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Elements of Maltese Law

The Constitution of Malta

To visit: www.justiceservices.gov.mt

Go to legal services – Laws of Malta – Constitution

Constitution is the basic legal and political document of a state or a country. Typically it will provide for the form of government whether it is in the form of a presidential style ex the United States/France, whether or not a parliament exists and the powers conferred on parliament. This may be for various reasons ex two chamber system ex Italy/France – deputies and the senate, UK – PARLIAMENT AND HOUSE OF Lords – or powers are shared between ex parliament and president. Other imp matters addressed by the constitution – who is entitled to hold the frequency of elections, how governments are appointed.

Other related issues – judiciary meaning the courts – and public finances meaning budgets, how taxes are raised etc.

Expresses the political character of a state.

Monarchs do not have elections

Malta's System – West Minister Style/Model.

West Minister Model – British model – Parliament, prime minister and cabinet of ministers to lead and head the government, opposition, periodic elections, judiciary and public finances.

The present constitution of Malta owes its origin to an act of the British parliament in 1964 (when Malta became a British dependent territory) – act of British parliament in 1964 which granted independence to Malta – known as The Malta Independence Act which incorporated the constitution (written in Malta but was an act of the British parliament giving independence to Malta)

It has been amended throughout the years for many reasons – Republic, local councils, legal possibility of having double citizenship. Ex Australian and Maltese citizenship.

Chapter 1 of the Constitution

It regulates matters such as the Maltese Language, being the national language and the language of the courts, the Maltese and English languages being the languages of administration, national territory, the Maltese islands, the neutrality clause, which says that Malta shall pursue a policy of neutrality and will not have or host military bases. Other aspects are National Anthem, religion, the rule that the constitution will be the supreme law of the land. (Article 6)

The constitution is therefore at the same time the most basic and the highest law of the land. It is the most basic because it defines the political structure and organisation of Malta. It is at the same time the highest law because anything done which goes against or is in violation of the constitution is null (no effect) and void. There have been many instances ex rent in prime areas being ridiculously low because of some old war laws. This is a violation of the property laws – cannot have a house which costs a million being rented at very low prices.

There is a court known as the constitutional court which has the power to annul laws which go against the constitution or any act of government which is considered by the court to violate the constitution. This is therefore because the constitution is the supreme law of the land – the highest law. Anything which goes against the constitution can be challenged because it is unconstitutional – ex government cannot have elections in 6 years.

Chapter 2 of the Constitution

This was adapted from the constitution of India. In the 50s and 60s there was a movement where the British started digesting itself from its colonies.

The constitution of India was also a model for the Maltese Constitution because it was a very important colony of the British Empire.

It is a declaration of principles ex – the state shall encourage private economic enterprise for example that the state will encourage artesian trade, will promote minimum working hours. The essential point is that these declaration of principles are not enforceable in any court, some people say they are worthless. This caution exists today – not written in constitutions that state will guarantee employment for all – otherwise government can be taken to court.

Very high principles but not enforceable in any court.

Chapter 3 of the Constitution

It relates to citizenship. It relates to the way Maltese citizenship is acquired.

Chapter 4 of the Constitution

It relates to fundamental rights and freedoms.

Chapter 5

It relates to the office of the president of the republic. It states that the president is appointed by a simple majority in parliament, has to be a citizen of Malta, cannot have held the office of judge and holds office for 5 years.

Chapter 6

It relates to parliament. It establishes parliament – there shall be a parliament known as the House of Representatives. It provides who may vote (18+ years and have been resident in Malta for the past 18 months) and who may not vote. It provides the method of election of parliament. The parliament shall be elected on the basis of electoral district. Our electoral system is known as a proportional representation system, with a single transferable vote – a citizen is only entitled to one vote and can vote for as many candidates as he wants. In the English system the parties nominate a candidate and the people vote for that candidate representing the party.

From each district there are normally 5 elected candidates.

The parliament has to meet two months after the general election and has a life of 5 years from the first sitting, apart from some technical extensions. The parliament is charged to legislate for the good order of the country in accordance with the constitution and the laws of the European Union. This is because a parliament can legislate only within the four squares of the constitutional document and the EU Laws.

Two other important aspects of this chapter are that the parliament has to elect from amongst its own members a speaker who presides over the (trying to maintain order) or a deputy speaker who takes over when the speaker is absent. The other imp point is the establishment of the electoral commission is a body charged to organise and cause of local council elections, national parliamentary elections and elections to the European Parliament, as well as referenda.

Chapter 7 – The executive

Here we have the rule of the prime minister and cabinet government. The government is that political party commanding a majority in the house and its leader is the prime minister. The government is carried out by a cabinet of ministers. The constitution provides for opposition and the leader of opposition, in our case its relatively straight forward since we only have 1 opposition party. The constitution also considers the appointment of imp functions such as the attorney general, who has various functions – whether to prosecute (charge someone and take him to court) – he acts independently – free from any government control.

Chapter 8 – The Judiciary

The relevant questions here are that there shall be judiciary mandatory. There shall be a judiciary, there shall be the courts. The constitution therefore provides for the existence of the courts and there are at a constitutional level, judges, who have to have 12 years' experience or magistrates who require 7 years' experience. Judges are appointed by government and their retirement age is 65. Once appointed judges and magistrates serve until retirement age. It is not therefore a question of a renewable contract. There is a constitutionally established retirement age. Judges enjoy independence – the independence of the judiciary means that they are at complete liberty in their judgements and therefore cannot be dismissed simply because they may give unpopular or unexpected judgements or rulings. The independence of the judiciary is a fundamental pillar of the constitution and of what is known as the rule of law.

