1. The History of Human Rights in Malta.

With the advent of British Rule in 1800, the Maltese legal system became exposed to new and perhaps more liberal ideas. The independence of the judiciary, trial by jury in criminal matters, the presumption of innocence of the accused, freedom from arrest without prompt trial (*habeas corpus*), the rule of law and the equality of all before the law, aimed at ensuring speedy and impartial justice. Notions which traced their origin to the first fifty years of British Rule in Malta.

On the 25th March, 1802, the Treaty of Amiens was signed, in virtue of which, Malta was to revert to the Order of St. John. When this came to the knowledge of the Congress, the leaders of the people re-assembled and drew up a Declaration of the Rights of the Inhabitants of the Islands of Malta and Gozo. After declaring that the King of the United Kingdom of Great Britain and Ireland was to be considered as the Sovereign Lord of Malta, Congress provided that the King had no right to cede the islands to any new power. The Declaration, signed in Malta on the 15th June, 1802 affirmed that: *"Free men have a right to choose their own religion. Toleration of other religions is therefore established as a right; but no sect is permitted to molest, insult or disturb those of other religious sentiments"*; *"That no man whatsoever has any personal authority over the life, property or liberty of another. Power resides only in the law, and restraint, or punishment, can only be exercised in obedience to law"*. Thus, it is evident that at the time the representatives of the people had already envisaged the Constitution as being an inviolable charter.

On the 23rd October 1953, the British Government, after acceding to the European Convention on Human Rights, extended its applicability to forty – two territories, including Malta, for whose international relations it had been responsible at the time. However, since the Convention had not been adopted as part of the municipal law of Britain it had a very limited application in Malta.

Although the vicissitudes of the constitutional development of Malta were remarkable, especially in view of the fact that from 1813 to 1964 twelve Constitutions were promulgated, it was only in 1961 that another formal and written declaration of rights was provided for. Notwithstanding, in the interval other documents ensured the protection of human rights in an indirect manner. Thus, for example the promulgation of the *Costituzione della Corte Criminale* in 1814, provided for the abolition of all forms of torture, the protection of persons who were being charged before the courts, the publicity of the trial, the right of the accused to defend himself.

The 1961 Constitution, based on the Blood Commission's recommendations and commonly referred to as the Blood Constitution, had as its source the Nigerian Constitution of 1960 which, in turn, was based on the European Convention on Human Rights and on the Sierra Leone Constitution of 1961. It provided for a Bill of Rights laid down in general terms, and a mechanism for redress when a person's rights were violated or threatened with violation *(1)*. Section 5 of this Constitution asserted the entitlement of every person in

Malta to the fundamental rights and freedoms of the individual, which rights are to be enjoyed subject to respect for the rights and freedoms of others and the public interest. The fundamental rights were described as being the right to:

> *"(a) Life, liberty, security of the person and protection of the law;*
>
> *(b) freedom of conscience, of expression and of assembly and association; and*
>
> *(c) protection for the privacy of his home and other property and from deprivation of property without compensation".*

On the 21st September 1964 Malta acquired its independence *(2)*. This saw the enactment of the Malta Independence Act 1964, the instrument which legally gave independence to Malta, and the Malta Independence Order 1964, which incorporated the Independence Constitution. In the words of the then Prime Minister Borg Olivier, *"The Constitution which we envisage incorporates the principle of responsible parliamentary government based on a tested democratic system. It safeguards the interests of the nation and the fundamental rights and freedoms of the individuals composing the nation. It secures the independence of such organs and authorities as must be outside political influence. It reaffirms*

the political sovereignty of the electorate by ensuring the holding of free elections as fixed intervals" (3).

The 1964 Constitution in Chapter IV contains an extensive and judicially enforceable bill of rights, largely based on the European Convention on Human Rights model. The provisions contained in the 1961 Constitution were in substance retained and also amplified. New clauses which were introduced provided for non-discrimination *(4)*, protection of freedom of movement, and the restriction of deportation of Maltese citizens *(5)*.

Other protected rights are, the right to life and security of the person, privacy of the home and other property, freedom of expression, right to a fair trial, freedom of association and peaceful assembly, right not to be subjected to inhuman and degrading treatment, arbitrary arrest. The Constitution also provides for particular instances which legitimize derogations from the observance of these rights. For example, in the interest of public safety, public order, public morality or decency, public health or the protection of rights and freedoms of others. Such measures have to be prescribed by law and must be *"reasonably justifiable in a democratic society"*. Thus, although the Constitution acknowledged the fact that there cannot be a state of absolute liberty, it has not left the question of the limitation of such human rights entirely to the Courts; it defines the scope of the limitations in each and every right, and requires that such limitations should be contained in a law or done under the authority of a law.

The Constitution also provides for the judicial enforcement of these rights. The courts are vested with the power to take cognisance of human rights cases and to grant the individuals concerned an effective remedy where it is found that their rights have been violated or are threatened. The legislator also stipulated that the Constitution is the supreme law of the land, thereby ensuring the prevalence of the Constitution in relation to other laws *(6)*. Thus, unlike the Westminster Parliament, in Malta the House of Representatives is not supreme as it is subject to the Constitution. Furthermore, the amendment or repeal of the provisions regulating the fundamental rights and freedoms require a two – thirds majority of all members of the House of Representatives as opposed to ordinary legislation.

On the 19th August 1987, the European Convention on Human Rights became part of Maltese law when the European Convention Act *(7)* came into force. This legislation was, *"An Act to make provision for the substantive articles of the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, to become and be enforceable as, part of the law of Malta"*. The incorporation of the Convention in domestic law was deemed to be necessary as it provided for broader rights to the individual. A few months prior to the enactment of the European Convention Act, Parliament granted to all persons found within the Maltese jurisdictional boundaries the right to petition the Strasbourg organs. Furthermore, it acknowledged the jurisdiction of the European Court of Human Rights for a period of five years, with effect from the 1st May, 1987.

The actual ratification of the European Convention on Human Rights and four of its Protocols took place on the 12th December, 1966 and 25th January, 1967 respectively. Though Malta was a Contracting Party to the European Convention, no individual falling under the jurisdiction of Malta could invoke the provisions of the Convention either before the local authorities or before the Convention organs. According to established constitutional practice in Malta, the power to make laws is vested in Parliament, and this power is exercised by bills passed by the House of Representatives and published in the Government Gazette as Acts of Parliament, after assent by the President. Since our legal system is based on dualist principles, any international treaty cannot be said to form part of domestic law until it is incorporated in *ad hoc* legislation. This established practice was confirmed by the enactment of the Ratification of Treaties Act in 1983 *(8)* which provides: *"No provision of a treaty shall become, or be enforceable as part of the law of Malta except by or under an Act of Parliament"*. Thus, before 1987 the rights and freedoms as laid down in the European Convention on Human Rights were not enforceable in a local court.

Act XIV of 1987 stipulates that where an ordinary law is inconsistent with the Convention's protective provisions, the Convention shall prevail, and such law shall, to the extent of the inconsistency, be void. Section 2 defines *"ordinary law"* as *"any instrument having the force of law and any unwritten rule of law, other than the Constitution of Malta"*. In a revolutionary judgement delivered by the Constitutional Court *(9)* in the case Dr. Lawrence Pullicino v. Commanding Officer Armed Forces of Malta

nomine et al., the Court dealt with the issue whether a domestic law which is in conformity with the Constitution, but which is in conflict with the European Convention, is to be applied or disregarded. The point in issue was a provision in the Maltese Criminal Code which prohibited the granting of bail to persons accused of homicide. Applicant argued that this provision was in breach of the European Convention. The Constitutional Court held that a domestic law, although not contrary to the Constitution, is inapplicable if it conflicts with the provisions of the European Convention. Thus, the Constitutional Court ruled that the refusal of bail to applicant violated his fundamental rights as guaranteed under Article 5 of the European Convention.

Even prior to the enactment of the above – mentioned legislation, the Constitutional Court would refer to decisions of the European Court of Human Rights and the European Commission on Human Rights. In the case Cecil Pace v. The Hon. Dom Mintoff nomine *(10)*, the Constitutional Court held that Article 34(3) of the Maltese Constitution *(11)*, which deals with the length of time which is to elapse between the moment of arrest and passing of the verdict, corresponds to Article 5(3) of the European Convention. In passing judgement the Constitutional Court referred to various opinions delivered by the European Commission of Human Rights in this respect. Other judgments delivered by the Constitutional Court are, Emanuel Formosa v. Commissioner of Police *(12)*, and Vincent Ellul Sullivan et nomine v. Housing Secretary *(13)*.

