

## Questionnaire

### Conference of the European Constitutional Courts

#### The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice

- 1. The legal framework for the protection of human rights in your country. Are human rights entrenched in the constitution, basic law (charter), or by ordinary law ?**

Protection of human rights is guaranteed by the Maltese Constitution in Chapter IV entitled Fundamental Rights and Freedoms of the Individual (Articles 32 – 45). Furthermore, the European Convention for the Protection of Human Rights is part of Maltese law.

- 2. Is the European Convention of Human Rights part of domestic law ? Specify the rights guaranteed. Are the rights guaranteed applicable against everyone – *erga omnes* – or are they only operative against the State ?**

The European Convention for the Protection of Human Rights together with its first Protocol were incorporated into Maltese law by the enactment of the European Convention Act (Chapter 319 of the Laws of Malta). Malta became a signatory to the Convention on the 12<sup>th</sup> December 1966, and subsequently ratified the Convention and its First Protocol on the 23<sup>rd</sup> January 1967. With effect from the 1<sup>st</sup> May 1987 Malta recognized (for a period of five years) the competence of the European Commission of Human Rights to receive individual petitions, as well as the compulsory jurisdiction of the ECHR. Subsequently, the European Convention Act (Act XIV enacted on the 19<sup>th</sup> August, 1987 - Chapter 319 of the Laws of Malta) incorporated the European Convention on Human Rights into Maltese law. 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*”.

Individuals – persons or companies – may invoke the rights guaranteed. As a general rule the guaranteed rights are applicable against the State.

- 3. Are guaranteed human rights subject to limitation ? If so, where does authority to limit them stem from ? Furthermore, are**

**guaranteed human rights subject to limitation by a clause of general purport ? or are the limitations that may be imposed correlated to each guaranteed right ?**

Human rights are subject to limitation under certain circumstances. Such restrictions are stipulated by the Constitution. Article 32 of the Constitution states that the enjoyment of fundamental rights and freedoms of the individual is “*subject to limitations... as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest*”. The provisions dealing with the particular rights provide for limitations that are correlated to the particular guaranteed right. It would therefore appear that only the restrictions expressly authorized by the Constitution are permissible and there is no room for implied limitations.

Thus for example Article 41 provides protection of freedom of expression. However, nothing that is done under the authority of any law shall be inconsistent with or in contravention of this right where the law is required in the interests of defence, public safety, public order, public morality or decency or public health. Similarly, the protection for privacy of one’s home (Article 38 of the Constitution), can be limited where a law authorises, for the purpose of enforcing a judgement or order of the court, the search of any person or property by order of the court or entry upon any premises by such order, or that is necessary for the purpose of preventing or detecting criminal offences.

**4. Are the causes for which human rights may be limited specified in the Constitution or other document guaranteeing their enjoyment ?**

Limitations to human rights are specified in the Constitution.

**5. Indicate the prerequisites for the limitation of human rights for a cause in furtherance of which limitations are permissible. Must there be dire necessity or a real and pressing need for the introduction of limitation to a human right ? If limitations are permitted which authority is the arbiter for the ascertainment of the existence of the necessity or need put forward in justification of the measure ? Is the Constitutional Court or any other Court of the country vested with jurisdiction to adjudicate upon the existence of the necessity or need for limitation ?**

The Constitution provides that limitations should aim to ensure that the enjoyment of rights and freedoms of any individual does not prejudice the rights and freedoms of others or the public interest. Those provisions of the Constitution which provide for the possibility of imposing limitations, highlight the instances where the guaranteed right may be limited.

The Civil Court, First Hall has jurisdiction over claims of breach of human rights. An appeal can be sought before the Constitutional Court. These courts act as arbiters for the ascertainment of the existence of the necessity or need put forward in justification of imposing limitations on human rights.

**6. Explain the institutional means through which a limitation to a human right may be imposed. Can limitation to human rights be introduced in any way other than through legislation ?**

Limitation to human rights are introduced by legislation for such purposes as are stated in the relevant Article of the Constitution which safeguards the particular right.

