evitably shown through Mintoff v. Borg Olivier where the Constitutional Court held that **when procedures are laid down specifically in the Constitution, then Parliament may not dispense with that procedure but must follow it for the validity of the act it purports to make**. The Court can interfere in the decisions taken by Parliament as a result of that procedure, but the Court will not be able to interfere in

the way Parliament discusses issues. There is no way, as happened for example with the divorce bill, that the bill is not debated in Parliament. Ultimately, **the way proceedings are conducted in Parliament is up to Parliament itself to determine in the freest manner possible**.

The position of the minority is protected by the election of a Speaker to allow them to make their points heard in the debate. The implementation of parliamentary procedure is through the rulings of the Speaker and not through the Courts of law. Parliamentary privilege are those special rights which pertain both to the House of Representatives and to its members in virtue of the public functions they are performing. For example, the House of Representatives is able to enact laws through the passing of bills which no other body in the country may do. For example, UoM in virtue of the Education Act can adopt regulations. Any other body may not adopt regulations which will be binding at law, only the HoR may adopt bills which when assented by the President become the law of the country. this is a special privilege which pertains to the House fully. Another privilege which pertains to the House fully is that to conduct its own procedure in a manner which suits its purpose.

Parliamentary privilege was formally a very extensive notion: it has special rights pertaining to MPs and to Parliament as a whole in order for them to perform their public duty.

Secondly, there is the breach of privilege. The House of Representatives Ordinance, Chapter 113, contains provisions which are considered as a breach of privilege and a list of offences which are included in article 11(4). In the 1970s when certain persons attempted to bribe a Member of Parliament, Parliament brought up the persons charged in the HoR and condemned them to 6 months imprisonment. That is, the issue of contempt involves a judicial process of Parliament by which the person is punished for his breech of privilege. Of course, today this is still a relevant factor in the UK but not in Malta as a result of the ***Demicoli case*** who was the last person filed by the HoR. He took his case to Europe and the European Court held that the proceedings violated the right to a fair hearing in front of an impartial and independent tribunal and declared Malta to be in breach of the fundamental rights of Demicoli. The law was changed. If a person is guilty of contempt, the HoR can either reprimand the individual or refer the case to the Magistrates Court. Of course, in so far as MPs are concerned, it is still up to the Speaker to keep the order in the House and any persons who resorts to unruly behaviour may be excluded from the House by the Speaker – this is called 'a naming'. The speaker needs to ensure that proceedings are done in an orderly fashion.

The only relevant privilege which has survived in Maltese law is **the freedom of speech** attributed the members of parliament whereby they can speak freely in Parliament, provided in terms of what he is allowed to say as a matter of parliamentary proceedings. This is important to ensure the ability of the opposition to criticise effectively and rationally the government of the day. No lawsuit can be based on words spoken in Parliament or reports made in Parliament since these are covered by absolute privilege. As long as it is a bona fides report on what happened in Parliament. This is the only privilege which is of considerable value to the democratic position. It is so because it **allows the Opposition to criticise the Government effectively and without fear of retaliation of what is spoken in Parliament** and therefore, it ensures parliamentary debate which is able to reflect on the national debate because what gets stated in parliament gets very reported in the press. People argue that this can be easily abused of by mentioning persons who are not present in parliament and not able to reply in the same tone in parliament. the reputation of such persons is protected by

standing orders and by the Speaker. This is the only relevant parliamentary privilege which is left to the MPs it is essential to the proper functioning of democracy. It may be said that what is said in parliament should be subject to proceedings, still the proceedings may impinge on the freedom of speech. You want the greatest level of freedom of speech to ensure that the democratic processes are solid, and people are free to criticise the government effectively.

In relation to freedom of speech, this is one of the fundamental human rights of the individual and is essential like any other fundamental human right. It is restrained and limited by the equal rights of others – someone has the right to his own reputation. Anyone who feels damaged by public speeches can bring an action for damages by making that allegation. The possibility of a liable suit is naturally a restriction on restriction of speech, but it is one meant to protect the equal rights of others who might feel damaged/slandered by what is said. This is the possibility of liable proceedings. this is not the case to what is said in the House because it important that the Opposition can criticise the Government in as free a manner as possible.

The most important privilege is the one relating to immunity from proceedings for what a member states in the House since the immunity for arrest from civil debt, is today futile as no arrest can any longer be made for any civil debt.
Although the immunity from proceedings for what is said in the House may seem unfair, one must add that such immunity exists in most legislatures in member states of the European Union. Indeed, in certain jurisdictions, e.g. Italy, the immunity extends to any criminal proceedings, even for acts done by the members outside the House; unless the legislature authorises such criminal prosecution against any member of Parliament.
In Malta, the immunity applies only to what a member of Parliament says in the House. Any action, verbal or otherwise, outside the House is not protected in any way. The justification of such parliamentary immunity is that a member should be free to express an opinion, state facts and give his value judgement, raise reports or allegations about misconduct, without the fear of being sued in court.
Today, this concept of parliamentary privilege is not as important as when Parliament was asserting its rights against powerful Monarchy or against a powerful House of Lords. A number of lawsuits happened in the 19th century touching parliamentary privilege. The concept of privilege has become of dubious value. The position is whether MPs should have privileges at all because while in a former age it was necessary for Parliament to be able to assert its own position in the face of powerful monarchy, this is no longer so. The idea of parliamentary privilege becomes less important than it once was.

CONCLUSION

The whole basis of a democracy functions on a good representation in Parliament – democracy which is achieved through the operation of the function of the representative of the persons concerned. government is elected by the people, from the people but it is not the people themselves who are governing but their representatives who govern through them, on their behalf. This is necessary for a proper functioning modern democracy where issues of population size become relevant. It is quite okay to have a democracy where you have 1000 people but is a different thing where you have 500,000 people or more who want to have a say in the government of the day. This is representative democracy. Today, electoral measures have been introduced in our electoral process for gender measures to be introduced.

MARTINA CAMILLERI

Constitutional Law
Dr Austin Bencini

INTRODUCTION

In law you have to distinguish between public law & private law. Public law is that field of law which deals with the State. Private law deals with the relationship between individuals. The most classic situation of Private Law is that of property which, of course, involves two or more individuals. In Public Law there must be the institutions of the State involved. Moreover, Malta is a sovereign state and is one that has a constitution. No state can exist without one.

What is a constitution?

The law which defines the powers of the organs of the state, their relationship with each other and their relationship with the individual. It is not enough to say this, however.

"The constitution of a state in the abstract sense is the system of laws, customs and conventions which ***define the composition and powers of organs of the state*** *and* ***regulate the relations of the various state organs to one another and to the private citizen****.*
A constitution in the concrete sense is the document in which ***the most important laws of the constitution are authoritatively ordained****."* Therefore, a country which has no written constitution has no constitution in the concrete sense of the word – O. Hood Phillips.

The most important laws constituting the basis of the State are specified in one formal document or a series of formal documents which are binding on the Courts and all persons concerned.

The Constitution of Malta may be described as appertaining to the so-called Westminster model. This means that the Prime Minister, who is a member of the House of Representatives enjoying the support of a majority of its members, holds a pre-eminent position in the political structure. All major appointments within and beyond the Constitution depend on his advice and the Constitution provides that the Head of State is bound to abide by that advice. Indeed, it makes it clear that in the exercise of his functions – not necessarily those under the Constitution – the President is bound to act according to the advice of the Cabinet, or some other person or authority delegated by Cabinet (85). It is only in a small number of cases – some of them of an exceptional nature – that the Head of State acts according to his own deliberate judgement. These cases form the residual powers of prerogative based on British constitutional conventions.

Malta has a Republican form of government.

The main characteristics of the Maltese Constitution are that it is written, rigid & requiring a three-tier mechanism to amend (**article 66** sets out three methods of amendment namely, two-thirds majority of all members of the House of Representatives and a referendum, two-thirds majority, and an absolute majority of all members of the Legislature depending on which article is amended). It sets up a parliamentary democracy, maintaining a more or less separation of powers on the British model. It is not autochthonous in the sense that it is the result of a legislative act of the last colonial power. The Head of State is the President of the Republic. All issues in the House, except amendments to the Constitution, are decided by a simple majority of those present and voting.

Unless you quote the source of law on which you base your opinion, no marks will be given to you. What are the sources of law? In constitutional law, they are

(1) the Constitution,
(2) legislation,
(3) custom (unwritten law),
(4) court judgements, &
(5) writers of repute (recognized authors in law that compile works that tell us what the law is – their analysis influence minds on how the legal system works).

Brief Constitutional History

The Constitution is not ordinary law, it is a special type. It also tells us how law is made and therefore, it is law which defines what law is. Our constitution owes its sovereignty to when Malta became independent constitutionally from the United Kingdom in **1964**. Our legal system, especially our Public Law system, owes so much to the period when we were under British rule and therefore, to events that took place prior to Independence. From **1921** till today, the way we voted is a system that was introduced under the British sovereignty. Therefore, we must follow the timeline from **1921** to nowadays. In **1921** we did not have what is known as universal suffrage. On the other hand, **nowadays, everyone has the right to vote**. As we have already established, we are dealing with Public Law. In **1964**, Malta became an independent sovereign state with an equal status of all other sovereign states of the world. The Constitution of Malta came into force the minute Malta became independent. Malta took its place amongst the international community of states.
The constitution defines what the state of Malta is.

"*Reason is the life of the law*" – Sir Edward Coke (a jurist in the Middle Ages) he stated that it is in fact the perfection of reason. The law must have as its life reason.

Malta as a democracy

Democracy is a value which the Constitution itself considers to be its reason for life:

> **1.** (1) Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.

The Constitution starts off by telling whoever is regulated by it, which includes all of us, that Malta is a democratic republic. This is why the constitution is the fundamental law of a state.

Is democracy necessary for a constitution to exist?

The answer is no.
In the case of Malta, however, we have adopted a democracy. It is the sections of the Constitution which indicates the type of democracy Malta has adopted. Moreover, the Constitution is the sole legitimate source of power.

Article 6

> **6.** Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

The constitution is both fundamental and supreme law: it defines the powers of the Organs of the State, whilst stating that no other law in Malta can alter it unless it is done in the manner contemplated by the Constitution itself. Our Constitution is the brain which gives the rest of the body the organs so that the body may live. The case of Marbury v. Madison helps us to understand what supreme law is.

Article 51

> **51**. There shall be a Parliament of Malta which shall consist of the President and a House of Representatives.

There was a shift in sovereignty from the UK to a new State. Moreover, that new State adopted a constitution, and that constitution issued a command. Here, the wording is regarding an immediate future. The House of Representatives does not form parliament alone.

State versus Nation

Our current constitution owes its nature to these initial constitutional cases.
One must make the distinction between a State and a nation. Malta became an independent state in 1964. A State may have various nations in it since, a State may have peoples of different languages, religions and cultures. Therefore, whilst a State is a territory considered to be an organised political community under one government, a nation is a large group of people who inhabit a specific territory and are connected by history, culture, or another commonality.

The Maltese are a nation as we have a common language, a common history, a common religion belief and also a common aspiration.
However, **not all nations are States**, and this is seen in Maltese history. Malta was a colony of the British Empire, meaning it was not a State at the time because our executive and judiciary was determined by a sovereign state called the United Kingdom, but was nevertheless a nation.
It was only in 1964, through the Malta Independence Act did the Maltese nation identified themselves with a state **because Britain let go of sovereignty** over Malta, Gozo, Filfla and Comino. At this time, Dr Borg Olivier became the Prime Minister of Malta whilst Mr Dom Mintoff was in opposition. The Parliament of the 1964 existed under the 1961 colonial constitution. Moreover, the 1961 constitution was given to us by Great Britain because we were not yet a State. Nonetheless there was a colonial constitution which was not supreme. The concept of supremacy means that it is subject to nothing else. A constitution is supreme while a State is sovereign.

Britain would allow free elections for the Maltese to elect a parliament, known as a legislative assembly, in those days. That came very much later when the Maltese, under Borg Olivier and Mintoff, said they can no longer remain under the British and therefore, wanted independence. The 1921, 1947, and 1961 constitution where the prototypes and the actual models of our current Constitution. You cannot understand the current Constitution if you do not go back in time first. Therefore, going back, Malta was not conquered by the British, but they were voluntarily invited by the Maltese nation to come and take over the islands, not as a conquered territory, but as a voluntary concession of sovereignty.

A nation becomes a State the moment these people have a defined territory. If the people do not have a territory it controls, then it can never aspire to become a State. This is the case of Palestine but obviously, not the case of Malta.
A nation/s can claim statehood by proving that its three organs control totally a given territory. This is called State Sovereignty.

Prior to 1964, we were not a sovereign State as Maltese, but we had constitutions. These constitutions were subject to a higher authority – Parliament. Under the British, Malta had a number of constitutions which **denied the Maltese any form of participation in the**

colonial power, and we had others which allowed the Maltese a form of participation in our internal affairs.

The 3 amendments main Constitutional amendments
Our Constitutional History

2. Discuss the extent to which, if at all, the so-called 'Republic' amendments to the Constitution of Malta enacted by Parliament through Acts LVII and LVIII of 1974 modified the protections to the supremacy of the Constitution of Malta originally introduced in the 1964 'Independence' Constitution of Malta.

4. *"Starting from the coming into force of the Independence Constitution, the constitutional development of Malta has been rich, varied and sometimes contradictory"*. Discuss the validity of this statement by selecting three 'landmark' constitutional amendments to the Constitution of Malta and illustrating the constitutional importance each has had in the development or otherwise of the constitutional law of Malta. (50 marks)

1921

Prior to 1921, all the Constitutions granted to Malta were extremely limited in constitutional freedom, either because most powers remained in the hands of the British authorities, or because there was no Maltese Executive. So, one can say safely say that the first step towards a proper self-governing Constitution occurred in 1921. Two Governments were set up, forming a diarchic form of government – the Maltese Government which was responsible to a bicameral legislature, the Legislative Assembly and the Senate; and a Maltese Imperial Government, more imperial than Maltese, which administered the so-called reserved matters which included the defence of Malta, all the British forces of the Crown, foreign, security and defence policy, coinage and currency, to mention but a few. **A Ministry was for the first time envisaged in the Constitution** and elections were duly held in October 1921 under a **new electoral system** which has survived since then – the proportional representation by means of the single transferable vote (STV). **The first Prime Minister and his Cabinet were duly sworn in, and a Government for Malta started administering, and through the Legislature, legislating on non-reserved matters.**
After the War, following the holding of a National Assembly, a Constitution, commonly known as the MacMichael Constitution, generally following the core structure and norms of the 1921 Constitution was promulgated, with a unicameral legislature, the Legislative Assembly, composed of forty members. Since the Constitution was not being granted by an Act of the British Parliament, the British Government could by Letters Patent amend the reserved matters list and in cases of emergencies enact laws to maintain public order without referring them to the Maltese Legislature.

1961
The Blood Constitution

The 1961 Constitution was popularly known as the Blood Constitution. The islands of Malta were to be known as the State of Malta, even though Malta was still a colony. **The diarchic form of government was removed. The Government of Malta had full executive and legislative powers**, but defence matters and external affairs were exercised concurrently with the British Government. **An enforceable Chapter on Human Rights was contained in the Constitution for the first time**. The Constitution of 1961 for the first time in our constitutional history introduced a chapter on Human Rights and if any law, decision, or measure was in conflict with these fundamental rights one could seek regress in a court of law. Prior to this we had human rights, but they were scattered in the different ordinary laws.

So, in 1961 they were enshrined in the Constitution. Since there was no Constitutional Court because we were still a colony, the ordinary courts decided ordinary cases under the 1961 Constitution. It was evident that the door to independence had been subtly opened; even though the main political parties were extremely critical of the powers retained by the British Government and its representatives.

On 20 August 1962, the then Prime Minister George Borg Olivier wrote to the Secretary of State demanding independence and requesting him to fix a date for such independence as a matter of urgency. Later in the year, Professor JJ Cremona was entrusted with the drafting of the new Independence Constitution. In December 1962, it was announced that all political parties would take part in an Independence Conference which discussed the draft Constitution. No full agreement was reached on the Constitution, with the smaller parties against independence at that time, and the Labour Party against certain points in the Constitution such as the electoral system (the Labour Party favoured the system known as first-past-the-post. But Prime Minister Borg Olivier made it clear that thus was for him a decision of principle) and **the status of Malta as a monarchy**. A referendum was held, and the result was in favour of the adoption of the Independence Constitution.

1964
The Independence Constitution

7.3.5 Malta's 1964 Independence Constitution

The independent State of Malta came into being on 21 September 1964. It embarked upon its independence with a status similar to that of any self-governing Dominion in the British Commonwealth of Nations. The executive authority of the Government was vested in Her Majesty the Queen of Great Britain and Northern Ireland as Queen of Malta and was exercised on her behalf by a Governor-General appointed by Her Majesty. In the exercise of this authority, the Governor-General was advised by a Prime Minister and a Cabinet of Ministers.

The Constitution of this newly independent State is to be found in the Malta Independence Order 1964[358] made by the Queen of Great Britain and Northern Ireland in exercise of the power conferred upon Her by article 1(1) of the U.K. Malta Independence Act, *1964*.[359] The Constitution of Malta appears as a Schedule in the aforesaid Order. Moreover, the Malta Independence Act 1964 provided, *inter alia*, that on and after 21 September 1964, Her Majesty's Government should have no responsibility for the government of Malta or any part thereof.

(David Joseph Attard)

The British gave and the British took away. Malta did not have the ultimate control on the type of constitution it would have which is why it was not sovereign. In 1964, all this changed.
In 1961 we had a representative constitution whereby the road to independence was open. Moreover, the elections of 1962 gave a majority to Borg Olivier's Nationalist party. This parliament remained in office even after Independence in order for there to be political continuity. Up until Independence, this parliament was a colonial parliament. After Independence, and once **the Malta Independence Act of 1964** and **the Malta Independence Order of 1964** were enacted, till today, it became a supreme sovereign parliament under a supreme Constitution, which is what was decided in Mintoff v. Borg Olivier. Therefore, that very same Parliament elected at the 1962 elections **from a colonial Parliament became the Parliament of a Sovereign State on the 21st of September 1964 because on that day,**

Britain gave up its control and sovereignty on the Maltese islands. At that point in time, the Maltese had a territory, and the Constitution gave them a parliament, an Executive and a Judiciary **answerable to no one except the Maltese Constitution**. So, in the past, we had constitutions but under a more supreme constitution, the British. The ultimate oath of loyalty was to the supreme colonial power. **After 1964, the only thing above the Maltese was the constitution alone**. Obviously, that Parliament at some point had to face elections, and did so in 1966.

As from "the appointed day" (21 September 1964), the Malta Independence Act, 1964 provided in particular for the cessation of all responsibility of the United Kingdom government for the affairs of Malta, the abrogation of the United Kingdom Parliament's power to make laws extending to Maltese legislation of the Colonial Laws Validity Act, 1865, the conferment on the Malta Parliament of full power to make laws with extraterritorial effect and the abolition of the repugnancy rule, to give the Maltese Parliament power to make laws inconsistent with United Kingdom legislation extending to Malta. The Constitution was envisaged as the ultimate and supreme legal principle at the apex of the nation's juristic order.

On the 21st of September 1964, Malta became a sovereign State in international law, and in fact shortly afterwards joined both the United Nations & the Council of Europe. By choice, it continued to be a member of the Commonwealth.

The 1964 Constitution owes so much to what happened before and has changed so much. If a constitution is amended in terms of the constitution itself than it is a development; there is legal continuity. There is legal continuity in our Constitutional Law which definitely started from 1964 but also existed prior to this time. Law is a dynamic phenomenon; it is evolving and alive and law must respond to the needs of a society. It must also regulate that society. The 1964 Constitution followed in the main a prepared local draft. It was broadly based on what is known as the Westminster model in the sense that it comprises the main features of the British Constitution, though certainly not all. In fact, it also incorporated the limitation of parliamentary sovereignty and judicial review of the constitutionality of legislation. It was in effect the constitution of a parliamentary democracy. And it also **established the Constitutional Court**. Also, in 1964, practically **all the Human rights were transferred from the 1961 constitution lock stop and barrel into chapter IV of the Constitution of 1964 and some rights were added** in this Constitution as well. The 1964 Constitution also discarded the incorporation of certain important British conventions by reference, which was adopted by out 1921 Constitution, and it spelled them out into rules of strict law. In 1964, Malta got the most important unwritten rules from which regulated the relationship of the Head of State with the Prime Minister, the Head of State the Prime Minister and the Cabinet, and the relationship between the Head of State, the Prime Minister, the Cabinet and Parliament, from the British and these were written down. But they still retained their element of conventions. Therefore, in 1964, when we adopted our Constitution, in order to have the Westminster model, we had to immediately write down these most important unwritten British conventions. This constitution also didn't place a limitation on the number of Ministers or Parliamentary Secretaries.

Between 1964 and 1974 the Constitution provided for a monarchical form of government with the Governor General acting on behalf of the British Sovereign. The state of affairs was changed in 1974 when Parliament amended the Constitution and Malta was declared a Republic. However, the newly constituted office of President of Malta merely replaced that

of Governor-General with no special additional powers being conferred on the new Head of State.

As the Independence Constitution was originally devised as a monarchical one, it affirmed that the executive authority of Malta was vested in the Queen (Elizabeth II) and subject to the provisions of the Constitution, was to be exercised on her behalf by the Governor General. Yet after 1964, she did not obey the British Prime Minister and Governor but obeyed our Prime Minister and Maltese Governor. The Queen had obligations to Malta under the Maltese Constitution.

In 1964, we maintained the same monarchy and same governor. The powers of the President vested in the Queen. In 1964, the governor general became a Constitutional Head of State and all his political powers were removed.

Prior to 1964, we were not a sovereign State as Maltese, but we had constitutions. These constitutions were subject to a higher authority – Parliament. Under the British, Malta had a number of constitutions which **denied the Maltese any form of participation in the colonial power** and we had others which allowed the Maltese a form of participation in our internal affairs.

1974
The Republican Constitution
Act LVIII of 1974

Act LVIII of 1974 turned Malta into a republic.

The Constitutional Crisis of 1972
In brief:
Originally, under the 1964 Constitution, the Court was composed of five judges. This provision gave rise to serious problems between 1971 and 1974. Following the nomination in 1971 of the then Chief Justice to the post of Governor-General, the Vice-President was appointed Chief Justice. Government tried to pass a constitutional amendment through the House to abolish the post. When it did not succeed, it refused to nominate any judge to the post, leaving the Constitutional Court un-constituted for three years. The post was eventually abolished in the 1974 constitutional changes ushering the Republican form of government. Besides, a provision catering for the automatic composition of the Court to prevent a repetition of the 1971-1974 crisis, was approved. The Government, to exercise some pressure on the Opposition to endorse its proposals for changes in the Constitution, had refused to appoint a Vice-President of the Constitutional Court when the holder of such office retired with the consequence that the Court was no constituted. Consequently, during the negotiations leading to the 1974 amendments, agreement was reached between the two sides: The Opposition accepted the number of judges of the Court be reduced from five to three and in return Government accepted the automatic composition whenever the Court was no constituted for more than fifteen days; in such case the three most senior judges would take over and compose the Court themselves without the need of any intervention by Government. Today, the automatic composition of the Constitutional Court is enshrined in article 95(2).

Mintoff and the Labour Party were determined to revive the proposals they had submitted at the 1963 Independence Conference, and which were not accepted. Chief among them was the

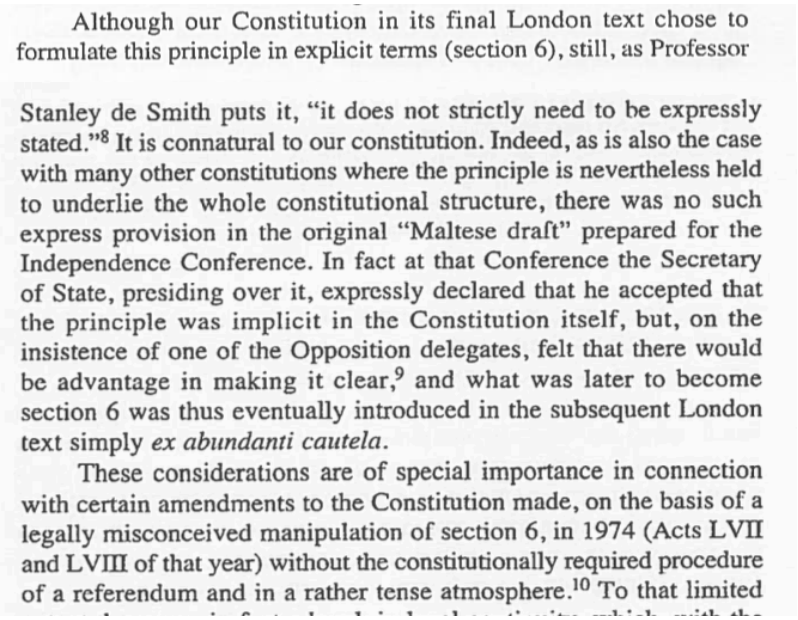
replacement of the monarchy by a republican form of government. On Labour's return to power in 1971, **Mintoff immediately embarked on a strategy to radically amend the Constitution** even on matters which at the time required a two-third majority of the House and others which also required approval by a referendum.

Labour's strategy involved 'legal' bypassing of the constitutional entrenchment clauses and the neutralisation of the principal constitutional guardian, the Constitutional Court. The latter was achieved as early as 1971 when a judge of the Constitutional Court fell ill, and the Government conveniently interpreted its right to appoint another judge to fill the vacancy created as the right not to appoint any judge to fill the vacancy. The effect of this was that the Constitutional Court remained un-constituted and therefore not functioning until 1974.

A more radical move was the effective suspension of the supremacy of the Constitution following the advice given by then Attorney-General Edgar Mizzi that the removal by Parliament of the Constitution's supremacy clause, article 6, through a simple majority of the House would have meant that Parliament would have been authorised to amend or revoke any other part of the Constitution with a simple majority, even if those articles had been entrenched at the two-thirds or the two-thirds and referendum tiers.

Mintoff's government passed on to put into effect the Article 6 stratagem through the constitutional amendments of Acts No. LVII and LVIII of 1974. The Opposition, which had been involved in lengthy negotiations with the Government on the proposed Republican amendments, found itself divided on how to vote on these amendments. Twenty Opposition MPs voted in favour of the 1974 Republican amendments on the grounds that among them was the entrenchment of the supremacy clause at the two-thirds tier and the introduction of the automatic composition of the Constitutional Court in the eventuality of the government failing within the 30-day period to fill a vacancy in the composition of the Court. Six Nationalist MPs, led by party leader George Borg Olivier, voted against.

In 1972, the Constitutional Court was composed of 5 judges, unlike today composed of 3 judges, and all had to be present when a constitutional case was discussed. In 1974, the government was led by Dom Mintoff who won the elections of 1971 with a majority of only one seat. The Constitutional Court was not composed because the Government, very controversially, decided not to appoint a substitute Vice-President. Consequently, for 3 years the Constitutional Court of Malta was not operating. In this way, the Parliament of Malta was approaching that of the United Kingdom. This brought great tension in the country because the opposition was afraid. Dr Edgar Mizzi gave the advice to the Government and later on to Parliament that there was a defect in the drafting of the 1964 Constitution as Article 6 was entrenched at the lowest level of parliamentary majorities required to change the Constitution. Therefore, the advice given to the Government was that if they do not reach an agreement with the opposition, they can go through it alone since with the majority of one in a two-party parliament, they already had the absolute majority. Therefore, Article 6 could be changed. Now, society and the Opposition were fearing that the supremacy of the Constitution would come missing.



Although our Constitution in its final London text chose to formulate this principle in explicit terms (section 6), still, as Professor Stanley de Smith puts it, "it does not strictly need to be expressly stated."[8] It is connatural to our constitution. Indeed, as is also the case with many other constitutions where the principle is nevertheless held to underlie the whole constitutional structure, there was no such express provision in the original "Maltese draft" prepared for the Independence Conference. In fact at that Conference the Secretary of State, presiding over it, expressly declared that he accepted that the principle was implicit in the Constitution itself, but, on the insistence of one of the Opposition delegates, felt that there would be advantage in making it clear,[9] and what was later to become section 6 was thus eventually introduced in the subsequent London text simply *ex abundanti cautela*.

These considerations are of special importance in connection with certain amendments to the Constitution made, on the basis of a legally misconceived manipulation of section 6, in 1974 (Acts LVII and LVIII of that year) without the constitutionally required procedure of a referendum and in a rather tense atmosphere.[10] To that limited

In 1971, we had a two-party parliament. Mintoff with the one seat majority, reached the absolute majority of votes in Parliament. In order for this to have occurred, it was necessary that all of the labour MPs had to be present and vote. Therefore, with the majority of one alone, the Labour Party could amend those sections which required the absolute majority. Obviously, this would be impossible in the case of a two-thirds majority being required.

Although they could not change most of the important articles of the Constitution, Dr Edgar Mizzi, as the lawyer to the State, gave the advice that they could bring down the entire qualified majority system since the Constitution, according to Dr Mizzi, was not drafted well as there was a lacuna (a gap in the drafting of the law). This is what he later referred to as a *lapsus thalami*.

It remains a fact that, in 1974, Article 6, which declares the supremacy of the Constitution, was not included amongst the articles that required a two-thirds majority or the two-thirds majority + referendum. Dr Mizzi asked **what would happen if today Parliament were to abrogate Article 6 of the Constitution with only an absolute majority of all the members of the House**. The Labour Party, in wanting to negotiate with the Nationalist Party changes regarding the 1964 Constitution, did not compose the Constitutional Court. This was used as a second leaver to put pressure on the opposition that if they do not come to an agreement, the Labour Party will go through with it alone. This brought tension in the country since the Constitution is the assumption upon which our democracy is based. The Maltese Constitution was supposed to be a rigid Constitution so, in effect, suddenly the Maltese were being faced with the prospect of our Constitution no longer remaining rigid.

The Government then understood that the Nationalist Party was divided: there was an agreement in principle between the Government majority and a large part of the Nationalist party, but Dr Borg Olivier could not accept that the Constitution was not well drafted and was of the idea that in the case Article 6 changes, the Constitution will no longer remain rigid. Therefore, the Opposition split when it came to whether the Constitution should be amended or not. Many jurists were on the side of Dr Borg Oliver and the argument that article 6 is supreme because the whole Constitution is supreme. On the other hand, Dr Mizzi argued that if Article 6 was changed, any article in the Constitution could be changed with an absolute

majority. Professor J.J Cremona, the Attorney General in 1964 credited of having drafted our Independence Constitution of 1964, later on completely disagreed with Dr Mizzi because **it is obvious that something which his supreme will prevail over something which is not supreme** (make reference to Marbury v. Madison 1803). He was of the idea that the Constitution is an organic whole, it is a unit. Therefore, if it is supreme, it is because of the combined effect from the first article till the last one. Therefore, you cannot pick one article and say here resides supremacy. Professor Cremona clearly stated that Dr Mizzi is wrong. True was fact that Article 6 required an absolute majority only, but it does not mean to say that if it is removed, one can conveniently change articles which require the two-thirds majority through an absolute majority.

Therefore, two opposing views existed:

1. If Article 6 is changed, the Constitution no longer remains rigid.
2. Based on the thinking of Marbury v. Madison – the Constitution has to be read on its entirety and each section builds on the other. Therefore, even if article 6 is changed, this does not mean that one can change all articles with an absolute majority.

Professor Cremona's argument was that a supremacy clause was not necessary. One cannot just say there is Article 6 without saying there is a Constitutional Court; you cannot discuss supremacy without referring to article 67. The line of reasoning underlying Mintoff v. Borg Olivier was that the fact that Malta, on becoming independent, created a Constitution from which were created parliament, the executive and the judiciary means that we are a democracy, and a limited government. **Our government is limited by the supreme Constitution and this logic cannot simply be placed in one article**.

Acts LVII (57) & LVIII (58)

Mr Mintoff realised that there was not going to be an agreement with the Nationalist Party but that the Nationalist Party was splitting: the young MPs were in total agreement with Dr Borg Olivier that Edgar Mizzi's theory was not correct. However, an element of pragmatism crept in amongst these young MPs as they said that **if, at the end of the day, they can reach an agreement with the Government which wanted that the monarchy be removed and that we introduce a Republic**. But **Borg Olivier never wanted to admit that there was a lacuna**. Mintoff clearly understood that the majority of the Nationalist Party would vote in favour of the amendments to reconstitute the Constitutional Court and remove the doubt surrounding Article 6 and the supremacy of the Constitution.

The Labour Party decided to amend Article 6 and enacted a law whereby Article 6 was first removed and in the same law that removed it, Article 6 was re-enacted with a slight difference. Article 6, now, in its new version, did say that if any law goes against the Constitution, that law will be void. But the addition was that if Parliament, even with a simple majority, passed an act which declared that act more supreme than the Constitution than that act will therefore not be bound by the Constitution. Two things that are apparently contradictory were made to live together. By changing Article 6, Mintoff was saying that the labour majority would go through it alone.

Act LVIII (58) is precisely the only act in which parliament proclaimed its own supremacy. It is the only act which made use of the provision contained in act LVII (57) which allowed Parliament to pass an act not subject to the Constitution. The new version of article 6 once more removed the second article 6. Act LVIII (58) introduced Article 6 amongst those articles requiring a two-thirds majority. It removed once and for all the controversy of

whether Article 6 alone is the centre of the supremacy of the Constitution. Today, thanks to this act, the Constitution is more supreme than ever.

Therefore, 3 steps have been highlighted:

1. Article 6 of 1964 Constitution,
2. Article 6 of Act LVII (57): Article 57 which first abrogated article 6 of the Constitution and in the same instance, re-introduced it but subject to Parliament passing laws and not subject to the Constitution,
3. Article 6 of Act LVIII (58): Article 58 declared that it is not subject to the Constitution but ultimately what it wanted to do was to again remove the article 6 of act 57, and introduce article 6 of article 58, in the wording of the 64 version, which would now place article 6 amongst those articles which require a two-thirds majority of all the members of the house.