The scope of Act XIV of 1987 was two – fold:

(1) The incorporation of the fundamental freedoms and rights as set out in articles 3 to 18 of the Convention and articles 1 to 3 of the First Protocol, as part of Maltese law. It also provides for the supremacy of its provisions vis – a – vis ordinary law where the latter is inconsistent with such rights and freedoms.

(2) To make judgements delivered by the European Court of Human Rights directly enforceable by the Constitutional Court of Malta. Such judgements are enforceable locally *(14)*.

Furthermore, notwithstanding the similarity of the provisions found in the Constitution and those contained in the Convention, one should remember that the latter is an international agreement between sovereign states, binding themselves to follow certain rules in the treatment of their own nationals. Thus, it would be safe to state that the rules of interpretation are different from those relating to human rights provisions in national constitutions, in the sense that the former should be interpreted more restrictively.

Although prior to the enactment of Act XIV of 1987 the European Convention did not form part of Maltese ordinary law, throughout the years its impact was evident. Through the enactment of Act XIV of 1987, the safeguard of rights and freedoms of individuals was extended. For example, Section 45 of the Constitution guarantees the protection from discrimination on grounds of race, place of origin, political opinions, colour, creed or sex. The grounds listed are exhaustive. On the other hand, Article

14 of the European Convention, provides an illustrative list of the grounds on which discriminatory treatment would not be justified. This distinction was confirmed in the case Dr. Walter Cuschieri et al v. Hon. Prime Minister et al decided by the Constitutional Court *(15)*. The Court held that the grounds of discrimination as listed in the Maltese Constitution, similar to other foreign Constitutions, are restrictive of their nature. Thus, if there is any other ground or consideration for the differential treatment besides those prohibited by the particular section, the discrimination will not be unconstitutional.

Similarly, in our Constitution the right to marriage is not one of the fundamental rights. In Act XIV of 1987, by means of which the European Convention became part of Maltese law, it is stipulated that *"men and women of marriagable age have the right to marry and found a family"* (Article 12). In the case Raymond Gilford v. Hon. Prime Minister et al decided by the First Hall of the Civil Court *(16)*, the Court held that in 1987, for the first time, the right to marry was included as a fundamental right under Maltese law.

Another area which has broadened the spectrum of individual rights is that concerning forced labour. Section 35(1) of the Constitution provides that, *"No person shall be required to perform forced labour"*. On the other hand, Article 4(2) of the European Convention Act protects the individual against both forced and compulsory labour. In 1977, an amendment to the Medical Kindred Professions Ordinance *(17)* provided that no private clinic

or hospital could employ a doctor in Government service unless so authorized by the Minister of Health. This authorization was granted only if the doctor would sign a declaration that he would accept to work in government hospitals. In the case Dr. Walter Cuschieri v. The Hon. Prime Minister decided by the Constitutional Court in the same year, applicants contended that this provision constituted an imposition of forced labour. Reference was made to decisions delivered by the European Commission where forced or compulsory labour was said to consist of work that a person is compelled to do against his will, in unjust or oppressive conditions accompanied by unnecessary harsh treatment. However, the Court distinguished between the wording of the Constitution and the European Convention on Human Rights, and held that the phrase compulsory labour had a wider interpretation than forced labour. The Court held that the term compulsory labour was apt to describe certain forms of indirect compulsion to work. The condition being imposed on doctors was interpreted to be compulsory labour, a protection not guaranteed under the Constitution.

Although local courts have referred to Strasbourg case - law in delivering judgements dealing with human rights issues, particularly after the enactment of the European Convention Act, they are still not bound by such decisions as the doctrine of precedent does not form part of our law. Thus, in the case Colin J. Trundell v. The Hon. Minister of Foreign Affairs et al decided by the Constitutional Court *(18)*, it was held that the right to a fair trial was also applicable in extradition proceedings. This conclusion was reached on the basis of local extradition law, which imposes on the Court a

duty to inform the person who is facing extradition proceedings of his human rights, as guaranteed under the Constitution, and of the right to file an application in Court if he is of the view that his rights have been violated.

Similarly, up to 1993 certain laws (Criminal Code, Code of Police Laws, Code of Organization and Civil Procedure, Commercial Code and the Civil Code) although they could contain certain provisions which were inconsistent with the provisions laid down in the Constitution concerning human rights, were granted immunity. However, according to Article 3(2) of the European Convention Act, *"where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said ….. shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void*".

In the case Lorry Sant v. Commissioner of Police decided by the Civil Court, First Hall *(19)*, applicant alleged that his right to a fair trial was breached as his trial was being heard by Magistrate who had carried out the preliminary investigations. Although this situation was permitted under the Criminal Code, applicant alleged that it constituted a violation of Article 6 of the European Convention Act. The Court found in favour of the applicant and therefore ruled in favour of the provisions of the European Convention Act as against the Criminal Code. Thus, although the above-mentioned legislation was saved from the provisions of Chapter IV of the Constitution, they could nonetheless be challenged on the basis of the provisions of the Convention.

An interesting situation would be where the provisions of the European Convention Act are in conflict with the Constitution. To date no such issue has arisen before our Courts, and it would seem that the occurrence of such a situation is unlikely in view of the fact that the source of our human rights provisions are embodied in the Convention itself. Notwithstanding, in 1987 the Government of the day held that in cases of incompatibility and inconsistency, the Constitution would prevail as the supreme law of the land. This was also the view expressed in a number of court judgements amongst which are Rosaria Cassar v. Permanent Secretary for Housing et al decided by the Civil Court, First Hall *(20)* and Dr. Louis Vassallo et al v. The Hon. Prime Minister nomine decided by the Constitutional Court *(21)*. Reference was made to the case Marbury v. Madison where it was held that *"if a Constitution claims by its terms to limit the powers of the institutions it creates, including the legislature, it 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" (22).*

During the parliamentary debates which preceded the enactment of Act XIV of 1987, it was argued that if a human right as expressed in the Constitution, had a more limited extension than as expressed in the Convention, the latter should prevail once it became part of Maltese law. It was stressed that the principle should always be that the human rights provisions with the more extensive definition should prevail *(22)*.

2. The Constitutional Court as a Guardian of Human Rights.

An independent judiciary is an indispensable requisite of a free society under the Rule of Law. This implies freedom from interference by the Executive or the Legislature with the exercise of the judicial function.

It is the Civil Court, First Hall which has original jurisdiction to hear and determine applications alleging the breach of an individual's fundamental human rights. However, according to Article 46(2) of the Constitution the Court may, *"if it considers it desirable so to do, decline to exercise its powers under this subsection in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law*". The wording is very different to that found in Article 26 of the European Convention on Human Rights which stipulates: *"The Commission may only deal with the matter after all domestic remedies have been exhausted"*.

When it is clear that the applicant has ordinary remedies at his disposal, the applicant must exhaust these remedies prior to filing a constitutional application. However, in terms of Article 46(2) of the Constitution, where the applicant has not made use of such a remedy, this does not necessarily mean that the Court is bound to decline jurisdiction to take cognizance of the case. This would for example be the case where the remedy available

would only provide a partial remedy to the complaint of the applicant [Dr. Mario Vella v. Joseph Bannister nomine decided by the Constitutional Court *(23)*]. It is contended that the legislator conferred such a wide discretion on the Court in the interest of the better administration of justice. In this way, applicants are precluded from filing unnecessary constitutional proceedings, while those applicants who have a genuine interest in seeking a constitutional remedy, can exercise their right without being hindered by unnecessary legal obstacles.

In the case Joseph Arena nomine v. Commissioner of Police et al *(24)*, the Constitutional Court held that there was no provision in the Constitution which expressly or implicitly required that the remedies available under ordinary legislation had to be necessarily exhausted in order for the court to exercise its constitutional jurisdiction. While it is obvious that a constitutional application is the ultimate judicial remedy, the right to a constitutional remedy is not subject to such a condition. It is not correct to argue that an aggrieved party cannot refer his complaint to the Constitutional Court if and until the ordinary remedies are exhausted. The Court further held that even in respect to proceedings for the safeguard of human rights under the European Convention, there may be special circumstances when the applicant is freed from the obligation to exhaust domestic remedies even though the same may be adequate and effective. The European Commission itself held that there may exist circumstances where it is not reasonable to apply this rule in a rigid manner.

The Constitutional Court is the highest court in the court hierarchical system in Malta. This Court was originally composed of the Chief Justice and four other judges. Its constitution is guaranteed by the Constitution and the relevant provisions cannot be amended without a two-thirds majority vote of all members of the House of Representatives who must vote in favour of such an amendment.

