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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**Relations between the Constitutional Court and the
Supreme Court from the viewpoint of Malta**

Meeting of Presidents of Supreme Courts of Central and Eastern European Countries on "The
Supreme Court and the Constitutional Court:
interrelation of the roles, powers and responsibilities"
(Prague & Brno, 20-23 October 1997)

Relations between the Constitutional Court and the Supreme Court from the viewpoint of Malta

Mr. Chairman, Colleagues,

It is an honour for me to be invited as a member of the Venice Commission for Democracy through Law to participate in this Seminar and to report on the relations between the Constitutional Court and the Supreme Court from the view point of Malta.

My first reaction was: Why Malta? The answer was immediately obvious, because in our Island's state the Constitutional Court and the Supreme Court, which is, in our legal system, termed the Court of Appeal, are in practice, though not in theory, the same Court, having separate and distinct jurisdictions. Considering that this meeting is concerned with relations between the two Courts and hence the possibility of contrasts and dissenting opinions, the notion of the two Courts functioning as one must have seemed novel and, perhaps, even intriguing. Hence my pleasant presence in your august company. I shall attempt to trace Malta's experience in this field giving some indication as to how the system works in practice, its advantages and disadvantages.

Historical notes

I think it useful at this early stage to give a very brief outline of Constitutional development in Malta, a small republic in the very middle of the Mediterranean Sea, with a population of less than 400,000 but with a chequered history.

The Maltese legal system is an eclectic one being largely based on the two main streams of European legal development - Roman Law and British Common Law. This is undoubtedly a reflection of Malta's political and cultural history. Since the year 216 B.C., when the Romans occupied the Island, the laws enacted by Rome for the provinces applied to Malta and continued to do so until the end of Roman rule in 870 A.D. With the Norman conquest of Malta in 1090 by Count Roger and for a subsequent period of over 400 years, Malta's destiny was tied up with that of Sicily. As a result Sicilian Laws were applied. Successive Grandmasters of the Order of St. John who ruled Malta from 1530 to 1798 enacted their own legislation. However, whenever there was a lacuna in these enactments recourse was made to Roman Law as the *ius commune*. The Code de Rohan of 1784, which consolidated previous laws enacted by the Order, was very similar to the Codes governing the greater part of the Continent of Europe at the time.

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

Malta has had, since those early times, the good fortune of enjoying an uninterrupted tradition of

a strong, impartial and independent judiciary, even when still a British colony, when the Maltese did not as yet enjoy any measure of constitutional autonomy and had absolutely no say in the legislative and executive functions of the State. In fact constitutional development was rather slow and successive constitutions alternated between the principles of benevolent autocracy and that of representative government. There were however a number of basic social reforms that the British bequeathed Malta and these included the introduction of a judicial system that has stood the test of time. It is both pragmatic and streamlined, based on the two tier system, whereby only one appeal is possible from a decision of a Court of First Instance to a Court of Appeal. No appeal is possible from a decision of the Court of Appeal. The Court of Appeal under British Rule was considered to be the Supreme Court of the country and was composed of three of His Majesty's Senior Judges, one of whom was designated as Chief Justice. A set up that was retained under the Independence Constitution. Independence was achieved in 1964. The Constitution of that year established Malta as a liberal parliamentary democracy based on the safeguard of fundamental rights and freedoms of the individual, guaranteeing the separation or division of powers between the legislative, executive and judicial branches of the State, with regular elections based on universal suffrage.