**7. Are there any entrenched human rights inamenable to limitation ? For example the right to equality, the right to a fair trial and such rights as are associated with the protection of the dignity of the individual and his bodily and mental integrity.**

In principle every fundamental right and freedom is subject to certain limitations and restrictions. However, there are certain human rights that are not subject to limitations. For example Article 39 provides that:-

- (a) No person shall be held guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence;
- (b) Every person charged with a criminal offence shall be permitted to defend himself in person or by a legal representative;
- (c) No person who has been tried by a competent court or tribunal for a criminal offence and either convicted or acquitted shall again be tried for the same offence (*ne bis in idem*).

**8. Does the Constitution or basic law restrict the period during which a guaranteed human right may be limited ?**

There is no provision for the restriction of the period.

**9. Can the limitation of a human right last longer than the necessitous circumstances that led to its introduction last ? Are the judicial authorities entrusted with jurisdiction to review the justification of a limitation to a human right for any given period of time ?**

The answer to the first question is No. As to the second question, courts have jurisdiction to review the justification of a limitation to a human right.

**10. Does the Constitution make provision for pre-emptive control of the constitutionality of any given law importing limitations to human rights ? Furthermore, is there provision in the constitution or the law for a sequential or remedial control of the constitutionality of a law limitative of the application of human rights ?**

The Constitution does not make provision for pre-emptive control of the constitutionality of any given law importing limitations to human rights. However, an individual can contest the validity of a law limitative of his human rights beyond what is permissible in terms of the provisions of the Constitution.

**11. Is there a power to suspend, as opposed to limiting, a human right ? If there is such power, which authority is entrusted with competence to suspend the application of human rights ? Are the criteria for suspension specified in the constitution or basic law ? If suspension is permissible is any decision to that end subject to judicial control ?**

Yes, during a period of public emergency, i.e. if Malta is engaged in war; or there is in force a proclamation by the President declaring a state of public emergency; or there is in force a resolution of the House of Representatives supported by the votes of not less than two-thirds of all the Members of the House declaring that the democratic institutions in Malta are threatened by subversion. A proclamation of emergency ceases to be in force at the expiration of fourteen days from the date on which it was

made. The duration of the proclamation of emergency may be extended for a further period of three months by a resolution of the House of Representatives. Similarly, a resolution of the House of Representative declaring the democratic institutions in Malta to be threatened by subversion, ceases to be in force at the expiration of twelve months from the date it was passed. The provisions of the Constitution which expressly refer to public emergency are the following:-

- (a) **Article 34** which provides protection from arbitrary arrest or detention. Anything done under the authority of any law shall not be held to be inconsistent with this provision of law where the law authorises, during a period of public emergency, the taking of measures that are reasonably justifiable for dealing with the situation. It appears that the measures could be subject to judicial review to establish whether they are “*reasonably justifiable*”;
- (b) **Article 35** stipulates that any labour required during a period of public emergency does not qualify as forced labour. It appears that during a state of public emergency, judicial review is not possible where any labour is required during such a period.
- (c) **Article 45** guarantees protection from discrimination on the ground of race, etc. The rule that no law shall make any provision which is discriminatory does not apply where the law makes provision for the taking, during a period of public emergency, measures that reasonably justifiable for dealing with the situation.

**12. Make reference to the jurisprudence of the constitutional and other national courts on the interpretation and application of human rights with particular reference to decisions enlightening on the subject of their limitation and its implications.**

*M. Choubene v. Commissioner of Police et*, Constitutional Court, 28<sup>th</sup> December, 2001 – Complainant, a foreigner, was deported from Malta and alleged a breach in his fundamental right for the protection of private and family life as guaranteed under Article 8 of the Convention. The Court concluded that the interference was in accordance with law and pursued the legitimate aim of preventing disorder or crime.

**The Police v. M. Camilleri**, Civil Court First Hall, 12<sup>th</sup> April 1999 - The 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. This was not however 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.

**N. Galea vs G. Briffa**, Constitutional Court, 30<sup>th</sup> November 2001- The Court confirmed that legislation which imposed a limitation on the right of the owner to the enjoyment of his property was subject to judicial review, thereby establishing whether such a limitation was in conformity with the Constitution. A law giving right to an occupant to convert his title into a lease was qualified as a law aimed at controlling the use of property in accordance with the general interest.