The court is entrusted with the function of securing the enjoyment of freedoms and rights of individuals, thereby becoming a central support for democracy. The Constitution provides for the automatic setting up of the Constitutional Court, thereby ensuring that the highest judicial organ, entrusted with the duty of ensuring the safeguarding and enforcement of the people's constitutionally protected rights, is able to function at all times. Section 95(6) of the Constitution provides that if, for any reason the Constitutional Court is not constituted according to law, the three most senior judges, including where possible the Chief Justice, would automatically assume the powers and jurisdiction of the Constitutional Court without the need of any further formality or appointment. This amendment to the Constitution was introduced following a constitutional crisis in the 1970s when the Constitutional Court was suspended for a number of months.

A main argument against the setting up of a separate Constitutional Court is the danger of politicisation of such a court. Under Maltese law the appointment of judges who will sit on the Constitutional Court does not in

any way guarantee the representation of political tendencies. This notwithstanding that it is the President of Malta who has the duty of assigning to judges the chambers of the court in which they are to serve. Upon taking office the members of the judicature are by law and custom expected to sever any political affiliations or connections.

The Constitutional Court may well be described as the guardian of the Constitution. It acts above and beyond changes which occur in the political arena. It is completely insulated from political control, including government, parliaments and the pressure of political parties and interest groups.

Of its nature, the Constitutional Court is an appellate court. It hears and decides appeals from decisions of the First Hall of the Civil Court on applications for redress in respect of alleged violations of the human rights protected by the Constitution and by the European Convention on Human Rights. It also considers appeals from decisions of any court of original jurisdiction on questions as to the interpretation of the Constitution and the validity of laws. However, it also exercises an ordinary jurisdiction in determining questions as to whether a member of the House of Representatives has been validly elected or whether any member is bound by law to cease from performing his duties as a member of the House. It has jurisdiction in deciding over the validity or otherwise of a general election which has been suspended by the Electoral Commission, where it is for example believed that illicit practices have occurred.

The procedural mechanism is regulated by the Court Practice and Procedure Rules of 1993. The application must state clearly and concisely the circumstances out of which the appeal arises, the reasons of appeal and the prayer for the reversal or a specific variation of the decision appealed from. Time – limits and procedures for filing, service on the respondent to file a reply, and for the date of hearing or its abridgment, are also stipulated *(25)*. In almost all the cases in which the Constitutional Court must rule, there exists a previous judgement which has been delivered by another judicial organ.

Furthermore, if while proceedings are pending in any court other than the First Hall of the Civil Court or the Constitutional Court, an issue arises as to the breach of a fundamental freedom and right of any one of the parties to the proceedings, then that particular Court is bound by law to refer the issue to the First Hall of the Civil Court. This referral is made as long as the issue raised is not frivolous or vexatious. The Court would be bound to order such a referral upon the satisfaction of the following conditions:

(a) Proceedings are pending before a Court;

(b) Such proceedings must not be pending before the First Hall of the Civil Court or the Constitutional Court.

(c) The issue must be raised during the proceedings;

(*d*) The issue must refer to an alleged breach of any one

of the provisions of Articles 33 to 45 of the Constitution which regulate the fundamental freedoms and rights of individuals;

(e) The raising of the issue must not be frivolous or vexatious.

This interpretation has been extended by case – law to breaches of fundamental human rights contemplated by Act XIV of 1987.

The scope of this provision is to limit the procrastination of judicial proceedings especially as regards to issues which of their very nature are frivolous and vexatious. Thus, the law aims at doing away with delaying tactics.

It is pertinent to note that this procedure operates as a staying of proceedings, whereby the decision in Constitutional proceedings will be binding upon the Court referring the question, be it a Court of first instance or second instance.

Where a referral has taken place and the court determines for example that a provision of the law is contrary to the Constitution, it is the legislator who must remedy this unconstitutionality by enacting new legislation *(26)*.

3. Human Rights Cases Decided by National Courts.

The Constitutional Court has throughout this last decade considered several applications in which the European Convention on Human Rights has been invoked by the applicant. In this respect it is suggested to examine certain areas which have been examined by the Constitutional Court.

3. 1 The Right to Privacy.

Article 8(1) of the European Convention provides that: *"Everyone has the right to respect for his private and family life, his home and his correspondence".*

In this regard Article 38 of the Constitution is more restrictive in its wording and provides that: *"no person shall be subjected to the search of his person or his property or the entry by others on his premises".*

The inviolability of an individual's home is but one aspect of the wider and much more complex concept of the right to privacy. Nowadays, domestic legislation aims at safeguarding other aspects such as non-disclosure of professional secrets, secrecy of telegraphic correspondence.

A number of cases have come before the local courts dealing with this aspect:

3.1.1 The Legal Acknowledgement of Transexuality.

To date, only one issue relating to transexuality has been dealt with by the local courts. This relates to the allegation of breach of respect for private life, resulting from the lack of procedures for change in the indication of sex and name on the original birth certificate. In Lawrence k/a Roxanne Cassar v. Prime Minister et *(27)*, the court examined the case in the light of principles established in the case - law of the European Court. In this respect the Court considered that the decision depended on the fair balance that had to be struck between the general interest of the community and the interests of the individual. As a result controls by the State which seek to establish the identity of the individual are inevitably restricting the area of privacy of the individual. The Court concluded that the entry in the birth certificate did not in itself amount to a breach of Article 8, as merely historical facts were being recorded therein. However, it still ordered an annotation in the birth certificate, in the sense that applicant had by means of surgery obtained the female sex.

A more recent judgement is that delivered by the First Hall of the Civil Court in the names Raymond Gilford known as Rachel Gilford v. Director of Public Registry *(28)*. The Court recognized the fact that the right to privacy consists essentially in the right to live one's own life with a minimum of

interference. The Court considered that there was nothing in the law which prohibits a person from undergoing a gender re - assignment operation. Thus, should not the State provide the necessary measures so that a person could enjoy his newly achieved sexual identity?

The Court ordered that the birth certificate should indicate the present physical appearance of the applicant. However, due to the serious implications which a change in the indication of sex on a person's birth certificate may have, the Court further ordered that the Director of Public Registry includes a note in the birth certificate stating that the change was effected in terms of a judgement delivered by the Court after applicant had undergone gender re - assignment surgery. The Court argued that in certain circumstances society was entitled to be aware of the change in the birth certificate, since it could be a relevant and determining factor if for example applicant decided to contract marriage. It is pertinent to note that the case is still pending final judgment before the Constitutional Court.

3.1.2 Right to Respect for Family Life.

In the Martin Vella case *(29)* the Constitutional Court considered the issue concerning the adoption of illegitimate children. According to Section 115(3) of the Civil Code *(30)*, the adoption of a legitimate child is possible only if there is mutual consent of both parents. This does not apply to illegitimate children where the mother's consent suffices. The natural father is merely entitled to be heard by the court.

The Constitutional Court held that although applicant was objecting to the adoption of his daughter, it considered that if the minor were adopted she would acquire the status of legitimacy. The Court emphasized that the first and paramount consideration is the welfare of the child to which other considerations must be subordinate. Although nowadays we speak of equality between legitimate and illegitimate children, the Court expressed the view that it would be preferable for a child to be brought up in a legitimate family.

It is interesting to note that in the reasoning adopted by the court it is evident that it considered that in the field of fundamental human rights there are diverse situations of conflict between the fundamental rights of different persons who find themselves in conflicting relations. These conflicts have to be resolved by an examination of the hierarchy of the same rights.

Notwithstanding its decision the Court confirmed certain principles established by the European Court, including:

(i) The notion of family in terms of Article 8 is not solely confined to marriage based relationships;

(ii) A child born out of wedlock is *ipso jure* part of that family unit from birth;

(iii) That between the child and his parents there is instilled from the very outset a bond amounting to family life even though at the time of birth the parents may no longer be cohabiting;

(iv) Respect for family life requires that biological and social reality prevail over a legal presumption.

3.1.3 Entry and Search by the Police.

The entry by the police and certain other public officers on private premises is envisaged in the Criminal Code *(31)* and other laws such as the Customs Ordinance *(32)*, the Investment and Services Act *(33)* and the Banking Act 1994 *(34)*. The power of the police to enter premises is directly connected with the general duty to preserve the peace and public order, prevent, detect and investigate offences, collect evidence and bring offenders before the judicial authorities. The possibility that such a power is abused is regulated in the Criminal Code itself under the heading *"Of Abuse of Authority and of Breach of Duties pertaining to a Public Office"*. Thus, it is an offence for a public officer to enter, under colour of his offices, in cases other than those allowed by law or without the formalities stipulated by law *(35)*. Ordinary law aims at affording effective protection to the inviolability of the home.