The setting up of the Constitutional Court

The 1964 Constitution established the Maltese Constitutional Court for the first time. Initially it was composed of the Chief Justice and four other Judges of the Superior Courts nominated from the existing members of the ordinary judiciary. Since 1974 the Constitutional Court has been composed of three Judges [Section 95 (2)], these normally being the Chief Justice and two most senior judges. The appointment to sit on the Constitutional Court is made by the President of the Republic usually following the advice of the judges themselves. The Constitution qualifies the Constitutional Court as one of the Superior Courts made up of three judges that can sit on the Court of Appeal. It does not therefore recognise a hierarchical superiority to the Constitutional Court vis-a-vis other superior courts. Its superiority emanates from the nature and quality of its special jurisdiction to decide constitutional matters with an effect erga omnes. Decisions which other courts are expected to respect and follow as they indeed do, even though the Maltese system does not recognise judicial precedent. The Constitutional Court therefore forms an integral part of the judicial system. The Chief Justice, who is in relation to other judges a primus inter pares, is the President of that Court as well as the President of the Court of Appeal. There can be only one Constitutional Court. On the other hand the Constitution provides that the Court of Appeal, in its superior jurisdiction, is to be composed of the Chief Justice and two other judges of the Superior Courts. There can be more than one Appeal chamber - there are presently two - but each chamber has to be presided over by the Chief Justice. This assures continuity and uniformity in interpretation. As stated, the Maltese legal system does not recognise the judicial precedent but lower courts are expected to follow Appeal Court decisions unless there is a grave and well motivated reason for not doing so.

Appointment of judges of the Constitutional Court and of the Supreme Court

The judges of the Constitutional Court, like all other judges of the Superior Courts, are appointed by the President of the Republic acting upon the advice of the Prime Minister. To qualify for such an appointment a person must have acted as advocate or served as a Magistrate in Malta for a period of not less than twelve years. Judges must vacate their office on reaching the age of sixty five years. The Constitution and the Code of Organisation and Civil Procedure have various provisions meant to secure the impartiality and independence of the judiciary. Judges enjoy security of tenure once appointed to their office, they are completely independent of the other organs of the State. The Constitution in section 107 provides that salaries for judges are a charge on the Consolidated Fund. This is an important provision as thereby the salaries of judges cannot be withheld under any pretext by any organ of the State. Moreover, the same section provides that the salary and terms of office of a judge cannot be altered to his disadvantage after his appointment. Another safeguard to a judge's independence is provided by sub-section (2) of section 97 which provides "that a judge shall not be removed from his office except by the President of the Republic acting upon an address by the House of Representatives supported by the votes of not less than two thirds of all the members thereof. The only grounds for a removal of a judge that are mentioned in the Constitution are proved inability to perform the function of his office, whether arising from infirmity of the body or mind of any other cause or proved misbehaviour. The relative sections are entrenched sections according to section 66 of the Constitution.

The functions of the Supreme Court and of the Constitutional Court

Broadly speaking it can be said that the functions of the Court of Appeal in its various jurisdictions, for example, commercial, civil or criminal, extend to all matters that do not fall within the special competence of the Constitutional Court. It is therefore pertinent to identify what falls within the exclusive jurisdiction of the Constitutional Court since such an exercise would immediately bring us into the subject matter of this meeting which concerns the inter-relation of the roles, powers and responsibilities of both Courts.

An Original Jurisdiction

The Constitutional Court has an original jurisdiction to hear and determine issues referred to it on whether a person has been validly elected as a member of the House of Representatives; whether a person who, as a member of the House of Representatives, has vacated his seat therein, or was required to cease to perform his duties as a member because of any one of the reasons established by the Constitution; whether a person has been validly elected Speaker of the House of Representatives from among persons who are not members of the House or having been so elected as Speaker he has vacated his office. The Constitutional Court has also an original jurisdiction to determine any reference made to it in cases where voting at elections of members of the House of Representatives is alleged to be tainted with illegal or corrupt practices or foreign interference. If such practices were proved, the Court has the power to annul the election in all, or in one or more, of the electoral districts, to provide the proper remedy and in particular to ensure that fresh free elections be held at the earliest possible opportunity. The Court has also original jurisdiction relating to other matters regarding the conduct of elections and is also called on to hear and determine any reference made to it in accordance with any law relating to the election of members of the House of Representatives.

In these matters the Constitutional Court has an exclusive jurisdiction to the exclusion of any other Court. It has a determining role and there is no appeal from its decisions. The Constitution sacrifices the right of appeal in the interests of certainty of composition of the highest democratic institution in the land and the need to ensure correctness of the electoral process within the shortest possible time. In these matters the Constitutional Court exercises exclusive powers and responsibilities and does not relate in any way to the Supreme Court.