The rule of law is not ruled by law because even the worst dictators in history ruled by law. A law can be an instrument of oppression. The rule of law is a political and legal concept, which ensures that nobody is above the law, that in the eyes of the law, all persons indistinctly have equal standing and therefore a law applies to all those affected independently of status and position in a society.

Therefore, the courts are a fundamental pillar because their role is to ensure and keep in check that the law is applied to all and that nobody is above the law.

The chapter on the judiciary also provides for a commission for the administration of justice, which has various functions but is also a watchdog on the process of the courts without interfering with the independence of the courts.

Judges and magistrates can be removed by a process known as impeachment, which requires proved and established incapacity (example mental illness) or misbehaviour. The commission of administration of justice also has a role in this process.

Chapter 9 – Public Finance

This authorises and establishes the procedure for taxation and there is an old principle that there is no taxation without representation. In other words, taxes have to be directly or indirectly (power delegated by parliament on government). The constitution gives the power to parliament and the executive to levy taxes and establishes what is known as the consolidated fund.

The consolidated fund is the public fund by default. Of course there are many allocations and specialised and particular accounts. The chapter of finance deals with the auditor general and the deputy auditor general. The auditor general has the function to regularly and on an ongoing basis audit public money and report to parliament. The auditor general is appointed for a fixed period of time and may be reappointed but during the period of office the auditor general enjoys the same independence as the judiciary.

Chapter 10 – The Public Service and Local Councils

The existence of local councils is also acknowledged and provided for in the constitution. There is not much detail. We find the detail in the local council's act.

The public service is those who are engaged by government. This has a long history and the rule is that public servants are engaged, disciplined and dismissed by a commission known as the Public Service.

The discretion of the public service commission cannot be challenged or enquired into by any court. This means that it is possible to challenge the public service commission for acting beyond its powers.

Conclusion

There are two authorities.

One is known as the Broadcasting Authority and the other is known as the Employment Commission.

The function of the broadcasting authority is a watchdog to ensure that reasonable air time in television and radio is granted to parties, movements, NGOs etc wishing to have access to airtime. Also the public broadcasting authority needs to ensure that no serious misrepresentation is made in current affairs. The broadcasting authority licences radio and television operations.

The employment commission's function as originally designed was to ensure that there is no political discrimination on the workplace. People should not be treated differently, either in favour or against by virtue of holding a particular political view.

Focus on chapter 4

The Development of Fundamental Human rights

There are today three generally accepted levels of fundamental rights and freedoms.

1. The First Level - Traditional civil and political rights
 - Freedom of expression, freedom of assembly and association.
2. Second level – social rights
 - For example the right to welfare, education and employment.
3. Third level – future generation right
 - Urban planning, eco diversity, culture, and environment.

It is only the first generation which has acquired a significant amount of legal enforcement, this is not in the case of the 2nd and 3rd generation rights. There are no important treaties. The point about the first generation rights refers to an effective machinery of legal enforcement. The truth is that while it would be optimal, for example, second generation rights to be enforced, it may not always be feasible and possible to guarantee this by means of a legal obligation of the state.

It would be great if employment were to be guaranteed as a fundamental human right with the consequence that an unemployed person could have a remedy against the state but of course desirable that this may be at least at the current state of development, it is not feasible. Although, it is obviously a political desideratum (high on the priorities and wish lists ex universal free healthcare).

As at today what is guaranteed and enforceable are the first generation of human rights – the civil and political human rights, which include the right to fair hearing, certain minimum rights relating to arrest and detention, the prohibition of torture, inhuman and degrading treatment and also the death penalty.

There is then an important provision regarding the protection from the compulsory taking of possession of a person's properties and the right to peaceful enjoyment of possessions.

There are the 3 freedoms:

- Freedom of expression

- Freedom of conscience and religion
- Right to peaceful assembly and association

There is the prohibition against discriminatory treatment on certain grounds, protection against the illegal expulsion of persons from national territory and the right to an effective remedy for human rights.

In the Maltese law there are 3 levels of protection of fundamental human rights.

The first is The Constitution of Malta chapter 4. The second is the European Convention on Human Rights and Fundamental Freedoms. The third is Chapter 319 of The Laws of Malta.

The Constitution of Malta – Chapter 4

There is a human rights chapter in recent history. The 1961 constitution also embodied a human rights chapter. The current version is the 1964 chapter 4. It is broadly based on the European Convention as it was at the time the constitution was written

The European Convention of Human Rights - ECHR

www.echr.coe.int – homepage of convention

This was signed in Rome in 1950 and is a convention which operates under the organisation of the Council of Europe. After the 2nd World War there was a resolve to avoid the inhumanities which happened in WWII and the council was set up to promote democracy, fundamental human rights and the rule of law. There are today some 48 members of the council of Europe and are signatories to the European convention. These include Russia, The Federation of Russian States: Andorra, Moldova, Montenegro, Bosnia, and Azerbaijan. It also includes the 28 states of the European Union.

This convention has 2 characteristics:

- There exists a European Court of Human Rights whose seat is in Strasbourg, France. It has the power and competence to consider complaints and grievances of human rights brought both by an individual member state against another state but perhaps more importantly there exists the right of individual petition. This means that an individual citizen, a company or a foundation has the right to bring its case to the European Court when all domestic remedies have been exhausted. They would have to go through all that is possible under the local law first. The effect of the judgement in the Court of Human Rights is that it can be enforced locally

- The European Convention is a European Treaty whereby the subscribing parties guarantee to those present in their territory not necessarily their own citizens are protected by the convention. There have been additions to the original convention. These are turned as protocols in the language of international law. For example – the first protocol guarantees the freedom to enjoy possessions, the right of free education and the right to periodic free and fair elections. Other protocols establish the right to compensation if you are wrongly detained or convicted, the right not to be tried twice for a criminal offence. There are 2 protocols on the death penalty. The first is the abolition of the death penalty except in time of war. The second is the abolition of the death penalty in any circumstances. Malta has subscribed to some but not all protocols.