In the case Lawrence Sant v. Commissioner of Police *(36)*, applicant alleged a breach of his rights as protected under Article 8 of the Convention.

Police officers had effected a search in applicant's residence, which search was recorded on film. The Constitutional Court declared that the police have no right to enter into an individual's home except for a valid reason. The Court deplored the fact that the search was carried out early in the morning and that the footage recorded during the search included also shots of intimate belongings of the applicant's wife. However, the search was in accordance with the law as:

(a) The police officer effecting the search had the authority to do so;

(b) There were reasonable indicators that a crime had been committed of which the applicant was suspected;

(c) The police officer had fulfilled his duties of informing the applicant of his authority to carry out the search and the reasons leading to the same.

3.1.4 Recording of Telephone Conversations.

In a recent case *(37)*, applicant was contesting the validity of a number of prison regulations concerning restrictions on correspondence and telephone conversations, amongst which was Regulation 59:

"All telephones within the prisons shall be equipped for monitoring and recording of conversations. Any Director may authorise the intentional hearing of such conversations to safeguard members of the public or to safeguard the security or safety within the prisons or to prevent furtherance of any illegal activity".

The Court considered that Article 8 of the Convention had as its main object that of protecting the individual against arbitrary interference by the public authorities in his private and family life. According to the Court, this was not an absolute right, and the State could intervene as long as it satisfied one of the conditions stipulated under Article 8(2) of the Convention. The arrest of a person after a judgment or under preventive custody, implies certain restrictions to the enjoyment of his private and family life. The Court also considered that a democratic society required the striking of a balance between the legitimate interests of public order and security and that of the rehabilitation of prisoners. The Court concluded that the recording of the telephone conversation was permissible under the particular circumstances, as it concerned the planning of an illicit activity. Thus, the interference was justifiable and Regulation 59 was deemed to satisfy the condition of Article 8(2) of the European Convention and Article 38 of the Constitution.

3.2 Discrimination.

Article 45 of the Constitution affords protection from discrimination on the grounds of race, place of origin, political opinions, colour, creed or sex. This provision proclaims the principle that no law may introduce any provision that is discriminatory either of itself or in its effect, and that no person may 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.

The following differences can be said to arise between Article 45 of the Constitution and Article 14 of the European Convention on Human Rights:

(a) The five grounds listed under the Constitution are exhaustive, whereas this is not the case with regards to the grounds found in Article 14 of the European Convention.

(b) Whereas in terms of Article 14 one must prove some form of connection between the violation of one of the rights and freedoms set forth in the Convention and the violation of Article 14, this requirement is not found under Section 45. In the case Charles Spiteri v. Minister of Public Works et al *(40)* decided by the Constitutional Court, it was held that under Section 45 of the Constitution, the concept of discrimination is independent from the concept of freedom of expression as laid down in Article 41 of the Constitution. It is possible to have a violation of Article 45 without having at the same time a violation of the right protected under Article 41. This does not mean that you cannot have a concurrent breach of Article 45 and Article 41 of the Constitution.

3.2.1 <u>Discrimination based on Sex.</u>

The European Court has expressed the principle that: *"the advancement of the equality of sexes is to-day a major goal in the Member States of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention"* (Burghartz v. Switzerland – 22nd February 1994; Schluer – Zoraggen v. Switzerland, 24th June 1993; Abdulaziz, Cabales and Balkandali v. United Kingdom, 28th May 1985).

This attitude appears to have been adopted in the case Paul Stoner et v. The Hon. Prime Minister et *(41)*. In this case the Constitutional Court went so far as to declare a provision of the Maltese Constitution protecting the right to freedom of movement as being discriminatory on the basis of sex under another provision of the Constitution. Applicant, an English citizen, and his wife, a Maltese citizen, challenged the decision of the competent authorities not to let applicant live in Malta. Section 44(4) (c) of the Constitution, dealing with the right to liberty of movement, stipulates that any person who is the wife of a person who is a citizen of Malta and is living with that person, *"shall be deemed to be a citizen of Malta*".

The Constitutional Court held that in protecting the liberty of movement solely to women, the Constitution makes a discrimination. The complaints of the applicants were held to be justified on two grounds:

(i) If the discrimination in the protection of the freedom of movement were removed, Paul Stoner would be entitled to be deemed by right, a citizen of Malta;

(ii) As the law stands, applicant's wife, a Maltese citizen, was being discriminated against since she was placed at a disadvantage from the fact that she married a foreign citizen, when compared with foreign women who marry male Maltese citizens, and to male Maltese citizens who marry foreign women.

In delivering judgement the Constitutional Court also considered that in 1987, the Maltese Parliament approved the European Convention on Human Rights and Fundamental Freedoms. Later in March 1991, Government signed the UN Convention on the Elimination of all forms of Discrimination against Women. In July, the Constitution was amended to provide a legal remedy to individuals who suffer sexual discrimination. Such radical changes were motivated by the principle that man and woman should enjoy equal rights.

The Constitutional Court emphasized that there was no justification for the difference in treatment, and held that the above-mentioned Article was discriminatory on the basis of sex, as it treated in a different manner a foreign husband of a Maltese citizen, from a foreign wife of a Maltese citizen.

3.2.2 Discrimination on Religious Belief.

Article 40 of the Constitution of Malta stipulates that: "all persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship". The freedom of conscience and religion is one of the foundations of a democratic society. This Article is included amongst those provisions of the Constitution which require no less than two – thirds of all member of the House of Representatives for purposes of amendment. It appears that the right protected by Article 40 of the Constitution, appertains to natural persons, churches and other legal organizations *(42)*.

As in the case of the European Convention, Maltese law does not define the terms *"conscience"* and *"religion"*. It would seem that the interpretation of these words should be according to their meaning in common usage. Furthermore, nothing contained in or done under the authority of any law is to be held to be inconsistent or in contravention of Article 40 where the limitation is imposed in the *"interests of public safety, public order, public morality or decency, public health, or the protection of the rights and freedoms of others, 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"*.

Similarly, Article 45 provides protection from discrimination on grounds of race, place of origin, political opinions, colour, creed or sex. The use of the word "creed" constitutes a marked difference between the Constitution and

other human rights instruments, particularly the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief, and the European Convention on Human Rights. Although to date there is no reported case – law defining the term "creed", it is submitted that it covers a variety of situations.

To date there has been one judgment where the Constitutional Court declared that there was discrimination on this ground. The Archbishop of Malta sued the State following the enactment of the Devolution of Certain Church Property Act of 1983 *(43)* and Act XI of 1983. Applicant alleged that such legislation imposed certain obligations on the Catholic Church, which were not imposed on other churches or religions. Respondent on the other hand, submitted that this was not the case as the law was aimed at ecclesiastical entities, thus including all churches and religions. However, this submission was contradicted by the applicants who stated that the reference to masses for the repose of the souls of the deceased, as well as the use of the term "ecclesiastical", only affected the Catholic Church and, with certain limitations, the Orthodox Church in Malta.

Amongst the various complaints, was the restriction of making donations by persons professing the Roman Catholic Religion for the celebration of masses for the repose of souls. The law stipulated that such donations could only be made for a maximum period of twenty – five years. The First Hall of the Civil Court (44), upheld applicant's grievance and declared that this

restriction was tantamount to discriminatory treatment. The same conclusion was reached with respect to a provision in the law which deprived the Roman Catholic Church from acquiring rights over property by means of prescription, even though according to Canon law prescription had no value unless based on good faith.

3.3 Freedom of Expression.

In Malta, press censorship was abolished way back in 1839 *(45)* and the Constitution proclaims freedom of the press. This includes the right to impart opinions without being subjected to interference. The media is free to bring to the notice of the public, any matter of public interest or concern. The law itself recognizes this by the defence of fair comment on a matter of public interest. However, this right is not free from limitations, which include legislative provisions as are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons.

A number of decisions have been delivered by the Court of Appeal wherein it emphasized that people holding public office are subject to close control and scrutiny in the execution of their functions. Such control is to be performed not only by their direct rivals in the institutions of the State or other organizations, but also by public opinion which to a large extent is formed and expressed in the media. Freedom of expression is to be ensured even in respect of information which may be regarded as offensive, or which may shock or disturb the State or any sector of the population.

Such are the demands of pluralism and tolerance, without which there can be no democratic society. Thus, a politician should be prepared to accept even harsh criticism of his public activities and statements, and such criticism should not be understood as defamatory, unless it throws a considerable degree of doubt on his personal character and good reputation. Politicians, inevitably and knowingly lay themselves open to scrutiny of their words and deeds by both journalists and the public at large.

