

Social Rights in Malta – An Overview¹

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Brief historical background

Malta³ became an independent sovereign state on 21 September 1964. Prior to that date it had been a British Crown Colony for close to 164 years. During this long period of British domination the Maltese had been allowed to retain to an appreciable extent their own legal system and judicial system, although it goes without saying that English law⁴ did influence the development of both systems. British imperial interests, mainly commercial and military, have helped to mould certain aspects of Maltese law. Thus, for instance, public law in Malta follows very closely (some would argue, slavishly) English public law. English law has also influenced the development of commercial (especially company) law, maritime law and fiscal law. It should however be emphasised that Malta was never a “common law jurisdiction”, and English common law⁵ was never part of the law of Malta, even though many common law principles are found enshrined in statutory provisions (e.g. the law of evidence in criminal matters, provisions dealing with jury trials, military law and the general law on the interpretation of laws).

The Maltese legal system does not recognise any distinct category of “social rights”. The terms is, however, increasingly being used to designate those rights (with, in some cases, correlative duties) which are regarded as falling with the broad notion of a “social compact” between the state and specified categories of citizens and which are regarded as important in the promotion of social justice. Notable among these would be rights associated with social

¹ This is a slightly modified version of a paper commissioned by Professor Julia Iliopoulos-Strangas in connection with the forthcoming edition of her work on the Protection of Social Rights in Europe. The author is greatly indebted to Professor Iliopoulos-Strangas for her comments and advice in connection with the first drafts of the paper. The paper reflects the law as it was on 1 March 2012. Needless to say, any errors are entirely the author's.

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³ The Maltese archipelago consists of the two main islands of Malta and Gozo, the very small and largely uninhabited (except in summer) island of Comino, and the two uninhabited islets Cominotto and Filfla.

⁴ In spite of the influence of Roman law on Scots law, the latter has had very little, if any, direct influence on Maltese law. Nevertheless Scottish case-law and text-writers remain useful for purposes of interpretation even in such unlikely areas as the general principles of criminal law and criminal liability.

⁵ Judgements do occasionally refer to English common law for purposes of interpretation or comparison. These references must, of course, not be confused with references to the *ius commune* – a combination of Canon and Roman law -- which obtained on the continent from the middle of the 12th century up till the period when rigorous codification reduced it in essence to mere jurisprudential principles. For a reference to the *ius commune*, see *Rapa Brothers Co. Ltd v. Cranes and Commercial Sales Ltd* Court of Appeal (Inferior Jurisdiction), 16 September 2004.

security benefits, pensions, collective work agreements, and trade union rights. After the incorporation into domestic law of the substantive provisions of the European Convention on Human Rights in 1987⁶ and the corresponding increased awareness of these rights, there has also been a trend to refer, albeit loosely, to rights such as the right to the enjoyment of one's property, the right to adequate compensation when property is expropriated or controlled in the public interest and the right to primary and secondary education, as social rights. Moreover, although Malta has to date not ratified Protocol 12 of the said Convention⁷, the concepts⁸ of non-discrimination in Article 45 of the Constitution of Malta and in Article 14 of the Convention continue to play a critical role at the legislative level in connection with the rights above indicated.

One cannot identify any single court judgment which has dealt *funditus*, or in a systematic or theoretical way, with the notion of social rights. The approach has been on the whole a piecemeal and a pragmatic one, with the courts more concerned with an effective and just outcome on the particular facts of a given case whenever any such right was sought to be enforced, rather than with trying to establish principles or to apply doctrine.

Up to the first quarter of the twentieth century, what "social rights" were accepted by the ruling class in Malta as possible candidates for incorporation into appropriate legislation were largely inspired by the social teaching of the Catholic Church. The Church was also responsible for providing most of the available welfare and charitable institutions. It can safely be said that the spring-board for the necessary quantum leap in legislation was provided by the educational system in Malta which, even in the late nineteenth century and by the standards of the time, was good. The Keenan Report⁹, published in 1879, noted that Malta at the time had a University¹⁰, 2 lyceums, 2 secondary schools and 79 primary schools, which catered for a total of 8,565 students. There were, besides the government run schools,

⁶ European Convention Act (Cap. 319 of the Laws of Malta), enacted by Act XIV of 1987.

⁷ Article 1 of Protocol 12 provides that "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

⁸ Whereas discrimination is defined in Article 45(3) of the Constitution as affording different treatment to different persons "...attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description", the grounds of discrimination in Article 14 of the Convention are not exhaustive but merely illustrative.

⁹ Keenan, P.J. *Report upon the Educational System of Malta* (1880), London, H.M.S.O.

¹⁰ Between 1937 and 1974 (when Malta became a Republic), the University petitioned for and obtained regularly the right to the use of the word "Royal" in its title – Royal University of Malta.

125 “private” schools which catered for another 2,710 students¹¹. The major impetus for social reform came in 1891 with Leo XIII’s encyclical *Rerum Novarum* which, although frowning upon strikes, placed great emphasis on the material well-being of the “working poor”, respect for the workers’ dignity, the right to appropriate wages and rest and leisure periods for workers, and the formation of “workingmen’s unions”. The right to private property was also highlighted¹².

One of the earliest “social laws”¹³ was enacted by Act I of 1925 – “*An Act to make special temporary provisions respecting rent and conditions in re-letting immoveable urban property.*” This law, originally intended to be of a temporary nature, aimed to protect tenants from being put out on the street at the end of the lease by the refusal of the landlord to renew the tenancy, or by imposing exorbitant rents or other unjust conditions for its renewal. This law was rendered permanent six years later with the Re-letting of Urban Property (Regulation) Ordinance (Cap. 69)¹⁴. In 1926 a law was passed¹⁵ which provided for the minimum age – 14 years – for the employment of children in factories, on building sites and in stone quarries. Article 6 provided that women and children could not be employed for more than eight hours a day, and that they were entitled to two or more “intermediate breaks” amounting in total to an hour. Moreover the law enabled the minister responsible for the Department of Work to make, on the advice of the minister responsible for Public Health, regulations prescribing the measures to be adopted by employers for the health and safety of their employees.

In June 1927 the Widows’ and Orphans’ Pensions Act came into effect. This law set up a fund for the provision of a pension to be paid to the widows and orphaned children of those employed in the public service. Speaking about the Government’s achievements between 1924 and 1927, the then minister responsible for the Treasury, Carmelo Mifsud-Bonnici, had this to say about this law:

“But the crowing glory of this Government is perhaps the Act making provision for the payment of pensions to the widows and orphans of public officers who are in the service...There could not be a more fitting close to a fruitful administration than the constitution of this fund, for which the Civil Service has been clamouring for the past thirty years, and it is a source of

¹¹ See Schiavone, M.J. *B’Imħabba u Solidarjeta`* (1991), Malta, PIN Publications, p. 28.

¹² Some of the themes in *Rerum Novarum* were taken up again by Pius XI in 1931 in *Quadragesimo Anno* which however focussed more on the principle of subsidiarity as the basis for social organisation.

¹³ See Schiavone, M.J. *op. cit* pp. 68-69.

¹⁴ Enacted by Ordinance XXI of 1931.

¹⁵ Act XXI of 1926.

gratification to this Government that the pleasant task of legislating this measure fell to their lot...Notwithstanding that the Bill was brought forward at a time when Parliamentary business was at its height, the Government did not shirk what they considered their duty towards the service and the community at large...The benefits of the Act are self-evident and need not be dwelt upon; suffice it to say that the Government have by their action removed a just grievance and remedied to a state of things too pitiful to relate.”¹⁶

The year 1952 saw the Government focussing again on employment after considerable industrial agitation in the previous years because of the rise in the cost of living. The Conditions of Employment (Regulation) Act and the Industrial Training Act were both passed in 1952. The first gave effect to the provisions of two ILO Conventions – the Minimum Wage-Fixing Machinery Convention of 1928 and the Protection of Wages Convention of 1949¹⁷. The second law provided for the setting up of apprenticeship schemes in various trades, and by the end of the year almost 2,000 persons had participated in one or other of the schemes¹⁸. The year 1956 saw the enactment of the National Insurance Act which replaced the existing Workmen’s Compensation Scheme. Five days after the law was passed, the National Insurance (Armed Forces) Order, 1956 came into being. This was the result of an agreement between the British Defence Departments in Malta and the Maltese Government by which the National Insurance Act was extended to cover Her Majesty’s Forces raised in Malta¹⁹.