It is important to distinguish the Council of Europe from the European Union.

All the 28 members of the EU are members of the Council of Europe but not vice versa. The European has a court, the Court of Justice, which is a distinct body from the ECHR. The court of justice of the EU has its seat in Luxembourg and is concerned with the Law of the EU. It has various pillars but the most important are the freedom of services and capital.

There is a charter of human rights of the EU. This has not yet the specific binding machinery of the European convention but it is an instrument which is binding on the union and indirectly therefore on its citizens. Example it protects the right to subsidiarity – this means that decisions as far as possible are taken by those directly involved.

The European Council is an institution of the EU whereby the heads of state meet to take political decisions – this is not the Council of Europe.

Malta became a member of the European Convention of Human rights in 1967 and late in 1987 when they signed the right of individual petition.

Chapter 319

This is an act of the Maltese parliament passed in 1987 whereby the provisions of European court were incorporated as part of the Maltese domestic law. It provides the provisions regarding to procedure but most importantly there are 2 rules:

- The convention is part of domestic law
 - This means that the European convention is not only part of Malta's International obligations but also that as part of domestic law the provisions of the convention are incorporated. This means that when a citizen brings an action, a procedure, on human rights, the citizen is evoking not merely the constitution but also directly as a matter of local law the provisions of the convention.

- This chapter provides for a mechanism of enforcement of judgements of the u court as if it were a judgement of the Maltese court. The majority of cases that the Maltese have taken to the European Court related to property issues – expropriation or claims on very low rent. There have been other issues but mostly property. For example they take your property and give you a compensation which you believe is too low.

The relevant Articles of both the Constitution and the European Convention of Human Rights

Chapter 4 of the Constitution

Article 32 of the Constitution.

This is a preamble which states that every person in Malta is entitled to the following fundamental rights. This preamble does not go into the detail of protection. It is a general statement on the level of protection. The rights protected are the first generation rights and refer principally to the traditional civil and political rights. This preamble states that every person in Malta is entitled to protection of the following rights:

- Life liberty and security of the person
- Enjoyment of property
- The protection of the Law
- The 3 freedoms: Conscience, expression, peaceful assembly and association, respect for private and family life

These rights are to be secured to any person in Malta regardless of place of origin, race, political opinion, colour, creed, sex, sexual orientation or gender identity. These are irrelevant criteria for discrimination.

These rights are subject to 2 important limitations which are the rights and freedoms of others and the public interest. The rights and freedoms of others acknowledge that other members of the community have an equal and corresponding right and entitlement for protection of this right. Therefore, the exercise of the right has to be kept within the limits of the corresponding exercise by the other members of the community. The second is that there are instances, which tend to be controversial, where the public interest may limit or override the exercise or the uncontrolled exercise of any right. Example: there are instances where the public interest may limit the individual rights in the interest of the community. Example: have to work. There is a corresponding obligation at article on of the constitution, where all the signatures to the convention have undertaken to secure the enjoyment within the rights of the convention.

It is important to bear in mind that a right is always subject to limitation and there is the proper exercise of a right and the abuse of a right. The abuse of a right is when a right is exercised not for its proper legitimate purpose but for something else. Example: Governments have the right to expropriate property of private individuals in the public interest like a school, a hospital, a playground etc.

Article 33 of the Constitution corresponding to Article 2 of the Convention – The protection of the Right

There is protection of the rights. The original 1950 text stated that there is right to life and entitlement to the protection of one's life. There shall be no intentional deprivation taking of life, capital punishment, execution, except where there is a law which provides for such execution and subsequently there is a conviction for a criminal offence.

The sixth protocol to the convention, to which Malta has subscribed to and is part of the domestic law, provides that there is an absolute prohibition of the death penalty except for offences in times of war or apprehended war. Those are the only situations where there can be the death penalty. Example: Treason.

There are situations, particularly in control of violence and force, where life can be lost. For example: self-defence, mob control where it gets violent. Is this a violation of the right to life? There are 4 exceptions, which the European Convention has established.

In certain situations it is acknowledged to control mob violence as a consequence of fire, life has to be lost. This is never a clear exercise. The rules imposed are that the reaction has to be necessary and the rule of proportionality. It is very easy to state but in reality it is difficult to control. Subject to this the convention and constitution lay down the following rules which if there is loss of life there is no violation of the protection to the right of life.

Exceptions:

- Where life is lost from the defence of a person from violence or to protect property.
- For the purpose of the authorities of suppressing a riot or insurrection (an up riser), where you have therefore uncontrolled mob violence which goes out of control or threatens the authority of the state.
- Where there is loss of life to prevent the commission of a crime or to affect a lawful arrest or to prevent the illegal escape from lawful custody. If in these situations there is loss of life, it is not a violation.

Articles 35 and 36 which correspond to articles 3 and 4 of the convention

Article 3 of the convention prohibits inhuman or degrading treatment. This is coming, written in the 1950s, after the world war. This has been applied and interpreted in the context of inhuman and degrading treatment. It has found specific reference to treatment during detention, there is a way to conduct an interrogation when you are arrested, you cannot deprive a suspect during sleep. It has also been applied in the case of punishment. Every punishment has to show a minimum level of respect. Therefore, even when punishments are designed there are limits. In the past we had the idea that a more severe punishment is hard labour, physical hard work. This was abolished.

This precludes and underlines an important principle that there cannot be collective punishment. Guilt – responsibility punishment is specific to each person. There cannot be the imposition of a punishment on a group of people – known as collectivity. Each person has the right to be judged accordingly, if people conspire to do a crime, their punishments will be similar but personal.

Article 4 of the Convention and article 35 of the constitution.