An appellate jurisdiction

The Constitutional Court has an appellate jurisdiction to determine matters, which, by the Constitution, are entrusted to its exclusive jurisdiction to the exclusion of the Supreme Court. These matters are mainly concerned with violations of fundamental human rights protected by the Constitution and matters relating to the validity of laws. The Constitution provides that these matters should first be examined and decided by the First Hall of the Civil Court, being the Superior Court of First Instance having original jurisdiction and this according to a special and speedy procedure provided for in the Constitution. The Constitutional Court therefore hears and determines appeals from decisions of the Civil Court First Hall regarding cases concerning the protection of fundamental human rights and freedoms of the individual, enshrined in section 33 to 45 of the Constitution. These fundamental human rights have been further safeguarded in Malta by Act No. XIV of 1987 by which the European Convention for the Protection of Human Rights and Fundamental Freedoms was made enforceable as part of the domestic law of Malta. This Act extends the jurisdiction of the Constitutional Court to exclusively hear and determine all appeals from the Civil Court involving cases based on the said European Convention. Malta recognises the right of individual petition under Article 25 of the Convention. Moreover Section 6 of Act No. XIV of 1987 further extends the jurisdiction of the Constitutional Court since the enforcement of the relevant decisions of the European Court of Human Rights, within the Maltese jurisdiction, is expressly delegated to the Constitutional Court with power to enforce these decisions in the same manner as judgements delivered by this Court. This too can be considered to be an original jurisdiction. The Constitutional Court also hears and determines all appeals from any Court of original jurisdiction in Malta as to the interpretation of the Constitution. Thus whenever the question arises regarding the interpretation of any Constitutional provision before any Court, the decision of that Court gives rise to the possibility of appeal to the Constitutional Court which will decide the matter finally. It has also the jurisdiction to hear all appeals from any Court of original jurisdiction as to the validity of laws. Section 6 of the Constitution expressly provides for the supremacy of the Constitution in that if any other law is inconsistent with the Constitution, the Constitution should prevail and the other law shall, to the extent of the inconsistency, be deemed void. From the above it should be clear that the Constitutional Court in Malta has the powers and responsibilities inherent in the functions of a constitutional court as envisaged in modern constitutional doctrine. It should also be clear that the Constitutional Court operates within clearly defined parameters. Its functions do not as a rule clash or even relate to those of the Supreme Court in so far as its functions are either exercised in an original jurisdiction or in an appellate one that is exclusive, to the exclusion of the Supreme Court's jurisdiction. Moreover, the legislator became aware through experience that a question decided by a Court of an original jurisdiction on matters concerning fundamental human rights, interpretation of the Constitution or validity of laws might involve issues that did not fall within the jurisdiction of the Constitutional Court and would therefore normally fall within the jurisdiction of the Supreme Court. The Constitution provides for such an eventuality by declaring the Constitutional Court competent to deal with

and decide all questions raised in the case and not merely the Constitutional issue. Had there been no such provision in the Constitution the action would have to be divided into two parts, one going before the Court of Appeal, and the other before the Constitutional Court. To obviate for this possibility the Constitution provides a practical solution before the same Court which avoids confusion and delay, before the same Court, namely the Constitutional Court would decide all issues, not merely the constitutional ones. In this regard one could say that the Maltese Constitutional Court is recognised as having the important role of acting as guardian of the Constitution and that in the proper exercise of its functions it is, where necessary, given the jurisdiction to decide matters which would normally fall within the competence of the Supreme Court to avoid the possibility of conflict or delays. In these limited exceptional cases one could say that in the inter-relation between the Supreme Court and the Constitutional Court the latter is favoured and assumes the jurisdiction of the former in the interest of the determination of the constitutional issue.