The judgements emphasized that the need to afford protection to politicians has to be weighed in relation to the interests of open discussion of political issues. In this respect reference is made to the following judgements delivered by the Court of Appeal: Angelo Fenech propio et nomine v. Carmelo Callus et al. *(46)*; Hon. Lorry Sant v. Victor Camilleri *(47)*; Richard Vella Bamber v. Joe A. Vella et al. *(48)*.

These principles were also highlighted in a judgement delivered by the Court of Magistrates (Malta) in the criminal proceedings The Police v. Olaf. A Cini. In this case a journalist, notwithstanding a ban from publication, continued to publish articles concerning such proceedings. The Court emphasized that whilst the mass media was duty bound not to overstep the bounds imposed in the interests of the proper administration of justice, it was bound to impart information and ideas concerning matters which come before the courts just as in other areas of public interest. In delivering judgement the Court referred to various decisions of the European Court, including Sunday Times vs United Kingdom (26th April 1979), Handyside v.

United Kingdom (7th December 1976). Furthermore, the Court referred to the writings of Jeremy Bentham who contended that: "*Publicity is the very soul of justice. It is the keenest spur to ercion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.....*" *(49).*

Among the rights and freedoms of the individual is the right to a fair trial. The public character of judicial proceedings remains a fundamental principle of Maltese law. It is an established fact that the courts cannot operate in a vacuum. Whilst being the forum for the settlement of disputes, it does not mean that there can be no proper discussion of disputes elsewhere, whether it is in specialised journals, in the media or amongst the public at large. However, under Maltese law the courts enjoy a general power to prohibit the publication of reports of criminal proceedings before the termination of such proceedings *(50).* It is a fact that as a general rule the press in Malta is reasonably prudent in such matters. Thus, in similar cases the courts are faced with the principle of the publicity of criminal proceedings on the one hand and that of the presumption of innocence on the other.

In a recent judgement delivered by the Constitutional Court in the case Dr. Lawrence Pullicino v. The Hon. Prime Minister et al. *(51)*, the court held that publicity is a means of guaranteeing the fairness of trial. It helps to maintain public confidence in the administration of justice by removing any doubt as to the manner in which it is conducted. On the other hand, a virulent press campaign could prejudice the fairness of a trial by influencing

public opinion. In this particular case, although the press had given extensive coverage, one is to expect press comments on a trial involving a matter of public interest. The Court further expressed the view that in a trial by jury, a prejudicial comment may be countered by the judge himself during the proceedings by the statements he makes to the jury to discount such comments. This would have a neutralising effect on such undue influences.

3.4 The Right to the Enjoyment of One's Property.

In this particular area it is generally felt that Section 37(1) of the Constitution which protects individuals from deprivation of property without compensation, has a wider application than the provision found under the European Convention for Human Rights *(52)*. This view has also been confirmed by local judgements, Oliver Siracusa nomine v. The Hon. Prime Minister et al. *(53)*, and Alfred Balzan v. The Hon. Prime Minister et al. *(54)*.

Section 37 of the Constitution sets out four guarantees over the right to property:

(a) Property, interest in or right over property of any description may only be compulsorily taken possession of or acquired by virtue of a law;

(b) Such law must provide for adequate compensation;

(c) The law must also provide for the access of the aggrieved person to an independent and impartial court or tribunal for the purpose of determining: (I) such person's interest in or right over the property which was taken possession of or acquired; (II) the amount of compensation to which such person is entitled; (III) ensure payment of such compensation;

(d) Such law is also to ensure a right of appeal from any of the above determinations.

It has been argued that Article 37 of the Constitution protects the right not only to own but also to enjoy property. Thus, in the case Doris Spiteri v. Commissioner of Police *(55)*, an injunction was issued prohibiting the removal of plaintiff's vending stall. The Court declared that the removal would have constituted a deprivation of applicant's right to the enjoyment of her property. This position appears to be reinforced by Section 38 of the Constitution where, no person shall be subjected to the search of his person or his property or to the entry by others of his premises. However, in the case Hon. Dominic Mintoff et al v. The Hon. Prime Minister et al, the First Hall of the Civil Court *(56)* held that it was not clear whether the protection afforded by Article 37 of the Constitution included the deprivation of enjoyment of one's property. The Court expressed the view that Article 32 of the Constitution listed as one of the fundamental rights and freedoms of the individual, the right to the enjoyment of property. However, this Article

was not enforceable in front of a court of law and was merely a declaration of principles.

It is interesting to note that the Constitution does not define property. The Civil Code *(57)* in Article 307 provides that, *"All things which can be the subject of private or public ownership are either movable or immovable property"*. However, the Constitution speaks of *"property of any description"*. This would appear to include any possible asset, economic unit or any right protected by law whether real or personal, which can be estimated in money. Thus, for example leaseholds have been deemed to constitute a property capable of protection. In Ferro v. Housing Secretary *(58)* the Court nonetheless acknowledged that plaintiff in a tenancy relationship with a third party, could have pleaded protection under this Article. On the other hand squatters who occupy property under no valid title, cannot plead violation of Article 37 *(59)* of the Constitution.

Although the Constitution itself stipulates that it is the supreme law of the land (Article 6), there are certain exemptions which emanate from ordinary law. Thus, for example Article 47(9) of the Constitution provides that *"nothing in section 37 of this Constitution shall affect the operation of any law in force immediately before 3rd March 1962…"*. This provision came under severe criticism in 1992 during parliamentary debates concerning proposed amendments to the Housing Authority Act *(60)*. It was contended that the above – mentioned provision was intended only as a temporary provision. At the time the gradual removal of this provision was

suggested, allowing a transitory period to amend those laws which can be seen to violate the Constitutional safeguards under Section 37(1).

Notwithstanding this clear immunity, the local Courts have had occasion to mitigate the effects of certain privileged laws.

It should be noted that exemptions to Article 37(1), particularly Article 47(9), have been mitigated by the enactment of Act XIV of 1987. Laws in force before the 3rd March 1962 must now satisfy Article 1 of the Protocol Number 1. This was confirmed in the case Tarcisio Borg v. Parliamentary Secretary for the Environment et al decided by the First Hall of the Civil Court *(61)*. The Court held that the provision that no person shall require any proof of the public purpose for the expropriation of land *(62)*, other than the declaration of the President of Malta, was no longer applicable with the enactment of the European Convention Act. The Court held that it was to be satisfied that the expropriation of land was in the public interest. It also confirmed that the Land Acquistion (Public Purposes) Ordinance *(63)* could not impose limitations on Article 1 of the First Protocol.

A landmark judgement in this area of human rights was delivered by the Constitutional Court *(64)* in the case The Hon. Dominic Mintoff et al. v. The Hon. Prime Minister et al. Applicants filed a constitutional case alleging a breach of Article 37 of the Constitution and Article 1 of the First Protocol of the European Convention. They alleged that the building of a power station a couple of metres away from their residence constituted a

breach of their fundamental right to enjoy their property. The Constitutional Court emphasized, that in this respect protection was to be afforded to an individual not only where there was an expropriation in the true sense of the word, but also in the absence of a formal transfer of ownership (referred to as a *de facto* expropriation). In such a case there would still be a diminution in the attributes of ownership. Although in cases of public interest the State is granted a wide discretion on a national level, a balance had to be struck between the interests of the community and the property rights of the individual.

The Court concluded that:

(a) From the evidence produced, the negative effects of the power station on applicant's residence could have been easily predicted by the authorities.

(b) The authorities had originally intended to expropriate applicant's property. However, it was later decided not to proceed with the expropriation.

(c) There was nonetheless a *"de facto"* expropriation as applicants are being deprived from enjoying their property. Since their property was not expropriated according to law they were not entitled to claim compensation under the ordinary law.

(d) Furthermore, the economic value of the property was diminished to such an extent that it is difficult to predict that applicant's property retained a commercial value. Applicants' quality of life was also adversely affected and they had to bear an excessive burden.

(e) Although the State enjoys a wide margin of appreciation in determining what is in the public interest, and it had every right to determine where the power station was to be built, it failed to exercise the concept of proportionality. A fair balance had to be struck between the demands of the general interests of the community and the requirements of the individual's fundamental rights.

