Questionnaire
for the XIVth Congress of the Conference of European Constitutional Courts

"Problems of Legislative Omission in Constitutional Jurisprudence"

Response of Malta

The concepts of "legal gap" and "legislative omission", as defined for the purposes of the questionnaire, are not known as such in Maltese constitutional law or indeed in the Maltese legal system. It has therefore not been possible to relate most of the questions in the questionnaire to the situation obtaining in Malta. However, there have been several instances where the Constitutional Court of Malta, acting as the highest court charged with, among other things, ensuring the protection of the fundamental rights and freedoms of the individual, has ruled that the law was "inadequate", with the result that either the law or practice had to be changed.

The Constitutional Court of Malta was established with the coming into force of the 1964 Constitution. The Constitution is the supreme law of the land and, besides setting up and regulating major institutions – such as Parliament, the Executive, the Judiciary, the Consolidated Fund, the Auditor General, the Public Service Commission, the Broadcasting Authority, the Employment Commission – it contains a chapter (Chapter II) dealing with "Declaration of Principles" and another chapter (Chapter IV) dealing with "Fundamental Rights and Freedoms of the Individual". Although the principles[1] contained in Chapter II are "not enforceable in any court", article 21 of the Constitution provides that "[these] principles…are nevertheless fundamental to the governance of the country and it shall be the aim of the state to apply these principles in making laws". It has often been argued in academic circles in Malta that these principles could be resorted to by a court for purposes of interpretation of existing provisions of the law, including instances where interpretation is necessary in view of a lacuna in the law which can be addressed by interpreting other provisions of the same law to render a coherent whole in line with the maxim *interpretare et concondare leges legibus est optimus interpretandi modus*.

[1] These fourteen principles deal with the Right to Work, Promotion of Culture and Scientific and Technical Research, Safeguarding the Landscape and the Historical and Artistic Patrimony, Compulsory and Free Primary Education, Educational Interests, Protection of Work, Hours of Work, Equal Rights of Men and Women, Minimum Age for Paid Labour, Safeguarding the Labour of Minors, Social Assistance and Insurance, Encouragement of Private Economic Enterprise, Protection of Artisan Trades and Encouragement of Co-operatives.

The Fundamental Rights and Freedoms contained in Chapter IV, on the other hand, are directly enforceable by the courts – by the First Hall of the Civil Court in first instance and, upon appeal, by the Constitutional Court. Since the enactment of the European Convention Act [2] in 1987, these two courts are also responsible for the enforcement of the substantive provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including provisions of the First, Fourth, Sixth and Seventh Protocols to the said Convention.

A case for securing the protection of any one or more of these fundamental rights and freedoms may be brought before the First Hall of the Civil Court in one of two ways: either by way of a direct application to that court by any interested party, or by way of a reference made to it by any other court. Article 46(3) of the Constitution (and the corresponding article 4(3) of Chapter 319) provides that if in any proceedings in any court (other than the First Hall of the Civil Court or the Constitutional Court) any question arises as to the contravention of any of the provisions of Chapter IV of the Constitution or of any of the substantive provisions of the European Convention and its Protocols, "that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this sub-article and…the court in which the question arose shall dispose of the question in accordance with that decision". In enforcing these fundamental rights provisions, the First Hall of the Civil Court and, on appeal, the Constitutional Court, "may make such orders, issue such writs and give such directions as [they] may consider appropriate for the purpose of enforcing, or securing the enforcement of, any [of these provisions] to the protection of which the person concerned is entitled…"[3]. This provision gives a very wide latitude to the First Hall of the Civil Court and to the Constitutional Court as to the type of "remedies" it can give when finding that a human rights provision has been, is being, or is likely to be breached.

A typical case of an "inadequate" law which did not measure up to the requirements of the human rights provisions is provided by *Victoria Cassar v. Malta Maritime Authority et*, which was finally decided by the Constitutional Court on the 2 November 2001. Under part of the Port Workers Regulations then obtaining, when a port worker retired, his son, or his eldest son if he had more that one son or, in the absence of sons, his brother or his eldest brother, were eligible to be registered to fill the vacancy left by him. Cassar was the eldest of the children of a retired port worker, but the Port Worker's Board refused to register her as a port worker since eligibility to fill the vacancy was limited to sons and brothers thereby excluding daughters. It was argued before the First Hall of the

[2] Chapter 319 of the Laws of Malta.
[3] Article 46(2) of the Constitution and Article 4(2) of Chapter 319.

Civil Court that this discrimination was objectively justifiable in view of the nature of work in the port area – its hazardous and strenuous nature. The Constitutional Court, confirming the judgment of the First Hall of the Civil Court, found that the provision of the Port Workers Regulations which excluded *a priori* the daughters of retired port workers from filling the vacancy left by their father was in breach of both the Constitution (article 45 – protection from discrimination on the grounds of, among others, sex) as well as of article 14 of the European Convention read in conjunction with article 3 (degrading treatment). The court declared the provisions of the said regulations, in so far as they discriminated on the basis of sex, to be null and void, and further ordered the Port Workers Board to register Victoria Cassar as a port worker with retroactive effect (that is from the date she would have been so eligible to be registered had she been a son or a brother). In coming to this conclusion the Constitutional Court referred to, among others, the European Social Charter and to the Equal Rights Amendment of the Constitution of the United States.