Constitutional Court to be constituted automatically

The Malta Constitution now provides for the automatic setting up of the Constitutional Court thereby ensuring that the highest judicial organ, entrusted with the duty of ensuring the safeguarding and enforcement of the people's constitutionally protected rights, is able to function at all times. Subsection (6) of Section 95 provides for the automatic constitution of this Court thus guaranteeing the availability of the necessary means of redress to any aggrieved person. This section is one of the many entrenched provisions in our Constitution, thereby ensuring that it would not be possible to amend such a provision unless a minimum of a 2/3 majority vote of the members of the House of Representatives is obtained. It is provided that if, for any reason the Constitutional Court is not constituted according to law, the three most senior judges, including where possible the Chief Justice, would automatically assume the powers and jurisdiction of the Constitutional Court without the need of any further formality or appointment. This amendment to the Constitution was introduced following a constitutional crisis in the 1970's when the Constitutional Court was suspended for a number of months. Malta, like other countries, has had its dark moments of attempted political interference in the judicial process and of unfortunate attempts of the executive to try and influence the course of justice. Better counsel eventually prevailed and it is considered that the Constitutional amendment, which in effect correctly recognises the supremacy of the Rule of Law and the role, powers and responsibilities of the Constitutional Court, is a landmark in our Constitutional history and a credit to the political maturity of the Country. This provision regarding the automatic constitution of the Court does not extend to the Supreme Court, but it is clear and obvious that the Supreme Court's very existence is adequately protected by the very fact that the Constitutional Court can function at all times thus ensuring the effectiveness of all constitutional provisions, including those relating to the judiciary and constitutionally recognised jurisdictions.

Relations between the Constitutional Court and the Court of Appeal

I think I have given sufficient data to illustrate that in reality it therefore becomes difficult to speak of collaboration between the Constitutional Court and the Court of Appeal in the Maltese scenario. The distinction between the two Courts is more virtual than real. The fact that the two Courts have the same identical composition leads to a situation where you cannot really speak of collaboration. Although the distinction between the Courts is formally maintained, in reality the two function as one Court. The binding force of the Constitutional judgement derives not from the fact that it is delivered by the Constitutional Court but from the authoritative nature attributed to the judgements of the Superior Courts in the Maltese system.

The ambiguity in the Maltese position has been further compounded, as I have already stated, by reserving the protection of fundamental human rights to the First Hall of the Civil Court and from there, on appeal, to the Constitutional Court. Other Courts, not being the First Hall of the Civil Court - therefore including the Court of Appeal - are ordained by the Constitution to refer an issue regarding the violation of fundamental human rights, where raised, to the First Hall of the Civil Court for decision by it. A quaint situation sometimes arises where the Court of Appeal refers an issue raised in front of it concerning an alleged violation of fundamental human rights to the First Hall of the Civil Court for a decision by it; the matter ultimately ends up on appeal in front of the Constitutional Court that might be composed of the same judges in the Court of Appeal who originally made the reference.

The decision of the Constitutional Court is therefore not much different, except as to its subject-matter, from that of the Court of Appeal especially as to its authoritative and binding character.

Stare decisis

I have already noted that the Maltese legal system does not recognise judicial precedent. On this important point the Maltese system only recognises authoritative weight but not binding force to the judgements of the Court of Appeal in so far as subsequent decisions are concerned. There is therefore no doctrine of "stare decisis" in Malta. Significantly this could be seen as the main reason why the Constitutional authors have decided to introduce a Constitutional Court into the Maltese system. There is however no provision in the Constitution providing for the statutory binding effect of the decisions of the Constitutional Court beyond the merits of the application considered and decided by it. This means that in theory the doctrine of stare decisis is not applicable to these judgements, just as it is not applicable to the judgements of the "ordinary" Courts, including those of the Court of Appeal.

Therefore while it is clear that the judgements of the Constitutional Court would be binding on the other courts in so far as concerns the case specifically referred to that Court for decision, it is not at all clear that the judgement of the Constitutional Court would constitute a binding precedent on other courts if a similar issue were to arise before them.

On the other hand one can consider that certain Constitutional Court judgements that have an effect erga omnes like decisions regarding the validity or constitutionality of laws would be considered to have a binding effect on its own subsequent decisions and on those of other Courts including the Court of Appeal. It would perhaps be more proper to consider these

judgements as being the final determination by the competent constitutional tribunal of the state of the law in dispute within the country rather than as a matter of judicial precedent.