The majority of the Nationalist Party voted in favour because Act LVIII (58) introduced the automatic composition of the Constitutional Court ensuring that Malta will never again end up without a composed Constitutional Court. Now, the government has 15 days to nominate a substitute in the case of a vacancy. If the 15 days pass, the senior most judge through the authority of the Constitution alone, and therefore, asking the advice of no one, will declare himself as a member of the Constitutional Court. It was the automatic composition of the Constitutional Court that convinced the majority of the Nationalist MPs and consequently, that the Judge Flores situation was resolved.

Therefore, the Article 6 of act LVIII (58) included:

1. Two-thirds majority
2. Automatic composition of the constitutional court

The road was open to the Republic. In 1974, the Queen stopped being the Head of State of Malta. Malta, through the compromise reached between the Government and the Opposition, changed from a monarchy to a republic. In essence, the powers of the Head of State remained the same. Parliament appoints the Head of State and Parliament removed the Head of State and he/she cannot remain for more than 5 years. The amendments of 1974 are still today valid.

JJ Cremona:

[10]Section 6, which in the London text containing it was not entrenched, provided that, *subject* to the entrenchment provisions of the Constitution itself, any other law inconsistent with the Constitution was, to the extent of such inconsistency, to be void, the Constitution prevailing over it. This section was first, temporarily, repealed and replaced by another which in the first part substantially repeated that, subject to the entrenchment provisions, in the case of inconsistency, the Constitution was to prevail over any other law made by Parliament, but then in the second part rather weirdly added that any other law made by Parliament was, if so declared by Parliament itself, to prevail over the Constitution. On the same day some amendments to the Constitution were then made on the strength (if that is the right word) of this amendment, many of them without the required constitutional formalities, and the *former* section 6 was then, by virtue of the same Act, reinstated and formally entrenched.

The Constitution, a written one which, expressing its own natural superiority, imposed limitations on the powers of the legislature which it itself created, was thus stultified and subverted in its very nature. Besides, in effect the amendment to section 6 was only too clearly intended to rebound on, and indeed paralyse section

67 (the entrenchment provision, now renumbered 66) so that what could not be directly modified was sought to be indirectly nullified. What was essentially being altered was section 67 itself. But that was itself entrenched and paragraph 5 of Schedule I to the (U.K.) Malta Independence Act, 1964 provided that "nothing in this Act shall confer on the legislature of Malta any power to repeal, amend or modify the constitutional provisions otherwise than in such manner as may be provided for in those provisions." Again, it was both legally and logically meaningless and indeed essentially unsound that a whole elaborate entrenchment edifice, erected with such meticulous care by the Constitution itself as part of its basic structure to safeguard against abuse of power, should in fact have been viewed as capable of being so devastatingly dismantled by just a simple (and, to a prospective power-abuser, convenient) *non obstante* parliamentary clause.

In the writer's view it would have been preferable (as originally proposed) not to have had at all an explicit provision concerning the supremacy of the Constitution, which, being implicit in the Constitution itself, was unnecessary. As it is, by the same 1974 "philosophy," if it were right, a power-drunk government having a two-thirds majority in Parliament would now be able to amend section 6 so as to suspend the supremacy of the Constitution in order to prolong indefinitely the life-span of Parliament (and of course its own) without having to submit to the additional constitutional requirement of a referendum.

(See in general J.J. Cremona, *The European Convention on Human Rights as part of Maltese Law* in the Proceedings of the Bologna (Ninth University Centenary) International Congress of September 1988 (Giuffrè, Milan, 1991, Vol. 2, pp; 566–572) reproduced in *Selected Papers 1946–1989*, pp. 230–232, and authorities therein cited. See also Dr (later Mr Justice) Albert Manché, *The Supremacy of the Constitution: an unalterable principle (Times of Malta*, 19th November 1974, p. 5), in which, after stating that supremacy is of the very essence of the Malta Constitution without the need to be expressly enunciated and that the reason why section 6 was not entrenched is that it in fact enunciates an unalterable principle, he went on to say that the amendment then proposed to section 6, empowering Parliament to render section 67 of no effect, ran counter to a fundamental constitutional principle and offended against common sense.)

2020

Appointment/removal of the judiciary & President

CUSTOM VERSUS CONVENTIONS OF THE CONSTITUTION

Conventions of the Constitution are rules of political practice considered as binding to those to whom it applies but **not enforceable in a court of law**; they are not justiciable.
A custom is where in a community you have that community accepting **a practice as binding and which are recognised as practices by the courts.** In other words, unwritten practices considered as binding by a community since time in memorial.

Conventions give a new meaning to the law. Conventions, as argued by Jennings, "provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas."

The main difference between custom and conventions is not form as they both fall under the term of **unwritten norms**.
Custom is not a form of lacuna (a gap in the law, law being court judgements, legislation and custom), nor is it something that is created overnight. They must have existed from time in memorial. When the judge investigates practises in the community that is considered to be binding, the proof which has to be given to the judge is that that particular community have considered this unwritten practice to be binding over many, many years. If the judge is given proof that, say, from 1800-1915 there was an understanding that a particular practice was binding but over the past 60 years the practice is no longer followed, then it is ignored. The practice has to be binding up till the court case. **Desuetude kills custom**.

A convention differs from a custom precisely in the length of time in which there must be observants. A convention deals with our political community. Therefore, the practices of our political class as applied to our institutions, in particular, the relationship between the Prime Minister and the Cabinet, the relationship between the Prime Minister, the Cabinet and Parliament, and also the relationship between the Prime Minister, the Cabinet, Parliament and the President of Malta.

British Conventions

A useful definition of British conventions is that offered by O. Hood Phillips who describes them as "rules of political practice which are regarded as binding by those whom they apply, but which are not laws as they are not enforced by the courts or by the House of Parliament."

Our Constitution is supreme law – Article 6 – but is not the only law that governs the State (Public Law) and is not the only law that governs the relationships and functions of the 3 forms of the State between themselves and the individual. A convention is a political practice and, therefore, the Courts do not want to get involved because of the doctrine of the Separation of Powers. This doctrine gives the judiciary the function of servants of law and not of the politicians. Therefore, they are not enforceable in a court of law but are binding, nonetheless. This explains why the British Constitution is considered to be mainly an unwritten one, unlike the Maltese Constitution which is of a written nature. In the UK, the Queen (Head of State) still retains, at face value, enormous legal powers. Politically, Boris Johnson is the Political Head, but the law still preserves the Queen in some of her absolute powers the Monarchy enjoyed 500/600 years ago. But in Britain social evolution took place through practices of a political nature. The truth is that while the British system retains the Queen as if she were still an important political figure, but the Queen knows that if she tries to enforce all her legal rights, the British will revolt. They've preserved the Queen as an absolute monarch but then through the practices, she does not interfere at all in the political life of the British. Everything is done in her name, but she does not interfere whereby,

through conventions, she auto-limits herself from just assenting to whatever the Prime Minister tells her. So, the Prime Minister advises the Queen but in reality, she knows that she has to obey.

When you have on the advice, that is a misnomer, it's a term that does not reflect its exact meaning. Advice is a voluntary suggestion of how to act and results in a voluntary action. Therefore, the word of the Constitution reflects a different political reality – this is where Constitutional conventions come into play. Therefore, no judge even of the Constitutional Court will be happy to interfere in the relationship of the President/Queen and the Prime Minister.

The residual prerogatives are those where the President may act without the advice of the Minister or the Cabinet or even against the advice of the Prime Minister or cabinet. This contrasts with the other prerogatives which are not residual whereby, the President has to act on the advice of the Prime Minister and the Cabinet. The distinction is not strictly legal but conventional (political). In reality, the courts will not interfere in which the presidential prerogatives in Malta are exercised.

The vast majority of the conventions in the British Constitution are unwritten. In the United Kingdom, since its political development is different from that of Malta, they retained the monarch who up to even two centuries ago was an absolute monarchy but there has been a transfer of power from the Monarchy to Parliament. Parliament is made up of the Queen and the two Houses. Today, legally, the power of the monarchy resides in the Queen. Politically, however, it resides in the Prime Minister. Therefore, legally, the Queen still has most of her powers but over the years, the Queen started to exercise these powers not the way she likes. A democracy is tolerated in the United Kingdom, because the monarch is completely out of the political game. So, when the British monarch is asked to appoint a Prime Minister, technically, in the past, she used to appoint whoever she/he wanted. With the transition of power, the people did not remove the monarchy as they did in France, because the monarch will act as told to do so – conventions of the Constitution. 300/400 years ago, it was the Queen who would decide whereas today it is the majority in Parliament (House of Lords + House of Commons). From 1910 onwards, it is a convention that the Prime Minister must come from the elected part of the House of Commons. These won't be found written down but in Malta they are.

The monarch knows that the democratic element will remove the monarchy if the monarch refuses to use her legal powers as the House of Commons wishes.

Moreover, when we became independent, we transposed the most important conventions of Britain into our Constitution. In fact, as enshrined in the Maltese Constitution, the legal presumption is that every decision taken by the President is in accordance with the advice of the Government of the Day. Of course, this is a rebuttable presumption in the case of the Presidential Prerogatives.

Maltese Conventions – David Joseph Attard

The Constitution of Malta contains a number of British constitutional conventions reduced in writing; a practice repeated in practically all the Constitutions given by the United Kingdom to former colonies.

The Maltese Constitution practically contains several British constitutional conventions relating to such important issues as composition of the three organs of the State, the

relationship between them, the doctrine of residual prerogatives belonging to the Head of State and of collective ministerial responsibility. However, it is written, and it is the apex law of the land. Besides, a special qualified majority (in most cases two-thirds of the legislature's members) is needed to amend the more important provisions which are entrenched.
In the case of Malta, number of British constitutional conventions have been adopted but they have been incorporated within the Constitution itself. Hence, to this extent, British constitutional conventions have been codified in the Constitution of Malta.

Examples of these codified constitutional conventions are:

a) Article 72(2) – the need for the President of Malta to assent to legislation. There has been no known case where the President has refused to give assent. Nonetheless, *The Times of Malta* has reported that President Dr. George Abela was refusing to sign the Civil Unions Bill. Although there was no official confirmation of this news item, it was not President Abela who assented to this Bill but his successor in office, President Notary Marie Louise Coleiro Preca.
b) Article 80 – the requirement that the President has to appoint as Prime Minister **the leader of the political party** who has obtained a majority of members in the House of Representatives. The law, in article 80 reads that, "the President shall appoint as Prime Minister the member of the House of Representatives who, in his judgement, is best able to command the support of a majority of the members of that House" The Constitution does not specify that the person who in the President's judgement is best able to command the support of a majority of members of the House is necessarily the leader of the party. That being said, it is a political practice that the person chosen by the President to be Prime Minister, is in fact, the leader of the party.
c) Articles 82(1) and 79(2) reflect the convention that government ministers are individually and collectively responsible to Parliament.
d) Article 90(1) and (2) – the appointment of the Leader of the Opposition from the party commanding the support of the largest single group of members of the House of Representatives in opposition to the Government.
e) Article 76(1) – The dissolution of parliament. Usually, a dissolution of Parliament is a result of a vote of no confidence in the executive. That being said, under certain conditions the President can dissolve Parliament. What I think is being suggested here is that if the President does not dissolve Parliament this cannot be enquired into in any court. Or is this referring to the fact that if the PM refuses to resign or to call for a dissolution, the Courts do not interfere and then the law comes into play when the President has to dissolve parliament him/herself?

Aside from the above, a number of home-grown constitutional practices have emerged since Malta attained independence. For instance, the Constitution of Malta in article 59(1) regulates the election of Speaker of the House of Representatives. Over the years, a constitutional practice emerged whereby the Speaker of the House is Government-nominated. One the other hand, a more recent constitutional practice has evolved to the effect that the Deputy Speaker is normally nominated by the opposition.

Another example of a constitutional practice which has evolved over time concerns the appointment of the President of Malta. After the appointment of the first President of Malta there developed a constitutional practice that the President of Malta was appointed from amongst the persons who share the Government's political views. This practice however was disregarded in April 2009 when a former Deputy Leader of the Opposition Party was appointed President of Malta. It would appear, however, that there has been a return to the

said practice. With the 2020 amendments, the President is appointed by a resolution of the House of Representatives supported by the votes of not less than 2/3rds of all the members of the House.

Another constitutional practice worthy of mention is that when there is a *lacuna* in the Constitution or in the House of Representatives Standing Orders concerning parliamentary procedure, reference is made to Sir T. Erskine May's book entitled *The Law, Privileges, Proceedings and Usage of Parliament.* This book has evidentiary value in establishing the 'rules, forms, usages and practice' referred to in Standing Order No. 197 of the House.

Another instance of constitutional practice that deserves mention is that which requires a Minister not to criticise his own Government in public. This is the result of the doctrine of collective ministerial responsibility enshrined in article 79(2) of the Constitution of Malta which specifically states that '[t]he Cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible therefor to Parliament.'

It should be recalled that, as these are practices, they are not legally binding and cannot be enforced in a court of law. There may only be a political sanction, if at all, when a constitutional practice is breached. It is up to the electorate to decide whether to return or not to Government that political party which has breached the constitutional practice.

[Another convention has evolved with regards to the appointment of holders of important positions, such as members of the Public Service Commission, the Broadcasting authority etc. The convention holds that the PM gives the advice to the President to people he trusts as half of the members and the other half would be trusted people of the Opposition. At law, however, the PM still retains his full power of patronage and therefore, he can break this convention whenever he likes].

O. Hood Phillips

Nature of constitutional conventions

The significance of conventions in the working of the British Constitution, and therefore the importance of their study for an understanding of the British Constitution, were brought out by the emphasis Dicey placed upon them.

Conventions are sometimes called "unwritten laws", but this is very confusing because according to the generally accepted doctrine they are not laws at all.

The working definition of constitutional conventions is:

Rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or by the Houses of Parliament.

This definition distinguished constitutional conventions from:

(i) Mere practice, usage, habit or fact, which is not regarded as obligatory such as the existence of political parties (fact). If persons concerned are not aware that they are under an obligation to act in a certain way, there is no convention. On the other hand, the opinion that they are bound is not conclusive as they may be mistaken. It is sometimes difficult to distinguish between obligatory rules and non-obligatory practice.

(ii) Non-political rules, i.e. rules of conduct which are not referable to the need of constitutional government, e.g. ethical or moral rules.

(iii) Judicial rules of practice such as the rules of precedent (does not apply to Malta).

(iv) Rules enforced by the courts, i.e. laws. Sir Ivor Jennings, while admitting that there was this formal distinction between laws and conventions, contended that there was

no distinction of substance. The distinction may perhaps be comparatively unimportant for the political scientist or politician, but it is surely of vital importance for lawyers. Mitchell criticised the distinction on the ground that there may be laws with no judicial sanction. It is true, as Jennings pointed out that laws cannot be enforced against the government as a body or against either House (in Malta, the House of Representatives); but they can be enforced against individual Ministers personally or (subject to parliamentary privilege, which is itself part of the law) against individual members of either House; and judgement may be delivered (though not executed) against a government department. It is also true, as Mitchell pointed out, that Parliament sometimes imposes "duties" on public authorities while going on to say that such duties are not enforced by judicial proceedings. In Malta, using article 86(3) as an example,

> (3) Where by this Constitution the Prime Minister is required to perform any function in accordance with the recommendation of, or after consultation with, any person or authority, the question whether he has in any case received, or acted in accordance with such recommendation or whether he has consulted with such person or authority shall not be enquired into in any court.

On analysis it appears that from a legal point of view such 'duties' are properly classed as powers. It has been construed to be directory, not mandatory.

THIS IS KNOWN AS AN OUSTER CLAUSE

Judicial recognition of conventions

The fact that the courts do not *enforce* constitutional conventions does not mean that the courts do not incidentally recognise their existence. These are areas in which the courts feel that they cannot or should not become involved. References are still made to conventions in court cases.

Conventions are not enforced by the courts: if there is a conflict between conventions and law the courts must enforce the law. The sanctions for conventions are political, though the violation of conventions is "unconstitutional".

Jennings established criteria for establishing the existence of a convention. However, Jennings says, "it is sometimes enough to show that a rule has received general acceptance," and goes on to speak of the assertions of "persons of authority". Conventions have the unquestioned acceptance not only of the politicians but of the public at large.

Legislation may recognise or presuppose conventions. Moreover, conventions are capable of being formulated in statute and they have been incorporated in various Commonwealth constitutions.

Conventions would be meaningless without their legal context. Every constitutional convention is closely related to some law or laws, which it implies.

On the other hand, constitutional conventions are subject to the process of growth and transformation.

Purpose of constitutional conventions

Conventions are a means of bringing about constitutional developments without formal changes in the law. It must not be supposed that conventions are peculiar to unwritten constitutions. They are found to a greater or less extent in written constitutions as well. Upon gaining independence, Malta transposed a number of British conventions into its constitution but since Independence, it has developed its own conventions. This informal method of change is more adaptable than a series of statutes or constitutional amendments.

The ultimate of most conventions is that public affairs should be conducted in accordance with the wishes of the majority of the electors. If the Government no longer retains the

confidence of the House, the Prime Minister should ask for a dissolution of Parliament (sometimes it may be more appropriate for the Ministry to resign), in order to enable to electorate, through a new Parliament, to obtain a Ministry more in accordance with its views.

How and when do conventions become established?

It is wrong to suppose that constitutional conventions are analogous to customary law in that they must necessarily have existed a long time, or even from time immemorial. A moment's thought will show that this cannot be so. Many conventions are indeed based on usage, although this is not necessarily of long standing. Some conventions, however, are based on agreement.

It is not easy to say precisely how or when conventions based on usage come into existence. Every act by the Queen or a responsible statesman is a "precedent" in the sense of an example which may or may not be followed in subsequent similar cases, but it does not necessarily create a binding rule. For that it must be generally accepted as creating a rule by those in authority. A long series of precedents all pointing in the same direction is very good evidence of a convention, but this is not possible in the case of recent precedents. An example would be that up till now, no President has refused to sign a bill.

Sir Ivor Jennings suggested two requirements for the creation of a convention:

(1) General acceptance as obligatory,
(2) A reason or purpose referable to the existing requirements of constitutional government. Thus, one precedent might create a convention whereas a long series of precedents might not.

Why are conventions observed?

What is it that induces obedience to these extra-legal or conventional rules?

The answer seems to be that obedience is yielded to the conventions because of the consequences that would plainly ensue if they were disregarded.

Some conventions are not always observed if special circumstances warrant a departure from established practice (put example here), but if they were not regularly observed they would not be, or would cease to be, conventions. It is the reason or purpose for which they stand that both leads to their development and secures their observance.

The question why conventions are observed is a political or psychological question. One might equally ask what motives induce people to obey the law, since fear of the legal sanction only operates on some of the people some of the time. As a matter of fact, statesman probably observe the conventions because they wish the machinery of government to go on and because they hope to retain the favour of the electorate.

Classification and illustration of constitutional conventions

Conventions relating to the exercise of the royal prerogative and the working of the Cabinet system

i. The Queen must invite the leader of the party or group commanding a majority of the House of Commons to form a Ministry. The person so called on is the "Prime Minister". **Article 80** – "the President shall appoint as Prime Minister the member of the House of Representatives who, in his judgement, is best able to command the support of a majority of the members of the House." There exists a convention that the President appoints the leader of the political party. The President, however, is only bound by the requirement that the PM has to be a member of Parliament and therefore not necessarily the leader of the party. That being said, it would be madness to appoint someone other than the leader of the party).

ii. The Queen must appoint as her other Ministers such persons as the Prime Minister advises her to appoint. **Article 80** – "The President…shall, acting in accordance with the advice of the Prime Minister, appoint the other Ministers from among the members of the House of Representatives."

iii. The Queen is bound to exercise her legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister. She has the right to be kept informed and to express her views on the questions at issue, but not to overrise ministerial advice. **Article 85** – "the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution". **Sub-article (2)**, however, follows by saying that "the question whether he has in any case received, or acted in accordance with, such advice shall not be enquired into in any court." The only way to go about such a situation would be to remove the President but nowadays it is no longer easy to do so (2/3rds majority & proved incapacity or proved misbehaviour).

iv. The Queen must assent to every Bill passed by the Houses of Parliament or passed by the House of Commons only in accordance with the provisions of the Parliament Acts. Article 72 (2) – "When a bill is presented to the President for assent, he shall without delay signify that he assents". "Shall" brings about the question whether the President can be sued in court on the grounds that refusing to sign the bill is unconstitutional. Some professors believe this is still a convention because it would be very difficult to enforce it in a court of law. The only remedy is a political one, that of removing the president. Up till now, this has never been the case.

v. The Government is entitled to continue in office only so long as it enjoys the confidence of a majority in the House of Commons. The Prime Minister is bound to advise the Sovereign to dissolve Parliament, or to tender the resignation of himself and his ministerial colleagues, if the government is defeated on the floor of the House of Commons on a motion of confidence or of no confidence. **Article 81(1)** – "if the House of Representatives passes a resolution, supported by the votes of a majority of all the members thereof, that it has no confidence in the Government, the President may remove the Prime Minister from office" (the last person – Alfred Sant). If the PM refuses to do so, he cannot be sued in Court. That being said, once 3 days have elapses, the President shall remove the Prime Minister from office.

vi. The Ministers are collectively responsible to Parliament for the general conduct of the affairs of the country. This collective responsibility requires that on a major question Ministers should be of one mind and voice. If any Minister does not agree with the policy of the majority in the Cabinet, he should resign or, if the matter is a minor one or he is not a member of the Cabinet, at least keep quiet about it. This can be formally waived. **Article 79(2)** – "The Cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible therefor to Parliament." Once a decision is taken in cabinet, even if a Minister disagrees with that decision, he/she has to support it. A Minister will not be sued in court upon outwardly disagreeing, but he/she will be made to resign.

vii. Ministers are also individually responsible to Parliament for the administration of their departments. A minister must be prepared to answer questions in the House concerning matters for which he is administratively responsible, and if a vote of censure is passed against him, he must resign his office. This doctrine is not found expressly laid down in the Constitution, however, it has been applied so one can

> safely say that a convention exists in this regard. A Minister is responsible to the House for his own actions and those of his subordinates. If a gaffe is committed by his subordinates, he is accountable to Parliament; not necessarily through resignation.

Judge made law – Jurisprudence

The judges will be able to interpret any section in a new way to cover certain circumstances, in order to encompass the facts of the case within a provision of the law. This is the case when a judge thinks they can cover a lacuna. But judges are not legislators. Lawyers and judges are there to serve the law and thus cannot invent law. There are some gaps in the law which are completely uncatered for and not even an interpretation by judges would cover the gap. Judges have a duty to tell one of the parties that there is no law that can cater for that particular situation and that therefore it would up to the legislator to fill the lacuna by providing an act of Parliament, and not the judge him/herself.
In the case of the lawyer being unhappy with the judgement, the judgement given in the Court of First Instance can be appealed.

Is the Constitution of Malta supreme, today?

13th December of 1974 is the day that Malta became a Republic.
Before, Malta was a Monarchy with Queen Elizabeth II as the Queen of Malta. Independence means sovereignty. Malta became a sovereign country on the 21st of September 1964.

In 1964, Malta got the most important unwritten rules from which regulated the relationship of the Head of State with the Prime Minister, the Head of State the Prime Minister and the Cabinet, and the relationship between the Head of State, the Prime Minister, the Cabinet and Parliament, from the British and these were written down. But they still retained their element of conventions. Therefore, in 1964, when we adopted our Constitution, in order to have the Westminster model, we had to immediately write down these most important unwritten British conventions.

The Constitution of Malta has preserved the conventional nature of the rules by stating expressly that where the President of Malta has to act on the advice of the Prime Minister or the Cabinet or any other authority, whether the Prime Minister has acted on this authority shall not be acquired in a court of law. Conventions are not enforced in a court of law and this is what saved the conventional nature of the rules which we imported to the rules of the British Constitution. Moreover, this can be seen in Article 85(2) of the Constitution of Malta. This is an important transition that took place in 1964.

Up till now, we have established:

1. Since 1974, Queen Elizabeth II is no longer our Queen, but the powers of the presidency are practically the same. Prior to 1964, the Queen was the Queen of the UK and of the British Empire – the colonial power which had control over Malta. The UK controlled Malta as its colony so prior to 1964, the Queen was not the Queen of Malta but of the colonies.
2. The Maltese Constitution adopted the rules of the British Constitution but changed them from unwritten to written. Moreover, the nature of these rules depends on whether these powers which the President uses on the advice of the Prime Minister or Cabinet to be inquired into any Court? The answer is no.

3. On the 21st of September 1964, Malta became of a sovereign and independent nature thanks to the Independence Act. it We maintained the same legal system, including our Parliament since it was elected in 1962 and this is for legal continuity.
4. Our Constitution follows the Westminster model.

Our Constitution is supreme, in the sense that this written document is supreme over any other law and this is in virtue of Article 6. On the other hand, Britain does not have one fundamental supreme document. With that being said, it has Constitutional Law, which involves all the laws regulating the British Constitution and these all reflect the fundamental constitutional principles of the sovereignty of Parliament. However, **all laws in Britain are of equal importance, meaning that one law is not more supreme than another because it is the institution, parliament, that is supreme.**

The British Parliament

1. can make or unmake any law in the form of ordinary legislation.
2. has no authority higher than it and
3. it cannot bind its successors.

In Malta none of these three characteristics apply. As enshrined in in Article 6 of the Constitution of Malta, in the case of any law going against the Constitution, the Constitution prevails, and that law will be declared null. Therefore, in Malta, Parliament cannot make or unmake ANY law like in the United Kingdom. While no court in the United Kingdom has the power to strike down a law passed by Parliament, in Malta, the Constitutional Court is higher than Parliament because it can strike down an unconstitutional law. Moreover, in Britain, Parliament cannot bind its successors meaning that the sovereignty of parliament is merely at **the moment it legislates**.

Parliamentary sovereignty

United Kingdom

The "Legislative Supremacy of Parliament" means that Parliament (i.e. the Queen, Lords and Commons in Parliament assembled) can pass laws on any topic affecting any persons, and that there are no "fundamental" laws which Parliament cannot amend or repeal in the same way as ordinary legislation. Of course, this is the exact opposite to the situation in Malta keeping in mind that in Malta, the doctrine of Parliamentary Supremacy does not exist as we have a constitutional court and of course, a constitution which essentially limits Parliament. In Malta, there are "fundamental" laws which Parliament cannot amend or repel in the same way as ordinary legislation, and these are those laws written in the Constitution which need not less than a two-thirds majority in order to be amended or repealed. Moreover, no law that Parliament passes can go against the Constitution of Malta and if this happens to be the case, a case can be opened (if in some way it affected you) first in the civil court, First Hall and then an appeal is made to the Constitutional court.
Dicey was following the tradition of Coke and Blackstone when he said that Parliament has "the right to make or unmake any law whatever," and further that "no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament." Therefore, once a document is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity.

Legislative supremacy as thus defined is a legal concept. The supremacy of Parliament, being recognised and acted on by courts, is a principle of common law. It may be indeed called the one fundamental law of the British Constitution, for it is peculiar in that it could not be altered by ordinary statute but only by some fundamental change of attitude on the part of the courts resulting from what would technically be a revolution. Parliament could not of course, confer this authority on itself.
On the other hand, **a state may be a sovereign state and yet have a legislature which is not unlimited and courts with jurisdiction to review its legislation**.

The legislative supremacy of the British Parliament, as well as being a legal concept, is also the result of political history and is ultimately based on fact, that is, general recognition by the people and the courts. It is therefore at the same time a legal and a political principle. In fact, this doctrine of the legislative supremacy of Parliament has been so firmly established that it has scarcely been challenged in the courts. In times when this did happen, it was said that "there is no judicial body in the country by which the validity of an act of parliament can be questioned. An act of legislature is superior in authority to any court of law…, and no court could pronounce a judgement as to the validity of an act of parliament". What Parliament enacts cannot be unlawful. A court can only look at the parliamentary roll of statutes and if it appears that an Act has passed both Houses of Parliaments (Commons & Lords) and had received the Royal Assent it could look no further.
Lord Campbell pronounced the following dictum in an appeal to the House of Lords: "All that a Court of Justice can do is to look to the Parliament roll: if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no Court of Justice can enquire into the **mode in which it was introduced into Parliament**, nor into **what was done previous to its introduction**, or **what passed in Parliament during its progress in its various stages through both Houses**."
The absence of "fundamental" laws means that the courts have no jurisdiction to declare an Act of Parliament void as being *ultra vires* (acting or done beyond one's legal power or authority) or "unconstitutional".

With regards to persons and areas, since Parliament is the Parliament of the United Kingdom its Acts are presumed to apply to the United Kingdom and not to extend further. If an Act is not intended to apply outside to Wales, Scotland or Northern Ireland, or if it is intended to apply outside the United Kingdom, *e.g.* to a colony, this must be expressly stated.

1. **There is no authority higher than parliament** – which is why its parliamentary sovereignty. Within the British legal system, the one constitutional principle of their unwritten constitution is that parliament has no authority higher than itself, making it sovereign. In the UK, Parliament consists of the Queen, the House of Commons and the House of Lords. Power shifted from the House of Lords to the House of Commons. Ultimately, what the House of Commons decides, the House of Lords has to follow through and the Queen has to duty to sign. The courts in Britain will only check the manner and form of legislation but have no authority to strike down the contents of a validly enacted act of parliament. if a bill has the three consents it is a valid act of parliament and the contents of this cannot be contested by any authority within the UK. The House of Commons is the political branch which today is dominant. Rules of political practice considered to be binding but not enforceable in a court of law.

2. **Parliament can make or unmake any law** – 'the Legislative Supremacy of Parliament'.

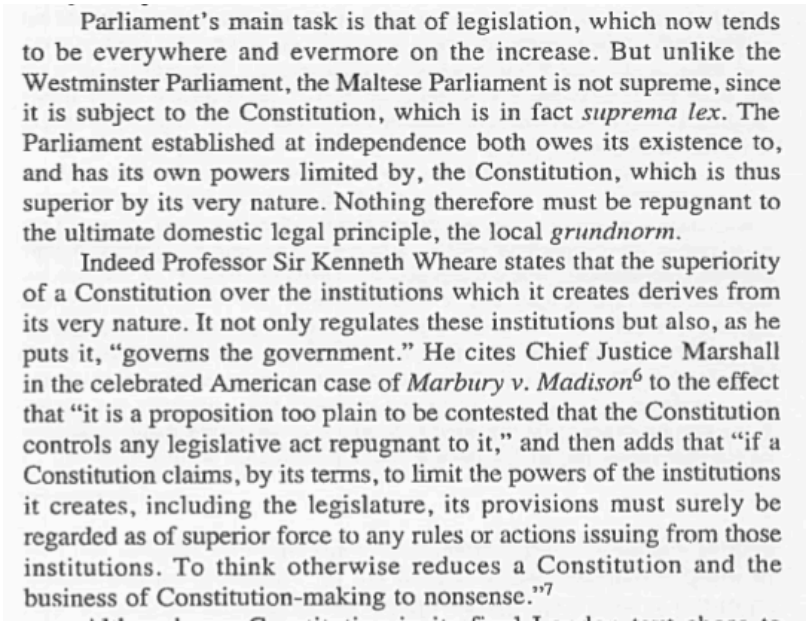
3. **Parliament cannot bind its successors** – at that moment in time the queen gives her consent, it is the will of parliament. What parliament decides today cannot be contradicted or nullified by anything that has been done before but cannot bind parliament a second after it passes. Today parliament may pass a law which will remove fundamental human rights – if that is parliament's will then that is what will be law. Parliament cannot bind its successor as each parliament is sovereign and can simply repeal legislation which is set to restrict them.

<u>Malta</u>
It is often said: the Maltese Parliament is supreme but only within a more supreme constitution. This applies also to Government and Judiciary. Cremona says, "Malta follows the idea of constitutionalism or limited Government. There are built-in limitations on Governmental power and safeguards against its possible abuse, with protection for the fundamental rights and freedoms of the individual *vis-à-vis* the State and independent courts to secure that protection".

<u>These 3 propositions all come missing.</u>
1. In Malta we have the constitutional court. It has the power to review laws and contrary to the UK thanks to article 6, the Maltese constitutional court may strike down an act of parliament despite it being validly passed, because the contents of the act infringe a provision of the constitution.

2. Since the constitutional court of Malta is a higher authority than parliament, parliament cannot make or unmake any law because if it makes or unmakes a law in an unconstitutional way, the courts will strike it down. They do not only review the manner and from but in addition the constitutional courts of Malta will read the contents. If the contents of an act of parliament are inconsistent with the constitution, then that other law will be declared void and null.

3. If today parliament meets and wants to pass a law which eliminates human rights in Malta and it is passed validly, any individual may bring a constitutional case before the constitutional courts of Malta because it is in infringement of **chapter 4** of the constitution of Malta. In any constitutional case, the first case is brought before the First Hall of the civil courts in this constitutional jurisdiction presided by one judge from which there is an appeal before the constitutional court of Malta. The constitutional court is the court composed of 3 judges – the Chief justice and two other judges. If today parliament meets and wants to pass a law, it must first ask itself 'are we infringing the constitution?' – in Britain this is not asked. **Parliament is bound by what the constitution says**.



Parliament's main task is that of legislation, which now tends to be everywhere and evermore on the increase. But unlike the Westminster Parliament, the Maltese Parliament is not supreme, since it is subject to the Constitution, which is in fact *suprema lex*. The Parliament established at independence both owes its existence to, and has its own powers limited by, the Constitution, which is thus superior by its very nature. Nothing therefore must be repugnant to the ultimate domestic legal principle, the local *grundnorm*.