“Another social welfare measure was the passing of the National Assistance Act, 1956. The Act gave legal standing to the various forms of medical and institutional relief previously governed by administrative practice. It improved the methods governing the calculation of means; introduced rent and unemployment relief; and classified public assistance into two main categories: social and medical. The first was designed to meet cases of destitution; while the second was intended to meet special needs caused by disease. The Old Age Pensions (Amendment) Act, 1957 provided for blind persons to qualify for old age pension at the age of

¹⁶ Schiavone, M.J. *op. cit.* p. 72. The Act was repealed and re-enacted, with amendments, ten years later by Ordinance XVII of 1937, and is today the Pensions Ordinance (Cap. 93) – see below.

¹⁷ Both Conventions were ratified by Malta on 4 January 1965, that is to say less than four months after achieving independence. See also Pirotta, J.M. *Fortress Colony: The Final Act 1945-1964* – Vol. 1 (1987), Malta, Studia Editions, pp. 338-339. As Professor Pirotta observes, another law intended to improve workers’ conditions was the Employment Injuries Insurance Bill, which was introduced before the Legislative Assembly in May 1953. The proposed law would have replaced the existing Workmen’s Compensation Act and provided more comprehensive and updated provisions regarding insurance against personal injuries sustained at work. The proposed new law would have encompassed all workers except those employed by the Defence Departments. However, the Bill was still in Committee stage when the government was defeated in October 1953, and it therefore lapsed.

¹⁸ Schiavone, M.J. *op. cit.* p. 74.

¹⁹ Pirotta, J.M. *op. cit.* Vol. 2, pp. 220-221.

forty years. A new policy in relation to the disabled laid down that certain occupations with Government would be reserved for handicapped persons. The [British] Defence Departments co-operated fully in this regard, while attempts were made by the Employment Service to persuade private employers to accept a handicapped person whenever a suitable vacancy occurred...The Labour Department also made a sustained effort [in 1956] to enforce strictly the legal provision against the employment of children. Such employment was commonest in public transport, in cinemas, in the building industry, in restaurants, bars and cafes. The commonest motive behind the employment of children was economy on the part of the employers. Steady eradication in this abuse was made, mostly as a result of the fixing of wage levels irrespective of the employee's age."²⁰

In 1969 the Persons with Disability (Employment) Act (Cap. 210) was enacted by Act II of that year. The aim of the act was to help all those who wished to earn a living but were hampered in this respect by some form of disablement, to find and to stay in employment. For this purpose the law provided for the appointment of a Disablement Resettlement Officer and the setting up of a Disablement Resettlement Service. Today the work of the Disablement Resettlement Officer is carried out by the Employment and Training Corporation set up under the Employment and Training Services Act (Cap. 343)²¹.

Finally, in 1979 the National Assistance Act, 1956 then in force was amended to provide for the introduction of a two-thirds pension applicable to all employed persons, whether in the public or private sector. Up till then only public officers were entitled, under certain conditions, to a pension linked to the salary upon retirement (generally called a 'service pension'). In its 1976 electoral manifesto the Malta Labour Party promised this two-thirds pension, and Act XXI of 1979 gave effect to this promise.

Sources of social rights – internal law, EU law and others

The 1964 Constitution of Malta is considered as the supreme law of the land. Article 6 of the Constitution provides the general rule that if any other law is inconsistent with the Constitution, the Constitution shall prevail, and the other law shall, to the extent of the inconsistency, be void. Apart from this there is, strictly speaking, no established internal hierarchy of laws or norms. However the Commercial Code (Cap 13)²² provides, in Article 3 thereof, that in commercial matters the commercial law shall apply, but where no provision is

²⁰ *Ibid.* pp. 222-223.

²¹ Enacted by Act XXVIII of 1990.

²² Originally enacted by means of several Ordinances, commencing in 1857.

made in such law “the usages of trade or, in the absence of such usages, the civil law shall apply”,²³.

Enacted by the Malta Independence Order of the 2nd September, 1964²⁴, the 1964 Constitution is divided into eleven chapters. It has been amended many times, the most fundamental amendments being those introduced by Act LVIII of 1974 when Malta, which had hitherto been a constitutional monarchy with the Queen of Great Britain and Northern Ireland as Queen of Malta, became a republic. Chapter VI of the Constitution deals, among others things, with the composition and with the powers and procedure of Parliament.

Apart from what has already been observed above in connection with the popular re-classification of some fundamental human rights protected by the Constitution (and by the European Convention on Human Rights) as social rights, the said Constitution, in Chapter II thereof²⁵, provides a set of “principles” which are held to be “fundamental to the governance of the country”. Article 21, however, makes it clear that these provisions in this Chapter “shall not be enforceable in any court, but the principles therein contained 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.” These principles – which, apart from an amendment to one article²⁶, have remained unchanged since the Constitution was enacted in 1964 – in effect reflect a commitment to the advancement of social justice made at a time when the people of the Maltese islands were preparing to sever their political links with, and their economic dependence upon, the United Kingdom. Particularly significant within the context of social rights are the following articles:

- Article 7 – “The State recognises the right of all citizens to work and shall promote such conditions as will make this right effective.”

²³ The very last provision of this Code – Article 552 – provides that “Any law or custom contrary to or inconsistent with the provisions of this Code shall have no effect.” On the other hand the Civil Code (Cap. 16) when dealing with certain particular institutes gives precedence to other laws. For instance, in dealing with the nature and form of mandate, Article 1872 of the Civil Code provides that the provisions of the Civil Code in this respect “shall not effect the provisions of the Commercial Code, or of any other special law or other usages of trade”; while Article 1997(2) of the same said Code provides that the provisions dealing with privileges and hypothecs shall not apply to ships or aircraft, or to debts to which ships or aircraft may be subject, except so far as they are consistent with the provisions of the Merchant Shipping Act (Cap. 234) and the Aircraft Registration Act (Cap. 503), as the case may be.

²⁴ This was an Order-in-Council made pursuant to legislation enacted by the United Kingdom Parliament – The Malta Independence Act 1964.

²⁵ Chapter II – Declaration of Principles.

²⁶ Article 14, on equal rights of men and women.

- Article 10 – “Primary education shall be compulsory and in State schools shall be free of charge.”
- Article 13(2) – “The worker is entitled to a weekly day of rest and to annual holidays with pay; he cannot renounce this right.”
- Article 14²⁷ – “The State shall promote the equal right of men and women to enjoy all economic, social, cultural civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men.”
- Article 17 – “(1) Every citizen incapable of work and unprovided with the resources necessary for subsistence is entitled to maintenance and social assistance. (2) Workers are entitled to reasonable insurance on a contributory basis for their requirements in case of accident, illness, disability, old-age and involuntary unemployment. (3) Disabled persons and persons incapable of work are entitled to education and vocational training.”

By and large, all ordinary legislation – as distinguished from the Constitution – has given effect to these principles.

Ordinary legislation, which provides for rights which can be considered as social rights, consists in either Acts of Parliament²⁸ (sometimes also referred to as parent acts or parent legislation or primary legislation) and Subsidiary Legislation (S.L.). The latter usually take the form of Rules, Regulations or Orders, depending on the wording used in the particular Act of Parliament under which they are made. Following the practice in the United Kingdom, the parent act will generally delegate power to the appropriate minister to provide for the more detailed regulation of matters dealt with in the said act. Such subsidiary legislation, however, is always subject to a negative resolution of the House of Representatives²⁹.

²⁷ Substituted by Act XIX of 1991.