3.5 Fair Trial

Even before the enactment of our Constitution in 1964, fundamental rights were guaranteed to the individual charged with a criminal offence. As rightly stated by Prof. J.J. Cremona when commenting on the Criminal Code which was promulgated in 1854, *"it is remarkable for the liberal protection afforded to the person charged or accused, while in general elaborating and consolidating the liberal principle introduced by the Constitution of the Criminal Court"* (*65*). This view was also expressed by the Constitutional Court in the case Police v. Belin sive Benigno Saliba *(66)*. In this respect reference is made to the following provisions of the Criminal Code *(67)*:

(i) Article 454(4): Where the accused does not simply answer that he is guilty, another answer, or his silence, shall be taken as a plea of not guilty. This provision is in line with the rule that the prosecution has to prove the facts alleged against the accused, and the latter on his part need not even utter a word in his own defence as he does not have to prove anything;

(ii) Article 489: During a trial, previous convictions of the accused are not to be disclosed to the jury;

(iii) Article 518: The acts and documents of the courts of criminal justice shall be accessible to the accused;

(iv) Article 519: It is the duty of the courts of criminal justice to see to the adequate defence of the parties charged or accused;

(v) Article 527: A person cannot be tried more than once for the same fact;

(vi) Article 531: Sittings are to be held in open court except if conducted in public, they might be offensive to modesty, or might cause scandal;

(vii) Article 570: An accused who does not have the financial means to defend himself may request that he be assisted by the Advocate for Legal Aid, who shall gratuitously undertake the defence of the accused.

(viii) Article 634: The accused may give evidence at his own request. The failure of the accused not to tender evidence shall not be made the subject of adverse comment by the prosecution.

(ix) Article 639: Evidence tendered by an accomplice against the accused shall not suffice on its own, unless the evidence of the accomplice is corroborated by other circumstances;

(x) Article 646: Witnesses are to be examined in court and *viva voce*.

On the other hand, a provision which has frequently come under serious criticism is Section 636(b) of the Criminal Code, which provides that *"No objection to the competence of any witness shall be admitted on the ground … that he was charged with the same offence in respect of which his deposition is required, when impunity was promised or granted to him by the Government for the purpose of such deposition"*. The criticism is based on the following arguments:

(i) Immunity from criminal proceedings is "promised or granted" by the Executive according to its own discretionary powers;

(ii) It prevents the accused from producing evidence which may illustrate that the witness "promised or granted" impunity is an incompetent witness.

The existence of courts in a legal system and the need to take care to ensure the independence of those called upon to operate within those courts is fundamental to modern society and the rule of law. It is not surprising that local Courts have been frequently called upon to decide cases in the interpretation of Article 6 of the Convention, the Article guaranteeing a fair trial *(68)*. The Constitutional Court has on various occasions declared that the essence of a court is its independence, and in several cases has examined that there has been no bias and that the adjudicating officer was able to deliver an impartial decision

In the case Cecil Pace et al. v. Hon. Prime Minister *(69)*, applicants contended that the setting up of an Appeals Board to determine certain issues under the Controlled Companies (Procedure for Liquidation) Act, was in flagrant breach of Article 39(2) of the Constitution and Article 6(1) of the European Convention. The Court declared that it was evident that both documents envisaged the possibility that an individual's civil rights and obligations could be determined by a court in the true sense of the term or by any other adjudicating authority established by law, on condition that they were independent and impartial. In establishing whether the tribunal or adjudicating authority was independent, the Court must have regard to the manner of appointment of its members, term of office and guarantees that ensure that the authority is free from extraneous pressures. Furthermore, members must enjoy security of tenure during their term of office except in grave circumstances stipulated in the law. In so far as impartiality is concerned, this requirement is satisfied by complying with a subjective and

objective test. The subjective test is based on the personal conviction of a particular member in a given case, and the objective test is to ascertain whether the member offered guarantees sufficient to exclude any legitimate doubt as to his impartiality.

In the case Antonia Bartolo proprio et nomine v. The Hon. Prime Minister et al *(70)*, a board of inquiry was set – up by the Minister of Transport following the disappearance of an aeroplane. Applicants alleged that the tribunal was not impartial and independent, and alleged a breach of their fundamental human rights as protected by Article 6(1) of the European Convention and Article 39(2) *(71)* of the Constitution. The Board of Inquiry was set in terms of the Civil Aviation (Investigation of Accidents) Regulation 1956. The Constitutional Court argued that the functions of the Board of Inquiry were merely investigative. The final report could not affect any of the parties concerned, and the Minister could very well ignore the conclusions reached therein. However, the report could be relevant where the Minister decides to take certain measures on the conclusions reached, either personally or on an administrative level through one of the organs of the State. However, in such an eventuality, the interested party would still be entitled at law to request the judicial review of such administrative action. This in itself was considered as a safeguard for ensuring a fair hearing in front of an impartial and independent tribunal. The same would apply if following the report criminal proceedings are instituted against any party. The report can in no way prejudice the accused who enjoys all the necessary safeguards entrenched in the Constitution, the Convention and the Criminal Code. The Court further opined that

impartiality and independence call for an absolute separation between the executive power and the judiciary. Thus, dependants of the Executive should under no circumstance be granted a judicial function, even though this may merely involve the appointment of an expert to assist a Court in reaching its decision. This principle was applicable notwithstanding that the appointed persons possessed technical qualifications to express an opinion in respect of the facts in issue *(72)*.

A particular guarantee of the independence of the judiciary is the immunity of Judges and Magistrates from proceedings for acts done in the exercise of their duties as adjudicators. In the case Hon. Lino Debono v. Magistrate Dr. Michael Mallia, decided by the First Hall of the Civil Court *(73)*, applicant alleged a breach of his fundamental right to a fair hearing by the contents of a judgement delivered by respondent.

The Court noted that this was the first case where an adjudicator was personally sued for something which, he had done in his capacity as Magistrate. The Court argued that the Constitution aimed at protecting the independence of the judiciary in order to allow it to fulfil its duties in accordance with justice and unhindered by any possible fear. If it were possible to sue one of its members personally for anything done in the exercise of his function as adjudicator, then the judiciary could no longer be considered independent and society itself would suffer since justice will not be done. Thus applicant's request was dismissed.

So fundamental is the right to a fair trial, that in a judgement delivered by the Constitutional Court *(74)* in the case Lawrence Cuschieri v. Hon. Prime Minister et al, the Court envisaged the possibility that the Constitutional Court could commit a breach of an individual's right to a fair hearing. The Court declared that Article 6(1) of the European Convention not only contains procedural guarantees in relation to judicial procedure, but also grants a right to judicial procedure. This Article creates a substantive right for a fair trial, which must necessarily be protected in all proceedings in any court, which is determining an individual's civil rights and obligations. This judgement did away with the notion that the Constitutional Court did not determine an individual's civil rights and obligations, and that it is only concerned with constitutional rights, in that it decides on issues as to the compatibility with the Constitution of any acts or measures by public authorities in the exercise of public power.

Similarly, in The Police v. Carmelo Ellul Sullivan et al. *(75)*, applicants alleged that Article 79 of the Code of Organization and Civil Procedure *(76)*. This Article barred lawyers who were also Members of Parliament from assisting an accused in certain cases. The Court held that this provision constituted a breach of the accused's right to a fair hearing since it prohibited him from choosing his own lawyer. In interpreting Article 6(1) of the European Convention, the Constitutional Court applied a wide interpretation to the words *"civil rights"*, and declared that constitutional rights were likewise covered by the protection of this Article. Such a deprivation would mean that the accused was not provided with a full opportunity to present his case.

An interesting issue concerned the appointment of court experts who were employed with the Police Corps, in criminal proceedings. In the case Nicholas Ellul v. Commissioner of Police decided by the First Hall of the Civil Court *(77)*, applicant alleged that his fundamental right to a fair hearing had been violated by the appointment of ballistic experts who were at the same time members of the Police Force. The prosecution was being conducted by the Police Commissioner. The Court argued that the appointment of an expert by a court has the affect of changing the role of the appointed person from an *ex parte* expert to a court expert. The Court held that the appointment of such experts could not be said to respect the notion of a fair hearing since such experts were not only closely connected with the prosecution but were also its dependants. The judgement was confirmed by the Constitutional Court.

A similar conclusion was reached by the Constitutional Court in the case Police v. Longinu Aquilina decided on the 23rd January 1993. The Court declared:

(i) It is advisable that police officers are not appointed as experts by the Magistrate at any stage of the proceedings;

(ii) The practice of an Inquiring Magistrate of appointing police experts in order to lift fingerprints from the scene of the crime, was acceptable as the same could not at that point in time be linked to any particular person;

(iii) Nor should there be an objection to the appointment of police experts merely to take the suspect's fingerprints. This merely involved a mechanical registration of fingerprints.

(iv) The appointment of an expert to effect a comparison, entails more than the mere recording of fingerprints. Their findings may constitute conclusive evidence of the guilt or innocence of the same suspect. It suggested that all scientific comparison should be given by court – appointed experts who are independent from the police authorities.