They are not identical because the convention has reference to slavery. Nobody shall be held in slavery or servitude. The constitution, being a more recent version, speaks that nobody shall be required to perform forced labour. It is the application against the rule of forced labour is in general terms easy and straight forward to understand. However, it is more the exceptions that in practice create difficulty.

What about what we call today the essential services?

If for example the medical service have to provide emergency treatment etc. is it forced labour? What about the other basic services of the community – law, army, police etc?

Does the fact that a law or policy requires that these have to maintain at all times constitute a violation of this right against forced labour?

There are a number of exceptions:

1. It refers to work during the ordinary course of detention. There is nothing in principle prohibited by the convention or the constitution which prohibits that those serving time have to perform work or even when they are released on parole (allowed time out from prison). Work here is very often for educational or collective purposes is not a violation of this.
2. Military services or work to be done by conscious objectives. Any work here is not in violation of the
3. The personal care of a person such as hygienic treatment, medical treatment in the interest of another person. No one can argue that it is forced labour.

The most controversial article is where work is imposed on a section of the community either in the public interest or in a period of public emergency or calamity. The more controversial aspect is where the public interest or the benefit of the community is invoked outside the context of an emergency or a calamity. Certain essential services cannot go on strike. The question always remains controversial. The inclination of the European court is that in the case of clearly defined services, such as those relating to medical emergencies, public order, civil protection, it is legitimate and not forced labour to expect that these essential services in the interest of the community are to be maintained. The emphasis however, is in the interest of the community, meaning that the imposition of duties have to be reasonably and objectively justified and cannot go beyond the requirements of the of the community. When, therefore, this becomes excessive or disproportionate, this could violate article 4.

The Freedom from and protection from arbitrary arrest and detention.

These are articles 34 of the constitution and article 5 of the convention. The question is can a person be arrested, kept in a prison cell, detained and deprived of personal liberty?

Here we are looking at the validity and legality of arrest and detention. The general principle is and the presumption is that a person is free and should be free from arrest and detention. So, the presumption and the general rule is that a citizen is entitled to personal liberty and freedom. It is the exception, not the rule, which allows a person to be arrested and detained. Most of the points that are referred to are the exceptions to the principles of personal freedom.

The first and the most obvious is where there is a judgement of a competent court whether within Maltese territory (Maltese court) or a foreign court, in respect of a conviction for a criminal offence. If this conviction imposes detention, for example a period in jail, this is a perfectly legitimate restriction on the right to personal liberty.

Another exception is where a person is unfit to plead to a criminal charge. This means that a person is considered not to have been of sound mind at the time the offence was committed and because of this a person cannot be held to be criminally responsible, but it does not mean that a person will escape detention because often the courts place such persons in some mental asylum, some centre where these people are kept apart for rehabilitation but it is still detention.

The courts have generally the power to order the arrest and detention for the purpose of ensuring compliance and obedience to a court order. If you disobey a court order the sanction can be arrest, detention either as a punishment or until a person decides to obey such court order.

In an alternate scenario, sometimes the courts order the arrest and detention of a person for the purpose of ensuring the appearance and attendance of such person before the court.

The courts have the power to detain and arrest a person, depriving such person of personal liberty either in awarding punishment of a criminal conviction or to ensure compliance with court orders or to ensure that a person does appear before a court.

There is then another situation where the arrest or detention is justified. This time it is not necessarily by court order but it could be another authority, an executive not a judicial authority, such as the police. Therefore, the question is what are the powers of the police to arrest and detain a citizen?

On what grounds can the police do this? The first is where the police have a reasonable suspicion that you have committed or you are about to commit a criminal offence. The action of the police of detention based on suspicion has to have grounds which are reasonable, it cannot be a fantasy or a possibility simply considered by a police official. The legality of the arrest can be challenged on the basis that there existed no objective evidentiary to lead to a reasonable conclusion that a person has committed or is about to commit a criminal offence. Detention is also justified on the basis that a person is about to flee and therefore cannot be then found to answer to charges. On the basis that a person is about to abscond (hide) or flee so that the person cannot be in a position to face charges then detention is justified.

There are other situations which justify the restriction of personal liberty. The competent authorities may detain a person under 18 years of age for the purpose of such persons' education. In other words, where minors are kept in an educational institution with the consequence that their rights to roam etc. is limited or curtailed, this is justified if it is done for the purpose of education and information of such person.

There are other grounds which justify detention. For example where people are kept apart and not allowed to go out freely to prevent the spread of infectious contagious diseases. Likewise, the detention of persons who are reasonably suspected to be either addicted to drugs or alcohol or a threat to the community may be detained for their own treatment and the protection of the community. A more controversial issue is the treatment of vagrants (tramps – people with no fixed residence). There were many early cases in the 1960s about the legality or detention or otherwise of these vagrants. The court only justifies a detention if they are a threat to the community.

When does a person who is arrested or detained have any rights?

The answer is yes that he has rights. The scenario is that he is placed in a closed cell, he cannot leave, given a bottle of water and might not know why he is being held. There are certain minimum rights:

- The authorities have to inform the person in a language that he understands, it has to be translated as soon as reasonably practical, why he is being held. The purpose of detention is to investigate a crime and to see whether a person is prepared to make a statement to the police. They have a right to remain silent when in custody. There is a right to one phone call to a lawyer of your choice. There is an interrogation in police custody has to be in the presence of a lawyer of choice. The reason is that the person claims that he is under pressure. If they are entitled to remain silent will prevent them from making a statement which they will regret.

Can a person be held in comunicado?

The answer is no. There is the 48 hour rule which means that a person who is arrested or detained has to be either brought before a court charged with a criminal offence within 48 hours, and therefore at the moment of charging a person, then the rights of a person charged come into play or within this 48 hour window released.