²⁸ Some “parent acts” dating from pre-independence days are styled Ordinances instead of Acts. Chronologically the last Ordinance still appearing as part of the laws of Malta is the Conservatorio Vincenzo Bugeja Arts and Crafts Branch Request (Provisional Application of Revenues) Ordinance (Cap. 173). The law was enacted by Ordinance XX of 1962.

²⁹ Article 11(1) of the Interpretation Act (Cap. 249) provides that when an Act of Parliament confers a power to make subsidiary legislation “any such legislation made by virtue of those powers...shall as soon as may be after it is made be laid on the Table of the House and if, within the period of twenty-eight days after it is so laid, the House resolves that it be annulled or amended, the same shall thereupon cease to have effect or shall be so amended, as the case may require, but without prejudice to the validity of anything previously done thereunder or to the making of new...” subsidiary legislation.

Notwithstanding that it survives a negative resolution, that is to say, no motion is approved by the House annulling that subsidiary legislation, it can still be challenged in the ordinary courts as being *ultra vires* the parent act³⁰.

The more important legislation in the field of social rights includes the Pensions Ordinance (Cap. 93)³¹, the Persons with Disability (Employment) Act (Cap. 210)³², the Employment Commission Act (Cap. 267)³³, the Social Security Act (Cap. 318)³⁴, the Education Act (Cap. 327)³⁵, the Occupational Health and Safety Authority Act (Cap. 424)³⁶, the Employment and Industrial Relations Act (Cap. 452)³⁷ and the Equality for Men and Women Act (Cap. 456)³⁸.

One law which, although passed by Parliament, has never been brought into force is the Employers' Liability (Compulsory Insurance) Act (Cap. 241). It was enacted by Act XVI of 1974. Article 3(1) provided that, subject to certain exceptions, "every employer carrying on any business in Malta shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Malta in that business..."

The Civil Code (Cap. 16)³⁹ may, in a sense, be considered as a source of social rights. Articles 7 to 34 deal with the "mutual rights and duties of ascendants, descendants and brothers". They provide, *inter alia*, that children are bound to maintain their parents and other descendants who are indigent, parents (and in default, other ascendants) are liable for the maintenance and education of their children, and that brothers and sisters (of the full or half-blood) are also liable for maintaining each other in default of other persons liable for their

³⁰ See Article 95(2)(e) of the Constitution and Article 242 of the Code of Organisation and Civil Procedure (Cap. 12).

³¹ Enacted by Ordinance XVII of 1937. This law deals with pensions, gratuities and other allowances payable to persons in the public service of Malta. With the introduction of the two-thirds pension in 1979 and the consolidation of social security legislation by Act X of 1987 – the Social Security Act (Cap. 318) – the Pensions Ordinance continues to apply to an ever decreasing number of public officers, some still in office, most of them retired.

³² Enacted by Act II of 1969.

³³ Enacted by Act XXXI of 1976.

³⁴ Enacted by Act X of 1987. When originally enacted this law was, to a great extent, a consolidating act. It provides for the payment of social insurance benefits, pensions and allowances generally, social and medical assistance, non-contributory pensions, and the payment of social insurance contributions by employees, employers, self-employed and the State.

³⁵ Enacted by Act XXIV of 1988. This act came into force in three stages – on the 16th August 1988, 5th September 1988 and 16th April 1991.

³⁶ Enacted by Act XXVII of 2000.

³⁷ Enacted by Act XXII of 2002. This act consolidated, with amendments, the previous Conditions of Employment (Regulation) Act and the Industrial Relations Act.

³⁸ Enacted by Act I of 2003.

³⁹ Originally enacted by Ordinance VII of 1868.

maintenance. According to Article 19, “maintenance shall include food, clothing, health and habitation”; and “in regard to children and other descendants [maintenance] shall also include the expenses necessary for health and education.” In practice, however, in view of unemployment and other social benefits, free health care and free education (including free university education), the provision can be said to have fallen into desuetude.

Collective agreements

Collective agreements are a source of social rights, but only to the same extent as any other contract between an employee and an employer governing the conditions of employment. Both an ordinary contract of employment and a collective agreement cannot have any condition that is less favourable than a condition contained in the primary legislation, or in a national standard order or in a sectoral regulation order applicable to the employee or employees concerned; any such less favourable condition is automatically replaced by the more favourable one contained in the legislation or in the orders⁴⁰.

European Union Law

Malta joined the European Union with effect from 1 May 2004. Since Malta, like the United Kingdom, follows a dualist approach to international treaties, it was necessary to enact special legislation to accommodate EU law. Article 3(1) of the European Union Act (Cap. 460)⁴¹ provides that as from 1 May 2004 “the Treaty and existing and future act adopted by the European Union” are binding on Malta and are part of domestic law “under the conditions laid down in the Treaty. The expression “acts adopted by the European Union” is defined in Article 2(2) as including “regulations, directives and other acts which Malta is bound to accede to as a Member State of the European Union”. The Treaty referred to in Article 3(1) is the one signed in Athens on 16 April 2003 (Treaty of Accession). Article 2(2) provides that the Prime Minister may by order declare that a treaty specified therein, being a treaty entered into by Malta after 16 April 2003, is to be regarded as one with the Treaty of Accession of 2003 and is to have the same effect for the purposes of the Act. Such order, however, can only be made after a draft thereof has been approved by resolution of the House of Representatives. Such an order was made on 1 February 2008⁴² in respect of the Lisbon Treaty.

⁴⁰ Articles 4(4) and 42 of the Employment and Industrial Relations Act (Cap. 452).

⁴¹ Enacted by Act V of 2003. The Act came into effect in two stages: on 16 July 2003 and on 1 May 2004.

⁴² Treaty of Lisbon Order, published by Legal Notice 42 of 2008 – Subsidiary Legislation (S.L.) 460.20.

Article 3(2) of the European Union Act also provides that as from 1 May 2004 any provision of domestic law which is incompatible with Malta's obligations under the Treaty or which derogates from any rights given to any person by or under the Treaty is, to the extent of the incompatibility or of the derogation, without effect and unenforceable⁴³. It is a moot point whether EU law can directly prevail also over provisions of the Constitution. Cap. 460 also makes provision for the appropriation of funds to meet Malta's obligations under the Treaty⁴⁴. Article 5 of the Act provides that, unless referred to the Court of Justice of the European Communities (ECJ), any question as to the meaning or effect of EU law is to be determined by the domestic courts or other domestic adjudicating authority in accordance with the principles laid down, and any relevant decision of, the said ECJ. Moreover domestic courts are to take judicial notice of the Treaty, of the Official Journal of the European Union, and of any decision of, or expression of opinion by, the ECJ.

The European Union Act also provides for the making of subsidiary legislation to give further effect to EU law domestically⁴⁵. Subsidiary legislation made under this parent act includes the Equal Treatment of Persons Order⁴⁶ (which implements the provisions of Council Directive 2000/43/EC of 29 June 2000), the Equal Treatment in Self-Employment and Occupation Order⁴⁷ (implementing Council Directives 2000/43/EC of 29 June 2000 and 2000/78/EC of 27 November 2000), the Free Movement of European Union Nationals and their Family Members Order⁴⁸ (giving effect to the provisions of Council Directives 2004/38/EC of the European Parliament and of the Council of 29 April 2004), and the International Maintenance Obligation Order⁴⁹ (implementing the relevant provisions of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations). Of course the implementation of EU directives is not limited to subsidiary legislation made pursuant to the European Union Act. To mention just one example, the Equal Treatment in Occupational Social Security Schemes Regulations⁵⁰, where the parent act is the Social Security Act (Cap. 318), gives effect to the relevant provisions of Council

⁴³ Article 3(1) provides that as from 1 May 2004 EU law shall be binding on Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty.

⁴⁴ Article 4(5).

⁴⁵ Article 4(1)(2).

⁴⁶ Published by Legal Notice 85 of 2007 – S.L. 406.15.

⁴⁷ Published by Legal Notice 86 of 2007 – S.L. 460.16.

⁴⁸ Published by Legal Notice 191 of 2007 – S.L. 460.17.