Indeed Professor Sir Kenneth Wheare states that the superiority of a Constitution over the institutions which it creates derives from its very nature. It not only regulates these institutions but also, as he puts it, "governs the government." He cites Chief Justice Marshall in the celebrated American case of *Marbury v. Madison*[6] to the effect that "it is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it," and then adds that "if a Constitution claims, by its terms, to limit the powers of the institutions it creates, including the legislature, its provisions must surely be regarded as of superior force to any rules or actions issuing from those institutions. To think otherwise reduces a Constitution and the business of Constitution-making to nonsense."[7]

(JJ Cremona)

The 1921 Constitution had a Bicameral Parliament with a Senate and a House of Representatives. On the contrary, the Constitution of 1964, up till today, is a Unicameral Parliament. Moreover, the 1921 Constitution introduced the Proportional Representation System (PRSTV) which is the electoral system we still have today. In 1974, the events are very important for understanding constitutional developments.

The first Head of State of Malta, prior to Sr Anthony Mamo, was the Queen Elizabeth II as Queen of Malta.

In 1964, Mr Dom Mintoff was in favour of Independence but was in opposition as he lost the elections in 1962. In 1964, the Queen Elizabeth II assumed the role of Head of State, but the labour party was not in favour of retaining the monarchy and wanted a Republic. In 1964, the labour party organised a number of demonstrations principally because they wanted a different type of Constitution but since they were in opposition, they had to lump it. In 1971 Dom Mintoff won the elections and the first thing he decided to do was to start implementing a programme of radical constitutional reform.

The status of the Constitution as supreme law is determined by the procedure prescribed for its amendment.[13] Indeed the Constitution can only be amended in accordance with the procedure and under the conditions laid down by its own provisions. There are different tiers of constitutional entrenchment. One requires a two-thirds majority of all members and applies to several important provisions, such as some of the preliminary provisions in Chapter I, those relating to the office of President as well as to his powers in respect of dissolution and appointment of the Prime Minister and other Ministers, the more important of the provisions relating to Parliament (including the parliamentary privilege of freedom of speech, composition and the requirement of at least a yearly session, general elections, voting and qualifications of voters, the Electoral Commission and the electoral boundaries), the Attorney General, the entire chapters on human rights, the judiciary (except with regard to oaths and the new Commission for the Administration of Justice) and finance, the Public Service Commission, public officers' pension rights, the Broadcasting Authority and the Employment Commission.

Another tier of constitutional entrenchment requires, in addition to the two-thirds majority already mentioned, the approval of the bill by the majority of the voters in a referendum (thus importing an element of direct popular control) and applies to the maximum duration of Parliament. The referendum is to be held not less than three nor more than six months after the passing of the bill. Of course, the entrenchment provisions themselves are similarly entrenched, the referendum entrenchment covering also the principle of personal voting by secret ballot in such referenda. It is to be noted that the remaining provisions cannot be amended by a simple majority of members sitting and voting, but by an absolute majority of all members. The 1974 amendments extended the two-thirds majority tier mostly at the expense of the referendum tier.[14] In effect entrenchment operates as an important safeguard against abuse of majority power.

Subject to these constitutional limitations, however, Parliament may by its ordinary legislative process "make laws for the peace, order and good government of Malta," a phrase habitually employed to denote the plenitude of Parliament's legislative power within the area of its constitutional competence. The courts can only strike down a law as unconstitutional if it is found to be inconsistent with the express terms or necessary implication of the constitutional provisions. Thus Parliament may also legislate with retrospective effect, but it cannot go against the entrenched constitutional provision that no person can be held guilty of a criminal offence on account of any act or omission which, when it took place, did not constitute such an offence. With regard to money bills, Parliament can only proceed on the President's recommendation signified by a Minister.

(JJ Cremona)

THE RULE OF LAW

Lawyers practice democracy by upholding the rule of law.
The sacred doctrine of the Rule of Law is an ambiguous doctrine – not in what it is trying to achieve (which is democracy through law), but in the fact that it must be put in the context of each particular country.
What unites all the countries that adhere to the Rule of Law is a functioning Constitution that safeguards the democratic principles every single moment of the day.
Democracy is a process and there is never a moment in time when you say we have reached where we wanted to meet.

Article 1 of the Constitution of Malta is the essence of every single article which follows it.

> **1.** (1) Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.

The Rule of Law depends therefore on each and every single article reflecting democracy through law. Not once is the term 'Rule of Law' mentioned in the Constitution of Malta, but it is there in every single word, phrase, comma and so on because it is the will of a society, its people and institutions, to operate democracy through law. Moreover, Separation of Powers is a function of the Rule of Law. The Rule of Law is something intangible without which our Constitution cannot function.

In 1974, we had the Rule of Law missing, with the Constitutional Court not being appointed.

Majorities under the Constitution

There are only 3 ways how the Constitution can be amended

1. The absolute majority,
2. The two-thirds majority and
3. The two-thirds majority with a referendum.

Ordinary Acts of Parliament are passed by the simple majority of those **present and voting**.
On the contrary, in order to amend the Constitution, the minimum majority is the absolute majority of all the members of the House.
In an absolute majority the word 'absolute' means undefeatable. A majority which is absolute is one which cannot be defeated.
In 1971, 65 members of Parliament were elected. Therefore, the minimum number which can never be defeated is 65 division by 2 plus one. That number can never be defeated because it takes into account ALL the MPs and this number applies irrespective of the number of MPs who are present and voting. This is the difference.
Under the 1964 Constitution, the House of Representatives was that elected in 1962. It was a colonial Constitution so when we became independent, we did not hold election again that day so at that moment in time we had more than two parties in Parliament, keeping in mind that our Parliaments were not always composed of the Nationalist and the Labour party only. When we still had colonial constitutions, our elections were held the same. In 1964 it was important to distinguish between a simple and an absolute majority because there were many parties in Parliament. In an absolute majority you get the 65 members of Parliament that compose it, divide by 2 plus one. The minimum majority to change those articles of the Constitution which require an absolute majority is 33. If for example, they come to amend the Constitution and there are 20 people in the chamber, not even if all the 25 members vote in

favour can they reach 33. So, in this situation, if you do not attend it is as if you are voting against. An abstention is a non-support in the case where an absolute majority is needed. 65 members of Parliament and an absolute majority of all the members of the House is required – so required present at least ½ to make the vote meaningful. By abstaining, you are making it a bit more difficult to reach the number of at least 33 members.

The role of the speaker is to keep order and to manage the sitting. He has the role of chairing the sittings of the House of Representatives. He can be chosen from outside the House. The speaker who does not vote with the MPs elected.

ELECTORAL LAW

HOW THE PRSTV WORKS

MATHEMATICS & DEMOCRACY

The Constitution, in terms of the Rules of Law, needs to define not only the organs of the State but has to also determine how the democratic system works. That is, the Separation of Powers is undoubtedly extremely important, but what is also important is the issue that there has to be a participation by the electorate, i.e. the citizens, in a democracy.
The relevant question here is are the people/voters of a particular democracy comfortable with the method in which, once every so often, they elect their representatives to the House? *Are we happy with our electoral system?*
These questions are fundamental because the test which the Rule of Law requires is **an accepted form of participation by the citizens in a democratic process**.
In Malta, our electoral system is known as the Proportional Representational System by the Single Transferable Vote, also known as the PRSTV, and through this system 65 members of Parliament, 5 from each 13 districts.

'PROPORTIONAL REPRESENTATIONAL'

What are the aims of the Proportional representational system?
The term 'proportionate' is essential. **The representation must be proportionate to the votes**. It is an equation; something is to something. There must be representation is to votes. In other words, the Constitution is entering into the field of mathematics, simple mathematics but mathematics, nevertheless. The accepted form of democracy is that there will be **a mathematical correspondence between the numerical votes as to the number of seats elected in Parliament** (the translation of votes into seats). Moreover, one may note that **the party is not the subject matter of our electoral system** since we cote for individual candidates and there is no need to stick to the same party when voting. However, we make a political calculation; I vote for someone even though those two candidates may not directly contest my district. It is not the only function of the PRSTV. It has another function. Firstly, it wants to have proportionality, and this is ultimately a mathematical relationship between numbers. **It is not equality**.

'THE SINGLE TRANSFERABLE VOTE'

Each individual expresses, through the one vote, **a number of instructions** given to the Electoral Commission.
We elect 5 candidates and not 1 because when we vote we give multiple instructions to the Electoral Commission which is empowered by the Constitution to oversee the elections.
In the UK, the instructions are simple and straight-forward. The Electoral Commission understands what the greatest number of votes wish. This is a simple instruction. On the other hand, in Malta, we give multiple instructions.

The first instruction: I want candidate A to be elected to Parliament and so I give candidate A my first preference. So far, both systems seem the same. The difference is, however, between my first preference versus having the only preference. At this stage, the first count is extremely important. From the voters' point of view, the biggest difference between the two systems is when you come to choose.
Therefore, up until the first preference, the Maltese electoral system is like that of the UK.
The second instruction: However, we then go down the ballot paper, and ask the question *'if*

my first preference is not elected, who do I instruct the electoral commission to elected instead of my number one?'
The rest of the instructions: Should my second preference not get elected, I have my third preference and so on and so forth. **Technically speaking, you can give a preference to each single candidate from whichever party they contest to all of the candidates. In Malta we tend to restrict our preferences to one party, but this is simply a political mentality.** In this way, the Maltese system empowers the voter's choice.

The PRSTV however, is not so simple. The Electoral Commission will come back and restrict our choice a bit.

MALTA	**UK**
The PRSTV	The first past-the-vote
We give multiple instructions.	The instructions are simple and straight-forward. The Electoral Commission understands what the greatest number of votes wish.
My first preference. We do not say case closed but we have further chances/opportunities. In this way, the Maltese system empowers the voter's choice.	Only preference. I give the instruction to the commission to elect candidate A and if that candidate does not get the single most votes, case closed.

THE QUOTA
The PRSTV creates what is called the **quota**. The quota, in short, refers to **the minimum number of votes** needed in order to get elected. In other words, it is a figure necessary to get elected. It is important to mention that it is a 'minimum' because it is a levelling effect.

MINORITY REPRESENTATION ENSURED BY THE QUOTA
Through this system, what is ensured is that **as many political opinions as possible reach Parliament**. In Malta, 5 candidates need to get elected per district and the threshold in order to be one of those 5 candidates, and therefore, get elected is $1/6^{th}$ of the votes. **In order to ensure that the minority** candidates get elected, the number of votes that a candidate can take with him/her to Parliament is **limited**. Once the candidate has attained the quota and surpassed it, those extra votes, i.e. those above and the beyond the quota, are passed on to all the other candidates in a proportionate manner. In other words, the **surplus of votes** which are not needed for that candidate in order to get elected are re-distributed amongst the second preferences of the voters. When I give my preferences, my candidate could get elected with so many more votes that is necessary to be elected. The Electoral Commission picks up the quota necessary to ensure the election of that candidate and there will be surplus.

You are not distributing the entire votes; you are distributing the [total minus the $1/6^{th}$] in order for the candidate to get elected. The surplus is distributed **proportionately** among those candidates in your district which are in the number two preferences of the elected candidate. The idea is that if you have a small party, or a candidate who is not very popular, he/she is given the chance to have a cascade of votes coming down to them so that they ultimately attain the $1/6^{th}$ of votes in order to be elected. The majority, naturally, will have more seats. It is proportionate through the single transferable vote.

HOW IS THE QUOTA CALCULATED?
[VOTES division by 6] + 1
The quota is **the valid votes cast in a district divided by the number of seats elected plus one and add one to the answer**. To take an example, if I get 100,000 votes but only need 3,000 votes to be elected, the Electoral Commission has to distribute 97,000 votes. The 5 candidates will only enter into Parliament if they get enough votes to obtain the quota. If you have more than the $1/6^{th}$ plus one, those have to be redistributed in terms of the proportionality. **We divide by a greater number**.

The vast majority, if not all, of the Members of Parliament elected through the **PRSTV** are all elected by **the same percentage**. This is not necessarily the same amount because the voters in each respective district vary. With that being said, at the end of the day it is **a formula** which applies in each of the various districts, if the election is made up of various districts, or of one district alone in the case of local council elections and the EU elections. Each member of parliament gets elected therefore, by the same percentage of votes (the quota). The PRSTV does not let you go to parliament with more than the quota.

In the general elections, the end result is **an aggregate of members elected from each district**. This explains why we have a democratic fault when working out our general election results in a two-party system. One cannot render the difficulties Malta faced in 1981 and 1987 if the fact that **the difficulty was not technical in workings of the PRSTV, but it was in the democratic understanding of legitimate power** is not understood.

THE COUNTING PROCESS
First count: When the ballots are first counted, the first preferences are examined and any candidate who reaches the quota will be elected. Here, we are looking at all the first preferences of all the candidates in the district.
Candidate A obtained the Quota.

Second count: more often than not, some candidates will obtain surplus votes, and these are re-distributed proportionately to the candidate marked second preference on the ballot paper. Once the surplus votes are re-distributed, the second count will determine whether any other candidate has now reached the quota. In short, this is the re-distribution of candidates in one district who have received the quota.
Candidate A's extra preferences have been distributed and candidate B got elected. B was elected because he inherited enough votes as a second preference and reached the quota.

Additional counts:
If at any count no candidate meets the quota, and therefore there are no more surplus votes to be re-distributed, the candidate with the fewest number of votes is eliminated and his/her votes are transferred to the candidate who is next-ranked choice on the ballot paper (if a ballot paper no longer indicates a preference for a remaining candidate, then the vote becomes 'non-transferable' and remains unused).

Let's say, after electing candidate B, no one else gets the quota. To keep the vote-flow, the Electoral Commission eliminates the candidate with the least votes. Candidate X has the least amount of voted, so the Electoral Commission eliminates candidate X and re-distributes his votes. Therefore, the Electoral Commission decides to start reducing the candidates to 5 and one extra, so 6. In this way, the process of elimination begins. **The votes of the eliminated candidate are distributed proportionally to the remaining candidates, until we are left**

with 5 candidates with a quota and one remainder. Each and every candidate, therefore, can either end up amongst the 5th elected, or the one-runner up (not eliminated but not elected) or else eliminated and your votes are distributed to the others.
In this way, the third, fourth, and so on count, starts from the bottom because you have always have to keep the flow going. **The counting in the proportional representation system is individual and NOT party related.** The PRSTV does not read a party. Apart from the first count, a count is always either the re-distribution of the excess votes of a person who got the quota or else in a sperate count, the re-distribution proportionately of all the votes of a candidate that was eliminated. With that being said, there are types of PRSTV which does not allow crossvoting.

Candidate X only got 50 votes after the first, second and third count, in the fourth now we are going to get all the votes of candidate X and all those 50 votes are re-distributed proportionally. After re-distributing the votes of the eliminated candidate, the Electoral Commission asks whether any other candidate obtained the quota through the re-distribution. If it's a no, another candidate is eliminated. Candidate X and Y are eliminated, and now, candidate C gets the quota. This quota is identical to A & B. If there are any surplus votes over the quota, the same re-distribution happens. This happens until you have 5 elected candidates and one remaining candidate. Up till 1987, the remaining did not make it. Through corrective mechanism introduced in 1987, the extra votes over the 13 districts were used to correct the end result of the PRSTV and this 're-activated' the votes to the name of the sixth candidate. Therefore, firstly 65 members of parliament have to be elected through the PRSTV before the 6th candidates can even be considered. This 6th candidates have to first be established. In 1987, in a situation where a party obtains the absolute majority of votes but not seats, extra seats will be awarded to that party in order to obtain a majority of one, and these MPs were chosen from a list made up of the candidates of that respective party who were neither elected nor eliminated.

THE 6TH CANDIDATES
If in any count you have no candidate who has achieved the quota, which is the minimum number of votes necessary to be elected, the Electoral Commission has to eliminate a candidate. This is done because otherwise, the process stops there. In the PRSTV, the one with the least votes in eliminated. Count number one is the opening of all the valid ballot sheets of all the candidates **in that district**. Does anybody have the quota immediately? Yes, and so the electoral commission declares that candidate elected. You get the surplus votes of the quota which the candidate does not need to take with him, you open all the votes of the electoral candidate, even those which are his, and proportionately the extra votes are distributed according to the number of times their name appears in the elected candidate's entire packet. Count number 2 is the distribution of extra votes if any candidate obtained the quota. In count number 3, if no candidate has obtained the quota, you eliminate the candidate from any party with the least votes in the entire list.

THE HISTORY OF MALTESE ELECTORAL LAW

THE 1981 CRISIS

The next big crisis came in 1981, more precisely the 1981 elections, where the Labour Party, at the general election, obtained the absolute majority of the seats in Parliament but not the absolute majority of first preference votes. The fact that the Labour Party won the majority of seats in Parliament was declared to be so by the Electoral Commission which certified that the MPs elected singly were elected in terms of the Constitution and of the General Elections

Act. In this way, **the letter of the law was adhered to**. Therefore, this general election did make use of the PRSTV, which was enforced from 1921, but what happened was unusual. The point being made here is that in 1981, after the elections took place, there was no doubt as to who LEGALLY won, the Labour Party led by Dom Mintoff.

The crisis lied in the fact, however, that the Nationalist Party argued that there is a higher constitutional problem here namely, **majority rule** because **the total first preference votes obtained by the Nationalist Party from all of the 13 districts added together** revealed that they had obtained the absolute majority of the first preference votes nation-wide. However, **their seats were in a minority**. In short, they had won the absolute majority of first preference votes but had lost the seats in Parliament. In other words, the Nationalist Party argued that they had lost the seats but when you add up all the first preferences votes obtained by the nationalist party and compare those which were obtained by the Labour Party, they realised that in fact **the loser in seats had obtained the absolute majority of all the first preference votes.** In this way, **the majoritarian party ended up the minority party in Parliament**.

The argument was that **how can a democracy survive without a majority rule** – how can a democracy be constitutional when the Constitution in its very foundations is built on majority rule? How can it be ever that in a democracy you would have the absolute majority of the voters denied their will? Constitutional law always involves **starting from the letter of the law** but then you have to ask the question are we respecting what the **constitution wants**? As a result, the Nationalist Party decided not to enter Parliament. Consequently, our Parliament was formed of only one party for many months. In light of this, there is always a strict legal argument, but the other argument is the scope of it. **In respecting the Constitution, we have to respect its aims**, and this is the Rule of Law. The Rule of Law is not a strict interpretation of the law.

The bottom line: Our electoral system is intended to favour minorities in electing at least some representatives to Parliament. With that being said, despite having an electoral system that is proportional and not majoritarian, the electorate favours the two parties only.
In systems such as ours, the case of the majoritarian party ending up the minority party in Parliament should not take place because it is a PROPORTIONAL system. The Nationalist Party argued that you cannot have, in a democracy, a proportional electoral system which does not guarantee the absolute majority right to govern.

WHAT CAUSED THE 1981 CRISIS?
What caused the problem in 1981 was the malfunctioning in the districts. Dr Edgar Mizzi provided a very clinical analysis of the 1981 result. As Attorney General, Mizzi had assumed a central role in the deep constitutional crisis which centred around the change from a monarchy to a republic and the far-reaching amendments to the Constitution effected through Act Nos. LVII and LVIII of 1974. It was already seen how Malta did not have the Constitutional Court composed at the time Parliament was enacting the 1974 amendments. In the absence of a functioning Constitutional Court Mintoff's government had received the advice from Mizzi, then Crown Advocate-General, that Parliament was empowered, by a simple majority, to remove Article 6 of the Constitution, which proclaimed the supremacy of the Constitution.
He posed the question which was central to the 1981 crisis:
"One of the first questions the electorate asked was whether there had been any gerrymandering. In other words, had the boundaries of the various divisions been altered in

such a way as to produce a result alien to the normal application of the principle of proportionality which was the basis of the electoral system."
Mizzi's point was that the districts with a Labour majority were more efficient in the voter-to-seat ratio than those with a Nationalist majority and which therefore led to a greater wastage of votes in the election of the Nationalist MPs. He also points out that a perverse result was avoided by a whisker in 1971 when Labour got elected by a "handful of votes" going its way in the fifth district.

Malta was therefore gaining the moral and constitutional conviction that the 1981 general election had to be the last in which the workings of the PRSTV was to be used on its own. The gravity of the denial of majority rule coupled with the Opposition's strong resistance to accept the result led to the introduction in 1987 of the first 'majority' constitutional systems intended to guarantee a given outcome of a poll if certain conditions take place independently of the final result as determined by the sole workings of PRSTV.

To understand our electoral system is to ask one simple question: does the electoral system give legitimacy to our political 'masters'? In 1981, the result in its pure PRSTV technicalities was legal in the sense that each of the 13 districts returned each 5 candidates and that these 5 candidates in total gave 65 members of Parliament and helped the President of Malta in electing a Prime Minister. **Nobody contested the district results of the 1981 elections**. However, the truth of the matter remained that if you add up the first preference votes of that particular party which legally won the election, they did not end up in a volume of votes nation-wide in the absolute majority of the votes in a two-party parliament. In 1981, **the difficulty was legitimacy**. Here is where the quota comes in. The PRSTV does not ask itself the question is there an absolute majority of one party nation-wide in Malta and Gozo? On the other hand, it asks through a mathematical calculation how can we ensure that in each single district we elect multiple representatives to parliament? **It is worked out in each of the separate districts separately**. At a general election you have **13 separate, independent elections, and counting processes taking place.** District 1 has a counting process that has nothing to do with district 2 and so on.

The democratic deficit of the 1981 elections was something that the PRSTV very technically could not remedy because **there was no fault in the way the PRSTV worked**. The fault was **gerrymandering** – where the powers that deal influence the manner in which the districts are divided. So, why is it a democratic issue more than a legal technical constitutional issue? **The problem was in the way the districts were worked out prior to the 1981 elections**. In 1981, there were the famous corridors that linked one district to another district in a small strip of land to make them linked which each other.
Mintoff v. Borg Olivier is fundamentally an electoral case. **The same thing was close to happening in 1971.**

Today there is a **5%** leeway. In all the districts in Malta, the Electoral Commission needs to adjust. You can pick and choose districts, but you got to be sure that **there is no more than 5% difference in all the Maltese districts voting population (keep Gozo apart**).

One can note that the first major crisis of independent Malta was the Republic where **article 6 was suspended**. The 174 crisis has no answer. The second enormous crisis that constitutionally independent Malta went through was in 1981. Of more importance, in both of these situations you have to explain that **there is a strict legal reading of the situation but there is also the interpretation of the Rule of Law.**

In Constitutional Law it is always a mix of legal thinking and political thinking. One has to explain the politics behind it. In Constitutional law, you have got to give examples of how the political world sometimes influences the Constitution and vice-versa. At the end of the day, what we are talking about is democratic legitimacy and the effect of the two-party parliament which is a political reality which the Maltese have freely chosen since 1966.

THE ISSUE WITH A TWO-PARTY SYSTEM

Since 1966, Malta has been a two-party Parliament with the Nationalist Party and the Labour Party. So far, no independent member of Parliament has been elected. From the first Independence election in 1966, till 2017, we always elected two parties in Parliament.

Had we decided over these many years to distribute our votes between 4 or 5 parties, this would not have been a problem because no one party will win necessarily the 50% - it is not impossible but is highly improbable. **What happened in 1981 and nearly in 1971 is that in each district you are facing the same contest between the same two parties. In other words, if you do not have two parties in parliament, the absolute majority in parliament must be the product of the coalition.** The issue of a party obtaining the absolute majority of the votes becomes a regular issue when you have the PRSTV facing two parties contesting each district.

The problem would be that in Malta and Gozo, there is not even enough votes circulating in a particular district which amounts to 1/6 which does not go to the two big parties. Here is where the PRSTV came missing in 1981 because the districts were being worked out to maximise a national majority in seats and therefore the political parties were now joining all the districts in a political exercise where you really are dividing by 2 (Nationalist & Labour).

If you are only two parties, as is the case in Malta, there must be a direct proportionality between what is in Parliament and what is in the country; there must be an equivalence. In Malta, our proportional representational system is known as *the droop system* whereby by **dividing the votes by one extra than the number of seats you require produces mathematically a remainder**. In 1981, the Nationalist Party calculated that the remainder was much more of Nationalist than Labour. For the first time in the history of the PRSTV, suddenly the attention went not on the 1/6th vote that translated into political parties but on the remainder. The Nationalist Party argued that, in a two-party system, the remainder added together means that without them I don't have a majority in Parliament. This created a crisis which was far from simple. The solution could have been one of two: Parliament could have either tried to get the PRSTV to recoup (strict proportionality which will not allow the extra – many think that if we get the PRSTV to recoup it could mean that we have more fragmentation and therefore you could have political instability). What was suggested was a 5% threshold nationally. So, for you to get elected you must at least get a 5% national vote, but this was not adopted. **The line taken was do not change the electoral system, let's keep the 1/6th but we introduce a corrective mechanism. To ensure majority rule, we correct any democratic deficit which the PRSTV may give rise to.**

The corrective mechanism goes beyond the district. It does not read the individual votes but the **party votes**. These party votes are the discarded votes not utilisable in the PRSTV, recycled in a new system to correct any democratic deficit. **In the PRSTV everything n depends on the quota whilst in the corrective mechanism, everything depends on the discarded votes.**

THE CORRECTIVE MECHANISMS

Notably, term 'corrective mechanism' is not found in our Constitution. This is a transition from the purely electoral to the legal. After the crisis of 1981, the Parliament of Malta decided to introduce the corrective mechanism. Here, one must keep in mind that at no point in time was the PSRTV changed. The problem of the 80s was to correct something that is final. One must distinguish between the way the result is shown to the people and the way the Constitution defines the process. They are both the same thing, but they give a story. So, in the PRSTV, you start with the first count. This first count is precisely that, district by district, the Electoral Commission starts off by asking a question: how many first preference votes did each candidate at the general election obtain? It reinforces the characteristic of the PRSTV that it is candidate oriented not party oriented. The Maltese, over many decades, do not use their voting rights to cross-vote.

THE 3 IMPORTANT AMENDMENTS TO THE ELECTORAL SYSTEM

The corrective mechanism has 3 stages/amendments. They are **not amendments to the proportional representational system** which in essence has remained the same for 100 years. Moreover, their effect is cumulative. They are not three separate amendments since the one that we have working today absorbs the two that came before. The 3 amendments built on each other.

1987

This is certainly not the corrective mechanism we make use of today even though the following two built on it. The amendment to the Constitution was passed in 1986 but was operated for the first time in the elections of 1987.

As already discussed, in 1981 we had the perverse result. The 65 members of Parliament were elected 5 from each district and the majority elected of those 65 members of Parliament were from the Labour Party, whilst the minority were from the Nationalist Party. However, the Nationalist Party had obtained the absolute majority of all of the valid first preference counts nation-wide. The Electoral Commission had a new function as from 1987 onwards. In 1987, after the 65 members of Parliament were elected, **the Electoral Commission had to ensure that the result respected majority rule**. The Electoral Commission, for the first time, had, as a first count, to count all of the first valid preferences of all of the districts together. In other words, for the first time the Electoral Commission had to take into consideration the political party affiliation of each candidate. So, for every candidate that received a first preference vote, the Electoral Commission gave one vote to the political party of the candidate. The Electoral Commission, for the purposes of the corrective mechanism, asks itself in which party does the candidate form part of?

In 1987, from a historical point of view, the one question that the Constitution wanted to answer was: **through the corrective mechanism, is there any one party that has obtained the absolute majority of all of the valid first preference votes from all of the districts in Malta and Gozo; nation-wide?** There will be one party that will obtain the absolute majority of all the valid votes from all the districts. In 1987, we call it a 'pragmatical attitude'. In order not to have a repetition of the 1981 elections, **Article 52** of the Constitution was amended which said that if any party obtains the absolute majority of all the valid votes aggregate over the 13 districts, and that party which obtains the absolute majority of first preferences does not obtain the absolute majority of the seats in the House of Representatives, the PRSTV final result has to be corrected.

In 1987 there some original thinking, with the introduction of the concept of adding new seats. It was argued that after all, each district always gives a remainder and therefore, it

would be seen which party needs extra votes to get the majority in parliament and use the candidates which ended up the 6th candidate, the eliminated one, to do so. A list would be made of all the 6th candidates of that particular party, and the 6th candidates will be chosen based on how many seats are needed and based on who had the most votes. In fact, in the 1987 elections, the Nationalist Party needed 4 extra seats to get the majority of seats in Parliament and for the first time, the 6th candidates that got the most votes were to be elected along with the 65 members which were elected through the PRSTV. This was done to **ensure majority-rule**. The Nationalist party in 1987 lost technically the PRSTV election but since they obtained the absolute majority of the first preference votes nationwide, they benefitted from the corrective mechanism and the Electoral Commission added 4 members of Parliament by picking them up from those that were eliminated, provided that the constitution imposes that the number of members of parliament is an odd number. This is why they are often described as **two electoral systems**.

Therefore, from 1987 onwards, in the any election, the two fundamental questions the Electoral Commission had to ask were which party has a majority in the House of Representatives after all the 65 members of parliament are elected? & Is the party that has the majority of seats also the party which has the absolute majority of the votes in the country? If the answer is no, like in the 1987 elections, the question following the amendments was **how many seats do we have to add now to give the Nationalist party an overall majority of 1? The party which obtains the majority of votes will govern.**

The amendment allowed for:

1. The party with an absolute majority of valid votes at the first count to have an absolute majority of seats.
2. Through the election of extra seats from candidates belonging to the absolute majority party selected among the last unelected sixth candidates from the 13 districts into which Malta and Gozo were divided.
3. If additional seats needed to be filled, the margin of difference in seats between the two parties in the House **would not exceed one seat overall**.

An important point is that it is not a given that at every general election a correction the result of the proportional representational system is needed. In fact, in 1992, the corrective mechanism was not needed since the Nationalist Party obtained both the absolute majority of votes and the majority of seats **through the PRSTV alone**. Therefore, in 1992, the House of Representatives was only the product of the PRSTV. The electoral system of Malta remains the PRSTV, and the corrective mechanism is used only when required.

The electorate understood perfectly well that the first preference acquired a dual significance. It not only gave a head start to the individual candidate for the purposes of the PRSTV process of selecting the five candidates for a district over all the other preferences within the voters' ballot paper; it also gave the first preference candidate's party a first preference to be aggregated to the first preferences of candidates belonging to the same party from all 13 districts.

1996

The question naturally arises as to whether the 1987 constitutional amendments which were enacted under a situation of political and electoral emergency would serve the needs of future elections. From the very beginning the electorate understood and adopted the logic behind the implant of the corrective mechanism into the electoral system. No difficulties were registered

during the voting and the counting process of the 1987 election, including the restoring to the election of additional MPs by the corrective mechanism.

There was a change in government, a change in majority. This time, the vote penalised the labour party. In 1996, the corrective mechanism was necessary to give the Labour Party an overall majority of one seat. In 1996, we had an amendment to the corrective mechanism, but the 1996 result had the Labour Party winning the absolute majority of first preference votes, but they did not win the absolute majority of the seats in parliament therefore the 1987 amendment kicked in for the Labour Party to get an overall majority of one seat.

At this time, Dr Sant raised the issue that he should have had a bigger majority than one and this set a process of thought moving; The process of thought is that two situations can come about: What happens if no party obtains the absolute majority of the votes in a two-party parliament? This is what led to the 1996 amendment. In this situation, only two parties get elected but none of the two parties gets the absolute majority either because they are so close or else if a third party does well without electing a candidate.

The question raised by Dr Sant was different because in 1996 he had obtained the absolute majority of the votes but not of the seats. The amendment of 1996 had nothing to do with the problem that Dr Sant raised, namely that there should not be a capping of one seat in the attribution of extra seats under the corrective mechanism. In fact, that question was dealt with much later on when the Nationalist Party won the 2008 elections.
Just before the 1996 elections, on April 2, 1996, Parliament had enacted Act No. XI which incorporated the second corrective mechanism amendment to Article 52 of the Constitution. the 1996 amendment introduced the possibility of additional seats being elected should, in a general election:

- More than two parties contest,
- Only candidates of two parties are elected,
- A political party obtains a relative majority being a percentage in first preference votes greater "than that obtained by any one other party."

In the case of concurrence of each of the above situations, then the party with a relative majority of votes "shall have one member more than the total of the other candidates elected at that election."

The 1996 amendment left intact the 'absolute majority' corrective mechanism of 1987. It added to it the new scenario of correcting a relative majority perverse result. A relative majority is when you have a party that gets the most votes, but that party would not have won the absolute majority – it would be below the 50% mark. This is a situation where two parties are elected but no party wins the absolute majority of the votes because of other parties. For example, one party gets 48% of the votes and another 45% and the rest goes to other parties but nobody gets the absolute 50% +1 majority. Hence, they said that the corrective mechanism of adding seats will also apply in the case of a relative majority in votes not winning the absolute majority of seats as long as there are only 2 parties elected.

Finally, the 1996 amendment to the corrective mechanism retained the same method of election introduced in 1987 for the selection of extra seats necessary to avoid a perverse result. These were again to be chosen from the sixth remaining unelected candidates belonging to the party which had won the majority, whether absolute or relative, of the first preference votes.

This provision confirmed that the working of the corrective mechanism introduced in 1987 were extended to cover the party with a relative majority of first preference votes. it tended to perfect the first corrective amendment in the case of a relative majority perverse but was not the fruit of any of any contingent dysfunction from an electoral experience.

In 2008, the party with the relative majority did not get the majority of seats in Parliament and since there was no other party represented in Parliament, the corrective mechanism came in to give Dr Gonzi a majority of one.

2007

The fall of the Labour government in 1988 and the new pragmatic realisation it brought with it, led to the third corrective mechanism amendment of 2007.
The political aftermath to the 1996 result indicated that the system had now to be amended a third time to cater for gaps in seats larger than one seat envisaged by both the 1987 and the 1966 amendments simply because factually the electoral gap between the two major parties in first preferences was increasing. The difference in electoral strength separating the two major parties was now exceeding a few thousand votes.

The 2007 constitutional amendment involved removing the capping of the corrective mechanism operating only to give a maximum of one seat. That is, Parliament decided that the Electoral Commission, in deciding the extra seats, must also decide what is the difference in percentage between the first preference votes of Party A in relation to those of Party B. In line with the 2007 amendment, this difference in percentage had to be reflected in the difference in seats. Therefore, from 2007 onwards, the corrective mechanism was no longer limited to giving the party that obtained the absolute majority of votes but not the absolute majority of seats, the number of seats that would give them a majority of one seat. In light of this, corrective mechanism adopted a **proportional element**.