The courts had consistently held that if a person is released it has to be a manifest and effective release. There were times when a person walked out of the police headquarters and was picked up again two streets away. Therefore the 48 hours starts again. The courts have said that release means that the person has to go home.

Today there is a practice of police bail. This means that you are not arrested but a person who is being investigated gives an undertaking to the police to go to them and cooperate whenever needed.

There are 2 final points:

- Where it is established that there has been wrongful arrest or detention there is a right to compensation and this point is further developed by the seventh protocol to the convention
- The right to freedom and personal liberty may be temporarily suspended not on a mass community level but in respect of specific individuals during a period of public emergency. For example where there is a war and certain people are considered to be allies of the enemy. This power of the authorities is not uncontrolled but it is subject to periodic review by an independent judicial authority.

The requirements of a fair hearing.

This protection is found in article 6 of the convention and 39 of the constitution. The context is court proceedings. So, it is not the scenario of being investigated, it is the scenario where a court procedure has commenced, it could be criminal or civil proceedings.

These articles provide for the minimum guarantees in court proceedings, meaning that if a party can show that a court proceeding or hearing fell short of these minimum standards, then there is a remedy under the constitution and the convention. This can be either that the proceedings complained of are set aside and annulled and the procedure is done afresh, or the court can grant a remedy.

A person charged with a criminal offence is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 3 of the constitution and article 6 of the convention

Any person who is charged with a criminal offence is entitled to a fair hearing by an independent and impartial tribunal established by law within a reasonable time.

We are looking at a scenario where the proceedings have been commenced. It is not the case where someone has been arrested or detained because such a person may be under investigation. The case here is that a person is facing criminal charges. A tribunal has to be established by law (ordinary courts and not a court or tribunal which is set up for an adhoc purpose.)

The requirements of independence and impartiality of a court

Chapters of the constitution of Malta state that the judges are independent. This means that they have what is known as security of tenure i.e they hold office from appointment till retirement age, which is currently 65. A judge can only be dismissed from office either in the case of illness, which prevents the judge from working, or proved misbehaviour. Other than that a member of the court remains in office and cannot therefore be dismissed because it may give an unpopular or controversial decision or a decision which somebody may dislike.

Impartiality

There is a rule that a man cannot be judged in his own case. This means that you cannot have for example the prosecutor being the person deciding the case. If one looks closely at the term 'impartial' he will see the root term 'part'. This means that the person judging cannot be a party, but the person judging has to be a separate and distinct party, hence impartial. Therefore, there is a link between a tribunal established by law, which has to be independent and impartial.

Within a reasonable time

People complain that lengths of time to have a trial are unreasonable. The European court of human rights has clearly established that it is the responsibility of each member state of the convention to ensure that there are an adequate number of judges properly supported and with the required resources to deal with the cases in reasonable time limits and therefore judges are overworked is no excuse (the state has to address the situation – making the conditions attractive to attract certain people.) there is no definition of what is reasonable because each case has its own story and merits. Relevant factors include the complexity of the case. The volume of the evidence involved and the difficulty of getting such evidence and the conduct of parties, if they deliberately delay or do not give the required attention to move with the case, that is another factor. The remedy is money compensation for delay in proceedings.

Civil Proceedings

These generally involve either private parties or companies, normally there is some private or personal interest which is being litigated. Both the articles and the constitution speak of civil rights or obligations. Here again, there is the minimum requirement in the case of proceedings to determine civil rights or obligations of a hearing and a judgement which is determined by a court which is established by law, independent and impartial within a reasonable time. In the case of civil proceedings the rule is that the records, the hearing, the evidence and the files should be public. Public means that any person, not necessarily having any direct interest, even out of curiosity, is entitled to full access and copies of the proceedings, more and most importantly there is full access by the media. The reasoning behind this is that the control of things being public is a guarantee or an added support factor for transparency and propriety of proceedings, which could be different if proceedings were otherwise conducted in secret, with no access to the media to keep a vigilant eye on what is happening.

There are exceptions to the rule of publicity of civil proceedings:

- There are proceedings which by their nature refer to the personal private lives of persons and while they are still as a rule open to public scrutiny the court has a discretion to order against the rule of publicity and that proceedings are held as the term goes behind closed doors. The reason is that normally the doors of the court are open and any citizen can follow what is going on.
- There are other exceptions where the rule against publicity does not apply, for example the interest of minor or vulnerable persons. In the interest of minor or vulnerable persons there is the courts' discretion to go against the rule of publicity. On this point there is also the discretion of the court to order that proceedings are not publically accessible in the interests of defence, public safety or public order and public morality or decency.

The presumption of innocence in criminal proceedings

The rule is that a person who is charged is presumed innocent unless and until proved guilty. The burden of proof to show guilt lies on the prosecution, those alleged, and the general rule in criminal matters is that the burden of proof has to be beyond reasonable doubt. In other words, the police or the prosecutors have to make a case which shows beyond any reasonable doubt the facts with which a person stands charged. There is an important provision to this rule that sometimes notwithstanding the presumption of innocence the burden of proof lies on the party charged. Example in crimes of money laundering, where a person is charged with recycling the financial proceeds of crime. In this event the burden of proof lies on the party charged to show the legitimate origin of the money and it was not deriving from proceeds of criminal activity. There is also inferences that in certain circumstances it may be legitimate for a court to infer conclusions from the conduct or silence of a party who is charged.

There are certain minimum requirements in the case of criminal proceedings. A person who is charged with a criminal offence has to be informed in writing in a language which such person understands and in detail of the charges. A person charged is entitled to full facilities to defend himself. This means in criminal proceedings, the right to have a lawyer of one's choice or if one

cannot afford at public expense, there is the right to have adequate time and facilities to prepare one's defence, full access to the evidence of the prosecution and the right to bring evidence and call witnesses and examine the witnesses called by the other party, to challenge or even discredit or disprove the witnesses of the other party.