⁴⁹ Published by Legal Notice 452 of 2011 – S.L. 460.25.

⁵⁰ Published by Legal Notice 317 of 2005 – S.L. 318.20.

Directive 86/378/EEC as amended by Council Directive 96/97/EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

Treaties

As has already been adverted to, Malta follows a dualist approach with regard to international treaties. International treaties are not a source of enforceable rights or duties at the domestic level unless and until they have been transposed into domestic law. One of the earliest post-independence laws which highlights this approach is the Diplomatic Immunities and Privileges Act (Cap. 191)⁵¹ which, in the First Schedule thereto, reproduces several provisions of the 1961 Vienna Convention on Diplomatic Relations, making them thus legally enforceable in Malta. Reference has already been made to the European Convention Act (Cap. 319), whereby the substantive provisions of the European Convention on Human Rights and of Protocols 1, 4, 6 and 7⁵² thereto have been made enforceable by the domestic courts in the same way that the Fundamental Rights and Freedoms of the Individual listed in Chapter IV of the Constitution are enforceable, that is to say by way of application to the First Hall of the Civil Court and then by way of appeal, if any, to the Constitutional Court. Within the framework of the Council of Europe, Malta has ratified a number of conventions which may be said to fall within the scope of the present paper. Among these are the European Convention on Social and Medical Assistance, 1953⁵³, the European Social Charter of 1961⁵⁴ and the (revised) European Social Charter of 1996⁵⁵. The European Social Charter Order⁵⁶ provides that the provisions of the Social Security Act (Cap. 318) shall apply to nationals of the countries being, together with Malta, parties to the European Social Charter, and who have their ordinary residence in Malta.

Malta has also ratified a total of 60 International Labour Organisation (ILO) conventions, but has also denounced 7 of those originally ratified. Among those which have been ratified (and not denounced) one can mention the Equality of Treatment (Accident Compensation) Convention, 1925, the Minimum Wage-Fixing Machinery Convention, 1928, the Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934, the Protection of Wages Convention, 1949, the Right to Organise and Collective Bargaining Convention, 1949, the

⁵¹ Enacted by Act I of 1966.

⁵² Malta has not ratified Protocol 12 to the ECHR. Although Protocol 13 has been ratified, the substantive provision – Article 1 – has not yet been incorporated into the act.

⁵³ CETS 014, ratified on 6 May 1969.

⁵⁴ CETS 035, ratified on 4 October 1988.

⁵⁵ CETS 163, ratified on 27 July 2005.

⁵⁶ Published by Legal Notice 204 of 1999 – S.L. 318.12.

Equal Remuneration Convention, 1951, the Abolition of Forced Labour Convention, 1957, the Minimum Wage Fixing Convention, 1970, the Holidays with Pay Convention (Revised), 1970 and the Worst Forms of Child Labour Convention, 1999.

Another example of how international obligations are reflected in domestic legislation is provided by the Social Security (U.N. Convention Relating to the Status of Refugees) Order⁵⁷, made pursuant to the Social Security Act (Cap. 318). Malta is a party to both the 1951 Convention on the Status of Refugees and to the 1967 Protocol Relating to the Status of Refugees⁵⁸. On 1 October 2001 the Refugees Act (Cap. 420) came into force. This law provides for the appointment of a Refugee Commissioner and establishes procedures, including procedures for appeal, for the granting of refugee status or subsidiary protection status in line with the above mentioned treaties. It further seeks to give effect to Council Directives 2004/83/EC⁵⁹ and 2005/85/EC⁶⁰ of 29 April 2004 and 1 December 2005 respectively. The Order provides that the provisions of the Social Security Act shall apply to those refugees who in terms of the provisions of the said Act are accepted as refugees by the Refugee Commissioner.

“Classification” of social rights

As has already been observed, the Maltese legal system does not have a “special place” for social rights. These rights may be said to be spread among a plethora of laws, some of which have other primary objectives than that of specifically conferring a “social rights”.

Broadly speaking, however, one may group the various “social rights” under the following headings:

i. Right to education

This right may be said to be derived from the general principles contained in the Civil Code dealing with the mutual rights and duties of spouses and the mutual rights and duties of ascendants, descendants and brothers (already discussed above), from the Education Act (Cap. 327), and from Article 2 of Protocol 1 to the European Convention on Human Rights. Reference has already been made to Article 19 of the Civil Code. Article 3B of the Code,

⁵⁷ Published by Legal Notice 291 of 2001 – S.L. 318.16.

⁵⁸ Malta acceded to the Convention on 17 June 1971 and to the Protocol on 15 June 1971.

⁵⁹ This Directive deals with the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the nature of the protection granted.

⁶⁰ This Directive deals with the minimum standards on procedures in Member States for granting and withdrawing refugee status.

which was added in 1993, provides that marriage imposes on both spouses “the obligation...to instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.” Sub-article (2) of Article 3B extends to duty of maintenance of the spouses towards their children who have attained majority (i.e. 18 years) until they reach the age of 23, provided it is not reasonably possible for the latter to maintain themselves and if they “are students who are participating in full-time education, training or learning.” The Education Act (Cap. 327) provides in Part I thereof: “It is the right of every citizen of the Republic of Malta to receive education and instruction without any distinction of age, sex, belief or economic means.”⁶¹ It goes on to spell out in general terms the obligations of the State and the duties of parents. The former consist in (i) promoting education and instruction, (b) ensuring “the existence of a system of schools and institutions accessible to all Maltese citizens catering for the full development of the whole personality including the ability of every person to work”, and (c) providing such schools and institutions where these do not exist⁶². The duties of parents are to ensure that a minor is registered in school for the first scholastic year when he is of compulsory school age, and thereafter to ensure that he continues to attend school until he ceases to be of compulsory school age⁶³. On the other hand the State has the right to establish the National Curriculum Framework and the national minimum conditions for all schools – that is for both State and private schools – and to ensure compliance therewith. Article 47(5) provides that the parents of any minor have the right to opt that the minor should not receive instruction in the catholic religion⁶⁴. It should finally be noted that, subject to certain exceptions, State-provided primary, secondary and tertiary (including University⁶⁵) full-time education in Malta is free for all citizens of Malta and (again subject to certain exceptions) for all those lawfully resident in Malta. Moreover the Government provides a maintenance grant (popularly known as “stipend”) for those attending certain courses at University and to post-secondary and vocational students. To qualify for this grant (which is not based on a means test and is not in the form of a loan) one must, *inter alia*, be a Maltese citizen or a student

⁶¹ Article 3.

⁶² Article 4.

⁶³ Article 5.

⁶⁴ The overwhelming majority of the population of Malta professes to be Roman Catholic. This fact is reflected in Article 2(1) of the Constitution which provides that the “religion of Malta is the Roman Catholic Apostolic Religion.” Sub-article (3) further provides that “Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.”

⁶⁵ See the University Fees Regulations, published by Legal Notice 258 of 2009 – S.L. 327.177. Regulation 3 provides that for the purpose of these Regulations “Maltese student” includes any person who is a citizen of a member State of the European Union.

with at least one parent being a Maltese citizen; have resided in Malta for a period of not less than five years from the commencement of the relative course of studies; have completed the term of compulsory education; and must not be over thirty years of age at the commencement of the course⁶⁶.

ii. *Rights associated with work or employment*

There is no enforceable right to work⁶⁷. The right to form part of a trade union (and, for employers, to form part of employers' associations), however, is guaranteed both by the Constitution and the European Convention on Human Rights as part of the freedom of association⁶⁸. Likewise, there is no "positive" right to strike, but an employee may not be dismissed from work simply because he has obeyed a union directive to strike⁶⁹, or for being a member of a trade union, or for seeking office in such a union, or for acting in the capacity of an employees' representative⁷⁰. Articles 63 and 64 of the Employment and Industrial Relations Act (Cap. 452) grant a wide measure of immunity to trade unions, employers' associations and to strikers from actions in tort or quasi-tort consequent upon acts in contemplation or furtherance of a trade dispute; while Article 65 protects peaceful picketing⁷¹.