Here, one must make an important observation. The 2007 amendment made an important change since now, not only could the majority party benefit from the additional seats elected through corrective mechanism, but so could the minority party. Therefore, this constitutional amendment on the corrective mechanism brought two major changes:

(1) it brought about the calculation changed; you have to establish the gap in percentage **the gap in votes must be reflected in the seats**.
(2) The second most important effect was that, as a result of (1), from now on the corrective mechanism **could give extra seats** not only to the party that wins but also to the party that loses.

Examples of when this corrective mechanism was of use were in 2013 and 2017, whereby although the Nationalist Party had lost both elections, and therefore, was in the minority as it did not obtain the absolute majority of votes, it was nevertheless given extra seats. In these general elections, the PRSTV result gave the Labour Party a large majority and this extenuated more the result. Consequently, the corrective mechanism came was brought into use in order to shorten the gap of seats to reflect the correct percentage difference. Furthermore, the system today is a complicated mathematical formula whereby you establish the relationship of the gap and therefore, the ratio of the difference of votes, and then separately, the ratio of the difference of seats as elected by the PRSTV. Finally, these two ratios are then worked together.

THE 6TH CANDIDATE UNDER THE CORRECTIVE MECHANISM

Mathematically, under our electoral system, if you need to elect 5 candidates, you divide by 6 which gives you a remainder. This would come to mean that in each district there are a number of votes which are valueless. This was true up until the election of 1987, the first general election making use of the then corrective mechanism, ensuring majority rule. When in 1986, Parliament at the last moment decided to introduce a corrective mechanism, any procedure involving the proportional representation system through the single transferable vote was left exactly as it operated from 1921. Therefore, the corrective mechanism did not in any way interfere in the counting process of the PRSTV carried out by the Electoral Commission nor in the way the voters physically express their vote. But it was a revolution, nonetheless. Through the corrective mechanism, a double way of reading the same thing was introduced. The same vote has two significances. From 1987 till today, the ballot paper has been given two significances depending on whether we are operating the proportional representational system or whether we are operating the corrective mechanism.

The PRSTV takes 3 days to conclude; to count all the preferences of all the votes of all the districts. It takes a couple of hours to count all the first preferences of all the districts, so the corrective mechanism is based on the first count. And the PRSTV is based on the last count. The law works in a way that the corrective mechanism has to wait until 65 members elected through the PRSTV before it can kick in. In other words, the corrective mechanism should wait LGEALLY until you have the 5 members from each district because **you need to know who the eliminated 6th candidate is to operate the corrective mechanism**. Both the voter and the Electoral Commission both get into tune to read the same text in two, different, distinct ways.

'A', a candidate, can be read personally for the Electoral Commission for the purposes of the PRSTV. In giving 'A' a number one vote, this is having 2 effects: helping 'A' to reach the quota but also helping 'A''s party through the first preference so that 'B' who is the leader of the party, becomes Prime Minister. **For the PRSTV, you have to keep on going but for the corrective mechanism it is the first preference only that matters**. This complex reasoning if having one text with 2 significances only applies to the national elections.

WHAT HAPPENED IN THE ELECTIONS OF 2013?

What happened in the elections of 2013 exhibits the **important relationship that exists between fundamental human rights and an electoral result**. Each country determines itself the type of functioning model but certainly if an electoral system is adopted it must work.

In 2013, the electoral result was not in doubt with the Labour Party winning with by a landslide. That being said, something unusual happened. Two candidates, not elected at the PRSTV stage but elected at a second stage, claimed that they should have been elected as of right; that is, not through the corrective mechanism. They claimed that they had enough votes to get elected through the PRSTV.

For context, the two organs which oversee the process are: **The Electoral Commission** and **the Constitutional Court**, established by article 95 of the Constitution. The ordinary process is that one first you go to the First Hall Civil Court in its constitutional jurisdiction and then there is a right of appeal to the Constitutional Court. This ordinary procedure does not apply in electoral matters since decisions must be taken quickly so that it can be decided who to, via the president of Malta, give confidence to the Prime Minister and the Cabinet. Therefore, in

terms of the Constitution, a special procedure has to be applied before the Constitutional Court sitting as an electoral court.

Subsequently, the two MPs, namely Claudette Buttigieg and Frederick Azzopardi, applied before the Electoral Commission maintaining that some votes that were lost, in the case of Azzopardi and votes that went to another candidate instead, in the case of Buttigieg, should be given to them since as a result, they were not elected through the counting process. Therefore, asked the Electoral Commission to correct a mistake in the counting process. When the matter came before the Constitutional Court, and therefore, they made use of the ordinary process of electoral judicial review, upon seeking regress, the question arose as to **what juridical interest** the two MPs have since ultimately, they were elected as member of the House just through the corrective mechanism instead of the PRSTV. The remedy they were asking for was questioned. The Constitutional Court agreed that since the two candidates were elected nonetheless, they no longer had the juridical interest necessary to bring forward a court case under Maltese law. Both Claudette Buttigieg and Frederick Azzopardi argued that they do have a juridical interest because something that belonged to them is now in the packet of another MP who got elected instead of them, through the PRSTV, and that they should have been elected in their own right and not through the corrective mechanism.

However, the case took a different turning when the Nationalist Party argued that in truth, the fact the Nationalist candidates where not elected through the PSRTV, disturbed the working of the corrective mechanism. This is because, the calculation that is done to see how many seats are to be increased depends on the candidates elected through the PRSTV. So, it was in the interest of the Nationalist Party that it would have two extra members so that there would be a proper calculation of the seats which should have been added later on. Therefore, they instituted a **human rights constitutional case**. The fact is, the Nationalist Party gained juridical status because now they could claim they, as a parliamentary group, was affected adversely by the mistakes which the two candidates, still in their parliamentary group but as a whole, made the difference to the workings of the elections of extra members of parliament. The Nationalist Party argued that had this not occurred, the number the corrective mechanism results would have been different, and that the calculation would have been more to the favour of the Nationalist Party. With that being said, the Nationalist Party could not go to the Constitutional Court under article 95(2) because they are **not considered a candidate by law**.

In terms of the General Elections Act, neither the Nationalist party nor the Labour party are recognised as a candidate of the elections. <u>If the Nationalist Party were to have asked the Constitutional Court, as a court of electoral review, to correct the mistakes of Claudette Buttigieg and Azzopardi, would the court have given them audience? Did the Nationalist Party have the required juridical interest?</u> Not only do they not have juridical interest, but they are not even technically considered as candidates. The representatives of the two major parties in Parliament enjoy great rights in reviewing the working of the Electoral Commission but the parties are not recognised as being candidates of the general elections, it is the voter who reasons this out. The Nationalist Party argued that in the calculation of the corrective mechanism, the fact that the labour party had +2 candidates and they had -2 candidates disturbed the final composition of the parties in Parliament, keeping in mind that the moment we move from the PRSTV where the parties who are not recognised by law as candidates, to the articles of law dealing with the corrective mechanism, it is no longer the candidate but the party which obtains the absolute majority of the valid first preferences at the first count.

They decided therefore, to institute a Human Rights case under chapter 319, the **European Convention of Human Rights** since the EcrtHR recognises the electoral process as a fundamental human right under the First Protocol. It recognises the intimate connection that exists between democracy, free elections, the Rule of Law, and the Constitution of a particular country. The EcrtHR does not say the British system is the epitome of the democracy or the Maltese electoral system is the epitome of democracy. The EcrtHR said we want a system accepted by the people. So long as you have the basic requirements of a free election, the particular system may vary. Therefore, the ECHR is not there to determine and impose one system.

Our Constitutional Court accepted that the Nationalist Party had a juridical interest as a matter of a Human Rights remedy to request the Constitutional Court, not as an electoral review court, but under the other sub-section of article 95 that grants the Constitutional Court the jurisdiction to review the protections of fundamental human rights. The scenario, therefore, changed completely. The Nationalist Party now are claiming that the mistake distorted the democratic result of the 2013 elections in that 2 of its candidates were mistakenly left unelected and that fact disturbed the correct calculations of the additional seats to be granted to the NP in terms of the results of the 2013 elections. **The NP was claiming that through those two mistakes unremedied, there is a Parliament that is not composed correctly**. The facts of the case were undisputed. Both parties agreed. The remedies were what the issues found themselves in.

Here, we are dealing with the very basis of democracy & the Rule of Law. How can you discuss the electoral system if you do not link it to the essence of what the Constitution wants? The main principles of the Constitution and therefore, the true essence, is democracy and fundamental human rights. Consequently, this must be put into the form of law to have the Courts capable of enforcing this.

THE CORRECTIVE MECHANISM VERSUS THE 2013 CONSTITUTIONAL CASE
The term 'corrective mechanism' doesn't mean to say that you correct the results of the 65 Members of Parliament elected through the PRSTV. The 2013 constitutional case involving Claudette Buttigieg and Frederick Azzopardi has nothing to do with the corrective mechanism. Here, the Constitutional Court was requested, first by two candidates and then by the Nationalist Party, **to correct physically and literally the results as announced by the Electoral Commission at the 2013 elections**. There were physical mistakes committed in the counting of the preferences during the counting procedure of the PRSTV – a packet of votes was mistakenly passed on to a candidate of the Labour Party. The mistakes committed by the Electoral Commission where during the counting process of the PRSTV and this meant that the final calculation of the corrective mechanism was affected. The normal understanding of the term 'corrective mechanism' which applies to every form of correction envisaged by article 52, is not in the sense of the Claudette Buttigieg case were **the counting process for the election of members of parliament through the PRSTV was physically corrected.**

MARTINA CAMILLERI

THE FOURTH MAJOR CONSTITUTIONAL AMENDMENT
GENDER IMBALANCE – 2021
ACT 20 OF 2021- ARTICLE 52A

Perhaps, one must start of by saying that social revolutions have occurred in Malta prior to the gender balance reform. One of the greatest reforms in our electoral system took place in 1947 where universal suffrage was introduced. The great social revolution was precisely giving the vote to everyone irrespective of gender, political opinion, race and so on; the concept of one person, one vote. It was universal.

As of 2021, there has been a new constitutional amendment regarding the corrective mechanism: the Gender Balance Mechanism. Along with the Hundred Anniversary of our 1921 Constitution and, at the same time, our electoral law system, the PRSTV, the development with regards to the corrective mechanism, make up the two most important constitutional amendments of 2021.

As we have already established, the corrective mechanism, together with the PRSTV make up the complexity of our electoral law and this development precisely affects the corrective mechanism.

Here, the corrective mechanism is concerned, and it deals with the composition of Parliament and not at face value with the electoral system. Through a series of amendments, these corrective mechanisms which have been in force since 1986 are put in the article of the Constitution which deals with the composition of Parliament. When it comes to its composition, Malta has a flexible Parliament. The General Elections Act is authorised by the Constitution of Malta to determine the districts and to determine the number of Members of Parliament that are to be elected at the general elections.

SOCIAL CONSIDERATIONS
Malta has one of the lowest levels of women's political representation in the EU.
"The process has been far too slow and 70 years after the MacMichael Constitution, we can claim that the dearth of female representation amounts to a democratic deficit."
The fact that our political system has not attracted female participation the way that many other sectors have is, without a doubt, a major problem. It is always a battle which lies the way people think. It has been said that "with exceptions, women were often rendered 'politically invisible'…a situation evolved where Maltese women were not contesting elections in good numbers and so they were not being elected even when they were as active as men at a grassroots level".
That being said, this law will not solve the underlying problem of greater participation of gender, equality in politics, nor is it intended to do so. The main aim of the law is simply to get the wheels of greater female participation in politics set in motion. Therefore, here the issue is not whether this corrective mechanism is the solution because it is not, but it can be viewed as the first essential steps. This is of outmost importance since "improving gender balance will better reflect the needs and concerns of both women and men in contemporary society."

Attaining gender balance in political participation is pivotal for democratisation processes for the following reasons:

- Gender-based under-representation **undermines the functioning of democratic institutions and processes**.

- **Significant hurdles still discourage many valid women** from entering and ensuring sustainability in their participation in political and public decision-making.
- Matters related to the electoral system, the functioning of political parties, enduring gender stereotypes and certain roles and values regularly impinge on the private division of work, and this tends to allow little room for the participation of women in the public arena

Above all, this is a small but essential step in the right direction that derived from the following questions: how can we implement the idea of social equality in parliament and by reflection, in politics, today? How do we under the existing system, introduce a general balance mechanism immediately in this legislature? To this extent, the new corrective mechanism has showed that this was possible without disturbing the existing electoral system; that of the PRSTV along with the already existing corrective mechanism. In other words, by extending and creating a new corrective mechanism, we are still within the same legislature. Therefore, from the technical aspect, in the way it is being proposed, without disturbing the existing system (majority rule & proportionality), it has succeeded.

ARGUMENTS IN FAVOUR OF QUOTAS

Firstly, Quotas **establish a fixed percentage** or numbers for the nomination or representation of both sexes to **ensure a gender balanced representation in decision-making positions**. Electoral gender quotas address such issues **within political structures**.

Electoral gender quotas are subject to debate whenever women's representation in politics is discussed. On the one hand, proponents argue that quotas compensate for structural discrimination whereas opponents argue that quotas are in themselves discriminatory.
A study carried out by the European Parliament revealed a number of arguments in favour of quotas. Some of these include:

- Gender quotas do not discriminate. Rather, they compensate for existing barriers that hinder women from receiving their fair share of political seats preventing further barriers and mechanisms of exclusion.
- Gender quotas do not discriminate against individual men. Rather, quota rules limit the tendency of political parties to nominate mostly men and compel them to seek out active and competent female candidates. For the voters, the opportunities are expanded with the possibility to vote for parties with women candidates.
- Women are just as qualified as men, but their qualifications are often given less currency in a male-dominated political system.
- Women's experience is needed in political life. Political assemblies should take advantage of all the resources and of all the pools of competence in society.
- Women are best represented by women, since they have an understanding of what equality means for them, an understanding that men may not have.
- Quotas are a quick method for increasing the number of women elected. They are especially effective to break the status quo if other measures did not yield positive results. These will accelerate the process and lead to major leaps in the number of women elected.

APPLICABILITY

The proposed amendments may lead to two particular scenarios:

i. In the eventuality that the under-represented sex obtains a percentage of less than 40% the mechanism will be applied in a way to bring the percentage representing the under-represented sex nearer to 40%;

ii. In the eventuality that the under-represented sex obtains a percentage equivalent to, or more than 40%, the proposed mechanism does not apply.

The mechanism proposed will be used only when the need arises i.e. having an under represented sex of less than 40% of the elected Members of Parliament. Hence, although it will remain in vigore, it will not apply in the eventuality that the under-represented sex obtains a percentage equivalent to 40% or more. The proposed Constitutional amendment will be triggered in response to a situation of manifested under-representation. This proposed Constitutional provision is not absolute and provides for situations where such mechanism will not be necessary.

The reform says that if at any election there is an underrepresented gender, which does not have at least 40% in Parliament, be it male or female. The law does not really discriminate on the basis of sex. The law simply sates that there has to be a 40% threshold, such that an underrepresented gender will be corrected. This is why we say it does not discriminate against the males because if the electorate wants to elect all the candidates from the 13 districts, through the PRSTV, only males or only females, then the 65 members of Parliament could be composed of only 65 males or only of 65 females. Should that happen, then we have resort to the corrective mechanism.

The legal argument is how do we understand the system:

1. You have a 40% threshold
2. It will not stop the electorate from electing originally all male or all female but if that happens you enlarge parliament to allow this correction in gender balance up to a maximum of 40%.

ADDITIONAL SEATS

The proposed concept is not to be considered on the same basis as reserved seats and this is for several reasons. Primarily, as already mentioned, **the number of existent seats will continue to be filled by Members of Parliament elected through the existent process**. When necessary, the corrective mechanism will be applied to give an opportunity to candidates from the under-represented sex to gain experience, exposure and influence in decision-making in order to garner a critical mass that will eventually render corrective measures unnecessary.

Additional seats imply that **incumbents who do not belong to the under-represented sex are not put at a disadvantage and they will have the same opportunity to be elected through the existent process**.

The additional 12 seats provided by the proposed Constitutional amendments are the maximum seats applicable in proportion to the percentage of Members of Parliament representing the under-represented sex as illustrated in the Proposal for Malta's Electoral System presented further on in this Consultation Document.

APPORTIONMENT OF THE ADDITIONAL SEATS

As already outlined above, the proposed 'Gender Corrective Mechanism' **will be applied following the applicability of article 52, including the 'Corrective Mechanism'**.

In this respect it is to be noted that **both the majority rule and as well as the proportionality between the first preference votes and number of seats, will already be achieved prior to the application of the 'Gender Corrective Mechanism'**. Therefore, it is deemed that the 'Gender Corrective Mechanism' **should not disturb the already achieved**

proportionality and would rather confirm the same difference in seats between the Governing party and the Opposition, as expressed by the electorate.

ONE STATE – TWO SYSTEMS?

In line with these amendments, Stage 1 essentially remains exactly the same, that is, the election of 65 members of Parliament from the 13 districts which parliament has chosen for Malta and Gozo to be divided. The Electoral Commission must have at all times via Parliament 13 districts which elected 5 members from each district. Gozo is a separate district and the voting population of Gozo may be greater than the difference that is allowed in voting populations in the electorate between each district. After the districts have elected 5 members of Parliament through the PRSTV, the PRSTV has done its job. **That's why we argue that we have two electoral systems that interact one with the other**.

The moment that we have 65 members declared elected by the Electoral Commission, we pass to the next phase: the corrective mechanisms. This changes the terminology completely. Article 52 starts with *'the party which'*, a clear indication that here, we are changing the method of election completely. When dealing with the corrective mechanism, we transfer our thinking from candidate-based elections under the PRSTV, to party representation in the House of Representatives. When voting, the electorate does not vote Nationalist or Labour or for a third/fourth party – the party affiliation as far as the PRSTV is concerned is incidental. It is a mental calculation that each voter makes but the facts remain that the whilst the Electoral Commission carries out the process of electing the 65 Members of Parliament, it does not ask the question of party representation because our constitutional model is the Westminster model. In fact, there is not real guarantee that the Prime Minister chosen is the leader of the party. The Constitution says that the President is to appoint the Prime Minister, the person who in his judgement is most able to enjoy the majority in the House. Therefore, the President is not bound.

When it comes to the corrective mechanism, providing two parties have been elected into Parliament, there are a number of considerations. The corrective mechanism, as it is today, starts off by asking a simple question: **Is there an aggregate of candidates elected in the name of a party which has obtained the absolute majority of all the valid first preferences in Malta?** Subsequently, it asks **has that same party obtained the absolute majority of the seats in Parliament?** This is not a consideration of the PRSTV. This question is purely a question relevant to the operation of the corrective mechanism. Here, through the corrective mechanism, reference is made again to the votes of the electorate in appointing the 65 Members of Parliament, even though these 65 Members of Parliament have already been elected. The answer to the second question could be yes or no. Even if the answer is yes, the corrective mechanism does not stop there with a third question being ask as from the 2007 constitutional amendments: **is the gap/difference in seats in Parliament of each party proportional to the difference in the first preference votes between the same parties?** From ensuring majority rule, here we are ensuring proportionality. When it comes to the adding of seats, both in order to ensure majority rule and proportionality, a list of the 6th unelected candidates of the respective party that requires more seats is drawn up and the seats are chosen from this list depending on who obtained the most votes.

Up until 2021, our electoral system stopped there. With the inclusion of Article 52A, we have extended the reasoning of Article 52 in the Constitution of Malta. A total new concept has been introduced. When in the realm of gender balance, we are no longer correcting the PRSTV result on the basis of the two fundamentals of the corrective mechanism, i.e.

majority rule & **proportionality between the two parties elected in Parliament**. Up to the introduction of article 52A these were the only two fundamentals, therefore, Article 52A adds a completely new dimension. That being said, it does not add anything to these two fundamentals, so much so that it must observe them as they are two givens. **Article 52A cannot disturb at all the two fundamentals of the corrective mechanisms that apply before its introduction and still apply today**. It is in full observance of the two fundamentals.

Nevertheless, the gender balance reform is radical in that it has now put in a third fundamental namely, that **at no stage may the House of Representatives have a gender representation less than 40% of the total**. Therefore, the third question which the Electoral Commission must ask itself as of 2021, and in sequence with the other two questions is: **is there any gender from all the MPs elected under the PRSTV added with all the MPs elected through the corrective mechanism, that is unrepresented?** Here, the proportion of gender representation is being calculated on both parties put together; they became one. Therefore, here the corrective mechanism no longer remains party-based in the sense of Nationalist & Labour, but becomes one that is based on sex, male & female. This is revolutionary. Moreover, just like in any other case, the corrective mechanism is not always needed. If at least 40% of one gender and 60% of the other, is elected to Parliament, the corrective mechanism is not needed.

THE SOCIAL VERSUS POLITICAL AIMS

As we have already said, the third and important aim which article 52A has introduced must be in addition and in respect of the principle of majority rule and of proportionality between the two parties in Parliament. In other words, the balance in sex and gender must not disturb the workings either of the PRSTV or of the corrective mechanism in its two fundamentals. Today we have a totally new fundamental. In Parliament there cannot be either female or male representation below 40% of the total. If there is, then **extra seats have to be added to the final total** such that the underrepresented sex will be given at least a 40% representation in the House without disturbing the party that has obtained the majority of the votes having the majority of the seats and without disturbing the gaps between the two parties as established by the corrective mechanism. Moreover, there is a capping on the number of seats that can be added which is that of 12 seats – 6 to the Government and 6 to the Opposition. **The addition of seats is no longer to the majority party or the minority party POLITICALLY but rather the addition of seats to both parties so that in achieving the social aim of a balance between the sexes in Parliament, you do not disturb the political will of the electorate in electing a political majority in Parliament.**

When it comes to the newly introduced corrective mechanism, one must make a distinction between social and political implications. Under article 52A, the addition of seats is not based on political affiliation but on gender identity. Ultimately, we are refining the quality of our Parliament by putting in a **social element** for the first time: that we want our electoral system to have the mechanism such that the political verdict remains intact but in so doing, in reserving the political verdict of the electorate, we then ensure through article 52A that at least 40% of our MPs belong to the underrepresented sex. The aim is social and not political because it does not add anything to the essential functions which elections are normally attributed. Through this amendment, we are moving out of the strictly partisan & political. Article 52A introduced in the Constitution, will not re-define or define who will govern, nor does it focus on political parties. The aim of the gender balance reform is not intended to disturb the political balance established by the entirety of our electoral system as it results

from the last general election. This is the essence of the constitutional reform. The aim is social, based on civil rights. Whether we agree or disagree, it is an exercise in social engineering namely that the will of the electorate is being imposed upon in the final determination of parliament.

Article 52A presupposes exactly what it says. First of all, we are talking of the composition of Parliament. This is fundamental because it does not once more disturb the balance of the political part. But it assumes therefore, that (1) there was the PRSTV system, which is complete, (2) it presupposes that the casual elections which immediately follow a general election in terms of the PRSTV have taken place and (3) that the corrective mechanism in its 2 fundamentals has been used, if needed. This is different from the ordinary administration of the corrective mechanism.

THE PRSTV AS THE SUPREME SOVEREIGN WILL OF THE ELECTORATE
Today, the political vote is no longer the final word. The one ballot paper is used to elect 65 Members to Parliament, continues to possibly add a number of seats to ensure majority rule and to ensure the correct proportionality of seats, and finally, may continue to add on a number of seats to ensure the threshold of 40% is reached. That being said, **this last step must not disturb the final political verdict of the electorate**. That is democracy. Article 52A does not have an autonomous existence on its own but is intimately linked, as a final addition, to the other 3 steps that occur prior to it: electing 65 members into Parliament, ensuring majority rule, and ensuring proportionality. **Under no circumstances does corrective mechanism disturb the 65 members of Parliament elected**. The corrective mechanism does not pick out one and instead put in another. **The 65 members of Parliament through the 5 seats from the 13 districts is the supreme sovereign will of the electorate and that cannot be disturbed**. If I am not elected legally, that is different question, as seen in the Claudette Buttigieg case. Therefore, the supreme will of our electorate is preserved always.

THE PROCESS
Step number 1 (the PRSTV): 65 members are elected, 5 from each of the 13 districts in terms of the PSRTV as defined by the General Elections Act of Malta. Explain the quota.

Step number 2 (casual elections): you need the casual elections to take place. In other words, if there are any candidates elected from 2 districts, which is the maximum allowed to be elected from, the candidate would have to give up one of the two districts because you cannot have one candidate in Parliament representing 2 districts. Before the candidate gives up one district and a casual election takes place in terms of the General Election Act to determine who will take the place of the candidate who has resigned from one of the two districts, you cannot know the exact nature of the gender balance in Parliament. Therefore, not only do you require the election from each of the 13 districts, but then you have to determine the gender as it were of the Members of Parliament who will take the place of one of the Members of Parliament elected from two districts so that we start establishing the proper gender balance in parliament. The proportional representational system has to complete the process of 65 individual, separate members of parliament and this must include the result of the casual elections. Here, the packet of the candidate who has resigned from one of the two districts elected is opened and the member who gets ½ of the preferences in that packet is declared elected.

Step number 3 (the corrective mechanisms): The classic corrective mechanism as it was introduced in 1986 regards majority rule. If there is the need to add seats, note that the only way we address political and/or gender balance is through the addition of seats in Parliament thereby increasing the composition of Parliament and not taking a seat of a member elected through the PRSTV. The Electoral Commission cannot pass on to the gender balance reform until it has finalised the political determination of Parliament. After majority rule, it must then ensure proportionality between the two parties elected in Parliament. In either case, there is an addition of seats (a list the candidates of the party that requires the correction a list of those MPs who end up the 6th unelected MPs) to the extent that is required to give the party that won the absolute majority of the votes, the absolute majority of the seats and in the proportionate of the gap that exists between the first preference votes of one party to the first preference votes of the other. This process has to be absolutely completed in all its stages. When this is complete, we go into another stage. Up to this moment in time, the political element has been established, since the 2 fundamentals are ensured. Whilst this remains true, today the Electoral Commission will have to ensure that a gender balance such that at least 40% of the elected candidates (the political result of the elections) is made up of the **underrepresented sex in Parliament**. The Constitution does not say 'females', it simply mentions the underrepresented sex. The Electoral Commission has a simple job of working out a proportionate of male is to female to determine which out of the two is the underrepresented sex.

MAIN POINTS OF THE GENDER BALANCE REFORM

1. The final composition of the House after the operation of the gender balance mechanism must end up in a House composed with **at least 40% of an underrepresented sex**. It is not enough to determine that the result up to the political stage was inefficient, it has to be followed up by the formula without disturbing the political verdict as expressed by the PRSTV and today what we are calling the political part of the corrective mechanism. This term is being used for the purposes of this lecture and IS NOT found in the law. It puts into contrast the corrective mechanisms up to 2021, and as it stands today.

2. Therefore, there is a capping of the total amount of seats that can be added through the gender balance mechanism, that of 12 seats which are equally distributed among the two parties.

3. The gender mechanism only works in **a two-party Parliament**. This is mathematical because the Constitution says that Parliament must always be composed of an odd number of MPs which is mathematically very difficult to ensure if 3 parties are elected to Parliament. In order to have the general elections result complete and therefore you need the gender corrective mechanism followed, this can only take place in a two-party Parliament.

4. The gender mechanism is social-based, as opposed to the PRSTV which is candidate-based and the corrective mechanism with is party-based. The corrective mechanism in article 52 is political through establishing the majority party in Parliament and by how big the majority is. On the other hand, the gender balance reform is social, not political. It is social by including the criterion of underrepresented sex.
   (a) The gender balance reform will not in any way change politically the result of the general election. The aim is not to disturb the political balance in Parliament established by the electoral process as it was used at the last elections, prior to the introduction of Article 52A. Having finalised the political balance in Parliament

firstly, through the operation of the PRSTV, followed by the corrective mechanism if needed, then we enter into the final phase of the elections, and without disturbing the political balance as established by the PRSTV and corrective mechanism as applicable before the introduction of the gender balance reform, you establish a new gender balance.

(b) We are no longer in the realm of the corrective mechanism fundamentals. That is to say, we are moving away from majority rule and proportionality and introducing a social element based on gender.

(c) The focus here is not political parties, as the previous corrective mechanism did, but the focus is on the percentage which is based on all of the Members of Parliament. The new amendment makes it clear that **there has to be an equal addition of seats amongst the parties.** This is essential in a two-party parliament to maintain the political balance that existed before. Unless you add in equal measure the two parties with the number of genders required this would not be possible. Up till now, the corrective mechanism either added seats to the majority party or to the minority party. This doesn't exist in this form of corrective mechanism. The moment you touch the social aspect, both parties get added seats. **You add a specific number of females to Parliament and not to a party**. When you come to the working of the social mechanism, you have to thinking differently. Here we are not talking about politics and majorities and minorities. The result at this moment in time is before the President convenes Parliament. Once the House is fully composed from all the stages, it is composed both politically and socially.

A STEP BY STEP APPROACH

Introducing a Gender Corrective Mechanism which respects the current electoral system based on the Proportional Representational system through the Single Transferable Vote and the corrective mechanism which ensures majority rule in Malta, so that the percentage of MPs making the 'under-represented' sex in the House of Representatives will be closest possible to 40%.

1. Voting at the General Elections takes place through the PR-STV in the same manner adopted at the last General Elections in order to elect 65 members of Parliament, five from each of the 13 electoral districts.
2. On conclusion of voting at the General Elections, the Electoral Commission establishes if any party has won in the aggregate of the valid first preference votes attributed to all of its candidates nation-wide, the absolute majority of valid first preference votes or the relative majority of the valid first preference votes in a two-party Parliament.
3. The Electoral Commission determines the number of extra seats to be added in terms of the so-called Corrective Mechanism, which seats are to be added to the 65 seats elected by the PR-STV.
4. The Electoral Commission proceeds to start the counting of the PR-STV preferences so that 65 MPs are elected from the electoral districts.
5. Having completed all the counts of all the 13 districts the Electoral Commission declares 65 MPs elected.
6. The Electoral Commission then makes a list of candidates being the last remaining sixth unelected hanging candidates not elected from the party, which is entitled to extra seats through the corrective mechanism in order of the votes obtained. The ones with the most votes of this list will fill the seats in accordance to the Corrective Mechanism and the Commission declares them elected.
7. The Electoral Commission passes on to fill in the vacancies created by those candidates elected from two districts, where these candidates have to give up one of seats.
8. After the casual elections, it will be established which of the sexes is to be classified as "the under-represented sex" (being the sex which has less than 40% of the seats elected) after all the steps taken above from 1-7.
9. The Electoral Commission will then pass on to activate the 'Gender Corrective Mechanism' to elect such number of candidates from the under-represented sex up to a maximum of 12 new seats.

10. The Gender Corrective Mechanism will also make use of the unutilised parcels of votes of the unelected sixth hanging candidates such that:

    a. Any unelected remaining hanging candidate for the sixth seat from the under-represented sex will be declared elected on the basis of a ranking system and will retain one's parcel of votes;

    b. The remaining seats, necessary to approach the 40% threshold of the MPs forming the House, will be filled through a casual election open only to candidates of the under-represented sex having contested the General Election in that district but were not already elected from either the PR-STV, nor by the majority corrective mechanism (when applicable) nor by the casual elections of candidates elected from two districts;

    c. The Gender Corrective Mechanism utilises three types of wasted votes, applicable for both parties:

        i. The votes of hanging candidates from the under-represented sex that were not elected;

        ii. The votes of hanging candidates from the over-represented sex that were not elected;

        iii. The wasted votes of those candidates elected through a casual election.

Hence, the Gender Corrective Mechanism minimises the number of wasted votes because at present parcels of votes of candidates elected by casual election remain unutilised because if they give up their seat, they may only be replaced through a co-option. Through the Gender Corrective Mechanism their parcels of votes will now become available for use to address the gender imbalance in the House of Representatives.

    d. The Gender-Corrective mechanism is to elect such number of candidates from the 'under-represented' sex as to respect the difference in seats between the two parties in Parliament as established by the Majority Corrective Mechanism. When this is not possible, co-option is resorted to as a final option.

2013 case

- The PR-STV system was tested before the courts for the first time in the 'two seats' case – the first time the courts had to tackle the complex juridical and constitutional reality of Malta's two-tier electoral system.
- The cases revolved around the same basic facts, namely that two Nationalist candidates, Claudette Buttigieg and Frederick Azzopardi, who contested the 2013 general election, claimed that they were the victims of two counting errors by the Electoral Commission which resulted in their failing to be elected from the eighth and thirteenth districts respectively.
- The compliant raise by Buttigieg referred to the failure of the Electoral Commission to include a packet of 50 votes among her tally. This error meant that a Labour candidate was elected instead of her.
- Azzopardi, in turn, claimed that through another mistake by the Electoral Commission 10 votes 'disappeared', which was enough for a Labour candidate to be elected instead of him from Gozo.