**13. The impact of the jurisprudence of international and supranational courts especially that of the European Court of Human Rights on the case law of the country in the area under consideration (limitation of rights) and the contrary; the impact, if any, of national case law on the jurisprudence of international and supranational courts on matters concerning human rights and their limitation.**

Maltese courts apply the European Convention in accordance with the case law of the European Court of Human Rights. Where appropriate reference is also made to judgements delivered by other international and supranational courts. We are not aware of any instance of application of our case-law by international and supranational courts.

#### **14. The enforceability and implementation of decisions of the constitutional court of the country on issues bearing on human rights with special reference to their limitation.**

Under Maltese law there exists no legislation which specifically deals with the enforcement of judgements delivered by the Constitutional Court. The enforcement of judgements is regulated in Articles 252 – 283A inclusive (Chapter 12 of the Laws of Malta), whether the judgement is delivered by an inferior or superior court. It must also be emphasised that in practice the utilization of any one of the executive acts enlisted by the law is not appropriate in each and every case decided by the Constitutional Court (e.g. where the Constitutional Court declares a law to be unconstitutional, the method of enforcement does not lie in any one of the above-mentioned executive acts).

Under Maltese law the principle of precedent finds no application. The legal system only recognises authoritative weight but not binding force to the judgements of the Court of Appeal. Therefore, there is no doctrine of '*stare decisis*'. Similarly, there is no provision in the Constitution providing for the statutory binding effect of the decisions of the Constitutional Court beyond the merits of the application considered and decided by it. This means that in theory the doctrine of *stare decisis* is not applicable to these judgements, just as it is not applicable to the judgements of the so called 'ordinary' courts. While it is clear that the judgements of the Constitutional Court would be binding on the other courts in so far as concerns the case specifically referred to that Court for decision, it is not at all clear that the judgement delivered by the Constitutional Court would constitute a binding precedent on other courts if a similar issue were to arise before them.

On the other hand, one can consider that certain Constitutional Court judgements, such as those regarding the validity or constitutionality of laws, are deemed to have a binding effect on its own subsequent decisions and on those of other Courts including the Court of Appeal. It would perhaps be more appropriate to consider these judgements as being the final determination by the competent constitutional tribunal of the state of the law in dispute within the country rather than as a matter of judicial precedent.

However, it is a moot point whether a judgement delivered by the Constitutional Court declaring a particular legislation as being unconstitutional, is enforceable by the introduction of an amendment to the

relevant legislation. In terms of Article 242 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) when a court, by a judgment which has become definitive (*res judicata*), declares and 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. In a constitutional case (*Maria Rosa Tabone v. Attorney General et al*) decided by the First Hall of the Civil Court on the 30<sup>th</sup> May, 2000, the Court held that where the Constitutional Court declares legislation to be unconstitutional because it is in breach of an individual's fundamental rights and freedoms, such law will no longer be applicable once the judgement is definitive (*res judicata*) and the Courts are bound not to apply the impugned law. In this judgement, the Court was evidently implying that no legislation is required to enforce the Constitutional Court's decision. A similar judgement had been delivered by the Constitutional Court in the case *Frank Cachia vs. The Hon. Prime Minister*, where the court emphasised that any provision of law declared to be unconstitutional would immediately lose its effect, without the need of an authority, to amend or revoke the law, according to the circumstances of the case. Notwithstanding, there are still those who contend that it rests with the House of Representatives to take whatever action it deems necessary to fall in line with the judgement delivered by the Constitutional Court.

Where the decision concerns the protection of fundamental human rights, the Constitutional Court is empowered to provide such remedies as will ensure and guarantee an appropriate redress for the breach of any fundamental human right as protected by the Constitution and/or Act No. XIV of 1987. Thus, for example the Constitutional Court may, when quashing a decision of a public authority, order that the matter is transmitted back to the authority for a new ruling under the terms and conditions laid down by the Constitutional Court. Where the public authority fails to conform itself with the ruling delivered by the Constitutional Court, then its actions would be *ultra vires* and contrary to law.

Probably, the enforcement of judgements delivered by the Constitutional Court is an area under Maltese law which requires specific legislation to remove all doubts as to the manner of execution.

**15. Indicate the judicial and any other institution of your country, if any, trusted with jurisdiction to review complaints involving violations of human rights.**

The Civil Court, First Hall has jurisdiction to review complaints concerning violations of human rights. The Constitutional Court hears and determines appeals from judgements delivered by the Civil Court, First Hall.

January, 2005.