The right to wages and to minimum conditions of work (including paid leave and holidays), the right not to be dismissed other than for a "good and sufficient cause", and the right not to be discriminated against on the basis of gender in recruitment to, or dismissal from, employment are all protected by various provisions of the said Cap. 452. Special provisions deal also with the protection against victimisation (Article 28) and harassment (Article 29) at work. Moreover, the Equality for Men and Women Act (Cap. 456)⁷² provides a general framework against discrimination on the grounds of gender in many spheres of life, including employment, education, the granting or withholding of facilities by financial and insurance

⁶⁶ See regulations 4 and 6 of the Students Maintenance Grants Regulations, published by Legal Notice 372 of 2005 – S.L. 327.178.

⁶⁷ As has already been observed, Article 7 of the Constitution is a non-enforceable provision.

⁶⁸ Some holders of office in the public service may not form part of a trade union – see Article 67 of the Employment and Industrial Relations Act (Cap. 452). Article 34 of the Police Act (Cap. 164) provides that it is an offence against discipline for any police officer to be or to become a member of any trade union or any body or association affiliated to a trade union.

⁶⁹ Cap. 452, Article 64(4).

⁷⁰ *Ibid.*, Article 36(14)(a).

⁷¹ Art. 65: "It shall be lawful for one or more persons in contemplation or furtherance of a trade dispute to attend at or near (a) a place where another person works or carries on business, or (b) any other place where another person happens to be, not being a place where he resides, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working."

⁷² Article 3 of this Act provides that nothing in it shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities.

institutions, and in the advertising of job vacancies. This Act also introduces the ground of “family responsibilities” as a proscribed ground for discrimination, mindful of the fact that in Malta married women are still in practice the principal carers of young children⁷³.

Finally, from the duty imposed upon employers to provide a safe working environment⁷⁴ derives the right of workers to have their health and safety protected at places of work.

iii. *Right to social security and social assistance*

Rights falling under this broad category are regulated in the main by two comprehensive laws: the Pensions Ordinance (Cap. 93) and the Social Security Act (Cap. 318). The former deals with the right to pensions, gratuities and other allowances in respect of persons in the public service, as well as pensions and gratuities payable to dependants of public officers in certain cases (for example the pensions payable to widows of officers killed in the discharge of their duty⁷⁵). The latter deals more generally with the payment of social insurance benefits, pensions and allowances, social and medical assistance, non-contributory pensions and the payment of social insurance contributions by employees, employers, self-employed and the State. It provides in particular for the payment of sickness benefits⁷⁶, sickness assistance⁷⁷, invalidity pensions⁷⁸, disability pension and pension for the visually impaired⁷⁹, injury benefits⁸⁰ and unemployment benefits⁸¹; widows’ pensions⁸² and pensions in respect of retirement⁸³. Part VI of the Act provides for the payment of a number of special pensions and allowances, including carer’s pension, orphan’s allowance, maternity benefit, children’s allowance, allowance in respect of a child in care⁸⁴, and disabled child allowance. Moreover persons in receipt of social assistance, of an age pension, of a disability pension or a pension for the visually impaired, or of a carer’s pension receive also a house rent allowance “if the household is paying rent for its normal place of habitation”⁸⁵.

⁷³ See Article 2(1) of Cap. 456.

⁷⁴ See Article 6 of the Occupational Health and Safety Authority Act (Cap. 424).

⁷⁵ Regulation 15 of the Pensions Regulations, being the Schedule to the Pensions Ordinance (Cap. 93).

⁷⁶ Cap. 318, Article 18.

⁷⁷ *Ibid.*, Article 20.

⁷⁸ *Ibid.*, Article 26.

⁷⁹ *Ibid.*, Article 27.

⁸⁰ *Ibid.*, Article 28.

⁸¹ *Ibid.*, Article 30.

⁸² *Ibid.*, Articles 31 to 43.

⁸³ *Ibid.*, Articles 44 to 65.

⁸⁴ This allowance is payable to foster parents who have taken on the care of a child under the Foster Care Act (Cap. 491).

⁸⁵ See Part V of the Sixth Schedule to the Social Security Act (Cap. 318).

There is no right to “social housing” as such. However, Article 3 of the Housing Act (Cap. 125) provides that the Director of Social Housing may “if it appears to [him] necessary or expedient so to do in the public interest, but only for the purpose of providing living accommodation to persons or of ensuring a fair distribution of such living accommodation...requisition any building, and may give such directions as appear to him to be necessary or expedient in order that the requisition may be put into effect and complied with.” The requisitioned property is then to be allocated to a person for habitation purposes, and the requisitionee (who need not be the owner of the immovable property but could in fact be a tenant himself) is invited by the said Director to recognise the new tenant. The new tenant’s rent is then established by the Rent Regulation Board in accordance with the provisions of the Reletting of Urban Property (Regulation) Ordinance (Cap. 69)⁸⁶. The Housing Act, which was enacted by Act II of 1949, was intended to provide accommodation for those who have lost their houses as a result of enemy action during the Second World War by making available to them vacant property. Successive governments, however, found this law a convenient means to provide cheap housing instead of investing in new housing schemes. The law was very controversial, and is generally regarded as having been gravely abused, especially in the period from the mid-1970’s to the late 1980’s, largely because the words “but only for the purpose of providing living accommodation to persons or of ensuring a fair distribution of such living accommodation” were only introduced in 1989⁸⁷; prior to that date the only criterion was the “public interest”. Immovable property is known to have been requisitioned and then allocated to house political party clubs and band clubs⁸⁸. In 1995 the present Article 21 was added to the Housing Act, which provides that “With effect from the 1st of March 1995, the Director of Social Housing may not requisition any premises under Article 3”, and for the moment the said Housing Act continues to apply only to buildings which were already in the possession of the Director on 28 February 1995. The provision of new state-provided housing is in the hands of the Housing Authority established under the Housing Authority Act (Cap. 261)⁸⁹.

Who benefits from social rights?

All Maltese citizens residing in Malta are, in principle, the beneficiaries of social rights. The acquisition and loss of Maltese citizenship is regulated by the Maltese Citizenship Act (Cap.

⁸⁶ Enacted by Ordinance XXI of 1931.

⁸⁷ By Act XXXVII of 1989.

⁸⁸ See, for example, §§ 8-12 of the ECHR judgment of 29 October 2004 in the names *San Leonard Band Club v. Malta* (application no 77562/01).

⁸⁹ Enacted by Act XV of 1976. See in particular Article 4.

188)⁹⁰. This act has been repeatedly amended and today incorporates most of the provisions on Maltese citizenship which were originally found in Chapter III of the Constitution. Briefly, Maltese citizenship may be acquired by birth, by descent or by registration after marriage. It may also be acquired by naturalisation. Dual or multiple citizenship, which was originally expressly prohibited by the Constitution, is now also possible.

Social rights associated with education are generally also available to all persons lawfully resident in Malta. Any person in employment in Malta enjoys all the rights and benefits accruing from the provisions of the Employment and Industrial Relations Act (Cap. 452). Subsidiary legislation⁹¹ made pursuant to this Act gives effect to a number of Council Directives⁹² in relation to employment by laying down minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sex, sexual orientation and racial or ethnic origin.

As regards *social security and social assistance*, reference has already been made to the European Social Charter Order and to the Social Security (U.N. Convention Relating to the Status of Refugees) Order; the former extends the provisions of the Social Security Act to nationals, ordinarily resident in Malta, of those countries parties to the European Social Charter; the latter extends the provisions of the same said Act to those who have been accepted as refugees by the Refugee Commissioner established under the Refugees Act (Cap. 420).

Apart from the immunity granted to trade unions and employers' associations from actions in tort or quasi-tort, already mentioned, the beneficiaries of social rights are always physical persons.