Article 7 of the convention and the 7th protocol of the convention

These rules are still under article 39 of the constitution.

First of all, nobody can be compelled to incriminate oneself during a criminal trial. In other words a person accused of a criminal offence has the right to remain silent. A person cannot be charged with an offence or awarded a more severe punishment if at the time of commission or omission it was not a criminal offence or carried a lesser punishment. For example today a fact is committed which today is not a criminal offence. It cannot happen that in 6 months' time this fact is criminalised and a person is charged retroactively. In other words, if something is not criminal today, if made criminal in the future, one cannot be charged if the criminal fact occurred today.

The second is that a person cannot be charged twice for the same offence in which such person has been found guilty or acquitted (not guilty). He cannot stand trial twice for the same fact or the same charge.

The Three Freedoms

1. Freedom of conscience and religion
2. Freedom of expression
3. Freedom of peaceful assembly and association

There is a significant overlap between these three freedoms and a claim for protection against one freedom often invokes a basis for another violation.

Freedom of Conscience and Religion

Article 9 of the Convention which has its counterpart in Article 40 of the Constitution

The fundamental right generally protected here is that every person has the right to freedom of thought, conscience and religion.

This means that a person is free to believe in any religion of one's choice, to change belief from one conscience or religion to another. The right to believe includes the right not to believe, not to embrace any creed or religion. This fundamental right extends to the right to practise in public or in private the right to establish institutions (churches etc.) to show and practise one's belief. It also includes the full right to observe the teachings of one's religion. There is therefore the right to respect in one's observance and the right to practise includes the right to instruct others and to teach others.

There are some imitations which are inevitable in every right. No right is absolute and it is always subject to the rights of others and also to general measures in the interest of the community. The limitations to manifest a person's religion or belief are subject only to those restrictions imposed by law and necessary in a democratic society. Therefore here there is a twofold requirement for the restriction to be justified. It has to be done under the authority of the law and simultaneously necessary in a democratic society. They are simultaneous not alternative.

This is further qualified that such limitation may be justifiable in the interests of public safety or public order, public health, public morality or decency and to protect the rights and interests of others.

Two points emerge from Article 40 in the Constitution:

1. In the case of children, minors under 16, the right to decide on religious instruction is vested in those, normally the parents, having legal responsibility of the minors.
2. If a person decides to enter into a religious order and naturally applying to become part of this order, one has to accept the rules of this order. In this case there can be no violation of the right to freedom of conscience precisely because a person has opted out of his or her own free will to enter such religious order.

Freedom of Expression

Article 10 of the Convention and Article 41 of the Constitution

The rule is that every person is fully entitled to hold opinions, to receive and transmit without interference, ideas, information and opinions without frontiers.

This raises a number of controversial questions such as censorship. How far should a state be entitled to impose bans or limitations on artistic freedom and creativity? In art there is also the right to shock. This article is also involved in issues of freedom of the press, broadcasting and internet. On one hand there is the right to receive and transmit ideas. Is this right absolute? Or is it subject to limitations? The convention recognises the power of the state to regulate the convention, regulate broadcasting (radio, tv, cinema enterprises). At the same time the freedom we have referred to is subject to limitations without frontiers. The convention therefore acknowledges the right to regulate the business of broadcasting but not to hamper or restrain the right of freedom of expression.

For example: A person who applies for a radio or a television station is subject to a fit and proper test. This is permitted because it has to respect freedom of expression. The same applies in the case of traditional printed media. There is the right to edit or publish books, periodicals, newspaper, journals etc. the constitution imposes a requirement that a person has to be 21 years or over and that the contact details of such person are known to the authorities. This does not apply in the case of internet as people can set up websites from all over the world.

This right of freedom of expression is subject to certain limitations. They have to be prescribed by law and necessary in a democratic society. Freedom of expression may be limited to protect national integrity (defence) or security, public safety and public order, public morality or decency. There are then other grounds of limitations. These are the protection of the rights and freedoms of others, where appropriate the protection of person and private lives of others and the authority of the courts to maintain their independence and impartiality.

Freedom of Peaceful Assembly and Association

Article 11 of the Convention and Article 42 of the Constitution.

There is the right to form associations. It is natural that likeminded people form together a club, an association, a trade union, a professional body etc. this right is for the purpose of associating, furthering the ideas or economic interests of the body or association. The articles specifically acknowledge the right to form a trade union. (This was not so obvious when the convention was written). This has developed into a discussion whether the disciplined forces have the right to take industrial action or go on strike. The general trend of the European Court is to acknowledge the right of these disciplined forces to form unions but essential services (medical, police, fire etc.) have to be guaranteed at all times.

This right has been also extended in the right to publically manifest and gather to express one's point of view for example public meetings, demonstrations etc. this of course ties up with freedom of expression and freedom of religion. The limitation is that it has to be peaceful. The moment it stops being peaceful if the authorities intervene to maintain public order or stop a demonstration from degenerating into mob violence, here the intervention of the authorities is not a violation of the right to peaceful assembly and association. This is therefore subject to the limitations, limitations under the authority of a law and necessary in a democratic society for purposes of defence and national sovereignty, public safety and public order, for the purposes of prevention of crime and to protect the rights and freedoms of others.

Article 43 of the Constitution

It has no clear counterpart in the convention but speaks about the term extradition. This means where a person is sent from one country to another country, country B, to answer to criminal charges in Country B. The constitution provides that extradition can only happen under the authority of a law and by virtue of an international treaty between Malta and State B. there has to be a treaty under the procedure of the law. If a person who is wanted in country B can show that he will be tortured in country B there is resistance, it is a defence.