By an earlier judgment – *Paul Stoner et v. The Prime Minister et*, 22 February 1996 – the Constitutional Court also held that a provision of the Constitution, indeed a Human Rights provision – article 44 – was itself in breach of article 45. Article 44 provides for the protection of freedom of movement of citizens of Malta, and sub-article (4) thereof provides for who, not being a citizen of Malta, is nonetheless to be deemed to be a citizen of Malta for the purposes of the said article 44. Paul Stoner was an Englishman and his wife, Evelyn, was Maltese. Article 44(4)(c) of the Constitution then provided that the foreign wife of a Maltese citizen enjoyed freedom of movement in Malta, but the same was not available to the foreign husband of a Maltese citizen. By way of a remedy the Constitutional Court ordered that Paul Stoner was to be considered for the purposes of article 44 as being entitled to the same freedom of movement as his wife; and the respondents, that is the Prime Minister, the Commissioner of Police and the Principal Immigration Officer, were ordered to conform accordingly. Paragraph (c) of sub-article (4) of article 44 of the Constitution was eventually amended in 2001.

Findings of unjustified discrimination have not been limited to grounds of sex. In a judgment delivered by the First Hall of the Civil Court on the 17 January 1997 in the names *Mario Buttigieg proprio et nomine v. The Attorney General et*, several provisions in the Civil Code which discriminated between legitimate and illegitimate children in respect of rights of inheritance were deemed to be null and void. The court found the said provisions to be in violation of article 14 of the European Convention when read in conjunction with article 8 of the same Convention. No appeal was lodged by the Government with the Constitutional Court.

In a more recent case – *The Police v. Joseph Lebrun* [4] – the Constitutional Court imposed a time limit within which Parliament could amend the law. The case arose out of committal proceedings before the Court of Magistrates as a Court of Criminal Inquiry. Lebrun was charged with the offences of conspiracy to import, importation, trafficking and possession of heroin. At the end of the committal proceedings before the Court of Criminal Inquiry, that court ruled that there was not enough *prima facie* evidence for an indictment to be filed before the Criminal Court and therefore discharged (not acquitted) Lebrun, and sent the record of the case to the Attorney General. The Attorney General was of a different opinion and decided to contest the court's decision. As the law then stood [5], the A.G. sought, in private, the concurrence of a judge of the superior courts, not being a judge ordinarily sitting in the Criminal Court or in the Court of Criminal Appeal, and having obtained such concurrence ordered the re-arrest of Lebrun and ordered the continuation of the committal proceedings. Lebrun alleged that this procedure infringed his right to a fair hearing in violation of Article 39(1) of the Constitution and Article 6(1) of the European Convention. The Court of Criminal Inquiry referred the question to the First Hall of the Civil Court. The First Hall of the Civil Court dismissed the allegation on the ground that the administrative or quasi-judicial procedure whereby the A.G. consulted in private with a judge was not determinative of guilt or innocence; it would be the proceedings before the Criminal Court (in a trial by jury) which would eventually determine such guilt or innocence. Lebrun appealed to the Constitutional Court. The Constitutional Court, overturning the decision of the court of first instance, held that when the Court of Criminal Inquiry decides that there are not sufficient grounds for an indictment to be filed, that decision was in effect "decisive for the determination of the criminal charge" in so far as the case against the accused could not proceed further on that record and on that evidence. The procedure whereby the A.G. consulted in private a judge of his own choosing (other than a judge ordinarily sitting in the Criminal Court or in the Court of Criminal Appeal) and, with his consent, ordered the continuation of proceedings against the accused (either by filing straight away a bill of indictment in the Criminal Court or, as was done in this case, ordering the committal proceedings to continue), was in effect a form of "appeal" which reversed the judicial decision that there were not sufficient grounds for an indictment to be filed. This "appeal" stage, therefore, had also to abide by the minimum requirements of a fair hearing (as was the case with the committal stage). The Constitutional Court, therefore, held that the procedure adopted by the A.G. in conformity with article 433(3) of the Criminal Code was in breach of article 39(1) of the Constitution and article 6(1) of the European Convention; it ordered a three-month stay of the proceedings which had recommenced before the Court of Criminal Inquiry; and ordered that unless within such time a new procedure,

[4] Decided by the First Hall of the Civil Court on the 27 June 2006; decided by the Constitutional Court on the 9 February 2007.
[5] Article 433(3) of the Criminal Code.

conforming to the requirements of articles 39(1) and 6(1), came into effect, and was applied with respect to the proceedings against Lebrun, for the revision and possible variation of the original decision that there was not enough *prima facie* evidence for an indictment to be filed, then that original decision was to prevail.

Before the expiry of the three month period, Parliament amended sub-article (3) of article 433 of the Criminal Code, introducing a form of appeal to the Criminal Court in which the person accused would have the right to make submissions. Upon such an appeal, the Criminal Court held that there were sufficient grounds for an indictment to be filed against Lebrun and therefore the A.G. was allowed to continue with the case on the same record and evidence.

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