The addressees of rules protecting social rights

Leaving aside those instances where the State is obliged under EU law to enact certain laws, and apart from the moral obligation imposed by the Declaration of Principles contained in Chapter II of the Constitution, the legislature is not strictly speaking legally obliged to enact legislation in the field of social rights. As has already been mentioned above, Article 21 of the Constitution, while declaring that the principles set out in Chapter II of the said Constitution are "not enforceable in any court", at the same time provides that these principles "are nevertheless fundamental to the governance of the country" and that "it shall

⁹⁰ Enacted by Act XXX of 1965.

⁹¹ The Equal Treatment in Employment Regulations, published by Legal Notice 461 of 2004 – S.L. 452.95.

⁹² 76/207/EEC, 2000/78/EC, 2000/43/EC, 2002/73/EC and 2006/54/EC.

be the aim of the State to apply these principles in making law”. This provision, which may be regarded as a form of “soft law”, coupled with the commitment of all parties in the political spectrum to the improvement of welfare legislation, in practice places the biggest burden for the advancement and the protection of social rights upon the State and its officers. In many respects this duty, in so far as it refers to the State and other public authorities, may be regarded more as a political than a legal duty.

As a rule, general power is given to ministers by individual Acts of Parliament to make subsidiary legislation for further giving effect to the provisions of the particular piece of legislation, but this power is invariably couched in terms which imply no legally enforceable duty – “the minister *may* make regulations” and not “the minister *shall* make regulations”. But even where the law uses the word “shall”, there is still a wide margin of discretion. Article 6 of the Interpretation Act (Cap. 249) provides that in any case where any Act of Parliament “confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time *as occasion requires*” (emphasis added).

The holders of certain public offices and a number of public bodies may be specifically charged with promoting one or more aspects of a particular social right. Under the Education Act (Cap. 327), for instance, two Directorates are established – the Directorate for Quality and Standards in Education and the Directorate for Educational Services – and the law enumerates the particular “functions and duties” of each Directorate⁹³. By the same law the National Commission for Higher Education is also established.

The operation of the Social Security Act (Cap. 318), with all its “functions or duties”⁹⁴ is assigned by law to the Director General (Social Security). In the labour field no less than four public bodies are charged with the promotion of various aspects of social rights associated with employment and work – the Employment Relations Board⁹⁵, the National Employment Authority and the Employment and Training Corporation⁹⁶, and the Occupational Health and Safety Authority⁹⁷.

As to gender discrimination, the functions of the National Commission for the Promotion of Equality for Men and Women, established pursuant to Article 11 of the Equality for Men and

⁹³ See Articles 9, 11 and 12 of the Education Act (Cap. 327).

⁹⁴ See Article 132(2) thereof.

⁹⁵ Article 3 of the Employment and Industrial Relations Act (Cap. 452).

⁹⁶ Articles 3 and 5 of the Employment and Training Services Act (Cap. 343).

⁹⁷ Article 8 of the Occupational Health and Safety Act (Cap. 424).

Women Act (Cap. 456) include, *inter alia*, that of monitoring the implementation of national policies with respect to the promotion of equality for men and women, and of working towards the elimination of discrimination between men and women⁹⁸.

In the field of employment and, to a lesser extent, in the field of education private individuals and bodies may also, depending on the circumstances, be bound by the rules protecting social rights. As has been pointed out, above, parents have certain duties, both under the Education Act (Cap. 237) and under the Civil Code (Cap. 16) with regard to the education of their children. In the employment field rules governing the conditions of employment, including the payment of wages, statutory bonuses, and the prohibition against discrimination, harassment and unfair dismissal are directed in the first place to private individuals (including private companies)⁹⁹. It is only when the private individual defaults that the State, public bodies or public officers have to step in. This is best illustrated by the Occupational Health and Safety Authority Act (Cap. 424). This law provides, in Article 6(1) thereof, that “It shall be the duty of an employer to ensure the health and safety at all times of all persons who may be affected by the work being carried out for such employer”¹⁰⁰. If an employer fails in this duty he may either be prosecuted at the instance of the Occupational Health and Safety Authority¹⁰¹, or fined administratively¹⁰², or made the subject of a health and safety order. Article 17(1) of Cap. 424 in fact provides that an Occupational Health and Safety Officer may give any order, verbally or in writing, to safeguard occupational health and safety, and every person is to obey such order forthwith until such time as it is revoked by the same or another officer or until such time as it has been revoked by the Appeals Board¹⁰³.

The protection of social rights

The courts in Malta are divided into the Superior Courts (where judges sit) and the Inferior Courts (where magistrates sit). The Superior Courts are the Constitutional Court, the Court of

⁹⁸ Article 12(1) (c) and (f).

⁹⁹ By and large the same rules apply to employment in the public sector. However the appointment to public offices is regulated also by the Constitution. Article 110(1) of the Constitution provides that “Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices, shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission: provided that the Prime Minister may, acting on the recommendation of the Public Service Commission, delegate in writing, subject to such conditions as may be specified in the instrument of delegation, any of the powers referred to in this sub-article to such public officer or other authority as may be specified in that instrument”.

¹⁰⁰ There is also, however, the parallel “duty of every worker to safeguard one’s own health and safety and that of other persons who can be affected by reason of the work which is carried out.” – Article 7(1).

¹⁰¹ Article 38(1).

¹⁰² Article 38(3) second proviso.

¹⁰³ The Appeals Board is set up pursuant to Article 21 of Cap. 424.

Appeal, the Court of Criminal Appeal, the Civil Court and the Criminal Court. The Inferior Courts are the Court of Magistrates for the Island of Malta and the Court of Magistrates for the Island of Gozo¹⁰⁴. There are besides a number of boards and tribunals set up under various laws (some of which are presided also by judges or magistrates), as well as a Juvenile Court¹⁰⁵. The Court of Appeals hears civil (including commercial and administrative) appeals from judgments of the Civil Court, of the Court of Magistrates and of some boards and tribunals. When hearing appeals from judgments of the Civil Court, the Court of Appeal is composed of the Chief Justice and two other judges; when hearing appeals from the Court of Magistrates it is composed of one judge. The Court of Criminal Appeal hears appeals from decisions of the Criminal Court (in which case it is composed again of the Chief Justice and two other judges) as well as from judgments of the Court of Magistrates in its criminal jurisdiction (when the Court of Criminal Appeal is composed of one judge). The more serious crimes are tried before the Criminal Court, composed of a judge and nine jurors. The less serious crimes, as well as all contraventions, are tried before the Court of Magistrates.

The Civil Court, where cases are decided by a judge sitting alone, is divided into the Family Section (for the trial of child custody, maintenance, separation, marriage annulment and divorce cases), the Voluntary Jurisdiction Section (which deals, among other things with adoption cases and the opening of successions)¹⁰⁶, and the General Jurisdiction Section which is known as the First Hall of the Civil Court. This latter court (or section) deals with the majority of cases of a civil (other than those which fall within the competence of the Court of Magistrates), commercial and administrative law nature, including the hearing at first instance of applications for constitutional redress (including redress under the European Convention Act (Cap. 319)).

¹⁰⁴ Court of Magistrates (Malta) and Court of Magistrates (Gozo) for short.

¹⁰⁵ The Juvenile Court is set up pursuant to the provisions of the Juvenile Court Act (Cap. 287). It consists of a magistrate assisted by two lay persons. The Juvenile Court is deemed to be a Court of Magistrates and, subject to the provisions of the said Act, all the provisions of the Criminal Code and of any other law applicable to the Court of Magistrates, apply to the Juvenile Court (see Article 3).

¹⁰⁶ This section does not in principle hear and decide cases of a contentious nature. Its main function is to oversee and protect certain rights and interests, which for some reason or other are not exercised or not exercisable by the person to whom the right or interest appertains. It has jurisdiction to deal with applications relating to adoption, matters relating to trusts (under the Trusts and Trustees Act - Cap. 331 of the Laws of Malta), tutorship and curatorship and other administrators (including testamentary executors), interdiction and incapacitation, absentees, the depositing, opening and publication of secret wills, and declarations of the opening of succession. Any person who wants to accept an inheritance with the benefit of inventory or who does not want to accept an inheritance, has to file a note in this court. Requests for the taxation of fees due to notaries, advocates and legal procurators for extra-judicial services are also dealt with by this court. Under the Foster Care Act (Cap. 491) in the event of a disagreement between a foster carer and the accredited fostering agency in respect of any amendment to the foster care agreement, either party may refer the matter to the Voluntary Jurisdiction Section of the Civil Court, and the court "shall decide in the best interest of the child concerned" (Art. 24(6)).