Electoral Court's judgements

- Both candidates resorted to the Constitutional Court as the court of first and last instance with the jurisdiction to hear electoral complaints in terms of the 13th Schedule of the General Elections Act, Chapter 354 of the Laws of Malta.
- Both candidates make identical pleas for the electoral court to order the annulling of the counting of votes in the 8th and 13 districts and to order that the counting of votes for the two districts take place afresh.
- The cases: ***Claudette Buttigieg v. Kummissjoni Elettorali*** **(2013)** & ***Fredrick Azzopardi v. Kummissjoni Elettorali*** **(2013).**
- The Electoral Court in both cases declared that neither of the two applicants had the necessary juridical interest to pursue the cases since they had both been declared elected to the House through the operation of the corrective mechanism.
- In the 2013 general election, the corrective mechanism was applied to ensure proportionality – the margin between the parties in the House was reduced to nine seats after 4 additional candidates were declared elected, among whom were Buttigieg and Azzopardi.
- The Court made reference to the applicant's pleas that they had "an interest in being elected as an 'original' MP from her district, and not as an additional MP' but concluded: "this, however, is not a juridical interest because at law the 'additional' seats have the same value and privileges as the original ones."
- Therefore, the applicants did not have the juridical interest at law and the court held in favour of the Electoral Commission.
- In view of the electoral court's judgement being final, both Buttigieg and Azzopardi had recourse before the Constitutional Court in its human rights competence: **Constitutional Court,** ***Partit Nazzjonalista, Claudette Buttigieg u Frederick Azzopardi v. Kummissjoni Elettorali et*** **(2016).**
- A new constitutional case was instituted by Buttigieg and Azzopardi who were joined in the action by the Nationalist Party on the grounds that the two errors committed by the Electoral Commission had infringed their respective human rights protections.
- The applicants referred to Article 3 of the First Protocol of the European Convention of Human Rights as incorporated into Maltese domestic law – European Convention Act, Chapter 319 of the Laws of Malta).
- The Constitutional Court was now requested to act in its human rights jurisdiction.

- The constitutional applications were filed before the First Hall of the Civil Court since the Constitutional Court returned to its more traditional role of the ultimate appellate court on constitutional and human rights issues. It no longer functioned as the court of first and last instance in its electoral jurisdiction.
- In their application, the applicants requested the CC to correct the counting errors committed by the EC in their regard and that the Court, by ordering their election from their respective districts, reduced the differential between the two parties to seven seats instead of nine.
- The applicants finally requested the Court to order that the fundamental right of the people to express freely their opinions in the selection of the candidates to be elected to Parliament be adhered to by the State.
- It is pertinent to note that the CC included in the proceedings all interests of an electoral nature which fall under both PR-STV in the sense of **the individual candidates contesting elections at the district level**, as well as **the political parties in whose interests the individual candidates contested the elections**.

<u>Other points</u>

- The CC had to face a reality which had not been envisaged directly by either PR-STV or the corrective mechanism. Could the national corrective mechanism be used to correct an error in the working of the PR-STV which were prejudicial to an individual at district level?
- Judicial entanglement of articles 52 & 56 of the Constitution.
- The Constitution of Malta reserves an article to provide for the **proportional representation** to elect the individual MPs to the House from the districts and another article to **elect additional seats on a party basis in order to correct electoral disproportionalities between the seats elected to the House**.
- PR-STV depends on the provision of article 56 of the Constitution while the corrective mechanism depends on article 52.
- The electoral court got the working of article 52 and those of article 56 entangled – the motivation for this was in the Court's understanding that the values and the privileges of an MP elected by virtue of article 52 were the same as those of an MP elected according to article 56.
- The two applicants had a direct interest, since the General Elections Act refers to candidates. Political parties would have an indirect interest since their interest in the PR-STV results is not legal but political in the subsequent aggregation of elected candidates within the House in the formation of parliamentary majorities.
- The Court stated: *"In the Maltese context, however, where great importance is given to the safeguarding of proportionality, as witnessed by the scrupulously detailed regulation of the mechanism intended to guarantee a proportional result between the parties represented in Parliament, the outcome of a case like that would probably have been different, because the people's choice, as reflected in the Constitution and the electoral laws is that there is proportionality between votes and seats."*
- Therefore, to the Courts mind, *"if the proportionality between the voters' preferences and the elected members is the main and determining factor of the electoral system concerned, an error in the workings of that system which produces a result which does not reflect that principal factor may amount to a breach of Article 3 of the Protocol".*
- The Constitutional Court declared that it was in agreement with the conclusion reached by the court of first instance that there resulted an infringement of Article 3 of the First Protocol since proportionality between the preference expressed by the electorate and the

number of seats allocated to the respective parties is a "determining factor" of the PR-STV, which was democratically chosen for Malta, and this was not respected.

- It is pertinent to point out that the Court held that the **Nationalist Party, as distinct from its two candidates Buttigieg and Azzopardi,** did suffer an electoral prejudice through the error committed by the Electoral Commission in the 8th district.
- As a consequence of this finding, the CC reached the final conclusion that the Nationalist Party was to be given two parliamentary seats in addition to the 28, so that it would have 30 and the difference between the parties would be of 7 seats.
- IN THIS WAY, THE COURT WAS STEADFAST IN UNDERLYING THAT THE REMEDY WHICH IT WAS GOING TO PROVIDE TO THE NP WAS NOT TO BE EXTENDED TO THE REQUESTS MADE BEFORE THE COURT BY BUTTIGIEG & AZZOPARDI.
- The CC provided a remedy only to the NP and denied a remedy to the individual candidates. That is to say, it did not give Buttigieg and Azzopardi the remedy they sought to have their personal electoral patrimony restored to what it should have been.

MARTINA CAMILLERI

Main points from 'The 2020 Constitutional Amendments: A Legal Analysis', Dr. Tonio Borg

The Constitutional amendments that took place in Malta in the year 2020 through Act No. XLIII of 2020.

Introduction

- A series of amendments to the Maltese Constitution were introduced through Act No. XLIII of 2020.
- Mostly, these amendments were a reaction to the conclusions of the December 2018 Report of the Council of Europe's Venice Commission which had criticised the concerntration of powers in the hands of the Prime Minister and the method of appointment of members of the judiciary amongt other things.
- [these amendments proved to be a means through which the December Report was satisfied].

Method of appointment of the President

- The President, ever since Malta became a Republic through the December 1974 constitutional amendments to the 1964 Independence Constitution, would be appointed by a Resolution of the House of Representatives, and similarly removed on alleged (not proven) misbehaviour or incapacity.
- For the past 46 years, the Head of State in Malta did not need anything more than a majority of one of those voting (simple majority) which in practice meant he was chosen and elected depending on the will of the government of the day.
- The new amendment involves the President being elected by a resolution of the House, supported by a 2/3rds majority (the Opposition has veto).
- When the Bill on the matter was published, it transpired that Government was proposing a fall-back position should the two-thirds majority of the legislature be not obtained; namely that in such case a mere majority of one would be sufficient after two rounds in which the two thirds majority would not have been achieved. This meant that ultimately in the case of a stalemate, the appointment in such case would be still made by the government of the day.
- The Opposition declared that it would not vote in favour of such clause (keeping in mind a 2/3rds majority is needed to amend the Constitution) and at the very last moment it was agreed that **the holder of position would continue in office until the two thirds majority is obtained**.
- It also made sense that the President should only be removed from office by the same majority which elected him.
- A novelty in this respect is that while previously the President could be removed even on a mere allegation of misbehaviour, in the new amendments, apart from the fact that a two-thirds majority is needed for such removal, **any incapacity or misbehaviour alleged has to be proven**.

Appointment of members of the judiciary

Before:

- In 2016, through Act No. XLIV provided for a newly established Judicial Appointments Committee, being a sub-committee for the Commission for the Administration of Justice (CAJ), which **would give advice to the Government prior to the appointment** of a judge except that of Chief Justice.

- The ultimate decision on the appointment of a judge still remained in the hands of the government of the day but if the PM ignored the advice given by the Committee, the reasons had to be publicly declared. That being said, he could still ignore such advice.
- The composition of the Committee included the Auditor General and the Ombudsman as ex officio members – this was probably due to the fact that, at the time, these were the only two offices for which a two-thirds majority of the members of the legislature [they had both the approval of the Government and the Opposition] was needed for a person to be elected to such office. However, it is doubtful whether the Auditor General and the Ombudsman are the most competent persons to decide on the eligibility and suitability for a candidate for the office of judge or magistrate.

After:

Government no longer has any say in the initiative relating to, or approval of an appointment of a member of the judiciary.

- Following the 2020 amendments, the entire selection method has been changed.

1. Whenever a vacancy arises a call for applications is issued.
2. Members of the judiciary shall be appointed by the President, acting on recommendations of the Judicial Appointments Committee in which the judiciary has a majority of members (the composition of the committee was changed so that the members of the judiciary would enjoy a majority – the **Attorney General was removed**). It proposes 3 candidates, and the President chooses one.
   Criticism: The Auditor General and the Ombudsman still retain their position within the Committee – the Commissioner for Standards in Public Life is also appointed by a 2/3rds majority nowadays. [So, the argument based on how they are appointed wouldn't suffice any longer].
3. **The Chief Justice** shall be appointed by a resolution supported by a two-thirds majority of the members of the legislature. If the 2/3rds majority is not reached, the previous holder would remain in office until it is achieved – this means that, for the first time it could possibly happen that a Chief Justice continues in office until the stalemate is resolved, even beyond the compulsory retirement age of sixty-five.
4. A list of criteria and qualifications has been inserted for the first time ever regarding the appointment of members of the judiciary, apart from the traditional requirement of having the "number of years of practice of the profession of advocate in Malta."
   Criticism: it is doubtful how wise it was to include such detailed – though not so well defined – matters in the suprema lex of the land. It raises the question: the moment that they have been included in the supreme law, are they justiciable? Or are these merely indicators to assist the Committee?

Removal of judges and magistrates from office

The House of Representatives has been completely excluded at any stage of the removal procedure.

Before:

- In 1994, the Commission for the Administration for Justice (CAJ), with an inbuilt majority of membership in favour of members of the judiciary was set up.
- Any motion presented in the House for the removal of a judge or magistrate had to be sent under confidential cover to the Commission. If the Commission gave the green light after hearing the evidence and submissions, then the matter was sent to the House where, if two-thirds of all the members of the House supported the charges against the judge or magistrate, the address would be sent to the President for his removal. [this meant that the motion of removal had to survive both the scrutiny of the Commission as well as of the House – constituted a 'double protection'].

- If the Commission decided that there was no prima facie case, the matter conveniently stopped there; even if there existed a two-thirds majority in the House.

After:

- With the 2020 amendments which have faithfully followed the opinion of the Venice Commission in this respect, only the Commission has been entrusted with the task of deciding on the removal from office.
- The decision of the Commission does not need any qualified majority – a majority of one is enough.
- There now lies an **appeal** by the member of the judiciary to the Constitutional Court.
- This amendment is less protective of the rights of the members of the judiciary than before [has it weakened security of tenure?].

Criticism of the removal procedure:

1. **The Chief Justice** will now in virtue of the 2020 amendments be appointed by a resolution of the House supported by a two-thirds majority of all its members. However, for the Chief Justice to be removed from office, a mere ordinary majority of the CAJ is enough. This is the only office in the land whose holder is appointed by a two-thirds majority in the House but can be removed not by a two-thirds majority but by an ordinary majority.
2. The two-thirds majority rule has been abolished for the removal from office of judges and magistrates but has been retained for the offices of President of Malta, the Auditor General and his deputy, the Ombudsman, the Attorney General, the State Advocate and the Commissioner for Standards in Public life.
   The past system was a strong guarantee in favour of the members of the judiciary; it is difficult to imagine a firmer and stronger security of tenure.
3. Before any MP could submit a motion stating the serious reasons why a judge should be removed from office. Now, the new removal procedure can only be initiated by the government of the day, namely the minister for justice and the head of the judiciary, the chief justice.

MARTINA CAMILLERI

THE CONSTITUTION OF MALTA

Chapter 1 – The Republic of Malta

- Article 1: democratic republic.
- Article 1(3): Malta is a neutral state.
- Article 6: supremacy clause.

Chapter IV – Human Rights

Chapter V – The President

- **Article 48(1):** The President is appointed by Resolution supported by the votes of not less than two-thirds of all members of the House (2020 amendments).
  Proviso: if the two-thirds is not met, the person currently holding office will remain in office until the majority is met.
- Article 48(2): qualifications
- Article 49: acting President

Chapter VI – Parliament

Part 1 = Composition of Parliament

- Article 51: Parliament consists of the President and the House.
- **Article 52(1):** lays down the rules
  (1) The number of MPs must be odd and divisible by the number of electoral divisions.
  (2) Each division must return such number of members being not less than 5 and not more than 7.
  The proviso = the corrective mechanism ensures majority rule and proportionality.
- Article 52A: The Gender reform mechanism.
- Article 53: an MP has to have attained the age of 18 & has the qualifications for registration as a voter.
- Article 55(1) (a): upon the dissolution of Parliament, the seat of an MP becomes vacant. This also gives the Prime Minister a blank slate in which he can appoint his ministers (since ministers are MPs).
- **Article 56:** THE PR-STV
  (1): the members of the House shall be elected upon the principle of proportional representation by means of the single transferable vote.
  (2): the election of members of the House shall be free of illegal or corrupt practices and foreign interferences.
  (3): The duty of the Electoral Commission to suspend a general election in one or all districts.
  (4): the Electoral Commission must refer the matter to the Constitutional Court.
  (5): the right of any person entitled to vote may not later than 3 days after the publication of the official result of the election, refer the matter to the Constitutional Court – in this case, the Constitutional Court is a court of first and last instance.
  (10) (a) : voting shall be by the ballot and shall be carried out in such a manner as to not disclose the way in which the vote of any particular voter is given – SECRET.
  (10) (b): no person shall be permitted to vote on behalf of another.
  (12): candidates and their agents shall be given facilities to watch the transportation of ballot boxes and the sealing and unsealing thereof.
  (13): "corrupt practices", "offences connected with the election of members of the House of Representatives" and "foreign interference" are defined by the General Elections Act.

- Article 59: Speaker of the House.
- **Article 60:** the Electoral Commission.
  (3): the members of the EC are appointed by the President, acting in accordance with the advice of the Prime Minister, given after he has consulted the Leader of the Opposition.
  (Note the Convention in this regard)
  (7): security of tenure of the members of the EC – shall not be removed from office except for inability to discharge the functions of his office or for misbehaviour.
  (9): IN THE EXERCISE OF ITS FUNCTIONS UNDER THIS CONSTITUTION THE ELECTORAL COMMISSION SHALL NOT BE SUBEJCT TO THE DIRECTION OR CONTROL OF ANY OTHER PERSON OR AUTHORITY.
- **Article 61(1):** the review of the boundaries of the electoral divisions by the Electoral Commission.
  (4): Proviso = 5% threshold & *"the Island of Gozo and the islands of the Maltese Archipelago other than the Island of Malta shall together be treated as one electoral division and may not be divided between two or more electoral divisions."*
  (5): the electoral quota = *'the number obtained by dividing the total electorate of Malta by the total number of members to be returned to the House of Rep. at the general election following the next dissolution of Parliament.'*

- **Article 63:** the jurisdiction of the Constitutional Court
- Article 64A: The office of the Ombudsman
  (3): security of tenure.
  (4) Proviso: *'in the exercise of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority'.*

Part 2 = Powers and Procedure of Parliament

- **Article 65(1)**: Supremacy of Parliament within a more supreme Constitution & the EU.
- Article 65(3): Parliamentary privilege.
- **Article 66**: majorities: note how the Constitution empowers itself to be changed and in what ways.
- Article 67: The House may regulate its own procedure.
- **Article 71(1):** the presumption that all decisions in Parliament are taken by a simple majority unless stated otherwise.
- **Article 72 (2):** *'When a bill is presented to the President for assent,* ***he shall without delay*** *signify the he assents.'*
- **Article 72(3):** *'A bill shall not become law unless it has been duly passed and assented to in accordance with this Constitution.'*
- **Article 72(4):** publication in the Government Gazette

Part 3 = Summoning, prorogation and dissolution

- **Article 76(1):** *'The President may at any time by proclamation prorogue or dissolve Parliament'.*
- Article 76(2): Parliament, unless sooner dissolved, continues for 5 years from the date of its first sitting after any dissolution and shall then stand dissolved.
- **Article 76(5):** *'IN THE EXERCISE OF HIS POWERS UNDER THIS ARTICLE THE PRESIDENT SHALL ACT IN ACCORDANCE WITH THE ADVICE OF THE PRIME MINISTER:*
  PROVIDED THAT – (PREORGATIVES)

Chapter VII – The Executive

- **Article 78(1):** *'the executive authority of Malta is vested in the President'.*
- **Article 78(2):** *'The executive authority of Malta shall be exercised by the President, either directly or* ***through officers subordinate to him****, in accordance with the provisions of this Constitution.'*
- Article 79(1): Cabinet – PM + Ministers.
- **Article 79(2):** *'THE CABINET SHALL HAVE THE GENERAL DIRECTION AND CONTROL OF THE GOVERNMENT OF MALTA AND SHALL BE* ***COLLECTIVELY RESPONSIBLE THEREFOR TO PARLIAMENT'****.*
  Note how individual ministerial responsibility isn't mentioned but is very much used and therefore, is a convention.
- **Article 80:** *'the President shall appoint as Prime Minister the member of the House of Representatives who,* ***in his judgement, is best able to command the support of a majority of the members of that House'*** + The President appoints his Ministers *'****FROM AMONG THE MEMBERS OF THAT HOUSE'*** in accordance with his advice.
  Proviso: Ministers vacates their office when Parliament is dissolved giving a blank slate to the PM to be able to appoint his Ministers.
- **Article 81(1):** *'If the House of Representatives passes a resolution, supported by the votes of a majority of all the members thereof,* ***that it has no confidence in the Government****, the President may remove the Prime Minister from Office:*
  Provided that the President shall not do so unless three days have elapsed, and he has decided not to dissolve Parliament under article 76 of this Constitution.'
- **Article 83(2)**: Proviso: acting Prime Minister and the **prerogative of the President.**
- **Article 85(1): THE FACT THAT THE PRESIDENT SHALL ACT IN ACCORDANCE WITH THE ADVICE OF CABINET + THE PREROGATIVES OF THE PRESIDENT.**
- **Article 85(2):** ouster clause
- **Article 86(1):** the PM is required to exercise any function on the recommendation of any person or authority.
- Article 86(2): ?
- **Article 86(3):** ouster clause
- Article 87: The President to be kept informed concerning matters of the government.
- Article 88: President appoints parliamentary secretaries on the advice of the PM.
- **Article 90:** leader of the opposition as a constitutional and a political figure.
- **Article 91:** Attorney General – security of tenure.
- **Article 91A:** State advocate – security of tenure.

Chapter VIII – The Judiciary

- Article 95(2): establishment of the Constitutional Court + jurisdiction
- **Article 95(5):** automatic composition of the Constitutional Court.
  'if at any other time the said Court is not constituted as provided in this article for a period exceeding fifteen days, such Court shall, upon the expiration of the said period of fifteen days and until otherwise constituted according to law, be constituted by virtue of this sub- article and shall be composed of the three more senior judges as aforesaid.'
- **Article 96(1):** appointment.
- **Article 96(3):** appointment of the Chief Justice.
- **Article 96A:** Judicial Appointments Committee.

- **Article 96A (4):** *'IN THE EXERCISE OF THEIR FUNCITONS THE MEMBERS OF THE COMMITTEE SHALL ACT ON THEIR INDIVIDUAL JUDGEMENT AND SHALL NOT BE SUBJECT TO THE DIRECTION OR CONTROL OF ANY PERSON OR AUTHORITY'.*
- Article 96B: NEW call for applications.
- Article 96B: NEW qualifications.
- Article 100: magistrates are appointed the same way as judges.
- **Article 101A:** Commission for the Administration of Justice.
- **Article 101A (7):** *'IN THE EXERCISE OF THEIR FUNCITONS THE MEMBERS OF THE COMMISSON AND ANY OF ITS COMMITTEES SHALL ACT ON THEIR INDIVIDUAL JUDGEMENT AND SHALL NOT BE SUBJECT TO THE DIRECTION OR CONTROL OF ANY PERSON OR AUTHORITY'.*
- **Article 101B (1):** Committee for Judges and Magistrates.
- Article 101C (1): NEW right to appeal to the Constitutional Court from a decision of the Commission for the Administration of Justice's finding for the removal of a judge or magistrate…

Article 116: *actio popolaris*

Article 120(2): The right of the Leader of the Opposition to advise the President to appoint two members of the Employment Commission.

Essays Constitutional Law

1) The Supremacy of the Constitution
2) The Electoral System and the New Gender Quota Act
3) The Rule of Law
4) The Separation of Powers
5) The Judiciary
6) The Prime Minister
7) The President
8) The Process of Enacting Legislation
9) The Right to Life
10) **The Right to Protection Against Arbitrary Arrest and Detention**
11) **The Right to Protection Against Forced Labour**
12) **The Right to Protection from Inhumane Treatment**
13) **The Right to Protection from Deprivation of Property without Compensation**
14) **Securing Protection of the Law: The Right to a Fair Hearing**

The Supremacy of the Constitution

The Constitution of Malta contains the core principles and norms regulating the State and is the supreme body of legislation. This supremacy is proclaimed through Article 6. In declaring itself supreme, the constitution restricts executive power and ensures that the legislature may only legislate if they remain in line with that enshrined within it. The constitution is also supreme vis-a-vis the courts. Therefore, the three organs of the state are brought into existence by virtue of the constitution and their powers regulated by it.

The Maltese Constitution is a written one. It can therefore be argued that its supremacy is intrinsic as was established through the landmark case regarding constitutional supremacy Marbury v. Madison, decided by Chief Justice Marshall in 1803. Through this case, it was noted by Chief Justice Marshall that despite there being no supremacy clause explicitly written in the US constitution, by virtue of its very nature, i.e. owing to the fact that it is written, it is supreme. He remarks as follows: "*What is the purpose of writing down a constitution, reducing it to writing, if then any ordinary law would prevail over the constitution, so there is no need to have a written constitution at all.*" This differs from the unwritten British constitution. In the UK, Parliament is supreme, meaning no law passed by Parliament can be deemed to be unconstitutional. The reason for the unwritten nature of the Constitution is two-fold: firstly, there was no break in legal or democratic continuity which encouraged the formal writing of the Constitution. Secondly, as Parliament was considered to be the champion of the rights of the people, the need for a written constitution wasn't regarded as essential.

The Maltese Constitutional system is based on a model of a supreme legislative body within a more supreme Constitution which is the highest authority. This means that Parliament is supreme so long as it doesn't infringe upon the Constitution. Article 6 of the Constitution states that should any law be inconsistent with any aspect of the Constitution, then the Constitution shall prevail and the law will be deemed null and void to the extent of the inconsistency. This applies to any instrument having the force of law, not simple primary legislation promulgated by Parliament. Additionally, the virtue of supremacy protects the Constitution as in order to amend most Articles within it, a qualified majority is required as stipulated by Article 66. This demonstrates the rigid nature of the constitution, unlike the flexible constitution of the UK that alters every time a new Act of Parliament is introduced. While the procedures of Article 66 are often regarded as a protective mechanism as they give more significance to the provisions entrenched in the constitution, one may regard the fact that Parliament can declare itself supreme over the constitution as a shortcoming.

Parliament did declare itself supreme over the constitution in 1974 during the process of amending the constitution from the Independence Constitution of 1964 to highlight Malta's shift from a Monarchy to a Republic. When employing the amendments, which remain subject to legal and political scrutiny owing to the procedure made use of by the House to approve them, the legislative body did not work in accordance with the 1964 Constitution, working around required referenda, Article 6. This was possible as Article 6 did not require a two-thirds majority in order to be amended but rather required a simple majority. Contravening the principle of supremacy underpinning the constitution, the House of Representatives through a simple majority

suspended Article 6 making Parliament supreme. During this period, a number of amendments were introduced, following which Article 6 was re-sealed and entrenched, thereby making certain that in order to amend it a two-thirds majority would be required. This occurred as four-fifths of the House agreed to a shift to a Republic.

This elicited mixed reactions from academics. Those who argue in favour of the events of 1974 position themselves following the Latin maxim *ubi lex dicit voluit*, contending that the legislature acted within the parameters of the law despite the opinion of many claiming their actions went against the ethos of the constitution. This controversy resulted in confusion as to whether or not there occurred a break in legal continuity. However, the amendments have been applied by the courts without legal contestation and this issue does not have much effect in practice.

Since the constitution serves to regulate the institutions it brings into existence, it is superior. This applies also to the judiciary. The judiciary is given significant authority by the constitution as can be regarded through Marbury v. Madison. This case enabled a court judgment to invalidate a law passed by Congress on the grounds that it was unconstitutional. Through the review of Acts of Parliament, the judicial function of the court is able to define the limits of the legislative authority of Parliament through constitutional actions and administrative actions. Therefore, the unelected Supreme Court Judges were given the authority to declare a law passed by elected members of the legislative void. This indicates the power of the courts and the importance of their independence and impartiality. Moreover, it demonstrates the fact that the constitution is supreme to the judiciary also.

The supremacy of the constitution is highly imperative. It ensures stability by making binding the operations of power to strict and predictable procedural practices. It enables the rule of law to be upheld and ensures that the doctrine of the separation of powers is strictly adhered to, limiting the accumulation of arbitrary power.

The Electoral System and the New Gender Quota Act

There are a number of electoral systems in place that play a role in the determination of the House of Representatives in Malta, namely the PRSTV and the Corrective Mechanism. Recently, however, an act was passed by Parliament which amended the Constitution of Malta vis-a-vis Article 52 and introduced other laws which aim to ensure *de facto* equality between men and women in politics. These mechanisms are indicative of Malta's flexible Parliament in terms of its composition.

When discussing the process of electing Members of Parliament, we must begin by noting that the General Elections Acts is granted authority by the Constitution of Malta to determine the thirteen electoral districts of Malta as well as to determine the number of Members of Parliament which are to be elected at the General Election.

The first stage outlines the process through which the sixty-five initial Members of Parliament are elected from the thirteen districts across Malta and Gozo through the proportional representation system by means of a single transferable vote, henceforth referred to as the PRSTV. The Electoral Commission demands the presence of thirteen districts from which five candidates are selected. Following the count of first preference votes, the Electoral Commission declares the sixty-five candidates selected. This signals the end of the role of the PRSTV.

At this stage, the frame of mind is focused on the PRSTV, which is a system that is candidate oriented. It, therefore, doesn't deal with party representation within parliament. At the polls, individuals casting their votes do not vote for parties but rather for individual candidates, though it is to be assumed that the political affiliations of the candidates play a substantial role in a voter's decision to vote for them. Therefore, it can be stated that for the PRSTV, political associations are incidental. Additionally, the role of the parties at this stage is diminished once more through the detailing of Article 80, which dictates a prerogative of the President of Malta to appoint as Prime Minister the person elected to the Parliament, who, in his opinion, he considers to enjoy the majority in the House of Representatives. Constitutionally, the President is under no obligation to appoint as Prime Minister the leader of the party that won the election. However, despite him not factoring in political parties per se, political considerations do ultimately influence the decision he makes.

During this stage, it is also pertinent to mention the role that quotas play in the election process. The electoral quota refers to the minimum number of votes that a candidate must necessarily obtain in order to get elected. This operates as a levelling effect as through this system almost all members of Parliament elected through the PRSTV are elected by the same percentage. This operates through the use of a formula: in order to elect five members of Parliament from each of the thirteen districts, the valid votes must be divided by six. In order for a candidate to be elected, they are required to obtain one-sixth of the votes plus one. The fact that the division is performed by dividing one more seat, six, than the number of seats needed, five, is done for a multitude of reasons. Firstly, it ensures that minority candidates stand a better chance of election as there exists a limitation on the number of first preference votes a candidate can take with them to Parliament. The surplus of votes are redistributed proportionally among the second

preference votes and so on. Secondly, through the perverse 1981 election results, whereby the party having obtained the most first preference votes nationwide was not the party with the absolute majority of seats in the House of Representatives, the division by six ensures that there will remain an unelected sixth candidate in each district which is essential for the Corrective Mechanism. This mechanism, including its function and purpose, will be discussed further when outlining the second stage of the electoral process.

Following the initial election of the sixty-five members of the House of Representatives which must be finalised and certified by the Electoral Commission, the second stage begins. Here, we are no longer focused on the candidate-based PRSTV and instead attention shifts to the political parties through the Corrective Mechanism. This is evident even through the language made use of in Article 52 outlining the procedure of this Corrective Mechanism: "The Party which…". The Corrective Mechanism was introduced owing to the aforementioned perverse election results obtained in the 1981 election in relation to the proportion between the total number of first preference votes a party obtained and the seats in the House obtained by the political parties. This system has gone through many changes and has been amended in 1987, 1996 and in 2007, until the method employed today was decided upon. It is important to note that this system does not affect the sixty-five candidates elected through the PRSTV as those represent the sovereign will of the people. When arranging seats in Parliament through the Corrective Mechanism, the 65 seats cannot be reduced, seats can only be added. This mechanism focuses on political considerations as henceforth outlined.

The first step in the second stage is the following: The Electoral Commission through the Corrective Mechanism considers whether in the elected sixty-five Members of Parliament there exists a party that has obtained the absolute majority of the valid first preference votes at first count in Malta, i.e. whether there exists an aggregate amount of candidates elected into Parliament belonging to one party. It is important to note that while in this instance, first preference votes are being discussed, they are not being discussed in relation to the PRSTV, but rather the discussion extends solely to the application and relevance of these votes in relation to the Corrective Mechanism.

The second step refers to the questioning of whether the party which has obtained an absolute majority in terms of candidates has this majority reflected in the seats they have won. While in the past it was sufficient to question whether a party obtained a majority of votes and whether that party has the majority of seats, thus ensuring the principle of majority rules in Parliament, today it is not enough. Proportionality must be factored into the deliberation of the composition of Parliament.

This leads to the third phase and the following question being posited: Is the difference between the gap between the two political parties in terms of first preference votes proportional to the number of seats in the House of Representatives? In order to answer this, schematically these steps must be taken: The number of first preference votes valid nationwide of Party A must be divided by the number of seats of Party A. The same process must occur in relation to Party B. Depending on which Party has achieved the highest average as a result of this division, that number is once again divided by all the first preference votes nationwide. This then demonstrates

an average of seats which then must be added to the majority or minority party should either one be underrepresented. The number added must by force be an even number as according to the Constitution, the final tally of all the Members of Parliament, both those elected through the PRSTV and the Corrective Mechanism, must be odd. Therefore, the size of Parliament fluctuates and is dependent on the results of the above equation.

The candidates which are elected through the Corrective Mechanism and given a seat in Parliament are those unelected sixth candidates that have garnered a packet of votes through the functioning of the quota in the PRSTV system. Depending on which party gains seats through the Corrective Mechanism, the unelected candidate with the most votes is entitled to that seat.

Therefore, it can be argued that the function and the fundamentals underpinning the Corrective Mechanism are twofold. It firstly aims to correct the workings of the PRSTV to ensure majority rule in the House of Representatives and works to ensure proportionality between the two parties through the number of seats assigned in relation to the number of first preference votes cast.

As of 2021, a new Act of Parliament has introduced a third mechanism which is applied following the termination of the work of both the PRSTV and the Corrective Mechanism, i.e. the final composition of Parliament in terms of the PRSTV and the Corrective Mechanism must be set. This refers to the Constitutional Amendment 52A which calls for equality between men and women in Parliament. This amendment is the latest affecting our complex hybrid electoral system. The fact that this amendment is contained within Article 52 of the Constitution is an indication that it is in fact another facet of the Corrective Mechanism which operates under the umbrella of the Correct Mechanism System.

As we have noted, the Corrective Mechanism has underpinning it two principles, namely that of ensuring majority rule and of ensuring proportionality of parties in Parliament through the seats available. This Act is radical as it has presented a third principle which states that at no stage may the House of Representatives following an election have a gender representation less than 40% of the total. While it is revolutionary in introducing such a principle, it must operate in a manner that doesn't disturb the principle of majority rule nor the principle of proportionality.

The first step this mechanism takes is to consider the proportion of gender representation of all the MPs elected under both the PRSTV and the Corrective Mechanism of all parties combined. As can be noted, the fundamental division which motivates this mechanism is not party division but gender imbalance vis-a-vis representation. The political will is not affected as this question focuses not on the power of the state but on the unequal representation of the sexes. Following such observations, if the minimum threshold of 40% representation of one gender is reflected in Parliament, then this mechanism need not be applied.

However, should there be a gender, be it male or female, that falls below the 40% representation threshold then the gender balance must be corrected without disturbing the majority nor the proportionality. In such a case seats must be added to satisfy a third social, rather than political, principle that this amendment serves to promote: ensuring that 40% of MPs are from the

underrepresented gender. Therefore, the political verdict obtained by the electoral system must remain intact ensuring that the principles of democracy are upheld whereby the additional seats are not added based on political affiliation but on gender identity.

There exists a maximum number of seats that can be introduced into Parliament through this mechanism which currently stands at twelve. In order to begin this process, it is necessary first to identify what the deficiency in seats is of the underrepresented sex. This is done through the following mathematical calculation:

Firstly, taking Parliament as it is fully composed with the 65 members elected through the PRSTV and the additional members added through the Corrective Mechanism, the total number of MPs must be multiplied by 0.4, in order to find the 40% representation. Utilising a Parliament composed of 69 members, the calculation, therefore, is 69 x 0.4, the result of which is 27.6. Following, one must subtract the total number of members from the underrepresented sex from the result obtained from the equation before, in this case, 27.6. Assuming that 23 members of Parliament make up the underrepresented sex, 23 is subtracted from 27.6 which equals 4.6. This result then must be divided by 0.6 in order to reach the 40% threshold. The final result, using the aforementioned example, is 7.67. However, as previously stated, Parliament must necessarily be made up of an odd number of MPs and therefore, an even number must be added as a result of this corrective process based on gender. In order to determine this, one needs to round down to the nearest even number. In this case, that number is 6. In order that the political balance is not disturbed, the total, 6, must be divided equally between the two parties. In this example, that means that 3 candidates must be elected to the Nationalist Party and 3 candidates must be elected to the Labour Party. Therefore, in this mechanism, the political considerations, as to which parties get more seats through this mechanism are a final consideration. But, this is not the main reason for such a determination as the political balance is not disturbed by this mechanism.