Extradition cannot happen for political offences. A political offence is one whereby a person is charged with a crime of opposing a political regime or a political party. Historically, it has been acknowledged that it is unlikely that the requesting state will offer a fair and proper hearing and that therefore there was protection from extradition.

Discrimination

Article 45 of the Constitution and Article 40 of the Convention

When we speak of discrimination we refer to different treatment. This could mean subjecting a person to certain restrictions or denying certain opportunities. It could also mean denying certain rights to a person.

The question is what are the grounds of discrimination?

In common grounds discrimination is usually perceived in a negative manner, but here one has to qualify. Those who have greater need should receive more support and assistance, than those who have lesser needs. Those who are better performing deserve on merit to be treated differently from those who may have achieved less. In both of these cases, there is different treatment, there is discrimination, but it is discrimination on grounds generally accepted to be valid and acceptable ground for different treatment.

The question is not simply discrimination but discrimination on which grounds?

There are situations where treating people with different needs the same would lead to an unfair situation because obviously those with greater need require different treatment from those with lesser needs. Both the constitution and the convention have grounds where different treatment is prohibited and protected. The grounds are similar but not identical and the constitution appears to be wider in scope.

Article 45 states that there can be no law which provides for discriminatory treatment, also subject to the restrictions, in the constitution discrimination on prohibited grounds is protected in the sense that no person can be treated in a different manner on the grounds mentioned in the constitution. This is very important because it is not any different treatment which is prohibited. Discrimination is prohibited on the specific ground mentioned in the constitution.

We have a definition in Article 45 sub-article 3 whereby different treatment is prohibited on the following grounds:

- Race
- Place of origin
- Political opinion
- Colour
- Creed
- Sex
- Sexual orientation
- Gender identity

If it can be established that a person has been discriminated against on any one or more of these grounds, then such person is entitled to a remedy.

With the exception of (excluding) the grounds that we have mentioned, meaning that these grounds are always protected, in the case of public service or a disciplined force it is not prohibited by the constitution in the public interest to treat persons differently but not on the grounds that we have mentioned which remain always protected.

Article 14 of the convention

The scope here seems narrower in a sense from the constitution but then there are other grounds which the constitution does not mention or talk about. The convention links the grounds of discrimination to the rights and liberties it protects. It has been consistently held by the European Court that the meaning of discrimination in Article 14, has to be linked with another article protected by the convention. For example to claim discrimination on ground of political views or creed, this has to be linked with a claim for violation of freedom of expression or freedom of peaceful assembly and association.

The grounds protected by the convention

- Sex
- Race
- Colour
- Language
- Religion
- Political or other opinion
- National or social origin
- Association with a national minority
- Property
- Birth or other status

The Peaceful Enjoyment of Possessions

Article 37 of the constitution and article 1 of the protocol of the convention

The broad term is the protection of peaceful enjoyment of possessions. The constitution provides that a person's property can only be taken by the state in the public interest (roads, schools...), excluding private interest, and against payment of fair compensation to the fair compensation.

There is a procedure, called expropriation, which gives the citizen the right to challenge the amount of compensation payable and claim what he or she believes is fair value. There are exceptions in the constitution:

- Penalties
- Taxes

Enforcement of securities in insolvency scenarios are not a violation of this article. Enforcement of securities in insolvency means that when a person goes bankrupt, meaning a person is unable to pay his debts, creditors (example banks) will try to get paid from whatever property they can find. This is not confiscation and in a situation where because one does not pay his or her liabilities property is taken, there is no compulsory taking of property because it is in satisfaction of an obligation.

Looking at the convention, it states the point differently. It says that every person is entitled to peaceful enjoyment of possessions. This means that the convention does not guarantee that a person will have possessions, but rather that if a person does have possessions these are protected from being taken away for nothing without compensation. One cannot claim a violation of human right saying the he has nothing, but that something that has been taken away.

The convention has established that there has to be a proper compensation for property and according to recognised principles of international law, which are that there has to be proper compensation and it is here that the Maltese have been most active in the European Court. The convention acknowledges the right of a state to regulate the use of property and to raise taxes and penalties.

The use of property – today it is not simply a question of owning property but what use is to be made of the property by the authorities. The allowed use can change dramatically the value of the property. The convention allows the state the power to decide and regulate use of land.

The right of protection for private and family life.

Article 38 of the Constitution and Article 8 of the Convention

This is sometimes referred to as the right to solitude and the right to be left alone. The rule is that subject to the exceptions no person can be subjected to search of person or premises except as provided here under. There is the protection of being arbitrarily searched by the authorities except on grounds allowed by law and this includes:

- Interception of correspondence, email
- Eavesdropping on telephone conversation

This right is subject to criteria which are in the interest of public defence, public safety and public order, national security, public morality or decency. Other restrictions are on the ground of preventing or detecting a criminal offence. Another ground is the protection of rights and freedoms of others.

Article 8 of the Convention states the same thing but is wider in respect for private and family life.

The European Court

At the time, in the law of succession, those born out of wedlock (out of marriage) could not receive as much as those who were born in wedlock. He would be entitled to less than his half-brother born in marriage. The European Court held that this was a violation of this article because the right of the parent and the child for respect of family life had been violated. This judgement set the momentum where discrimination between children born in marriage and children born in wedlock was abolished.

The Fundamental Rights

The convention on article 3 ...to provide at national level at remedy to any person who claims his other rights protected by the convention have been violated. In article 6 the right to access a court is implied. This means that a party has to have available the procedure and mechanism to be able to pursue a human rights claim, moreover, a state is under an obligation to ensure the substantive, not merely formal or procedural, observance and guarantees relative to human rights. At domestic level therefore, a state has to commit and make available sufficient resources to enable a human rights' procedure to be effectively pursued and also under an obligation in the domestic context to provide respect for the substantive aspect of the convention.