The Constitution provides also for the establishment of the Constitutional Court¹⁰⁷. Although in connection with certain matters dealing with parliamentary elections the Constitutional Court is a court of first and last instance, in most other cases falling within its jurisdiction it acts in an appellate capacity. Indeed, the most important function of the Constitutional Court these last forty plus years has been as a court of appeal from decision of the Civil Court involving alleged violations of the fundamental rights and freedoms provisions of the Constitution and, since the enactment of the European Convention Act in 1987, of the substantive provisions of the Convention and its Protocols.

When the violation of a social right amounts, or is alleged to amount, *also* to a violation of a fundamental right recognised by the Constitution or by the substantive provisions of the European Convention on Human Rights or of one of its Protocols, the aggrieved party may seek redress (generally referred to as “constitutional redress”) by filing an application before the First Hall of the Civil Court and then, by way of appeal, before the Constitutional Court. Such an application may be filed not only if a violation has occurred or is in the process of occurring, but also if it is likely to occur¹⁰⁸. Moreover, if in any proceedings before any court¹⁰⁹, other than the First Hall of the Civil Court or the Constitutional Court, any question arises as to the contravention of any of these fundamental rights, that court must refer the question to the First Hall of the Civil Court unless in its opinion the raising of that question is merely frivolous or vexatious¹¹⁰. In determining such a question, whether by application or after referral by another court, the First Hall of the Civil Court and, as the case may be, the Constitutional Court “may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of” the fundamental right provision to the protection of which the person concerned is entitled¹¹¹. When a court has, by a final judgement, declared any instrument having the force of law, or any provision thereof, to run counter to any provision of the Constitution or to any of the substantive provisions of the European Convention or its Protocols, a copy of the judgment is sent by the Registrar to the Speaker of the House of Representatives, and the latter lays a copy of the judgment on the table of the House. It is then up to Parliament to enact the necessary amending or repealing Act. However, the Prime Minister may, within the period of

¹⁰⁷ Article 95(2) of the Constitution.

¹⁰⁸ See Article 46(1) of the Constitution and Article 4(1) of the European Convention Act (Cap. 319).

¹⁰⁹ By a “court” here is meant a court established under the Constitution and the Code of Organisation and Civil Procedure (Cap. 12). A tribunal or other judicial body established under any other Act of Parliament is not generally regarded as a “court” for the purposes of this provision.

¹¹⁰ Article 46(3) of the Constitution and Article 4(3) of Cap. 319.

¹¹¹ Article 46(2) of the Constitution and Article 4(2) of Cap. 319.

six months from the date of the said final judgment, and to the extent that it is, in his opinion, necessary to remove any inconsistency with the Constitution or with the provisions of the European Convention or its Protocols, make regulations deleting the relevant instrument or any provision thereof¹¹².

Any person who feels that he has been denied a social right to which he is entitled may sue the appropriate Government Department (or, if the right is alleged to have been denied by a particular person, that person) by filing an application before the First Hall of the Civil Court. An appeal from a decision of this court lies to the Court of Appeal¹¹³. If a violation is found the courts will order specific performance and, where it is proved that the plaintiff has suffered material damages (*damnum emergens* and *lucrum cessans*) as a result of the denial of the right, the payment of damages (moral damages are not available in these cases¹¹⁴).

Labour and social security disputes, however, have their own tribunals. The Industrial Tribunal, established under Article 73 of the Employment and Industrial Relations Act (Cap. 452) has exclusive jurisdiction to consider and decide all cases of alleged unfair dismissal from work and cases where it is alleged that an employer is in breach of a condition of employment. This tribunal can also decide trade disputes. From a decision of the Industrial Tribunal an appeal lies, on a point of law only, to the Court of Appeal¹¹⁵. Moreover, the Employment Commission, set up pursuant to Article 120 of the Constitution, has jurisdiction to hear and determine any application by a person on the ground that, in respect of employment, a distinction, exclusion or preference that is not justifiable in a democratic society has been made or given to his prejudice by reason of his political opinions¹¹⁶. In practice the work of this Commission is now undertaken by the First Hall of the Civil Court and by the Constitutional Court in constitutional redress proceedings.

The Social Security Act (Cap. 318) provides for the setting up of a Social Assistance Board¹¹⁷. Certain disputes as to whether a person qualifies or otherwise for social assistance

¹¹² Article 242 of the Code of Organisation and Civil Procedure (Cap. 12).

¹¹³ Malta does not have a cassation or “third instance” court. Moreover in the Island of Gozo the functions of the First Hall of the Civil Court (other than the function of hearing constitutional redress applications) are performed by the Court of Magistrates (Gozo).

¹¹⁴ Moral damages may be awarded by the First Hall of the Civil Court and by the Constitutional Court as a remedy for the violation of a fundamental human right pursuant to a constitutional redress application. Moral damages are possible in ordinary civil proceedings in the case of defamation by printed matter and in the case of a breach of promise to marry.

¹¹⁵ Article 82(3) of the Employment and Industrial Relations Act (Cap. 452).

¹¹⁶ Article 3 of the Employment Commission Act (Cap. 267).

¹¹⁷ Article 128.

are determined by this Board, and its decision is final and conclusive. However this does not exclude the possibility of judicial review by the ordinary courts.

Most laws rope in the criminal law as a way of enforcing certain duties connected with corresponding social rights. Thus, for instance, the Education Act (Cap. 327) provides that it is an offence for the parent of a minor to fail to register him or her in a State school or in a private school licensed under the Act, or to fail to ensure that he remains so registered at all times until the minor is of compulsory school age¹¹⁸. It is likewise an offence to fail to ensure, without a good and sufficient cause, that the minor attends school regularly¹¹⁹. In the case of a second or subsequent conviction for any of these offences, the Voluntary Jurisdiction Section of the Civil Court may, upon an application of the Director of Education, deprive the parent of his authority, whether *de jure* or *de facto*, over the minor and may appoint a tutor for that minor¹²⁰.

Victimisation and harassment at work are criminal offences in virtue of Article 32 of the Employment and Industrial Relations Act (Cap. 452), with the punishment being a fine, or imprisonment not exceeding six months, or both such fine and imprisonment. Article 45(1) of the said Act also provides that it is a criminal offence for an employer to contravene or to fail to comply with any recognised condition of employment prescribed by a national standard order or by a sectoral regulation order or collective agreement. It is likewise an offence for the said employer to fail to comply with any other provision of the Act. In like vein, Article 62 makes it a criminal offence for any trade union or employers' association to fail to keep proper registers of members, to make annual returns to the Registrar of Trade Unions, or keep proper accounting records. Article 38 of the Occupational Health and Safety Act (Cap. 424) makes it a criminal offence for both employers and employees to fail to observe health and safety standards at places of work.

The high political profile that social rights enjoy ensures that many issues touching upon the same are ventilated in Parliament¹²¹. Apart from the rather rare Government backed, or private, motion to debate a particular issue, social rights issues are regularly examined in one of several Standing (i.e. permanent) Committees of the House of Representatives. Standing

¹¹⁸ Article 129(1)(a) of Cap. 327.

¹¹⁹ *Ibid.*, Article 129(1)(b).

¹²⁰ *Ibid.*, Article 133.

¹²¹ According to Article 51 of the Constitution the "Parliament of Malta...shall consist of the President and a House of Representatives".