In the case John Saliba v. Attorney General et al *(78)*, it was contended that applicant could not contest the appointment of such experts, as he did not object to their appointment during the criminal proceedings themselves. The Court held that the experts were originally appointed in 1987 when the issue concerning the legality of appointing member of the Police Force as court experts, had never been tested in the local courts. At that point in time no one had ever thought of contesting such appointments and applicant's right could not be prejudiced merely on the basis that he had at the time not realized that his fundamental human right to a fair hearing had not been breached by such appointment. On the other hand, the Court declared that where it ensues that the accused was in a position to contest the appointment of the experts but nonetheless did not voice his objection, he cannot claim a breach of his fundamental rights.

An interesting statement of principle was made by the Constitutional Court in the case Gaetano Busuttil v. Hon. Prime Minister et al decided on the 16th November 1998. In this case applicant alleged that Article 30(A) of the Medical Kindred Profession Ordinance *(79)* was in breach of his fundamental right to a fair hearing. This provision of the law permits the production of statements made before a Magistrate and confirmed on oath. This is an exception to the general principle that witnesses should be heard *viva voce*. The Court observed that there was no reason at law why this type of evidence should be precluded. What is essential is that the accused is given an opportunity to control such evidence and to rebut it by cross – examining the witnesses who issued such declarations. A sworn statement was admissible at law like any other documentary evidence, thereby safeguarding the principle of equality of arms.

4. Cases Brought Before the European Court of Human Rights and the European Commission.

Since Malta introduced the remedy of individual petition, only three cases have been brought before the European Court and decided. The first judgement was delivered in the case of Demicoli v. Malta *(80).* The case dealt with the imposition of a sanction by the House of Representatives on a journalist for breach of parliamentary privilege.

Carmel Demicoli, was the editor of a political satirical periodical. Two Members of Parliament alleged breach of parliamentary privilege when an article was published in the newspaper commenting on a parliamentary session that had been transmitted live on television. They contended that the article contained insulting references to themselves. The House passed a resolution that it considered the article in question to be a breach of its privileges, and the applicant was summoned to appear before the House in order to answer a charge of defamation.

Applicant alleged that he had not received a fair and public hearing by an independent and impartial tribunal, and also complained of the failure to observe the presumption of innocence.

In its judgement the Court used the three criteria which it had laid down for the first time in the judgement of Engel and Others v. the Netherlands (8th June 1976). These were:

(I) The definition of the offence in issue according to the legal system of the respondent State. However, the indication afforded by national law was not decisive for the purpose of Article 6.

(II) The actual nature of the offence. The proceedings could not be considered to be disciplinary since they did not refer to the internal regulation and orderly functioning of

the House. The offence in issue, which included a penal sanction, was deemed to be akin to a criminal offence.

(III) The degree of severity of the potential penalty. Applicant was facing a maximum of sixty days' imprisonment. This warranted the classification of the offence with which applicant was charged as a criminal one.

The Court reached the conclusion that the House of Representatives had undoubtedly exercised a judicial function in determining applicant's guilt. The fact that the two Members of Parliament, who had raised the issue of breach of privilege, had participated throughout the proceedings sufficed to cast doubt on the impartiality of the adjudicating body and applicant's claims were justified.

In the case T.W. v. Malta *(81),* applicant alleged a violation of Article 5(3) of the Convention as domestic law did not require the police to substantiate the grounds militating in favour of his arrest and the magistrate could release him only if he submitted a bail application. The bail application had to be notified to the Attorney General, who had one working day in which to decide whether or not to oppose to applicant's demand. The bail application would be considered by a different magistrate from the one in front of whom the applicant would have appeared originally. The procedure was to allot cases by lot in order to eliminate the possibility of forum – shopping by the police.

The European Court noted that Article 5(3) of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty. Once detention is no longer reasonable, it is essentially the object of Article 5(3) to require provisional release. The Court expressed the view that, *"this provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons"*. Judicial control is to be prompt, and is not to be made dependant on a previous application by the detainee. The Court stressed that the Article aims at guaranteeing the independent judicial scrutiny of deprivation of liberty. Therefore, since according to Maltese law the magistrate had no authority to order applicant's release when the latter appeared before him for the first time, there was a breach of Article 5(3) of the Convention *(82)*.

On the 16th November 1992, judgement was also delivered in favour of a Maltese citizen by the European Court in the case Dr. Joseph Brincat v. Italy. Applicant had been arrested in Italy, and contended that he had not been promptly brought before a judge or other officer authorised by law to exercise judicial power. Furthermore, it was held that the functions of investigation and prosecution must be kept separate. The public prosecutor who had taken part in the investigations and who had decided to keep applicant in detention, could not be said to be objectively impartial as a

result of the subsequent role he had taken on as representative of the prosecuting authority.

A number of cases have also been considered by the European Commission. In Application No. 16756/90 (Connie Zammit v. Malta decided on the 12th January 1991), the issue concerned the restrictions imposed by Maltese law whereby legislation deprived an owner from recovering possession of his property on expiration of a sub-emphyteusis (sub-lease). The legislation – Act XXXVII of 1986 – granted the occupants the right to remain in possession of the premises.

The Commission concluded that the measure adopted by the Government pursued a legitimate aim in the general interest, that of protecting the interest of tenants. Notwithstanding the legislation, the applicants remained owners of their property and could thus freely dispose of it. Furthermore, they were entitled to receive rent from the occupiers. The Commission also considered the wide margin of appreciation afforded to States where the measures taken aim at regulating housing problems. Thus, the application was dismissed.

The entry and search of home by police was in issue in application number 18420/91 (Tonio Vella v. Malta). Police had entered into applicant's home without giving the authority for their action or any reasons. A search was conducted which produced no results. Applicant was subsequently arrested and kept in custody for forty – six hours, during which he was interrogated

for one hour. During proceedings an amicable settlement was reached between the parties whereby an *ex gratia* payment was effected by Government.

5. The Impact of Human Rights on Ordinary Legislation.

It is pertinent to state that human rights instruments have had a bearing on the enactment of local legislation.

A case in point is the amendment of Article of 575 of the Criminal Code *(83)*. Prior to the enactment of Act XXIX of 1989, persons accused of crimes against the safety of the Government or of crimes liable to the punishment of imprisonment for life, could not be granted bail. The above – mentioned legislation permitted the granting of bail in such circumstances.

Similarly, according to Article 79(2) of the Code of Organization and Civil Procedure *(84)*, a Member of Parliament was deprived from exercising his profession as advocate in a number of cases, for example in lawsuits where the State was a party or criminal trials where the accused was a public official. This Article was challenged in the case The Police v. Carmelo known as Charles Ellul Sullivan et al. *(85)*. The Constitutional Court held that since the number of lawyers who exercised their profession in law – suits of a constitutional nature, was limited in number, the said provision was in breach of the fair hearing guarantees afforded to those persons who

were involved in such litigation. By means of Act XXIV of 1995 this restriction was removed.

The manner of proceeding in matters concerning contempt of court has also been revised. In its report *(86)* for the review of the Code of Organization and Civil Procedure, the Commission suggested that the amendments it was proposing in this sphere of the law was aimed *"to ensure that the law in this respect is in line with the provisions of the Constitution and the European Convention on Human Rights"*. The Commission proposed that proceedings for contempt should be instituted by the Registrar of the Court. This would do away with the problem of the apparent unfairness in having the Courts act as a plaintiff against the defendant. The proposed amendment also aimed to do away with the procedure of having contempt proceedings instituted and proceeded upon by the complaining party himself. This proposal was adopted by Parliament by means of Act XXIV of 1995.

Amendments have also been introduced in connection with the powers enjoyed by the State to by-pass litigation and issue executive warrants for any amount due. Thus, prior to 1995 any head of department could recover a debt due to a government department by the issue of a warrant of seizure on the debtor's property, by simply making a sworn declaration before the Registrar of Courts or a Judge or Magistrate of the competent court. In such circumstances the debtor could either pay the amount under protest, and then sue the authority concerned or suffer the enforcement and if he

deems himself aggrieved institute judicial proceedings claiming compensation for damages. It was deemed that under such circumstances an individual's rights to a fair hearing as protected by the Constitution and the European Convention were being impaired as the debtor was not entitled to oppose the execution of a claim brought against him by a government department. In fact, the Constitutional Court also had the opportunity to rule on this matter. By means of Act XXIV of 1995 the debtor has been granted the right to contest such claims within a stipulated time period from when he receives a judicial act requesting him to effect payment. This procedure aims to secure the right of fair hearing of the individual concerned without excessively impairing the prompt exigibility of government dues.