Therefore, through the above formulae, the deficiency in seats vis-a-vis the underrepresented gender is determined. The next stage refers to how the individual persons are selected to fill the seats in order to obtain the 40% representation. Either, the method which is employed remains the same as the Corrective Mechanism, whereby if the 6th unelected candidate from a district belongs to the underrepresented sex they are recouped. However, if there are none in the pool of the 6th unelected candidates who belong to the underrepresented sex another method must be adopted. Here, in order to determine who to elect, one must move along the counting sheet to find females, assuming females are the underrepresented gender, that has survived the most in the counts, moving backwards to view the 24th count in order to determine which candidates have not yet been eliminated, i.e. viewing those who are the closest to being elected. A percentage is worked out of the votes a female candidate has with regards to the quota - determining how far percentage-wise they were from the quota. This process is carried out within the 13th districts and those who are closest to being elected nationwide will be elected as MPs according to the numbers stipulated by the aforementioned formulae.

The Rule of Law

The rule of law is a fundamental politico-legal concept, integral to the healthy functioning of any democracy. The rule of law is an expression of a State's desire to function within a legal framework guaranteeing the rights of individuals, the independence of the judiciary and the free expression of the will of the electorate. This concept emphasises the importance of the law, the fact that everyone is equal in the eyes of the law and the fact that no person can ever be above the law, as Thomas Fuller argued: "Be you ever so high, the law is above you".

The relationship between the rule of law and the doctrine of separation of powers cannot be understated. The doctrine of separation of powers was made famous by Montesquieu in his 1748 work 'The Spirit of the Law' and refers to the regulation of the relationship between the various organs of the state to ensure that no excessive power is vested in any single authority. Depending on the type of constitutional family the state's constitution adheres to, the relationship between the institutions differs. In Malta, owing to our Constitutional setup under the Parliamentary system, the separation of power is guaranteed through a system of checks and balances. This is vital as the existence of separation of powers is a condition that guarantees the rule of law's functioning.

As a concept, the rule of law as a concept dates back to Aristotle, however, it was Dicey who popularised it in modern times through his development of three principles. The first principle is the 'Supremacy of the Law'. He stated that everyone is bound by the law and that no man may either exceed the powers of law or infringe upon them. Included in this principle is the notion of *'nulla poena sine lege',* which refers to the notion that there can be no punishment without the breach of law. The crux of this principle is that power must emanate from the law. The second principle is 'Equality before the Law', through which he noted that everyone is equal in the eyes of the law and no one can be above the law. The final principle is the 'Predominance of a Legal Spirit' through which he argued that the rule of law is best guaranteed by tradition and convention, not a formal written constitution. This indicates Dicey's preference for common law protection of rights and freedoms and demonstrates his faith in the judiciary. This is noted seeing as the British Constitution is the result of the ordinary law of the land, developed by judges on a case-by-case basis, the Rule of Law is woven into the very fabric of the law and not superimposed from above. The British Constitution is pervaded by the rule of law on the grounds that the general principles of the Constitution, especially the liberties of the individual are the results of judicial decisions in cases brought before the courts. A landmark case that shows the commitment of common law to the constitutional principle of the Rule of Law is the case of *Entick v. Carrington*, 1765. This case indicated that everything must be done according to the law and that no one is above the law.

While Dicey is credited with formulating this concept in modern times, it is not prudent to limit the discussion on the rule of law solely to his theory as it is heavily influenced by the British Victorian scenario and times have rapidly evolved since. For example, the third principle as outlined by Dicey is quite controversial and obsolete as in practice, most states do opt to employ the use of a written Constitution. The rule of law has expanded to mean more than that which was laid out by Dicey, owing in large part to the atrocities of the World Wars in the 20th Century.

These events have allowed the concept of the rule of law to evolve to include the observance of internationally recognised fundamental human rights and the holding of free elections.

The overhaul and the formalisation of the modern concept of the rule of law were devised through the New Dehli Declaration of the International Commission of Jurists in 1959. This congress gave rise to important issues pertaining to the rule of law and defined key elements of this concept. The first refers to the right to representative and responsible governments that can be held accountable for their actions. The second refers to the rights and freedoms that every individual is entitled to by virtue of their humanity and the fact that such rights must be enshrined in a human rights chapter within the Constitution. This was influenced greatly by the United Nations' Declaration of Human Rights. The third refers to the absolute need for an independent judiciary that is tasked with safeguarding the aforementioned rights. While previously it was stated that the relationship between the institutions of the state differs depending on the constitutionally family the state's constitution subscribes to, which mainly refers to the relationship between the legislative and executive. It is important that the judiciary must always remain impartial and independent. The fourth refers to the absolute need for effective machinery for the protection of fundamental rights and freedoms. Finally, the need to establish social, economic and cultural conditions that would permit men to live in dignity and fulfil their legitimate aspirations. Other principles include the need for fair and free elections and the necessity that everything is done according to law.

It is important to note that while all individuals are guaranteed fundamental human rights, no right is absolute. Human rights stop at the frontier of human duty. Human rights may be restricted as long as they can be reasonably justified in a democratic society. For example, freedom of speech is a right afforded to all, however, no one is allowed to use this right as an excuse to slander others.

Adam Tomkins is another legal philosopher who has greatly impacted the discussion on the rule of law. He stated that in English Public Law, the Rule of Law has at its core a single simple and clear meaning: it is a rule that concerns the power of the executive government and it governs the relationship of the executive to the law, i.e. it keeps the government in place. The Rule of Law provides that the executive may do nothing without clear legal authority.

Other academics who have impacted this discussion are Joseph Raz with his work 'The Rule of Law and its virtue' (1977) and Tom Bingham through his work 'Rule of Law' (2010). The two outlined various principles, nine and eight respectively, which go hand in hand with the rule of law, further enabling our understanding of this concept. A few of the principles outlined by the former include the following: All laws must be prospective and not retroactive as well as open and clear; all laws ought to be relatively stable; the process of making laws should be guided by open stable, clear rules; the principles of natural justice, i.e. the fruit of English Common Law guaranteeing fair procedures such as the *nemo judex in causa sua* rule, must be observed and that the courts must be easily accessible. Examples of the principles as understood by Tom Bingham include: public officers must exercise the powers conferred upon them by law in good faith for the purposes for which the powers were conferred; human rights must be protected by the law; the state should provide a method at a reasonable cost to solve civil disputes and the fact that

the rule of law requires compliance with International Law, fulfilling their obligations on a national and supranational level.

The various aforementioned principles discussed by a wide range of writers are reflected in the Maltese Constitution on various counts.
In declaring itself supreme through Article 6, the Constitution of Malta places a restriction on executive power and stipulates that a legislature may only legislate if the laws promulgated remain in line with the constitution. Should any law be passed that in some way violates the constitution, the legislation will be deemed null to the extent of the inconsistency. Therefore, the three organs of the state are subject to this Constitution which may be amended with a qualified majority in Parliament according to Article 66.

The Constitution does much to guarantee the independence and impartiality of the judiciary, especially when regarding the constitutional amendments of July 2020. This independence is of the utmost importance in ensuring the rule of law and is guaranteed through the manner of the members' appointment, their security of tenure, and the fact that their salaries cannot be reduced and are a direct charge on the consolidated fund. Additionally, Judicial Review, both administrative and constitutional, are in operation through the judgments of the court. The automatic composition of the Constitutional Court owing to 1974 amendments also plays a large role in the guaranteed independence of this organ.

Thirdly, in Malta, free elections are held which are not conducted by the government but are governed by the independent Electoral Commission. Several powers are granted to the Commission by virtue of the Constitution including direct access to the Constitutional Court in cases of widespread electoral abuses and irregularities being witnessed which would affect the general result. This option of redress is also available to citizens who witness such happenings. The fairness of elections is also guaranteed through the existence of Corrective Mechanisms outlined in Article 52 of the Constitution which enable the avoidance of perverse election results by guaranteeing proportionality and majority in addition to representation depending on nationwide valid first preference votes. This right to free and fair elections is also reproduced in the European Convention of Human Rights which was enacted into Maltese Legislation in 1987 (now Cap 319 of the Laws of Malta) and thus double protection of this right exists.
Additionally, owing to the incorporation of this Convention in Maltese law, and the ratification of the individual right of petition to the European Court of Human Rights, this double protection exists for all human rights and extends to every person.

The manner in which laws are promulgated and approved is another way through which the Rule of Law is reflected in the Constitution. Parliament is governed by various procedural rules which the courts have a right to ensure are followed when it comes to the promulgation of laws at different stages. This vehicle was made possible owing to the case *Mintoff v. Borg Olivier* (5th Nov 1970). In this case, Mintoff alleged that a bill had not been regularly passed through Parliament. The Government argued that while it may have not followed strictly the internal procedures, such a matter wasn't for the court to decide upon. However, the Constitutional Court agreed that it had a right to review the procedure. In the First Hall of the Civil Court, the Government lost the

case but won in front of the Constitutional Court which couldn't find any widespread significant irregularities.

It is important to note that while Parliament enacts the law the process of implementation is in the hands of the executive. This is an indication of the doctrine of the separation of powers and is in line with the rule of law

For a law to be declared unconstitutional it must be contested, i.e. someone must bring a case against the law. If this doesn't occur, the law will continue to be deemed constitutional. Only the court has the power to declare a law passed by Parliament or a decision taken by the government to be unconstitutional. A matter such as this must pass first through the First Hall of the Civil Court and can be appealed to the Constitutional Court which is presided over by three judges. One has the opportunity to take the case up to the European Court of Human Rights in Strasbourg which is the ultimate court of appeal. This appeal is only open to civilians, however. Governments cannot appeal to the Strasbourg Courts.

Finally, the rule of law is present in Malta through the ratification of a number of international legal instruments in the human rights sphere which bind the Government at an international political level. These include the European Convention relating to the Prevention of Torture or Inhumane or Degrading Punishment or Treatment and the Sixth and Thirteenth Protocols abolishing the Death Penalty. Malta's accession to the EU has inevitably created a new system of norms and rules which guarantee the basic tenets of the Rule of Law.

It can be concluded that the rule of law is fundamental to every democracy. It operates in such a manner that ensures the functioning of the various institutions of the state and gauges the nature and direction of the law, ensuring that they remain constitutional and in line with the spirit of democracy. This ensures that the state is truly governed by the rule of law and not a rule by law as is often the case in dictatorships and totalitarian regimes. Therefore, it can be argued that the rule of law refers to a general principle and pillar of democracy that is put into action through the observance of the law.

The Separation of Powers

A fundamental aspect of a functioning democracy governed by the rule of law is the observance of the doctrine of the separation of powers. This term was coined by Montesquieu, an 18th-century French social and political philosopher in his work 'Spirit of the Law'. This refers to the regulation of the relationship between the various organs of the state to ensure that no excessive power is vested in any single authority. The Constitution regulates the relationships between the various organs of the state and ensures that the doctrine of separation of powers is strictly observed.
Depending on the type of constitutional family the state's constitution adheres to, the relationship between the institutions differs. In Malta, owing to our Constitutional setup under the Parliamentary system, the separation of power is guaranteed through a system of checks and balances. This constitutional system and how it ensures the separation of powers shall be henceforth explained.

The Maltese Parliamentary system, built upon the Westminster Model, allows for the legislative and executive to share a close relationship with members of the executive necessarily needing to form a part of the legislative. The members of the executive have an individual and collective responsibility to parliament. While the separation between the two may get hazy, the two are distinct bodies as demonstrated in *Miller Case no.2* decided by the Supreme Court of the UK. The Court ruled that the executive using its powers to prevent Parliamentary scrutiny, which was what Boris Johnson was attempting to do vis-a-vis the 'Withdrawal Act' owing to his lack of majority in Parliament, was illegal and against the principles of the Constitution that stated that the executive is responsible to parliament. This resulted in the Speaker recalling Parliament despite Johnson's suspension. Despite the lack of clear separation between these institutions, this system calls for the strict independence of the judiciary.

This is ensured through the Constitution by various important principles, including the manner in which members of the judiciary are appointed, their salaries being a direct charge on the consolidated fund which cannot be reduced and their enjoyment of the security of tenure. By virtue of the July 2020 Constitutional Amendments, the legislative was removed entirely, save for the appointment of the Chief Justice, in the determination of judicial appointments and removals. The independence of the judiciary is a feature identifiable in all democratic systems, regardless of the relationship shared by the legislative and executive. However, in a Parliamentary system, the judiciary is depended upon to provide checks and balances, ensuring the separation of power and allowing for the rule of law to prevail. The system of checks and balances between the sources of power is essential as it ensures that no authority has absolute power. Historically speaking, this corrupts and intense damage may ensue as a result of those who wield it.
Additionally, the judiciary, owing to its independence and impartiality, is uniquely able to declare a law to be null should it operate contrary and inconsistently to the Constitution as stipulated by Article 47 and 66. This establishes not only the doctrine of separation of powers but also the principle of 'Suprema Lex'. This indicates that while Parliament is supreme, it answers to a more supreme constitution, established through Article 6.

The manner in which matters of finance are dealt with indicates the separation of powers also. Parliament plays an important role in monitoring how the executive branch spends money. No government may exist without raising and spending money and therefore, this is a hefty responsibility. If a government fails to obtain the consent of parliament to raise and spend money, the lifespan of the government will be very short. The government of Malta survived for three months before calling a general election following the failure of the government of the day to obtain consent for their financial plan. Garnering the approval of parliament on matters concerning the budget, act as a vote of confidence in the government which, as previously mentioned is responsible to parliament. Should a government not pass this vote, the Prime Minister must call a general election or advise a dissolution. If not, the President may act upon his prerogative found through Article 85 (1)(a) and call for a dissolution. Without this system of separation of powers in place, the government would be free to control the finances in any manner they deemed fit which could lead to severe political and economic consequences.

It is important to note that while it is the legislative which enacts primary legislation, the executive is still able to legislate subsidiary legislation in consultation with the Acts of Parliament. Moreover, it is the executive which sees to the process of implementation of legislation. This further demonstrates the separation of powers afforded in Malta.

This doctrine is also visible in the manner of appointment of the Prime Minister according to Article 80 of the Constitution. It states that the President must appoint as Prime Minister "the member of the House of Representatives who in his judgement is best able to command the support of a majority of the Members of the House". While the President traditionally opts to appoint as Prime Minister the leader of the party that has won the election, constitutionally, he is under no obligation to do so. It may be argued that the Prime Minister himself may have excessive powers vested in him, which largely may be attributed to the fact that several constitutional provisions employ the use of the phrase "on the advice of the Prime Minister",

It can be noted, that while there exists a separation of power in Maltese institutions, it can at times remain hazy. This is because of Malta's subscription to the Parliamentary System. The US Presidential System allows for more systematic and rigid separation of powers. Members of the executive cannot form a part of the legislature. This means that the legislature has no power to remove or dissolve the executive nor is the executive responsible to the legislative. During elections, this separation is emphasized as individuals must cast their votes for the two institutions on separate ballots. Owing to this, the US elections are more structured than Malta's. There is a fixed date for every election. Similarly to the Parliamentary System, the Supreme Court in the US also has the power to declare a law to be null to the extent of an inconsistency with the Consitution, building from the landmark case of Marbury v. Madison in 1803.

It can be concluded that democracy may only be truly exercised in jurisdictions subscribing to the doctrine of separation of power which is essential in order that the rule of law and governance in accordance with the constitution may be ensured. This is the basis of democracy.

From what has been discussed, it is safe to say that a country run by the doctrine of separation of powers leads to the best form of democracy. This is because of constitutionalism and the importance given to the Rule of Law, which is the basis for every democracy.

The Judiciary

The role of the judiciary comprises the application and interpretation of the law to cases in a manner that is fair, equal and non-discriminatory, principles reflected in the symbol of the court, Lady Justice, through her blindfold, sword and scales. The judiciary is a highly important organ of the state. This is especially true in reference to Parliamentary Constitutional systems which depend on this institution for the checks and balances ensuring the separation of powers. For this function to be performed adeptly and for the rule of law to prevail, the effective independence and impartiality of this organ are of the utmost importance. This independence is a feature identifiable in all democratic systems, regardless of the relationship the legislative and executive enjoy.

The courts operate outside the realm of politics, meaning they are not subject to politics only to the law and work to ensure their independence safeguards the rights of individuals under the law as well as enables there to be stability and balance. This independence is guaranteed through four fundamental factors which enable members of the judiciary to arrive at impartial decisions, not subject to the influence of politics but to the principles of the rule of law and justice. Firstly, members of the judiciary enjoy the security of tenure, as outlined by Article 97 of the Constitution. Judges are required to vacate their offices when they reach sixty-five years of age or sixty-eight should they decide to extend their term by informing the Chief Justice and the President. Secondly, in accordance with Article 107 (3), the members of the judiciary cannot have their salaries reduced. Thirdly, the salaries of the members of the judiciary are a direct charge on the consolidated fund as stipulated by Article 107 (2). This means their determination is not at the discretion of the government of the day and that they are not subject to budget approval. Finally, the manner of appointment of members of the judiciary, as will be henceforth outlined, impacts greatly how they remain independent and impartial.

The appointment procedure of members of the judiciary was one of the key changes which came into force with the promulgation of the July 2020 constitutional amendments. Essentially, judges of the Superior Courts are appointed by the President in accordance with the recommendations made by the Judicial Appointments Committee established in Article 96 (1). The process encompasses the following steps. When a vacancy occurs in the office of a judge or magistrate, the Minister of Justice must issue a public call for applications. A person may apply if they meet the criteria listed in Article 96B (2). The requirements include possessing integrity, correctness and honesty in both public and private life in addition to knowledge of the law, court procedures and professional experience with both, amongst others.

The aforementioned Judicial Appointments Committee is a subcommittee of the Commission for the Administration of Justice, established through Article 96A. It is composed of seven members, including the Chief Justice who chairs the committee and the President of the Chamber of Advocates. It is important to note that members of the judiciary make up the majority of the members of this Committee. The various functions of the Committee are outlined via Article 96A (6), however, the main role can be boiled down to the receiving and examining of expressions of interest from people who wish to be appointed to the judiciary, the conducting of interviews to evaluate the candidates and the presentation of names along with a report of the three

candidates which they deem to be most suitable to the President. Moreover, this Committee must keep a thorough record of the applicants. The prerogatives of the President, dictated by Article 85 of the Constitution, refer to the functions which the President must perform independently, *"in accordance with his own deliberate judgment".* The amendments of the July 2020 Constitution, extend to include the selection of one candidate out of the three presented to him by the Judicial Appointment Committee to be appointed as a member of the judiciary.

The method of appointing the Chief Justice differs slightly from the appointment of a regular member of the judiciary. This process is explained in Article 96 (3). The process involved appointment through a resolution of Parliament supported by two-thirds of all eligible members of parliament. This remains the only case following the 2020 Constitutional amendments whereby it is the legislative that appoints the judiciary.

When it comes to the removal of a member of the judiciary, the focus shifts to yet another subcommittee of the Commission of the Administration of Justice known as the 'Committee' for judges and magistrates. This Committee according to Article 101B (4) shall have the right to exercise discipline on judges and magistrates. When disciplining a judge or magistrate, the process must be instigated through a complaint in writing containing definite charges against a member of the judiciary regarding a breach of the Code of Ethics or Disciplinary Rules made to the Committee through the Chief Justice or the Minister for Justice. The judge or magistrate against whom the complaint is lodged is granted a reasonable time to reply to the allegations against him.

Following *prima facie* consideration of the evidence and details of the case, the Committee decides whether the case has merit or not. Should the case be declared to not have merit it is discarded, however, if the case has sufficient grounds to advance to the next phase of investigations, a hearing date is established.

If during the hearing, the Committee finds the Judge or Magistrate has broken the Code of Ethics, it must consider the nature of the breach. If it is found to be minor, a warning or a pecuniary penalty is issued. If it is found to be serious, the Committee may suspend the member in question from exercising their duty for a period not longer than six months. If following this initial assessment, the evidence suggests the breach is serious enough to warrant the removal of a member, or the case is based on the grounds of incapability or incapacity, the member is suspended and the findings are reported to the Commission for the Administration of Justice. It is the Commission that then ultimately decides whether the Judge or Magistrate ought to be removed subject to the findings of further investigation. If the results of the further investigation confirm that the Judge or Magistrate ought to be removed, the Commission shall proceed to advise the President to remove them.

In accordance with Article 101C (1), there exists the right to appeal to the Constitutional Court regarding a decision made by the Commission for the Administration of Justice pertaining to the removal of a Member of the Judiciary. With the Constitutional amendments of 2020, the legislation has been removed entirely from such juridical decisions.

The Commission for the Administration of Justice, to which both the Judicial Appointments Committee and the Committee for Judges and Magistrates belong, is an independent body established through Article 101A of the Constitution. It is composed of nine members and is chaired by the President of the Republic. The main functions of such a body are outlined in Article 101A (11) and are as follows: To protect the independence and impartiality of the judiciary and regulate the body as a whole; To supervise the workings of all the superior and inferior courts and oversee the functioning of the court's administration of justice; To draw up codes of ethics regulating the conduct of members of the judiciary and call a member's attention to alleged failure to follow these codes; To exercise discipline over advocates and legal procurators practising their own profession. To commission a yearly report which must be presented to the Minister of Justice regarding its activities

The importance of the independence of the judiciary can be noted when regarding some of its more specific duties. For example, while it is evident that it is the duty of Parliament to legislate, that which can be legislated is restricted as no legislation passed by Parliament may violate the Constitution. This indicates that while Parliament is supreme, it is subject to a more supreme Constitution which is considered to be the highest authority. If legislation promulgated by Parliament violates the Constitution, it can be declared null and void by the courts. The courts provide structure to the ideals engaged upon in the case Marbury v. Madison which dictate that since the Constitution serves to regulate the institutions it brings into existence, it is superior. This supremacy is also enshrined within the Constitution itself through Article 6, which is known as the supremacy clause. Through the review of Acts of Parliament, the Judicial function of the court defines the limits of the legislative authority of Parliament. These powers of review are divided into two: Constitutional Actions and Administrative Actions.

The Prime Minister

Chapter 7 of the Constitution of Malta deals with the executive, one of the three organs of the State. The power of the executive is formally vested in the President, however, such power in practice is carried out by his subordinates, namely the Prime Minister, who the President himself selects and the Prime Minister's Cabinet. This is indicated through various provisions within the Constitution and numerous conventions. The powers of the Prime Minister are highly extensive and will be henceforth discussed.

Firstly, it is important to understand the difference between the legislative and executive branches of the State. While the legislative is composed of members chosen by the citizens of Malta, the make-up of the executive, i.e. the Cabinet, is at the discretion of the Prime Minister. The Prime Minister may select whomever he wishes to head the various ministries, so long as they are members of the House of Representatives. Yet, it is speculated as to whether this convention may be enforced in a court of law should the Prime Minister breach it. The members of the executive are all individually and collectively responsible to the legislative body. Moreover, all Cabinet members are bound by unity, so much so that it is said that the government ought to be united and one. This means that after a decision has been made following Cabinet discussions, even if a minister is in disagreement, they are duty-bound to support the decision taken. This is a conventional practice inherited from the UK. A minister may demonstrate his disagreement and criticize decisions being taken through their formal resignation. It is important to note that such a decision does not mean they must give up their seat in Parliament.

According to Article 80, the Prime Minister must be a member of the House of Representatives. The President is obliged to select the member of the House who he believes is best able to command the support of the majority of the House. The Prime Minister is not constitutionally bound to select the leader of the party that won the election, however, in practice this is the decision most often taken. This is a prerogative of the President according to Article 85.

The office of the Prime Minister represents the shift in power from the monarch to the Cabinet and therefore, developed through a British Convention. Today, the office of the Prime Minister is vested with much power and much responsibility, chiefly, the power to fire and hire, the power of Cabinet and the power to dissolve Parliament. This is an extensive amount of power which is further emphasized by the media attention this position garners the holder of the office. The Prime Minister is described as being *primus inter pares* which is a Latin phrase meaning 'the first among equals'. Formally, the Prime Minister is equal to the other members of the executive yet is afforded unofficial respect owing to their seniority in office and the increase in responsibility and power they bear. However, owing to the amount of power vested in a single individual by virtue of their office, as well as taking into consideration the media exposure the title gives him it is prudent to question whether the Prime Minister can truly be described as merely a *primus inter pares.*

The first power of the Prime Minister which shall be discussed is the Prime Minister's constitutional ability to hire and fire ministers. When selecting his Cabinet, the Prime Minister generally takes into consideration a number of factors including geographical representation and

popularity amongst the citizens. The professional background is also taken into account. Members ranking high in party structures are often selected to hold coveted Cabinet positions.

The Prime Minister also has the power to preside over Cabinet meetings, summon meetings and formalise the meeting agendas. Moreover, the ultimate decisions are made by the Prime Minister, despite dialogue and discussion taking place. The Prime Minister is not bound to consult with Cabinet on any decisions. An example of this can be seen through the actions of Prime Minister Eddie Fenech Adami who chose to inform the President and dissolve Parliament without consulting his Cabinet.

In practical terms, it can be argued that the powers of the Prime Minister enable him to make decisions even against the majority in Cabinet, allowing him great power. Yet, it is evident that a Cabinet united against a Prime Minister is much stronger and more powerful than a Prime Minister with no backing. It is important that the Prime Minister does not alienate his Cabinet as occurred with the governments of Tony Blair and Margaret Thatcher in the UK. Therefore, despite the constitutional strength afforded to the Prime Minister, in practice rarely are the decisions and opinions of the Cabinet ignored for fear of the risk of removal.

The power of the Maltese Prime Minister in many ways is comparable to the President of the United States, despite the two countries having vastly different constitutional setups. This can be observed through the manner in which electoral campaigns are run. Even though in Malta, when individuals are voting through the PRSTV system they are voting for candidates the front face of the campaign is the Leader of the Party and this person is generally the person awarded the position of Prime Minister. This is because people are aware that when a party wins a majority, the overwhelming likelihood is that the leader of that party will serve as Prime Minister. In the last thirty years, the Parliamentary elections in Malta, have looked identical to that of the Presidential Elections in the US.

In the American system, a person votes for either a Democratic or Republican candidate, and must do so for the legislative, Congress and Senate, and executive individually. In Malta, there only occurs votes for representatives, whereby political party affiliations are accidental, yet it must be assumed that they play a role in influencing who to vote for. Additionally, every voter is aware that their vote is supporting indirectly a specific leader. This is why debates prior to an election are held between the leaders of the two parties, just like in the US they are held between the two presidential candidates, one Democratic and the other Republican. The Prime Minister is, therefore, a very influential role and their actions both in the run-up to an election and during their tenure often leave an indelible impression on the electorate, as occurred with both Prime Minster Eddie Fenech Adami and Prime Minister Dom Mintoff.

Another ability of the Prime Minister is his power to dissolve Parliament. According to Article 76, the President may at any time dissolve Parliament on the advice of the Prime Minister. The President's prerogative of dissolving Parliament in accordance with Article 85 of the Constitution is only applicable when the Prime Minister, after having lost a vote of confidence, doesn't resign nor advise a dissolution.

There are several instances where the phrase "on the advice of the Prime Minister" is utilised within the Constitution, indicating how large a scope the powers of the Prime Minister are. This was subject to heavy criticism by the Venice Commission in 2018. The Commission recommended more prerogative power be granted to the President to lower the impact the Prime Minister has on various institutions. It was argued that this change would not serve to "abandon Malta's legal traditions, but would constitute an evolution that would provide more effective checks and balances."

Yet another important power is the Power of Patronage, which is also vested in the Prime Minister since he is integral to the process of appointment of many key figures in public office, including the appointment of the Commissioner of the Police, the AG and the High Commissioner. Through the constitutional amendments of 2020, the Prime Minister's powers were limited in that he no longer has any say in the appointment of members of the judiciary, ensuring the institution's independence and impartiality according to the doctrine of the separation of powers and the upholding of the rule of law.

As has been noted, the powers of the Prime Minister are vast and plentiful. He is a figure that is considered to be central to the operation of more than simply the executive branch but of the state as a whole. However, it is important that the Prime Minister remains subject to the rule of law and is not given free reign to corruptly exercise his powers undemocratically or unconstitutionally through the employment and operation of various systems of checks and balances in place.

The President

Malta transitioned from a Monarchy to a Republic on the 13th December 1974. With that came a transition whereby the Queen was no longer constitutionally Head of State and Government. Instead, this power was transferred to the President. However, the executive power, while vested in the President in accordance with Article 78 (2), is exercised by his subordinates, the Prime Minister and his Cabinet, whom he selects, the Prime Minister according to Article 80 and the Cabinet on the advice of the Prime Minister. Therefore, while the President in actual fact is removed from the operations, such a setup enables everything to be done in his name. This constitutional framework is extremely similar to the United Kingdom's Monarchy with respect to Royal Prerogatives and Protocols.

In order for the aforementioned transition from Monarchy to Republic to be a smooth one, the powers of the Governor General were transferred to the President with virtually no changes. So much so that in order to effect such a transition, the provisions outlining the functions and powers of the Governor General within the Constitution, were changed to refer to the President to reflect Malta's transition into a Republic. The Governor General refers to the person who was appointed by and who stood to represent Her Majesty the Queen in the ten years between Independence and Malta becoming a Republic.

When discussing the appointment of the President, we note that the President is appointed by a resolution of the House of Representatives which must be supported by the votes of not less than two-thirds of all the members of the House, as established by Article 48. In the case that the resolution is not supported by the required majority, the person occupying the office of the President of Malta shall remain in office until the resolution is supported by the required number. Article 48 (2) outlines the criteria which would disqualify someone from running for this office. Any person who is not a citizen of Malta is precluded, as well as any person who held the office of Chief Justice or any other position as a judge of the Superior Court. This is because it is thought to affect the independence and impartiality of the judiciary. Many regard this measure as being too harsh as regardless of the time which may have elapsed, specific members of the judiciary remain unable to contend for the highest office. Other disqualifications cross-reference criteria of ineligibility for membership in the Public Service Commission, Article 109, the Broadcasting Authority, Article 118, and the Employment Commission, Article 120. These Articles stand to disqualify those holding the office of Minister or Parliamentary Secretary, a member or candidate for election to the House or of the local authority and public officers unless they resign from their posts.

When a person elected as President by a parliamentary resolution takes office, they take their oath in front of the Speaker of the House. A President's term is of five years and is a non-renewable position. This clause is not found within Chapter V of the constitution but rather is found in Article 123 (2). This provides for an exception to the general rule that all other holders of constitutional offices may have their offices renewed.

Article 48 (3) details conditions under which the office of the President may be vacated. The first stipulates that the office should become vacant following the lapse of 5 years from the initial appointment of the President. Additionally, it should be vacated should the President be removed from office following a resolution by Parliament supported by a two-thirds majority for proven misbehaviour, misconduct or inability to perform the functions of his office, owing to infirmity of body, mind or other causes. Thereafter, Article 49 addresses the procedure which ought to go into effect if the office of the President is temporarily found vacant. This can occur in the interim until a new President is appointed, and whenever the holder of the office is absent from Malta, or on vacation, or is for any reason unable to perform the functions conferred upon him by the Constitution. Here, an Acting President is appointed whose functions shall be carried out by a person appointed by the Prime Minister following consultation with the Leader of the Opposition. Should no such person be appointed, the Speaker of the House may assume the duties of the President in these cases.

In recent years a convention has developed that the Prime Minister appoints as Acting President a person who holds a political opinion different than that of the Government or President such as the practice with Mrs Dolores Cristina, a Nationalist Cabinet Minister, who was appointed Acting President instead of President Marie Louise Coleiro. The same disqualifications apply to those who may be appointed as Acting President.

The President has conferred upon him many powers. However, in accordance with Article 85 of the Constitution, in the exercise of his function, the President is obliged to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. It is an automatic assumption that the President is constitutionally bound to exercise his power on the advice of the government of the day unless expressly stated otherwise. Yet there exist certain functions that the President must perform *"in accordance with his own deliberate judgment"*. These refer to the prerogatives of the President and are detailed in Article 85.

The independence granted to the President through these powers is important, as the President is rarely permitted to act alone and not on the advice of the executive branch. An example of this occurs through the granting of Presidential Pardons. While these are signed by the President, it is the government of the day which makes the decisions and upon whose authority the President must act. There are 6 prerogative powers which will be henceforth outlined.

The first refers to the President's power in relation to the dissolution of Parliament, in accordance with Article 85 (1) (a), a power conferred upon him by the proviso of Article 76 (5). Should the House of Representatives pass a resolution supported by the votes of a majority of all members, stipulating a vote of no confidence in the government and the Prime Minister does not resign or advise a dissolution within three days, the President may order the dissolution. Additionally, if the office of the Prime Minister is vacant and the President considers that there is no prospect of being able to appoint a person who can support the majority of members of the House within a reasonable time, he may dissolve Parliament. Alternatively, the President may refuse to dissolve Parliament following a recommendation from the Prime Minister if they believe the dissolution to go against the interests of Malta.

The second enables the President to appoint and remove the Prime Minister from office in accordance with Articles 80 and 81. The President must appoint the member of the House who in his view is best able to command the support of the majority of the House. The President may then remove such a person from office should the House pass a resolution of no confidence.

The third prerogative outlines how the President may appoint a member of the Cabinet to perform the functions of the Prime Minister should the Prime Minister for any reason be unable to perform his duties. This power is conferred upon him by Article 83. The fourth refers to the President's power to appoint the Leader of the Opposition and to revoke such appointment in relation to Article 90. In signifying his approval for the purposes of sub-article (4) of Article 110 of an appointment to an office on his personal staff is the fifth prerogative enjoyed by the President.

Finally, the exercising of the power conferred by the Constitution to make appointments to any office is the last prerogative enjoyed by the President. For example, it is a prerogative of the President to select from options presented to him by the Judicial Appointments Committee, the name of one individual to fill a vacancy in the judiciary. However, when it comes to the appointment of the AG and other public officers, the President must act on the advice of the PM.