Order (SO) 120A of the Standing Orders of the House¹²² provides for the setting up of, among others, the Standing Committee on Social Affairs. According to SO 120G, this Committee “shall deal with all matters relating to social policy, including social assistance and family matters, which may be referred to it by the House or by the Standing Committee on House Business”¹²³. Question time in the House is also availed of to seek information on social rights issues. Every member of the House is entitled to put not more than six questions to another member (invariably a Minister or Parliamentary Secretary) for oral answers for one sitting, provided that at least three days’ notice is given. A member may also submit questions for written answers, in which case the three day time frame does not apply. Question time takes place during the first half hour of each sitting of the House. This practice permits a member to submit a supplementary question to the Minister in order further to clarify certain issues, which question must however be related to the original question. Questions, however, must only elicit factual information within the special cognizance of the Minister or Parliamentary Secretary to whom they are addressed. In particular, a question must not contain any argument, opinion, inference, imputation, epithet or ironical expression; it must not relate to proceedings before any House Committee where the report of that Committee has not yet been placed before the House; and it must not ask for an expression of opinion or for the solution of an abstract legal question or of a hypothetical proposition¹²⁴.

Act V of 2007 – the Administrative Justice Act (Cap. 490) – has introduced, among other things, the “principles of good administrative behaviour” which are to be respected and applied by most administrative boards or tribunals, including the Umpires (appointed under the Social Security Act (Cap. 318)), the National Employment Authority (Employment and Training Services Act (Cap.343)), the Occupational Health and Safety Appeals Board (Occupational Health and Safety Authority Act (Cap. 424)) and the Industrial Tribunal (Employment and Industrial Relations Act (Cap. 452)). These principle, which are set out in Article 3 of the Act, include those of fair hearing and “natural justice”, equality between the parties, the adversarial nature of the proceedings, and the giving of reasons for all decision taken. In particular Article 3(2)(d) provides that “an administrative tribunal shall ensure that the public administration makes available the documents and information relevant to the case

¹²² Published by Legal Notice 23 of 1962 – S.L. Const.02

¹²³ The work of this Standing Committee overlaps to some extent with that of the Standing Committee of Family Affairs, established pursuant to SO 129H, whose function includes that of dealing “with all matters relating to the family, including the appraisal, analysis and monitoring of current and future family legislation and policies...”.

¹²⁴ The criteria governing the contents of a question are to be found in SO 27.

and that the other party or parties to the proceedings have access to these documents and information.”

Failures in the field of social rights may also be the subject of investigation by a number of bodies or authorities, foremost among them the Parliamentary Ombudsman (proper title “*Commissioner for Administrative Investigations*”)¹²⁵. The Ombudsman may conduct an investigation on his own initiative or on the written complaint of any person having an interest who claims to have been aggrieved by any action taken by or on behalf of the Government (or by or on behalf of any other authority, body or person to whom the Ombudsman Act applies), being action taken in the exercise of their administrative functions.

The National Commission for the Promotion of Equality for Men and Women¹²⁶ is empowered to inquire into and advise, or make determinations in an independent manner, on any matter relating to equality between men and women as may be referred to it by the responsible minister; as well as to provide, apart of such a reference, independent assistance to persons suffering from discrimination in enforcing their gender equality rights and to independently investigate complaints as to alleged violations of these rights¹²⁷. Similar functions, but related to illegal discrimination on the basis of disability, are also assigned to the National Commission Persons with Disability by Article 22 of the Equal Opportunities (Persons with Disability) Act (Cap. 413)¹²⁸.

As has already been pointed out above, social rights are protected in the main by civil actions either for specific enforcement or, where this is not possible, for damages; and by way of appeal to the ordinary courts (usually limited to points of law) from decisions of boards and tribunals. Judicial review both of administrative action (under Article 469A of the Code of Organisation and Civil Procedure¹²⁹) and generally of statutory boards and tribunals is also available. Under the former type of review (that is, under Article 469A) the First Hall of the Civil Court may enquire into the validity of any administrative act¹³⁰ and declare it null, invalid or without effect (a) if the administrative act is in violation of the Constitution (other

¹²⁵ The Ombudsman Act (Cap. 385).

¹²⁶ Set up pursuant to Article 11 of the Equality for Men and Women Act (Cap. 456).

¹²⁷ Article 12(1)(h)(i) and (j) of Cap. 456..

¹²⁸ Enacted by Act I of 2000. The Commission is established under Article 21.

¹²⁹ Cap. 12.

¹³⁰ Article 469A(2) defines an administrative act as “the issuing by a public authority of any order, licence, permit, warrant, decision, or refusal to any demand of a claimant, but does not include any measure intended for internal organisation or administration within the said authority.” Moreover, saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority following a claimant’s written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition.

than the Human Rights provisions thereof), (b) or if it is *ultra vires* because (i) it emanates from a public authority that is not authorised to perform it, (ii) the public authority has failed to observe the principles of natural justice or some other mandatory procedural requirement, (iii) the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations, or (iv) when the administrative act is otherwise contrary to law. Article 469A, however, does not apply where the mode of contestation or of obtaining redress with respect to any particular administrative act before a court or tribunal is provided for in any other law¹³¹. This means that when the Administrative Justice Act (Cap. 490) becomes fully operational, most cases of judicial review of decisions of *ad hoc* boards and tribunals will be carried out by the Administrative Review Tribunal¹³², with a right of appeal from this latter tribunal to the Court of Appeal.

As to the latter type of review, the First Hall of the Civil Court has a residual jurisdiction to review the operation of any statutory board or tribunal on the general grounds of alleged illegality, irrationality (or unreasonableness) and procedural impropriety as understood in English administrative law.

It is also generally possible to obtain the issue of a warrant of prohibitory injunction, whether against a private individual or against the Government or other public authority, to protect a social right. Article 873(1) of the Code of Organisation and Civil Procedure (Cap. 16) provides that the object of a warrant of prohibitory injunction is to restrain a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant. The court, before issuing such a warrant against a private individual, must be satisfied that the warrant is necessary in order to preserve any right of the person suing out the warrant, and that *prima facie* such person appears to possess such right¹³³. Where, however, the warrant is sought against the Government or against a person holding a public office, the criteria are slightly more stringent: the authority or person against whom the warrant is sought must first confirm in open court that the thing sought to be restrained is in fact intended to be done, and thereafter the court must be satisfied that unless the warrant is issued the prejudice that would be caused to the person suing out the warrant would be "disproportionate" when compared with the actual doing of the thing sought to be restrained¹³⁴. Thus, whereas when the

¹³¹ Article 469A(4).

¹³² Established by Article 5 of the Administrative Justice Act (Cap. 490).

¹³³ Article 873(2).

¹³⁴ Article 873(3).

respondent is a private individual the test is one of simple necessity, when the respondent is the Government or other public authority a “proportionality test” is applicable.

Conclusion -- amendments to the laws governing social rights and reform as to the substance of the rights

Parliament may amend the Constitution, but many articles require a two-thirds majority vote in the House of Representatives, while some others (including the provision that the maximum term of a Parliament is five years) require prior approval by popular referendum¹³⁵. Articles 7 to 21 of the Constitution – the Declaration of Principles already referred to – may be amended by simple majority. All other laws require a mere simple majority for amendment, or, indeed, for repeal. However it is doubtful whether, after the amendment of Article 65 of the Constitution by Act V of 2003, Parliament can legislate in such a way as to breach EU laws or, indeed, its international obligations. Article 65 now reads as follows: “Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta’s international and regional obligations *in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003*” (emphasis added). The prevalent opinion is that it may not so legislate and, *semble*, neither can it validly legislate in such a way as to breach its other treaty obligations which have been already transposed, or which will in due course be transposed, into domestic law.

Although case-law recognises the principle of vested rights and that of legitimate expectations, it is unlikely that these principles can, by themselves, be a bar to legislation curtailing social rights.

Given the high political profile of social rights and the avowed commitment to them by all the main political parties, nothing indicates that in the immediate future there is likely to be any substantial regression in the nature or content of these rights. While the *quantum* of pension entitlement remains problematic (given in particular the decreasing birth rate in Malta), the tendency is to expand slowly social rights to cover new terrain, foremost among these being that of the protection of the environment.

¹³⁵ See Article 66 of the Constitution.