An amendment introduced in 1995 was the removal of the impediment of departure against persons for debts owed. Although an effective precautionary measure, the basis for objection to this warrant was on the grounds of its unconstitutionality in restricting an individual's freedom of movement. This remedy was however retained in respect to vessels and the removal of minors from Malta.

Following the judgement delivered by the European Court of Human Rights in the Charles Demicoli case, an amendment was introduced in 1995 to the House of Representatives (Privileges and Powers) Ordinance *(87)* by means of Act XI. Today a breach of privilege by an individual is to be tried by the Court of Magistrates (Malta) following an order to that effect made by the

Speaker of the House to the Executive Police. In this respect the Speaker's request is subject to the authority of the House of Representatives.

The publication of a White Paper on the enactment of a new Code of Police Laws gives due account to case – law under Article 6 of the Convention.

A provision which refers to privacy is Article 3 of the Professional Secrecy Act *(88).* This Article imposes the obligation of non – disclosure on *"members of a profession regulated by the Medical and Kindred Professions Ordinance, advocates, notaries, legal procurators, accountants, auditors, employees and officers of the financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investment services under the Investment Services Act, 1994, stockbrokers licensed under the Malta Stock Exchange Act, insurers, insurance agents, insurance brokers, officials and employees of the State"*.

References.

(1) *"Similar provisions had in fact found their way into several other recent Commonwealth provisions"* (Prof. J.J. Cremona, ***The Maltese Constitution and Constitutional History Since 1813***, Malta, Second Edition 1997, p. 69).

(2) *"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 Malta as part of Maltese law, the termination of the application to Maltese legislation of the Colonial Laws Validity Act, 1865, the conferment on the Maltese 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, including the Independence Act itself, but subject in the latter case to the Constitution. The Constitution was envisaged as the ultimate and supreme legal principle at the apex of the nation's justice order"*, ibid. pp. 75-76.

(3) The Malta Independence Conference held in Marlborough House, London, 16th July 1963.

(4) An amendment was introduced by Act XIX of 1991 whereby protection was afforded from discrimination on grounds of sex, besides race, place of origin, political opinions, colour and creed.

(5) This latter provision was inspired by the deportation from Malta during the Second World War of a number of Maltese citizens, without trial.

(6) *"Subject to the provisions of subsections (7) and (9) of section 47 and of section 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).

(7) Act No. XIV of 1987.

(8) Act No. V of 1983.

(9) 12th April, 1989.

(10) 10th June, 1966.

(11) Article 34(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 subsection 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"*.

(12) 9th April, 1973.

(13) 16th April, 1973.

(14) Judgments delivered by the European Court of Human Rights are enforced by the filing of an application in the Constitutional Court and served on the Attorney

General containing a demand that the enforcement of such judgment be ordered (Article 6 of Act XIV of 1987).

(15) 30th November, 1977.

(16) 22nd April, 1997.

(17) Ordinance XVII of 1901.

(18) 22nd April, 1991.

(19) 15th December, 1989.

(20) 8th February, 1988.

(21) 27th February, 1978.

(22) *"It is true that under domestic law the Constitution remains supreme in the sense that, in the case of inconsistency with the Convention provisions, it is the Constitution that prevails (sections 2 and 3 of the Act). But then whenever, after the exhaustion of domestic remedies, a case is taken to Strasbourg (Malta made the relevant declarations under articles 25 and 46 of the Convention on the 1st May 1987), the European Court of Human Rights applies of course the Convention alone, and by the same 1987 Act its judgments are in fact enforceable in Malta as if they were judgments of the Constitutional Court"*, Prof. J.J. Cremona, ibid. p. 84.

(23) 7th March, 1994.

(24) 16th November, 1998.

(25) Legal Notice 35 of 1993 entitled Regulations Regarding Practicews and Procedures of the Courts provides: *"The application to appeal (in the Constitutional Court) shall me made within eight working days from the date of the decision appealed from, and the respondent may file a written reply within six working days from the date of service. The Court which gave a decision subject to appeal to the Constitutional Court, may in urgent cases upon demand, even by any of the parties immediately upon delivery of such decision, abridge the time for making the appeal or for filing of a reply"*.

(26) Article 242 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) stipulates: *"When a court, by a judgment which has become res judicata, declares any provision of any law to run counter to any provision of the Constitution of Malta or to any human right or fundamental freedom set out in the First Schedule to the European Convention Act, or to be ultra vires, the registrar shall send a copy of the said judgment to the Speaker of the House of Representatives, who shall during the first sitting of the House following the receipt of such judgment inform the House of such receipt and lay a copy of the judgment on the table of the House"*.

(27) Constitutional Court, 14th July, 1995.

(28) 22nd April, 1997.

(29) 22nd April, 1991.

(30) Chapter 16 of the Laws of Malta.

(31) Chapter 9 of the Laws of Malta.

(32) Chapter 37 of the Laws of Malta.

(33) Act XIV of 1994.

(34) Act XV of 1994.

(35) Article 136 of the Criminal Code.

(36) Constitutional Court,, 12th January 1994.

(37) Judgment delivered by the First Hall of the Civil Court on the 12th April, 1999 after the Court of Magistrates (Malta) as a Court of Criminal Judicature in the case The Police v. Mario Camilleri referred the issue.

(38) 5th October, 1988.

(39) 22nd February, 1996.

(40) 5th October, 1988.

(41) 22nd February, 1996.

(42) The First Hall of the Civil Court, in the case Mons. Giuseppe Mercieca proprio et al. v. The Hon. Prime Minister nomine et al (24th September 1984), declared that the Roman Cahtolic Church had a right to invoke a breach of the Article 40 of the Constitution. This judgment is a declaration of principle and is applicable to other religious beliefs.

(43) Act X of 1983.

(44) 24th September, 1984.

(45) Ordinance No. IV.

(46) 4th February, 1994.

(47) 14th February 1994.

(48) 4th November 1994.

(49) G. Robertson And Andrew G. Nicol, *Media Law, The Rights of Journalists and Broadcasters*, Second Edition, 1990, p. 11.

(50) Article 517 of the Criminal Code provides: *"Every court of criminal justice may, by an order to be signed by the registrar and posted up at the door of the building in which the court sits, prohibit the publication, before the termination of the proceedings, of any writing, whether printed or not, in respect of the offence to which the proceedings refer, or of the party charged or accused; and any person who fails to comply with the order, shall for the mere default, be guilty of contempt of the authority of the court, and be liable to punishment as provided in section 686, saving always any other punishment to which the offender may be liable according to law, in respect of any other offence arising from the said writing or from its publication"*.

(51) 18th August, 1998.

(52) Article 37 of the Constitution provides: *"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"*.

(53) Constitutional Court, 16th November 1989.

(54) Constitutional Court, 15th January, 1991.

(55) First Hall of the Civil Court, 20th July, 1988.

(56) 11th August, 1995.

(57) Chapter 16 of the Laws of Malta.

(58) Constitutional Court, 21st February, 1977.
(59) Carlo Cremona v. Minister for the Development of the Infrastructure et al. decided by the First Hall of the Civil Court in its constitutional jurisdiction on the 29th November 1989.
(60) Chapter 261 of the Laws of Malta.
(61) First Hall of the Civil Court, 3rd May 1991.
(62) Land Acquisiton (Public Purposes) Ordinance.
(63) Chapter 88 of the Laws of Malta.
(64) 30th April, 1996.
(65) *Human Rights Documentation in Malta*, 1966.
(66) 10th April, 1991.
(67) Chapter 9 of the Laws of Malta.
(68) Article 39(1) of the Maltese Constitution stipulates: *"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"*.
(69) Constitutional Court, 3rd December, 1997.
(70) 29th April, 1996.
(71) Article 39(2) of the Constitution provides: *"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"*.
(72) The Court referred to the judgment delivered by the European Court in the case Sramiek v. Austria, *"a violation of Art.6 where a member of a Court was subordinate in terms of his professional duties to one of the parties in a given suit, stating that in such circumstances, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the court must inspire in a democratic society"*.
(73) 4th October, 1989.
(74) 6th April, 1995.
(75) Constitutional Court, 5th April, 1989.
(76) Chapter 12 of the Laws of Malta.
(77) 18th March, 1991.
(78) Constitutional Court, 6th July, 1998.
(79) Chapter 31 of the Laws of Malta.
(80) 27th August, 1991.
(81) 29th April, 1999.
(82) Vide also judgment delivered by the European Court of Human Rights on the 29th April, 1999 in the case Longinu Aquilina v. Malta.
(83) Chapter 9 of the Laws of Malta.
(84) Chapter 12 of the Laws of Malta.
(85) Constitutional Court.
(86) Published in November, 1993.
(87) Chapter 113 of the Laws of Malta.

(88) Act XXIV of 1994.