One of the most essential functions of the President refers to the provision of Presidential Assent. This refers to part of the legislative process without which a bill does not become law and is not eligible to be promulgated in the Government Gazette. Article 72 (2) states that when a bill is presented to the President for assent, he shall signify his assent without delay. This power was derived from a British Convention emulating the power of Her Majesty the Queen. Should the President refuse to provide his assent, he has the option to resign as adamantly refusing to sign is a breach of the Constitution. However, resignation is not the most effective approach seeing as the bill will be signed by the following President anyhow

One cannot sue the President for refusing to sign and therefore acting in breach of the Constitution as there are many procedural difficulties and the practise, despite being written at law, remains a convention as derived from the British, and therefore, it would make suing highly impractical. This issue is one that has both legal and political consequences. This issue reportedly came close to manifesting itself during President Dr Abela's tenure with reference to the Civil Union bill granting gay marriage. The President was not in agreement and it was speculated that he would not sign the bill. What occurred was that the Government opted not to move onto the third reading of the law, since the issue was brought up at the end of Dr Abela's term and left the assent up to his successor, President Coleiro Preca, who fulfilled her duty according to Article 72 (2) by assenting without delay.

Both a right and duty of the President occur when the President is being kept abreast of the "*general conduct of the Government of Malta*" and is being provided with any "*information as he many request with respect to any particular matter relating to the Government*" by the Prime Minister. The President's right to be kept informed is stipulated through Article 87 of the Constitution. In practice, this exchange of information takes place in the form of a meeting that occurs every fortnight at either San Anton or Verdala. This has been taken from a British tradition observed by Her Majesty and her Prime Minister. These meetings are covered by strict

confidentiality and must be done on the Prime Minister's own initiative. During these meetings, the President has a duty to provide counsel, encouragement and warning and must support and act according to the decisions of his ministers.

As stipulated by Article 85 (3), where the President is required to act in accordance with the advice of any person or authority, the question of whether he has acted in accordance with such advice shall not be enquired into in any court. The President is bound by this advice which is not considered legally binding but politically binding. These may be seen as a safeguard of Constitutional values. The President can be regarded as the guardian of the Constitution. If the Government is seated in the House, the President must act carefully and deliberately to ensure that a Constitutional Crisis does not ensue.

The Process of Enacting Legislation

Article 65 of the Constitution grants upon Parliament the authority to "make laws for the peace, order and good government of Malta" so long as such laws are respectful of the fundamental human rights of every citizen of Malta, the accepted principles governing international law and the obligations of Malta on the international stage. Owing to that power, the law remains dynamic and ever-changing. However, in order that a law may be promulgated, a long process must be undertaken within the legislative institution which will be henceforth outlined.

The process of transforming a legislative proposal into an Act of Parliament generally begins at the government level with a minister outlining a need for new legislation to be devised. The Minister would begin by making use of green papers, white papers and consultation processes. The former refers to a form of consultation document and explains the idea which shall be proposed in an elementary manner. The simplicity of the green papers may lead to people being unsatisfied with the notions being put forward. Following this stage, white papers are made use of. These contain all objections received from the green paper enabling the proposal to be more robust and specific. This paper would often include a plan of implementation and have attached to it a bill. This is once again consulted upon with the minister using the strategy of divide and rule. This allows for the Minister to move forward in the process and present an amended bill which is to be discussed in cabinet. At this stage, the executive may propose further amendments. There is no set time frame for such an occurrence as it largely depends on the nature of the bill in question.

Following cabinet approval, the bill is taken to Parliament where the minister spearheading the bill moves a motion for the first reading. This process usually involves the Minister standing up and reading the title of the bill which is put to a vote without any debate. Once the bill has made it to the parliamentary level, at every stage, there occurs a vote. After the first reading, there is the publication of the bill in the government gazette in order that citizens may remain abreast as to the happenings within parliament. The publication process must necessarily have occurred in order that the bill may proceed to the second reading according to the Parliamentary Standing Orders.

The second reading allows for the minister to introduce the bill and explain its relevance and importance. In order for a bill that calls for a change in the Consolidated Fund to be considered, this stage must begin with the minister in charge informing the Speaker that the President recommends the bill to the House. A discussion on the bill and subsequent debate are involved in this stage. The debate etiquette embedded within the Standing Orders grants the first person to speak representing the side of the Opposition an hour and a half speaking time. All other members are granted forty minutes. The minister may speak to answer questions. The session culminates in a vote. Should the bill pass, it moved to the next stage - the Committee stage.

During this stage, members of Parliament, depending on the subject matter at hand, compose a Committee and examine the bill clause by clause. Every clause is discussed, beginning with an introduction from the minister and ending with a vote. The process is in line with the rule of law as it enables transparency in the enactment process. Once the bill has been analysed, the

chairperson of the Committee reports back to the House of Representatives that the discussion is concluded and notes whether the bill was passed with or without amendments.

If there are further changes to be introduced, the bill goes through a recommittal stage. If not, a third reading commences in which the bill is checked for typological errors and is numbered. The Speaker is then given the opportunity to declare whether the bill has been carried through the third reading stage by a majority of members present and voting.

Next, the bill is presented to the President for the Presidential Assent. Once this has been granted, the bill is promulgated in the government gazette and is made a Parliamentary Act. This is important as it enables the Latin maxim '*ignorantia legis neminem excusat*' to stand.

However, primary legislation is not the only form of law that can come into force. There exists also subsidiary legislation. The competent minister is responsible for making subsidiary legislation under the enactments. Such legislation generally is published as a legal notice found in Supplement B of the government gazette or as governmental notices.

The Right to Life

Within Chapter IV of the Constitution of Malta, the fundamental rights and freedoms of every person are enshrined. This is the first of two paramount legal instruments that protect these rights in Malta. The second refers to the European Convention Act, chapter 319 of the laws of Malta, through which the European Convention on Human Rights was brought into domestic legislation. This is supplemented also by the 1987 introduction of the individual's right of petition to the Council of Europe's human rights organs. The first right to be dually protected by both the Constitution and the Convention is 'the right to life', with Article 33 (1) of the Constitution dictating that "no person shall intentionally be deprived of his life". It is the first fundamental right to be discussed indicating its priority and importance.

The intentionality of the deprivation is emphasised within the wording of both legal instruments. The law provides protection against deliberate action which may impede on the right to life. This issue was raised in the case of *Darryl Grima pro et noe v. Prime Minister (FH) (17.06.1988)* when a group of environmentalists wanted an issuance of a prohibitory injunction against the Royal Navy warships paying Malta a visit. The reasons cited were that some ships could potentially be nuclear-powered or have onboard nuclear weapons and the group believed that this was a threat to the right to life. Justice Filletti in his judgment claimed that there existed no *prima facie* evidence that any level of danger or threat would enter with the ships of the Royal Navy and that in absence of such proof one cannot conclude that there exists a threat to the right to life. Furthermore, he argued that even if a breach of the right to life may occur, it was not one which would have occurred deliberately or intentionally.

While the wording of Article 33 formulates this protection in the form of a prohibition, it is important to note that according to the Strasbourg Courts, the right to life includes a positive obligation to protect life also. Should a state fail to comply with their positive obligations to protect life, they become liable under Article 2 of the European Convention. The judgment of *Ogur v. Turkey (ECHR) (20.05.1999)*, whereby it was argued that Turkey failed to conduct a thorough and effective investigation into the murder of a Turkish national at the hands of Turkish Security Forces, concluded the existence of this liability under Article 2 which arises from the failure to uphold positive responsibilities.

This positive obligation extends further to include the State's duty to ensure appropriate safeguards are in place within their jurisdiction to promote the protection of life. Primarily, this includes an appropriate legal and administrative framework to deter the commission of offences against a person and the provision of adequate law enforcement machinery to prevent, suppress and punish such commissions. However, it includes more than the provision of such a framework as can be regarded through the case of *Brincat v. Malta (ECHR) (24.07.2014)* whereby the European Court declared that the Maltese Government was failing to uphold their positive responsibilities by allowing the exposure of dockyard workers to asbestos in their work environment. It was contended that the Government knew or should have known the varying dangers to health arising from the exposure to asbestos and ought to have acted in such a way as to protect the right to life as their positive obligations must apply "in the context of any activity, whether public or not".

There do exist parameters and limitations on the State's positive obligation to safeguard the right to life as can be identified through the domestic case *Caterina Cachia v. Director General Health Department (CC) (08.01.2007).* Here, the claimant stated that as a taxpayer she was entitled to a cancer drug which would not cure her but prolong her life free of charge and that refusing to provide her with such medication was a violation of her right to life. The Constitutional Court argued that while the State is burdened by the duty to safeguard the right to life of everyone in their jurisdiction, such a duty does not extend to include the provisions of continuous free drugs, irrespective of the circumstances.

Despite the primacy and fundamental nature of this right, the articles of law still provide exceptions for it. One relates to the death penalty. Both the Constitution and the Convention have similar provisions that essentially guarantee the right to life save in the execution, following the conviction, of the sentence of a court in respect of a criminal offence. Such criminal offences, as stipulated by the Constitution, include within them contraventions as well as crimes, while the Convention extends only to cover crimes. While it is rational to assume that imposing the death penalty as a punishment for a mere contravention would go contrary to the principles of proportionality that govern the judiciary, it is always prudent to understand that these provisions protecting the right to life found within the Constitution and Convention were promulgated in 1964 and 1950 respectively, a time when the death penalty as a punishment remained used throughout Europe.

The death penalty in Malta was abolished in various phases. Firstly, in 1971 it was done away with vis-a-vis criminal offences committed by civilians but was retained for military offences committed by military personnel in accordance with the Armed Forces act of 1971. Following, in 1989, this form of punishment was abolished for all military offences should they have been committed in times of peace and not war. Finally, in 2000 it was eradicated across the board. Such a process was facilitated by the Maltese participation in the signing and ratification of both Protocol Six to the European Convention of 1983 concerning the abolition of the death penalty in times of peace and Protocol Thirteen which put an end to the death penalty under all circumstances. It is interesting to note that since the wording of the Constitution has not been altered since 1964, and thus allows for situations whereby a sentence delivered for a court can be that of death, should the Maltese Parliament opt to reintroduce the death penalty through appropriate legislation, it would not be unconstitutional. However, the ramifications of a similar decision would result in the Maltese Government breaching international obligations and owing to the fact that there exist no denunciation provisions within the various Protocols signed, extraditing the country from such obligations would be close to impossible.

All other exceptions regarding the right to life provided for within the Constitution are conditioned by the fact that death must be the "result of the use of force as it is reasonably justified in the circumstances of the case". The test of reasonableness is defined in the case *R v. Camplin AC 705 (1978): "[a reasonable man] means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as every is entitled to expect that his fellow citizens will exercise in society."* Therefore, in order to ensure that something is reasonable, one must presume that a man who fits the definition as provided, will

act in the same manner. While reasonableness is the measure within the Maltese Constitution, necessity is the measure within the Convention.

A topic which is shrouded in controversy relating to the right to life is the conversation on the wilful termination of a pregnancy - abortion. Such a practice raises the question: does the wilful termination of pregnancy result in a violation of the right to life? There are two schools of thought on the matter - those who are pro-choice and believe it ought to be a woman's prerogative whether to choose to keep the pregnancy or not and those who are pro-life and believe that the life of the unborn child ought to be protected at all costs. The Maltese position is staunchly pro-life with abortion being considered a crime according to the Criminal Code despite the presentation by Member of Parliament Marlene Farrugia of an amendment Bill to strike off the Criminal Code sanctions on abortion, effectively decriminalising it.

Much of the debate on this issue is focused on whether it is appropriate to assume that the term 'person' as made use of in Article 33 detailing the right to life applies to unborn children, especially since no country, other than Ireland, specifically recognises nor seeks to protect through their Constitutions the rights of unborn children. The Courts of Strasbourg have opted not to favour one school of thought over another and have allowed for a wide range of ideas to be allowed regarding the state's position on when life begins. Furthermore, the European Court of Human Rights has allowed member states to make decisions on abortion legislation autonomously. Through this, they effectively argue that voluntary abortions do not go against a state's positive obligations to safeguard life under Article 2 of the European Convention, but simultaneously do not establish a right to abortion either.

In Malta, an indirect recognition of the rights of the unborn was given in the case *VC v. DC (FH) (31.12.1977)* when a prohibitory injunction was sought by a partner of a pregnant woman who intended to leave Malta to perform an abortion abroad. The injunction was provisionally upheld in view of the right to life of the embryo but since the matter was resolved, the court did not have to issue a definitive decree. A similar situation occurred in September 2020 when a pregnant victim of abuse was subjected to a travel ban by the courts who took her passport following false claims from her former partner that the reason for her wishing to travel was so that she may travel to get an abortion.

The only case through which the court recognised the fundamental rights of the unborn child, establishing a precedent for future cases, refers to the case of *Persiano v. Commissioner of Police.* In this case, the Principle Immigration Officer was prevented from removing a pregnant foreign national from Malta, despite her illegal status. It was argued that owing to the fact that the father of the child was a Maltese National, then the unborn child in question, according to the Immigration Act, was to be considered a dependent and thus exempt. Therefore, should the mother have been expelled from Malta, the unborn child would have been illegally deported. Moreover, it was argued that if the mother was sent back to Morocco, she would be forced to have an abortion. The First Hall of the Civil Court claimed that "the unborn is deemed to have been born to the extent that its own benefits are concerned" and that "the child once born is considered to have possessed such personality and capacity of enjoying rights from the moment of conception".

In the US, through the landmark case *Roe v. Wade*, decided in 1973 by the Supreme Court, it was found that abortion up to 12 weeks is a right protected under Article 14 of the Constitution detailing the right to privacy. This means that in the first trimester, the State has no legal right to interfere, following the lapse of 12 weeks, each state was granted autonomy to make their own legislative decisions on the matter save for in cases where continuation of the pregnancy could negatively affect the health of the mother.

The Right to Protection Against Arbitrary Arrest and Detention

Within Chapter IV of the Constitution of Malta, the fundamental rights and freedoms of every person are enshrined. This is the first of two paramount legal instruments that protect these rights in Malta. The second refers to the European Convention Act, chapter 319 of the laws of Malta, through which the European Convention on Human Rights was brought into domestic legislation. This is supplemented also by the 1987 introduction of the individual's right of petition to the Council of Europe's human rights organs. Article 34 stating detailing the protection of every individual from arbitrary arrest and detention is one of the most interpreted provisions, both by the Constitutional Court as well as by the European Court of Human Rights in Strasbourg. This is mainly due to the importance placed on freedom and humanity's natural need to socialise. Therefore, the removal of such freedom, though in some cases justified must be imposed with caution and closely monitored. Most cases revolving around this article in Malta have centred around three main pillars: the lawfulness or otherwise of arrests made by the Police; the granting of bail and the legal restrictions to such rights and the detention of irregular migrants entering Malta illegally.

Article 34 claims that "no person shall be deprived of their personal liberty" but goes on to stipulate 10 exceptions, (a)-(j) respectively. The most important in practice is (f) which argues that "no person shall be deprived of their personal liberty save as may be authorised by law upon reasonable suspicion of his having committed or being about to commit a criminal offence." This refers to the police's powers of arrest. Every police force within a democratic society has the right to investigate a case but before they decide whether any case has merit, the criminal suspect in question must be interviewed. To enable such a procedure, the police have the power to arrest suspected persons and deprive them of their liberty. However, such a process must be duly regulated and such power must be limited as arbitrary arrests are a staple of dictatorships. These limitations come in the form of four rules laid down both within the Constitution and within the Criminal Code and include the need for reasonable suspicion that a person has committed a crime and the need for a warrant issued by a magistrate which must be duly passed on to the person arrested. Moreover, it is stipulated that there is no need for a warrant if the person is caught red-handed or in urgent cases nor is a warrant needed if the person has just committed the crime or is about to commit the crime. It is important to know that as a general rule no arrest can be made for contraventions. It is important to note that while the criteria for arrest is reasonable suspicion, suspicion doesn't constitute proof. As quoted by the Constitutional Court in the case *Tonio Vella v. Commissioner of Police et.* based on the English judgement *Hicks v. Faulkner*"the question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon reasonable bona fide belief in the existence, of such a state of things, as would amount to a justification of the course pursued." Moreover, one has the right to challenge an arrest made not on the basis of reasonable suspicion, the right to inform a relative or close friend of their whereabouts and the right to be examined by a doctor of the arrestee's choice during the detention as is provided for in Article 355AS(5) of the Criminal Code.

A criminal suspect in police detention, according to Article 355AT of the Criminal Code, has the right to a private consultation with a lawyer for a maximum period of one hour and the police in turn is bound to inform the detained person of this right. This consultation ought to occur before the police begin interrogations. Several problems have stemmed in relation to this right to legal provision including what happens to statements provided for prior to a suspect's consultation with their lawyer, especially when this is considered in tandem with the fact that should a suspect mention facts during the trial which they failed to mention during the interrogation, an inference may be made against him in accordance with Article 355AU of the Criminal Code. Unfortunately, elaborations on the retrospective nature of this right are not discussed within Article 34 nor within Article 5 of the Convention. Questions of whether a fair trial stands to include the pre-trial phase are also ones which is raised as a result of these legal provisions. However, the prevalent position was that one must regard the wider context of a trial in order to determine whether the pre-trial phase truly prejudiced the fairness guaranteed under Article 39 and Article 6 as was outlined through the case of *Victor Lanzon et noe v. Commissioner of Police (CC) (29.11.2004)*. The *Salduz v. Turkey (ECHR) (27.10.2008)* judgment which focuses on a minor being interrogated in Turkey in the absence of a lawyer, is a landmark one in this regard and brought with it a significant change in the operation of legal assistance in the pre-trial phase. Through it, as the shift was pronounced through which courts moved away from the trial-as-a-whole concept. Firstly, the European Courts provided several legal instruments of the Council of Europe and the United Nations that clearly state when minors are interrogated "they should in principle be accompanied by their parent/legal guardian… they should also have the right to access a lawyer." It is now standard practice in both European and Maltese law that Article 6, guaranteeing the right to a fair trial, can apply before a trial also. If this is the case, this assumes that there exists reasonable suspicion that the trial will be severely prejudiced.

The Court has stated that should a detained person be denied the right to legal support, that would, as a rule, constitute irretrievably prejudicing the trial in its entirety. George Pace iterated the Constitutional Court's position through the following statement: "The denial of such [legal] assistance may lead to a breach of that right, not *ipso facto* but only if, because of such shortcoming, the plaintiff suffers an unjust prejudice regarding his procedural rights." The vulnerability of the person providing the statement needs to be taken into account as well as the fact that the effects of such an aforementioned defect must still be considered in the context of the entire proceedings as observed by the European Court in *Imbroscia v. Switzerland.*

The person who has been arrested, at the moment of arrest has the right to be informed that he is under arrest and the reason thereof as outlined by Article 34 (2) of the Constitution and Article 355AC of the Criminal Code. This was further proved through the case of *Tonio Vella v. Commissioner of Police* whereby it was concluded that even though the entire details pertaining to the case need not have been communicated, the arresting officer must inform the arrested person of the reason behind the arrest.

The period of Police detention following arrest is a maximum of 48 hours. Following the lapse of that time, the person being detained must be lawfully released. In order to continue detention, it is imperative that the person has been arrested on the grounds of reasonable suspicion and that the conditions of the suspicion remain persistent as outlined in the case of *Frank Mifsud v.*

Commissioner of Police (CC)(10.03.1990). Once the reasons for suspicion have passed, the person must be released from detention immediately. Before 1981, the practice existed that once the 48-hour period has elapsed a person could be immediately re-arrested. This practice was decided to be illegal following the hearing of the case of *Police v. Joseph Galea* which was argued on the basis of the police re-arresting Mr Galea immediately following his released. The Court of Magistrates declared that after 48 hours a criminal suspect must automatically be released and a subscribed period of time must pass before another arrest can be made.

Following 48 hours, the police must make the decision whether to release the person or arraign them under arrest in court. Article 34 (3) states that a person arraigned under arrest must go through such a procedure not later than 48 hours before a court and "if not tried within a reasonable time, then he shall be released either unconditionally or upon reasonable conditions in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial." The impression given that anyone is entitled to bail according to this Article was challenged in the case *Dr L Pullicino v. Commander Armed Forces (CC) (12.04.1989)* through which the applicant disputed the provision stating that any person charged with a crime punishable by life imprisonment could not be afforded bail. This was argued on the basis that Article 5 (3) of the Convention, identical to Article 34 (3) of the Constitution, didn't provide persons with an either-or option: either the case is tried within a reasonable time or be granted bail. He claimed that he was entitled to both rights - entitled to a trial within a reasonable time, whether he was granted bail or not and that bail was to be granted if it was deemed that detention was no longer necessary as the right to liberty persist throughout the pre-trial detention.

The Constitutional Court decided that the *a priori* preclusion of persons from being entitled to bail went against Article 5 (3) of the European Convention, citing the European Court's decision in the case *Neumeister v. Austria* whereby it was stated that Article 5 (3), as Dr L Pullicino stated, cannot be understood as giving judicial authorities an either-or option between a trial within a reasonable time or granting provisional release. The Courts have ruled, additionally, that any granting of bail is subject to the discretion of the courts and that a person charged with a criminal offence cannot have conditions attached to their bail which are punitive in nature or so stringent that the granting of bail is futile. In cases of breaches of bail conditions, it is important to note that firstly, the courts do not discriminate between breaches related to the primary purpose of bail and appearances at trial and other less serious considerations.

The detention of asylum seekers and migrants is the final exemption discussed by the court. The Immigration Act of 1970 stated that any person entering Malta irregularly was to be kept in detention, a permissible statutory derogation under Article 34 of the Constitution and Article 5 of the European Convention. An Immigration Appeals Tribunal has been established owing to the increasing frequency and intensity of this problem. This tribunal is authorized to order the release of any person when there existed no prospect of his being deported and the release of any asylum seeker whose application was not determined within one year and capping of eighteen months is to be applied in all other cases. Despite such policies, in the case of *Massoud v. Malta* whereby an irregular migrant who had served a prison sentence was kept in detention pending

deportation for a further eighteen months, the European Court ruled that protracted detention could not be justified on the grounds of securing expulsion.
A person may also be detained for medical reasons, however, in order that such detention would not be a violation of the patient's right to liberty, stringent conditions certified by a responsible specialist, barring cases of emergency, must be met.

The Right to Protection from Forced Labour

Within Chapter IV of the Constitution of Malta, the fundamental rights and freedoms of every person are enshrined. This is the first of two paramount legal instruments that protect these rights in Malta. The second refers to the European Convention Act, chapter 319 of the laws of Malta, through which the European Convention on Human Rights was brought into domestic legislation. This is supplemented also by the 1987 introduction of the individual's right of petition to the Council of Europe's human rights organs. The third human right to be protected by the Maltese Constitution through Article 35 is the right to protection from forced labour. Through this article, the Constitution in essence forbids the imposition of labour against a person's will.

We recognise two facets that together constitute 'forced labour': firstly, the work being performed must be performed involuntarily and secondly, the work is unjust and oppressive or comprises avoidable struggles. However, it is prudent to note that even this right contains and allows for exceptions, such as any labour required as a result of a sentence or court order as prescribed by Article 35 (a). Four such exceptions are outlined, Article 35 (2) (a) to (d) respectively, but the provision which has associated with it two landmark judgments is the final provision which states that an exception to the right to protection from forced labour can be made in respect of "any labour required during a period of public emergency or in the event of any other emergency of calamity that threatens the life and well being of the community."

The first case of this nature refers to the case of *George Mula v. Minister for Trade (FH) (21.03.1977).* In this case, the Bakers' Union ordered a strike owing to the low price of bread citing that when factoring in production costs, the bakers were registering a loss. Soon after the Minister of Commerce declared through an Order issued under the Supplies and Services Act 1947, that all those who in the week before the strike made use of bakeries for the production of bread, or who in the same period continued the trading and distribution of bread, needed to continue to do so until the Minister decided to revoke such an Order. The aforementioned Supplies and Services Act granted the Minister the right to make such a decision even in the time of peace in order to ensure supplies. The bakers refuted the Ministerial Order and continued to strike. As a consequence of that decision, many bakers were arraigned before the Criminal Court, charged with contravening this Order.

Mula filed a constitutional case citing that the Order was entrapping the bakers into forced labour as owing to the Criminal proceedings being processed against striking bakers, continuing strikes could result in bakers being sent to prison. The Government argued that the issue of such an Order was constitutional as it fell under Article 35 (2) (d), where forced labour was permissible in cases of "*emergency or calamity that threatened the life or well-being of the community*". The Court ruled that the bakers' strike did constitute an emergency because as a direct result of it, bread, which in the eyes of the Court is to be considered an essential commodity, was being withheld from the public. This judgment is highly controversial, especially owing to the fact that the state of emergency as affirmed by the court deviates from the "period of public emergency" as is defined by the Constitution in Article 47 (2). According to the Constitution, such a period comes into being when Malta is in a state of war, when an order to this effect is issued by the President, or when the House declares the situation to be such through a two-thirds majority

vote. Additionally, the association of the word 'emergency' with the word 'calamity' further indicates the gravity in the eyes of the Court of the shortage of bread. The severity of the situation as promulgated by the Court must be put into question. Their decision to favour the Order and making such a decision on the basis of emergency was supported by the case *Iversen v. Norway* decided by the European Commission of Human Rights in 1963 which understood the Order moving dentists to the North of Norway owing to the lack of practitioners in the region as one constituting an emergency.

The second landmark case interpreting the provision refers to the case of *Dr Walter Cuschieri et V. Prime Minister (CC) (30.11.1977).* In June of 1977, the Malta Medical Association ordered a strike, a partial industrial action against the outpatient department of hospitals, in government hospitals. The Government of the day retaliated by banning striking doctors from the government hospitals. Additionally, a bill was passed (Act No. XX of 1977) further banning the striking doctors from being employed within private hospitals unless they declared they would perform the entirety of their duties in the public hospitals also. This stood even after their contractual agreement with the Government of Malta was made void. Therefore, many of the doctors that necessarily required adequate facilities within a hospital environment to properly work were left unable to do so. This left striking doctors with two options, either renounce their strike action or find employment outside of Malta.

The doctors who appeared on behalf of the striking population of medical practitioners claimed that such an action was a form of forced labour, amongst many other claims brought against the Government, as in order for them to work in any hospital in Malta, they were necessarily forced to perform the full scope of their duties in public hospitals. The Court of First Instance claimed such a situation as being an emergency and thus understood the emergency exception as provided for in Article 35 (2) (d) as being valid. The question as to who caused the emergency situation, either the doctors for following the legitimate order of their union to strike or the Government for taking such extreme action, needed however to be posited. The strike of the doctors was only subject to the outpatient department of the public hospital, whereas the lock forced by the Government effectively banned all striking doctors from the entire hospital. While it is arguable to postulate that in fact, it was the second action which created the emergency situation in the first place, the Court of First Instance opted not to tackle the causation of the emergency situation and chose instead to simply declare Article 35 non-applicable owing to such a state of emergency existing.

The Constitutional Court did not follow the same rationale upon the appeal made by Dr W. Cuscheri. It did not consider whether there existed a situation of emergency or not but argued that the Constitution does not prohibit indirect forms of forced labour, because unlike the protection provided for by the European Convention, the relevant article prohibits only forced and not compulsory labour. Therefore, only direct forms of forced labour may be prohibited. Finally, the Court stated that the law provided for the prohibition of labour in private hospitals and therefore was not a form of forced labour.

The reasoning behind these judgments was criticised in passing in subsequent judgments, such as in the judgment of *Not Joseph Able v. Prime Minister (FH) (05.10.1993)* whereby Mr Justice Said

Pullicino claimed that the two previous cases are ones which "this Court, as presided over, has great reservations".

A distinction must also be made when comparing forced labour with normal civic obligations. In the case of *Zarb Adami v. Malta (ECHR) (20.06.2006),* the European Court identified a situation whereby Article 14 in conjunction with Article 4 (3) (d) was being violated. It was noted that the service of a juror was to be understood as a normal civic obligation and not as forced labour, however, 'de facto' it was identified that the civic obligation had been transferred upon men disproportionately.

The Right to Protection from Inhumane Treatment

Within Chapter IV of the Constitution of Malta, the fundamental rights and freedoms of every person are enshrined. This is the first of two paramount legal instruments that protect these rights in Malta. The second refers to the European Convention Act, chapter 319 of the laws of Malta, through which the European Convention on Human Rights was brought into domestic legislation. This is supplemented also by the 1987 introduction of the individual's right of petition to the Council of Europe's human rights organs. Article 36 of the Constitution stands to prohibit the inhumane or degrading punishment and treatment of others. There are four key prohibitions embedded within this provision referring to inhumane or degrading, punishment or treatment. Moreover, by virtue of Article 36 (3) (a), this right extends to the protection against the promulgation of laws which would enable or impose collective punishment, the only exception standing to include the "collective punishment of members of disciplinary force". Regardless, such action must be taken in line with the law regulating the disciplinary force in question.

While in certain cases, inhumane and degrading treatment is easily identifiable, including the obvious the offences and violations of physical harm and ill-treatment such as torture, in other cases it is less distinguishable. The Commission argued that the "notion of inhumane treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable." Often this is reduced to refer to simply torture, which by definition refers to an aggravated and deliberate form of inhumane and degrading treatment or punishment. However, according to the Commission, it stands to encompass any punishment which is degrading - i.e. punishment which generally humiliates the person before others or drives them to act against their will.

As previously outlined, cases of inhuman or degrading treatment are not always as evident as one may expect. In order for the courts to determine whether treatment or punishment can constitute being inhumane or degrading, the standard of proof has been determined to be on the balance of probability as opposed to that of beyond a reasonable doubt. In the case of *Anthony Mifsud v. Supt Carmelo Bonello (CC) (18.09.2009),* the court, making further reference to the case of *Calleja v. Commissioner of Police et (18.02.2008)*, declared that the court's jurisprudence has demonstrated that the required degree of proof is that of beyond a reasonable doubt. Of course, owing to the severity of the accusation there must remain a level of gravity associated with the claims being made. This method refers to the objective method.

However, the courts have also adopted subjective methods of determination. Such a method was demonstrated in the case of *Ireland v. UK* decided by the European Court of Human Rights in 1978 pertaining to the treatment of IRA prisoners in Northern Ireland. The Court claimed that decisions must be made depending on the "circumstances of the case". An example of this refers to the nature, context, manner and duration of the treatment and the situation of the person affected. This is the method which was implemented in the case of *Tonio Vella v. The Commissioner of Police et (CC) (05.04.1991)* whereby the applicant, during the investigation was subjected to several acts of ill-treatment including threats of hanging, amongst other forms of ill-treatment. The Court commented that taking stock of the situation in its entirety the tactics made use of by the Police were sufficiently serious to warrant inhumane and degrading

treatment, especially considering the well-being of the applicant who suffered from both polio and diabetes.

While we tend to associate inhumane and degrading treatment with physical actions being taken against another person, the law also extends to provide protection against this type of treatment which is of the non-physical kind. The first case to prove this was the *Ellul Sullivan/Tinley* case - *Ellul Sullivan et v. Housing Secretary (FH) (15.06.1976).* This case revolved around the issuance of a requisition order under the 1949 Housing Act which allowed for the property belonging to the Ellul Sullivan family, being made use of by student and family member Mr Tinley, to be taken possession of. The claimant filed a case based on inhumane and degrading treatment to by-pass repercussions of the *Ferro* case, decided by the Constitutional Court in 1973, which granted a *carte blanche* to the Housing Secretary through the woven legal fiction of requisition orders in relation to when possession truly goes into effect. The court found that the effects if eviction from one's own home was degrading treatment. Their argument was supported by reference to Maltese values. Several other cases followed suit, arguing in a similar manner to the Ellul Sullivan family. Here, one may make reference to the cases of *Antonio Pace v. Minister for Housing and Land et (CC) (17.10.1988)* and *Lucrezia Borg v. Housing Secretary.* In the former case the court reiterated the inital argument put forward through the *Ellul Sullivan/Tinley* case by stating that "a family who is evicted from their home… necessarily suffers severe suffering, mental as well as physical, of a certain degree of gravity." This indicates that this article of the Constitution does indeed cover scenarios whereby the inhumane or degrading treatment is of a non-physical nature.

This article also stands to include the physical conditions which must be met in places of detention. This was demonstrated by the case of *Joseph Azzopardi v. Commissioner of Police (CC) (14.12.1994).* Through this case, the court noted that the conditions of the detenion faciliteis within the Police Headquarters in Floriana were extremely substandard, so much so that being held in detention within the facilities for the mandated period of 48 hours following arrest, as prescribed by law, was a violation of this article. The plantiff was held for 24 hours in a filthy, mosquito-infested cell with no natural light nor ventilation before the court made this decision.

This article, however, remains even more versitle, with its versitility being demonstrated clearly within the liberal judgment of the case *Vassallo Gatt v. Wilfred Cassar ne (FH) (19.03.1977).* In this particular case, the applicant had obeyed a political directive to abstain from work as part of the Opposition party's campaign of civil disobedience in 1982. As a reaction to the applicant's obedience to the directive, the respondent government-owned company dismissed the applicant. Following which, the Government offered to reemploy him on the condition that he sign a declaration pledging to not obey further directives. The court found such actions to be in violation of Article 36 as the punishment for his actions was considered to be both "cruel", "debasing" and "humiliating".
A similar judgment was passed in relation to the case of *Victoria Cassar v. Malta Maritime Authority (CC) (02.11.2001)* whereby the claimant wished to challenge the a regulation which stated that one was only able to obtain a port worker's license through inheritance by male descent. The case was won both on the count of such actions being discriminatory based on gender but also based on inhumane treatment with the Court concluding that "discriminatory

treatment" based on gender "is degrading treatment as it is based on a false premise that a woman, just because of her gender, is not capable of engaging in this work." The Court also found the action to "debase the dignity of women".

This article also plays a role in extradition and deportation proceedings. The case of *Soering v. UK* which was decided by the European Court of Human Rights posited the question of whether this provision may be engaged to prevent the deportation or extradition of a person to a country where they may face inhumane treatment. Mr Jens Soering, an eighteen-year-old German citizen, and his girlfriend murdered the girlfriend's parents in the state of Virginia in the US. They subsequently fled to seek refuge in the UK. The US requested the two be extradited to face trial in the US by Soering argued if they were to be extradited they would face death penalty and therefore being putting on death row for up to eight-year, the average in Virginia, which he argued constituted as inhumane treatment. The Court agreed with this assessment that the death row conditions in Virginia amounted to inhumane treatment and therefore that extraditing him to the US would put him at risk to experiencing treatment going beyond the limits Article 3 of the European Convention on Human Rights, especially considering the applicant's age and mental state. Owing to his status as a German national, it was decided that the German Courts had the jurisdiction to appropriately adjudicate and punish the individual, thus enabling the evasion of the death row sentence in Virginia.