The Common Law and Civil Law Tradition

The matter of judicial precedent is of paramount importance and appears to be at the root of the widely felt need for the setting up of a court with a special constitutional jurisdiction separate and distinct from the Supreme Court. If one looks at the rainbow of positions obtaining in different constitutions throughout the world a cleavage appears to exist between countries with a common law tradition and countries with a civil law tradition. The existence of constitutional courts seems to be, generally a feature of the latter, while in States with a common law basis it is more probable that the constitutional function is going to be exercised by the ordinary courts with the Supreme Court acting as a final court of ultimate appellate general jurisdiction, including, in such jurisdictions, the jurisdiction to enforce the provisions of the Constitution.

The reasons for this differentiation has generally been attributed to the existence of a system of precedent in the common law countries. The argument seems to assume that where no system of precedent exists it is impossible to have constitutional matters definitely decided unless the question is put into the hands of a constitutionally specific organ, such as a constitutional court, with specific and final jurisdiction on constitutional matters. The issue has also reflections on the ability of the Courts to annul the decisions of other constitutional organs, and in particular to annul the acts of the legislature.

The Kelsenian model of constitutional justice provides for a Court which is distinct and separate from the ordinary court system with a different composition and different procedures and having the power to examine the constitutionality of norms passed by Parliament and, if necessary, to annul any such norms found in conflict with the constitutional text.

It should be evident, even from the limited information I could provide in this paper, that it would be an over simplification to state that the Constitutional Court in Malta appears to be a reflection of the position adopted in civil law countries. It should be clear that while the genesis for the Constitutional Courts in Malta are the continental systems having a Constitutional Court, the situation in Malta cannot be classified as typical of a civil law country. The legal system in Malta is hybrid, with public law having as one of its principal sources the common law of England while private law being derived from the civil law system. These dual, sometimes contrasting traditional sources that animate maltese juridical development, are clearly reflected in the ambiguity even ambivalence of procedures regulating the workings of the Constitutional Court. An ambiguity that has been successfully overcome precisely because the Constitutional Court has been integrated within the existing, well-established judicial structures of the country.

Advantages of the Maltese System

One can safely say that the Maltese Constitutional Court, having been integrated into the country's well established judicial structures existing prior to independence, and composed of judges that were by tradition and training committed to independence and impartiality, had the obvious advantage of distancing the consideration and determination of constitutional issues, which are often charged with a marked political content, from political influence. The Constitutional Court benefited from this traditional independence of the judiciary and the Maltese judges had no difficulty in asserting this independence in deciding constitutional cases. The fact that judges of the Constitutional Court had to be chosen from among the judges already qualified to sit in the Court of Appeal, with all the guarantees regarding security of tenure to which reference has already been made and with a uniform established retiring age, further distanced them from political influence or patronage. Like any other judge in Malta, a member of the Constitutional Court is expected on appointment to shed every political connection or allegiance and his deliberations had to be strictly related to judicial and juridical considerations.

This is, in my opinion, the most significant advantage of having the Constitutional Court in practice, if not in theory, part and parcel of the Superior Court of the land. This does not mean that all has always been a bed of roses and that there have not been instances where the Constitutional Court, in a moment of trial, did not rise to the occasion. As Bernard Shaw would have it "human nature being what it is" cases have been recorded where the Constitutional Court seemed to have given in to pressures from the Executive or the party in power. More through fear than favour, since, as Alessandro Manzoni would say, "Not all men were born with the heart of a lion". But on balance I believe that the Constitutional Court can be proud of its record in the defence of fundamental human rights and freedoms, even in difficult political times. It has a positive record in matters relating to the correct evaluation and judging on the constitutional validity of laws and regulations and in the defence of fundamental freedoms and human rights. This success is, in my opinion, to be accredited directly to the fact that the Constitutional Court, like all other Courts in Malta, is completely apolitical. It exercises a purely judicial function, often judging political acts, but completely removed from political allegiance or influence. It does not represent political currents or affiliations and its composition is not related and does not depend on political considerations or approval. Any attempt at improper influence is actively resisted by the judges of the Constitutional Court just as any other judge of the Court of Appeal, or for that matter any other Court, would justly resent and resist it.

I trust that my comments on the workings of the Maltese Constitutional Court have provided interesting information and that they would further stimulate your interest in the debate on the topic of this meeting which is naturally much wider and much more all embracing than the Malta experience.

Thank you.

Justice Joseph Said Pullicino
Chief Justice
Constitutional Court of Malta