In relation to this issue in Malta, the Constitutional Court claimed that "under the Convention and its Protocols, there is no right to political asylum". However, in country where the situation is chaotic or dangerous, the Court continued to explain that under certain conditions in relation to Article 3 whereby if a person is extradited or deported they may face inhumane treatment directly violating the aforementioned Article, it is "a duty that such person is not expelled" as "Article 3 is an absolute right" which violation thereof cannot be balanced or justified by any other reasons. An attempted pushback of Libyan asylum seekers by the Maltese Government in 2013 resulted in the European Court, on application by the Jesuit Refugee Service and People for Change Foundation, applying their special powers of Interim Measures, which may be applied when there exists serious risk of imminent and irreparable harm, in order to issue a prohibitory injunction to stop the deportation.

The Right to Protection from Deprivation of Property without Compensation

The right to protection from deprivation of property without compensation is an essential right and is thus included within Chapter IV of the Constitution of Malta under Article 37. Since the ratification and the introduction of the European Convention on Human Rights into domestic legislation through chapter 319 of the laws of Malta in 1987, i.e. The European Convention Act, this is also of great importance. Owing to the current culture of rising property prices in Malta, this right has been heavily interpreted by both the Constitutional Court as well as by the European Court of Human Rights.

Through the Constitution, the function of this right is to ensure that once property has been compulsorily taken possession of, the owner is entitled to the following: a payment of adequate compensation as outlined by Article 37 (1) (a), a right of access to an independent and impartial court or tribunal to contest such compensation under Article 37 (1) (b) and finally, a right of appeal by virtue of Article 37 (1) (c). Therefore, one can argue the right protected under the Constitution isn't to property itself, but to compensation following the expropriation of property. Sub-article 1 allows also for Parliament to establish through law, the criteria which are to be adhered to, including the factors and other additional circumstances to be taken into consideration, when determining what constitutes as adequate compensation.

It is important to note that this article doesn't allow for an owner to challenge the facts of expropriation or possession, allows for them only to challenge the amount of compensation awarded for the property. This is discussed through Article 37 (4) which explicitly provides that nothing within Article 37 itself shall be understood as a limiting factor at law vis-a-vis the compulsory taking of possession of property when it is in the public interest. In relation to this provision, which was included in 1974, the case of *Mgr G Mercieca noe v. the Prime Minister (FH) (24.09.1984)* arose. The case was brought up based on an issue relating to Act X of 1983 and complimentary legislation known as the Devolution of Certain Church Property Act. This legislation intended to confiscate Church property acquired through acquisitive prescription without providing the Church with adequate compensation. The property acquired was to be used in order to provide free education to all, satisfying the criteria of the acquisition needing to be for the national interest under Article 37 (1). Through the law, the State established criteria for compensation based mainly on the value of the property at the time of acquisition, resulting in compensation not being fair to current market value, since a large majority of property had been in the hands of the Church since the Middle Ages. The argument of the State related to the latin maxim ubi lex volui dixit meaning when the law wills something it speaks it. They argued that the word 'compensation was not qualified by the article 'adequate'' under Article 37 (4).

Therefore, while that which was considered to be in the nation's best interest according to the State, i.e. space in order to provide for free education for all, was realised through such acquisition, the means applied denied the Church adequate compensation for the property which was expropriated. Moreover, it is important to note that such an action benefitted only a few

people who voluntarily attended Church schools as free education was already provided for through state-funded schools yet hindered the Church's means to achieve their mission to the Maltese Catholic population under the Constitution by denying them half of their income. The Court ruled that the State's interest needed to give way to the superior national interest of the Maltese Catholic population who would be deprived of the Church enabling to fulfil their mission. The provisio, according to the Court, allowed Parliament to establish the criteria of compensation but didn't allow for them to determine criteria which led to inadequate or ridiculous compensation. Additionally, the argument of the State in relation to Article 37 (4) was null since the proviso was included under Article 37, which in it's first sub-section does speak of "adequate compensation" then the government needed to honour that stipulationAdequate compensation according to the Court needs to be close to market value.

However, it has been decided that when an expropriation is done for a social purpose, the compensation doesn't need to be the actual market value of the property as was determined by the case of *Maria Xuereb v. Director of Land (CC) (19.04.2012).* In this case, the Constitutional Court quoted a judgment delivered by the European Court of Human Rights, namely *James v. UK* where it was said that where the state was pursuing economic reform or social justice, less reimbursement was due. This comes in addition to the fact that the state is given much leeway when it comes to assessing both the appropriate level of compensation as well as the actual value of a property.

The right to property is also protected under the European Convention of 1987, which was brought into domestic legislation through the European Convention Act, chapter 319 of the laws of Malta. To explain what the provision constitutes we can reference the case of *Sporrong and Lonnroth v. Sweden (ECHR) (23.09.1982)* through which the Court divides the provision into three distinct rules. Firstly, the rule "enounces the principle of peaceful enjoyment of property". Such a right is a derivative of natural law, incorporating the basic principles and values that are essential for the personal development and fulfilment of every individual. The second relates to the deprivation of possession and subjects such actions to certain conditions. The final rule recognises that "contracting states are entitled to control the use of property in accordance with the general interest". These rules are not unconnected - the relationship between the second and third is of particular importance and they ought to be understood through the general principle emanated through the first.

The word "possessions" is specifically made use of in the European Convention in Article 1. This has a wider interpretation than that of "property", which is the term utilised within the Constitution. Trading Licenses over property are considered also to be possessions. This was established in the Maltese Courts also through the case of *Victor Spiteri v. Attorney General (CC) (01.10.2009).* Moreover, through *Peter Muscat Scerri v. Attorney General et (CC) (06.02.2015)* it was determined that an "acquired right qualifies as a 'possession' when such right results sufficiently established as an enforceable right." Ultimately, what is meant by 'possession' is any right which has economic value as established through *Mellacher v. Austria (ECHR)*. Additionally, through the case *Anthony Attard et v. United Workers Union et (CC) (28.06.2012)* it was determined that "'possessions' may either be existing possessions or valuable assets, including claims in respect

of which the applicant can argue that he has at least 'a legitimate expectation of obtaining effective enjoyment of a property right'".

A major difference which can be identified between the Maltese Constitution and the European Convention is the fact that the latter allows for challenges as to whether property was taken in the public interest or not. Yet, it is important to keep in mind that states enjoy a large bracket in which activities can be declared to be in the public interest. Thus, court scruntity only applies when there is a manifest case of lack of public interest. In the case of *John Curmi v. Commissioner of Land et (CC) (26.06.2009),* the Court, quoting the European Court of Human Rights in Strasbourg, argued that a court ought not to interfere lightly to substitue its criteria with those of the Government and relies on opinion of competent authorities to determine whether decisions to take over property were not in the public interest or were arbitrary ones. However, the Court did maintain that national authorities enjoy "a certain margin of appreciation in determining what is in the public interest".

Following the same line of reasoning as dictated by the European Convention, the Maltese Constitutional Court ruled that expropriation of private property to allocate premises to lotto-licenses was not in the public interest in the case of *John Monsu v. Director Public Lotto (FH) (22.01.1999)*. Through this case the differentiation between 'public interest' and 'public purpose' was outlined. It was decided that while lotto facilities enable Government activity, the requisition of the property was not in the public interest. Yet, the requisition of premises in order that they may be used as political party clubs was understood to be done in the name of 'public interest' since it was determined that one ought not to have a restricted view of what amounted to 'public interest' in *Galea v. Holland (CC) (29.01.1980).* Political party clubs were deemed necessary for a healthy democratic surroundings even though the politics of the parties occupying the premises may be partisan. The term 'public interest' was made more accurate and less wide-reaching through the case of *Dr Carmelo Vella v. Housing Secretary (CC) (30.12.1993)* whereby the logic made use of in the aforementioned *Galea v. Holland* case was argued to have been fallicious.

This case was instituted following the second requisition of the Vella family's property, the first time in 1956 to grant the San Leonardo Band Club of Kirkop a premises to run a band club. This was understood to have been done for the public interest as it applied to the good of the citizens at large. The second time was in 1986 and it was in order to construct a rehearsal hall for the band club. The court declared the second requisition order to not be in the public interest as this decision was being taken based on private interest. It was stated that "an interest is always private when it does not have any general application to the citizen at large, and to the universality of the general public in the State." It was also made clear that for something to be justifiably done in the 'public interest', the benefit had to be available to the public at large and not a particular sector of the public.

There are certain case, however, as argued by the European Court whereby transfering property to a private individual may constitute a "legitimate means for promoting the public interest". An example of this exists whereby it was determined that even after the privitisation of the state-owned Malta Freeport Project, the public interest element subsisted. Moreover, such as in the case of *Philip Grech et v. Director of Social Accomodation (CC) (07.12.10),* the opening of a pubic

road is still understood to be within the scope of the public interest even if it indirectly benefits private third parties. In *Mario Cutajar noe v. Commissioner of Land et (CC) (30.10.2001)* it was argued that the deprivation of property for legitimate purposes of an "economic or social nature may be in the public interest even if the community in general does not have any direct use or enjoyment of the property which would have been taken possession of."

In the case of *Allied Malta Newspapers,* the established principles subscribed to by the Maltese Courts in relation to such matters are outlined. They refer to the following five: the laws of expropriation of private property are necessary in any society to guarantee its economic and social development; this right is not absolute and must be exercised in accordance with the Constitution and Convention; the right to property prevails in case of doubt; expropriation must be a measure of last resort and it is the onus of the State to present the necessary legal requirements in order that such an expropriation remains valid; the State has a duty to release property to its rightful owners when it has not yet been acquired by the State but the reasons for its expropriation no longer exist.

The European Convention did not only enable the rule of public interest but also the rule of proportionality thus impacting greatly the protection of property in Malta. The proportionality ensures that a fair balance is established between the demands of the general interest of the community and the protection of the individual's right to property. This means that the case being regarded must demonstrate a reasonable relationship of proportionality between the means employed and the aim sought ensuring that the individual is not left to face an excessive burden. Therefore, the compensation provided need not be market value, but must be related to the value of the property in such a manner that it does not disadvantage the individual as was judged in the case of *Lawrence Fenech Limited v. Commissioner of Land et (CC) (01.11.2012)*. The fairness is also impacted when the payment is not duly administered but heavily delayed.

A case demonstrating an individual and excessive burden being placed on an individual in relation to private property is the case of *Mintoff v. Prime Minister (CC) (30 April 1996).* Mr. Mintoff filed a case based on the Government's decision in 1988 to build a new powerstation at Delimara, very close to Mintoff's summer property. The claimant argued that even though *de jure* no expropriation had taken place, *de facto*, the value of the property was decreased considerably owing to the building of such a powerstation. The Constitutional Court, quoting the *Sporrong Case* decided by the European Court argued that Mr. Mintoff was entitled to compensation as it doesn't solely apply in the cases of expropriation but also in cases where the circumstances result in the equalivalent of expropriation having taken place. This was understood in the context of Article 1 whereby every person has the right to "peaceful enjoyment of his possessions". Based on the fundamental rights of the person in question, a fair balance ought to be determined. Should there be an issue in establishing a fair balance, it would be the individual who must bare the excessive burden. Owing to this, Mintoff won the case as it was found that the Government was not acting proportionately and thus he was entitled to compensation.

The first Maltese case to appear before the European Court of Human Rights relating to the right to property was the case of *Fleri Soler and Camilleri v. Malta (ECHR) (20.02.2006).* This case related to owners being deprived of their property in Valletta in 1941 by a requisition order where a

forced lease of indefinite duration had been imposed. Rent became fixed at 871euro per yeat by the Government. The Court, taking into account the comparatively low amount of rent, the 65 year requisition order the property had been under and the absence of sufficient procedural safeguards, the conclusion was reached that no fair balance had been struck. A similar case came in the form of *Ghigo v. Malta (ECHR) (20.09.2006).*

Through the case of *Amato Gauci v. Malta (ECHR) (15.09.2009)* a law relating to the protection of tenants was decided upon dealing with the protection of emphyteutae. Generally, when the contract of emphyteusis is terminated, the emphyteuta is obliged to vacate the property. In 1979, it was determined that if a premise was occupied by a Maltese citizen as his ordinary residence on the basis of emphyteusis, once that ended, he was entitled *ex lege* for such an arrangement to turn into a lease where the rent would be increased according to inflation but never more than double the ground rent and was subject to reevaluation every fifteen years. This lease could then be extended *ad infinitum.* The European Court in this case argued that in cases referring to the operation of "wide-ranging housing legislation" the determination of a fair balance may not only involve rent conditions and the relationship between the State and the lease market, but also on the existence of "procedural and other safeguards ensuring that the operation of the system and its impacts of the landlord's property rights are neither arbitrary nor unforeseen".

As a result of the 1979 law, there existed no effective remedy to evict the tenant or obtain an adequate amount of rent. This place a disproportionate burden on the owners which was declared to be a violation of Article 1 Protocol 1. The Court took into account the following four factors: the low rental value which could have been fixed by the Rent Regulation Board; the applicant's state of uncertainity as to whether he would ever recover his property - following the fact that the applicant had been subjected to this regime for nine years; the lack of procedural safeguards in the application of the law that related to the owner and finally the rise in the standard of living in Malta over the past decade. Such factors led the Court to conclude that an excessive burden was imposed on the applicant, Amato Gauci. He was requested to bear most of the social and financial costs of supplying housing accommodations to Mr and Mrs P. The Maltese State failed to strike the requisite fair balance between the general interest of the community and the propetection of the applicant's right to property.

The European Court also criticised Malta's stringent rent laws through the case of *Saliba v. Malta (ECHR) (22.11.2011)* and noted that the law sis not provide for any increase according to the cost of living and other factors but needed to by force be need to be associated with the 1951 rental values. They understood this to go against the background of the State's economic value as it was during the time of the adjudication and thus determined that this system could lead to "unreasonable results" - the amount of rent received by the owners was found to be manifestly disproportionate to the market value of the building. Ultimately it was concluded that the various legislation regarding controlled rents in Malta was in breach of Article 1 Protocol 1.

Regarding the 1979 law on emphyteutae, the Court struck down another law through the case of *Mario Galea Testaferrata et v. Prime Minister et (FH) (03.10.2000)* which became res judicata following a judgment of the Constitutional Court on the 16th October of that year. This law enabled residential property which had been given in emphyteusis for a period exceedings thirty

years, upon the termination, a Maltese citizen could convert the temporary emphyteusis into a perpetual one by multiplying the ground rent six times. Once this has occurred the Civil Code grants perpetual emphyteuta the right to capitalise the ground rent at the rate of 5%.

The Human Rights Chapter of the Constitution of Malta was formally instituted in its full form within the 1961 Constitution. Owing to this, a provision was included in the form of Article 47 (9) to ensure that "nothing in Article 37 of the Constitution shall affect the operation of any law in force before 3 March 1962". This was to enable all pre-1962 laws, including the predominant law relating to expropriations, namely the Land Acquisitions (Public Purpose) Ordinance of 1936, to remain constitutional and not in violation of Article 37. However, the Article in the question itself also contains many exceptions with sub-section (2) stating that "nothing in this article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property." An example of this refers to "satisfaction of any tax, rate or due".

In the case of Architect Joseph Barbara v. Prime Minister (CC) (20.02.1989) the court declared as unconstitutional the law abolishing the War Damage Ordinance of 1943. This decision eliminated the numerous actions pending calling for compensation owing to the fact that these actions were considered to be "property" for the purpose of Article 37 and the taking away of such property without providing adequate compensation resulted in a breach of this Article. The decision to take such legislative action remains in the hands of the legislative, should they believe such action to be in the national interest.

Securing Protection of the Law: The Right to a Fair Hearing

Within Chapter IV of the Constitution of Malta, the fundamental rights and freedoms of every person, a set of inalienable rights making up the foundation of freedom, justice and peace, are enshrined. This is the first of two paramount legal instruments that protect these rights in Malta. The second refers to the European Convention Act, chapter 319 of the laws of Malta, through which the European Convention on Human Rights was brought into domestic legislation. This is supplemented also by the 1987 introduction of the individual's right of petition to the Council of Europe's human rights organs. Under Maltese law, the right to a fair hearing is protected through Article 39 of the Constitution, Articles 6 and 7 of the European Convention as well as through Articles 1 to 4 of the Protocol 7 to the European Convention in 1984. It is a right of significant importance and is one of the most invoked rights.

Article 39 is divided into two subsections. The first guarantees a general right to a fair hearing in criminal cases. This enables anyone charged with a criminal offence to be entitled to the following three things: they are to be afforded a fair hearing, the hearing must be conducted within a reasonable time and it must be conducted by an independent and impartial court established by law. Sub-articles (5) - (11), further provide rights applicable to criminal proceedings, such as the right to be informed.

The second subsection affords a similar right to a fair hearing vis-a-vis civil procedures, however, in such matters, the Constitution allows for the case to be adjudicated by either a court or an adjudicating authority. Through the case of *Police v. Emmanuel Vella (CC) (28.06.1983)*, it was recognised that the Constitution regards the terms 'court' and 'adjudicating authority' as two separate and distinct terms which ought not to be used interchangeably. Thus, criminal cases, according to the Constitution, should only be heard before a court while civil proceedings may occur before an adjudicating authority or a tribunal. This distinction does not exist within the European Convention which provides simply for a 'fair hearing "by an independent and impartial tribunal established by law". While specific rights are outlined in relation to criminal proceedings by virtue of sub-articles (5) - (11), the Constitution only provides for a general right to a fair hearing in civil cases. Yet, as argued by Harris O'Boyle and Warbrick in *Law of the European Convention on Human Rights*, "Article 6 (1)... has [an] open-ended residual quality" and provides an opportunity to "add other particular rights not listed … that are considered to be essential to a 'fair hearing'."

Certain key understandings are not adequately defined by the Constitution, such as the term "fair hearing". This leaves room for interpretation as to what constitutes a breach of one's right to a fair hearing, allowing for it to be invoked for numerous reasons. However, through the case of *Misrahi v. Cassar et (CC) (10.06.1966),* the Constitutional Court provided a description of that which ought to constitute a fair hearing. While the Constitution allows for a degree of equivocation and interpretation regarding the general comprehension and definition of "fair hearing", there are various rules which are applicable to all cases, despite them not being explicitly outlined by the Constitution. These refer to the rules of *nemo iudex in causa propria/sua* and *audi alteram partem.*

The former enables the preclusion of one from being a judge in their own case, as justice must not only be done but also seen to be done, allowing for confidence to be maintained in the judiciary. The European Court demonstrated both the importance of this principle and the importance of the impartiality of courts and adjudicating authorities vis-a-vis its relation to the right to a free trial in the case of *Demicoli v. Malta (ECHR) (27.08.1991).* For breaching parliamentary privilege in 1986 by libelling two members of Parliament for something they stated while under the aforementioned privilege, Mr Demicoli was charged before Parliament, an institution that is neither independent nor impartial. Additionally, despite the proceedings being criminal in nature, as the accused faced as punishment a term in prison and/or a fine, the trial was not held within a court, as the law prescribes ought to be done. This therefore allowed for the victims and offended parties to be the same as those prosecuting and judging the case, in clear violation of this rule. Before reaching the Strasbourg courts, this case passed through different phases in domestic courts, with the First Hall of the Civil Court favouring Mr Demicoli and the Constitutional Court ruling against him, both for reasons separate to his right to a fair trial. The judgment of the Constitutional Court was particularly concerning as it cited that Parliament was in its rights to request that such a matter be adjudicated in front of them, as one could apply exceptions pertaining to liberty and freedom of expression through a particular procedure at law. This created exceptions to Article 39, even though no such exceptions are stated within the Constitution.

Following the ratification of an individual's right to petition to the European Court of Human Rights in 1987, Mr Demicoli pled his case in Strasbourg. Thereafter, the Court ruled that the procedures were criminal in nature thus attracted the protection of Article 6. It is at the discretion of the European Courts to determine what amounts to a criminal charge and what cases invoke the protection of Article 6 of the Convention, as can be regarded through the cases of *Campbell and Fell v. UK (ECHR) (28.06.1984)* and *Ozturk v. Germany (ECHR) (21.02.1984).* Moreover, owing to the status of Demicoli as a non-member of the House of Representatives, citing a disciplinary reason as a motivating factor for the case to be heard before Parliament was not considered valid. Ultimately, it was decided that Parliament was not impartially composed for the purposes of adjudicating proceedings as, in direct contravention of *nemo iudex in causa propria/sua,* the victims were the "prosecutors, witnesses and judges" in one.

The second principle, *audi alteram partem*, indicates that in order for an adjudicative decision to be made, both sides must be heard: 'let the other side be heard as well'. This refers to the right enjoyed by both the prosecution and defence to plead their cases and be informed in order to have the right of both being heard.

Aside from these perpetually applicable principles, there exist over thirty norms as established by the Constitutional Court through interpretation of Article 39 (1) and (2). Some examples include the fact that the trial or proceeding must be regarded in its entirety. One incident or irregularity does not vitiate the entirety of the proceedings. Such was established through the case of *Anthony Zarb et v. Minister for Justice (CC) (16.10.2002)* whereby it was argued that "one cannot and should not focus one's attention on a part only of proceedings before a court and if one finds any shortcoming… come to the inexorable conclusion that the entire proceedings are therefore

vitiated." In order to determine whether this right has genuinely been breached, one must regard the "entire *iter* of the judicial proceedings" and an assessment must be drawn based on all the elements which form the judicial proceedings. In *George Pace v. Attorney General (CC) (31.10.2014)* it was argued that the functionality of this right is twofold: firstly granted to ensure that a person who is innocent is not given an opposing verdict and that such a person is afforded all the necessary means to achieve this conclusion, and secondly, it stands to ensure that those who are guilty are not provided with the opportunity to evade the ramifications of their actions. However, such procedures will always remain under the scrutiny of Articles 39 of the Consitution and 6 of the Convention.

Another norm was established through the cases of *Frank Cachia v. Prime Minister (CC) (10.10.1991)* and *Carmela Bugeja v. PM et (CC) (17.06.1994)* where it was established that retrial on the wrong application of the law cannot be heard by the same judge or judges who first heard the case. Neither can the sam judges decide on a *prima facie* basis whether there has been a wrong application of the law. In accordance with *Paul Debono v. Prime Minister (CC) (07.12.1990),* it was decided that delivering judgment when the case had been postponed for final submissions amounted to a breach of Article 39.

The fact that an applicant may be acquitted in a criminal court but be forced to pay damages in a civil suit without this infringing on Article 6 is yet another norm. This is owed to the different onus of proof required in the two courts: beyond a reasonable doubt in criminal proceedings, v. balance of probability in civil suits. This was discussed in *Carmel Saliba v. Attorney General (CC) (15.10.2012)* where it was argued that while Article 6 does not stipulate the type of degree of proof needed in terms of both criminal and civil cases, it simply requires fair proceedings and a balance of proof based on probability is no less fair than a balance of proof which is more rigorous in nature.

A judge providing reasons for their decisions, particularly if the right remains open for appeal is another maxim that evolved from this right. Without adequate knowledge regarding reasons for conviction or acquittal, one cannot appeal. Not providing for reasons results is a breach of Article 6 according to the Constitutional Court through the case of *John Tanti v. Attorney General.*

Finally, in accordance with article 39, apart from being independent and impartial, must be established by law - *Dr Tonio Azzopardi v. Prime Minister (CC) (04.11.1992).*

As argued previously, the Constitution does not provide succinct definitions for key terms embedded within it. Aside from 'fair hearing' lacking a concrete definition, the term 'reasonable time' in relation to a fair trial also remains undefined. This holds true both for the Constitution as well as for the Convention. According to the case of *Emanuela Brincat v. Attorney General (CC) (23.01.1995),* it was argued that this depends on the nature of the case. Moreover, it was argued that 'reasonable time' was not a term that lent itself to being defined and that frankly, such a definition stipulating limitations of definite periods was not prudent. The element of discretion which a lack of clear parameters provides was thought to best befit the provision as it allowed for the consideration of the circumstances and members of the judiciary to term a timeframe as unreasonable. For example, the Maltese Court determined that there existed unreasonable delay owing to five years of inactivity in the case of *John Saliba v. Attorney General (CC) (06.07.1998).*

This issue of delayed justice is a systemic issue that manifests itself clearly in Malta. In fact, several cases which have been brought before the European Court of Human Rights regarding

this issue have been decided in favour of the applicant that made a claim on the basis of the reasonable time guarantee. An example can be noted through the case of *Central Mediterranean Development Co Ltd v. Malta (ECHR) (24.10.2006)*, which the Court noted had been postponed twenty-eight times domestically resulting in a delay of eleven years. The Court observed that cases that are not particularly complex ought not to have lasted so long. Furthermore, the Court increased non-pecuniary compensation awarded by the Maltese Courts from 240euro to 3000euro in this case. In the case of *Frendo Randon et v. Malta (24.10.2006)*, the Court also noted that expropriation proceedings lasting forty years also violated Article 6 (1) on this basis.

Questions as to whether fiscal litigation is covered under Article 6 and 39 are often posed. Through the case *Anthony Frendo v. Attorney General (CC) (30.11.2001)* the Constitutional Court, going against judgments passed by the European Court of Human Rights, applied Article 6 to tax disputes by distinguishing between the right of the State to imporse tax and proceedings contesting the amount of tax assessed, arguing that citizens have the right to request a review to ensure the law was correctly applied. The notion that Article 6 remains applicable to fiscal litigation is one repeated often throughout domestic jurisprudence. While the case of *Ferrazzini v. Italy (ECHR) (12.07.2001)*, whereby it was argued that tax disputes fall outside the scope of civil rights and obligations stipulate to be necessary through Article 39 (2) for the article to be enforced, admittedly still influences local cases. However, the judgment has been steadily ignored as can be regarded through the case of *Neil Carter v. Prime Minister et (FH) (30.11.2011)*. Here, the First Hall of the Civil Court, in specific relation to this case, remarked that the judgment delivered does not preclude fiscal proceedings from falling within the sphere of interest noted within the Constituion.
Both the Constitution and the Convention require a 'determination' on the existence or extent of a civil right or obligation in order for Articles 39 (2) and 6 to apply to proceedings.

Article 39 (2), relating to civil matters, not only guarantees fairness of a trial but also ensures access to a court. This was established through the case of Golder v. UK (ECHR) (21.02.1975) through which the Court noted that Article 6 applied not only to the conduct of proceedings once they had been instituted but also to the right to institute proceedings in the first place, regardless of a person's status as in this case, the applicant had been incarcarated. The right to access was inferred from the judgment delivered. Within Malta, lack of access resulted in the institution of several cases such as *Dr R Frendo Randon et v. Commissioner of Land (CC) (10.06.2009)* where the court ruled that the right to access of the claimant was being breached as the Land Acquisition Ordinance did not enable unconditional direct access to an adjudicating authority in order to enable adequate compensation.
In *Mizzi v. Malta (ECHR) (12.01.2006)* it was determined that the obstacles present within the Civil Code, deprived the applicant of the possibility of obtaining a judicial determination of his claim. Moreover, the Court argued that a degree of access to a court limited to the "right to ask a premilinary question could not be considered sufficient to secure the applicant's 'right to a court'".

Another essential element involved in ensuring the right to a fair trial is upheld, is the rule of publicity. This applies to both criminal and civil procedures but is not absolute. While Article 39 (3) claims that proceedings are rightfully held in public, 39 (4), allows for situations where the press

and public may be excluded from all or part of the trial in the interest of morals, public order or national security. This generally applies in situations where the interest of juveniles and the protection of the private life of individuals is taken into account or where the court feels like "publicity would prejudice the interests of justice."

As previously mentioned, Article 39 subsections 5 to 11 of the Constitution are applicable only to criminal proceedings and relate to the specific procedural rights of the accused. Subarticle 5 relays the presumption of innocence, a fundamental cornerstone of the justice system and a principle ensuring the governance of the rule of law. It is not the role of the defence to prove the innocence of the defendant but up to the prosecution to prove his guilt, allowing for the onus of proof indicating guilt to be placed on the prosecution. This complies with the Latin principle *in dubio pro reo* - when in doubt, one must acquit and not convict. The presumption of innocence also may relate to adverse publicity. A case of this nature decided upon in Malta was the case of *Formosa v. Commissioner of Police (CC) (16.04.1973)*. While the Police, in a press conference stated that they had apprehended the murderer thereby solving a case, the Constitutional Court ruled that while this did paint Formosa, who had yet to face trial in a bad light in the public eye, this one infraction taken in the wider context of the trial in general, couldn't be regarded as having breached his constitutional right to be presumed innocent. However, in the similar case of *Police v. Dr Noel Arrigo et (CC) (29.10.2003)* the court ruled that the press conference delivered by the Prime Minister who stated that judges had been arrested on suspicion of bribery did violate the principle of presumption of innocence. This judgment was delivered following the line of reasoning of the Strasbourg courts in the case of *Butkevicius v. Lithuania* which argued that a violation of the presumption of innocence occurs when a public official reflects an opinion that an accused is guilty prior to a formal finding. The inference of guilt whereby investigating officers are permitted by law to inform suspects that it might harm their defence to fail to mention key information within an interrogation is a continuation of the procedural right enlisted under Article 5. In Malta, this allowed in specific circumstances according to Chapter 9, article 355AU. In *Condron v. UK (ECHR) (02.05.2000)* it was decided that drawing inferences from an accused silence is not against Article 6 *per se.* However, it was specified within the judgment that in order to provide safeguards for the accused, this is applicable mainly in cases that clearly call for an explanation, such as when the prosecution establishes at least *prima facie* that some offence has been committed. . This once again reiterates that fact that courts are to look at trials as a whole and make determinations on a case-by-case basis rather than adhering to strict rules regardless of circumstances.

Subarticle 6 relates to the right to be informed of chare in writing and to legal assistance. This right extends to guarantee numerous principles. Firstly, the right of an accused to be informed in writing of the offence charged, although through *Police v. Francesco Certo (CC) (14.08.1968)* it was determined that it was acceptable to not be informed through writing but orally instead as the Criminal Code did not prevent such a practise. Secondly, the right to be given adequate time and facilities to prepare their defence. Finally, the right to be permitted to defend themselves in person or by a legal representative. The right to free legal assistance is also guaranteed under this right for those that cannot afford to pay. This is subject to the accused satisfying two conditions: not having adequate funds to engage legal representation, which according to Article 39 (11) of the Constitution refers to any person licensed to practise law as an advocate in Malta

for their own defence, and that the legal representation is 'reasonable required' in the case. Additionally, subsection 6 allows for the summoning of witnesses and cross-examination by the prosecution, which is a fundamental aspect of criminal trials. The element of cross-examination enables controlling evidence against the accused and testing their credibility as was principally argued through the case *Saidi v. France (ECHR) (20.09.1993).*

In Malta, trials *in absentia* are in direct violation of the Constitution. The right to be present at one's own trial is a right that is specifically guaranteed and may only be revoked with the explicit consent of the accused. While this is allowed, however, it is considered to be a duty to attend criminal proceedings, except in cases of contraventions where relatives may appear on behalf of the accused. According to the European Court, the waiver of this right is not in itself contradictory to Article 6 but trials that occur *in absentia* that don't allow for the accused to obtain a fresh determination of the charge were termed to be "denials of justice". This was outlined through the case *Sejdovic v. Italy*. The duty to guarantee the right of a defendant to be present in the courtroom is an essential requirement of Article 6. This form of trial is also prohibited within the Extradition Act, chapter 276 of the laws of Malta whereby the Maltese Government may refuse to extradite an individual should a trial have occurred *in absentia*. A copy of the judgment must be granted to the defendant upon conclusion of a case. This is a right protected by Article 39 (7) but is not found within the Convention.

Article 39 (8) outlines the principle of non-retroactivity of penal laws, i.e. the fact that one cannot be found guilty of an offence which at the time performed, the act or omission, did not constitute an offence. This is in accordance with the maxims *nullum crimen sine lege* and *lex non-habet oculos retro*. This principle only applies to criminal laws as was discussed through the case of *Lay Lay Co Ltd. v. Malta (ECHR) (23.07.2013)* whereby it was stated that "civil legislation which has a retroactive effect is not expressly prohibited by the Convention". This guarantees legal certainty in criminal cases as was established by the *Camilleri v. Malta* case *(ECHR) (23.01.2013)* in relation to Article 7 of the Contravention.

Subarticle 9 establishes the rule against double jeopardy: *ne bis in idem.* This allows for no one having been tried in front of a competent court, regardless of the outcome, to be retried for the same offence or for any other offence which could have been convicted at the trial for that offence. Once a case becomes *res judicata* it is not liable to be retried. This determination was clarified by the European Court of Human Rights which argued that a proceeding infringes upon the *ne bis in idem* rule if the offence "constitutes an action having the same elements of the offence of which the said person has already been convicted. If the elements are the same or overlap, then the tendency and probability are that there is an infringement." In Malta, there exists no specific provision enabling a criminal case to be juridically reopened upon discovery of new evidence but the Prime Minister does have the power bestowed upon him by Article 515 of the Criminal Code to recommend cases to the Court of Criminal Appeal. As outlined, this provision does not only relate to trials dealing with the same offence but also to other offences which could have been dealt with when dealing with the initial offence. This provision precluded a couple from being charged with adultery for performing a conjugal act in front of minors and following with defilement of minors in the case of *Rex v. Agatha Mifsud et (CCA) (15.06.1918)*. This is because the offences could have been dealt with simultaneously as the second charge was only

produced owing to the act which was already decided upon in a previous judgment. The rule of double jeopardy is also protected by Article 4 of the Seventh Protocol of the European Convention.