Turning to the constitution, the relevant article is 46. A person who claims that its human rights have been or are likely to be violated is entitled to apply to a court designated as the first hall of the Civil Court. The procedure here is given priority over other ordinary, not human rights provisions. An important point is that ordinary remedies, even at domestic level, have to be exhaustive, failing which the civil court may decline to provide a remedy because alternative remedies exist and were not pursued.

From a judgement of the civil court there is an appeal to the constitutional court and the matter is then final at domestic level. Both courts have wide powers to grant remedies, which at one end may include financial compensation or an order to the competent authority to take the measure directed by the court or sometimes a simple declaration where this in itself is adequate that a person's human rights have been violated.

If a party is dissatisfied from the judgement of the constitutional court, it is only there that the matter can be taken to the European Court of Human Rights. Before the European Court there is the rule that all domestic remedies are required to have been exhausted, failing which the application will be thrown out. The current time period for filing the applications is 6 months but this is in the process of being reduced, when all member states sign up to the amendment, to 4 months.

The Competition Act

Chapter 379 of the laws of Malta

This is in many ways a transposition of one of the fundamental pillars of the European Union. If the Union is built on free movement of goods, the ability for those selling goods or providing services requires an environment where obstacles to competition are as far as possible limited or removed. This is based on one of the fundamental philosophies of the Union, which is that competition within the free single market will provide for innovation, more business and employment opportunities and will give scope to innovation, research and investment in intellectual capabilities of businesses. Above all, competition will benefit the consumer both from the perspective of development, choice of products and goods, and prices. Therefore, it is ultimately the market that is to say the consumer, which has the determining say and therefore that is why there is in place a law which prohibits anti-competitive behaviour and practice.

Competition will stimulate innovation. This means quality or something different in order to attract the business. It is therefore competition, innovation, intellectual property and consumer. The question here is those rules which prevent barriers to competition. This includes anti-cartel rules – when the big businesses get together to prevent competition in the market because monopolies cannot and do not allow competition.

There is an authority known as the Malta Competition and Consumer Affairs Authority, which has among its terms of reference a competition office headed by a director general of competition and this office is responsible for the implementation of competition policy which is one of the fundamental basis of the Union.

There are 2 general substantive heads of prohibition of business practices. The first is the prohibition of anti-competitive agreements or business practices. The second is the prohibition against the abuse of a dominant position.

The prohibition against anti-competitive agreements

Article 5 of the competition, which reflects provisions in the EU treaties and rules, is about prohibition to anti-competitive agreements and business practices. Any agreement, direct or indirect, implied or understood, or any concerted practice (the practice has a focus) which has as its object preventing, restricting or even distorting competition is against the provisions of the Competition Act. In particular, any such agreements which have the effect of directly or indirectly fixing the selling price or other trading conditions.

Another prohibition is an agreement or practice which limits production supply or technical investment or development. Markets are also dependent on the availability of supply. Agreements to limit supply or investment with a view to ...prices are prohibited. Likewise prohibited are agreements

tending to share markets or sources of supply. This is because competition should always be at the level of producing what is required. Another prohibition is where businesses impose with outside parties different or discriminatory conditions in similar transactions without a commercial justification. This is prohibited if without any commercial justification it places outside third parties at a competitive disadvantage. One cannot discriminate like with like and put a third party at a competitive disadvantage without a commercial reason, for example volume of turnover. It is clear that volume of turnover can be a reason to provide a better price for the same product. This prohibition extends to imposing on third party businesses, conditions which are unrelated to the business or the commercial practice.

There are here a number of important exceptions that these practices may be allowed where they contribute to technical progress and innovation, and any improvement or benefit is given back to the consumer. In other words, a concerted practice could be possible where it is shown that it will create innovation and progress and that the consumer will get back all of the benefit.

The De Minimis Rule

This rule means that what we have stated, these anti-competitive prohibitions do not apply where the impact on the market is insignificant.

There is the power of the competent authorities to exempt in the national interest the application of these anti-competitive prohibitions. These are known as block exemptions.

Dominant Positions in the Market

What does a dominant position mean?

There is a statement defining a dominant position, which means a position of economic strength by a business on the relevant market. This position of strength enables the business to prevent effective competition because the business has the power on the market to behave independently of supply and demand of the economic behaviour of suppliers, competitors and even consumers.

It is important to note that having a dominant position in itself is not a violation of the provisions of the competition act. It is rather the abuse of such a dominant position which is prohibited. In other words, a business cannot use its dominant position to create entry barriers into the market. It is article 9 which defines the meaning of abuse of a dominant position. In language similar to the articles on restraint of trade and anticompetitive behaviour the provisions define the meaning of abuse of dominance.

The first is where there is an imposition directly or indirectly of an excessive or unfair purchase or selling price or the imposition of unfair trading conditions. The benchmark (criteria) here is the open market position. Therefore, any such assessment will have to focus on what supply and demand in an open market at arms' length conditions would have produced. If there is something which is unreasonable or unrelated to the market, this may create a presumption of abuse of dominance and it will be up then to the dominant player to show that it acted within the competition rules by giving a market justification.

The next criteria is the limitation of production, market development or technical production to the prejudice of consumers. As we know, a shortage on the market can lead to increase of prices because there is not enough supply to meet the demand. If it can be shown that such limitations of supply was done with the expressed intention of pushing up prices, then there could be a preface evidence of abuse of dominance. The reason is that the anticipated and logical response of businesses is that if there is an increase in demand the response is to increase production and capabilities to respond to the market rather than limit production. So, this anomaly will create a presumption against the business to show that it was not done with the intention to abuse its dominant position.

The next prohibition is price or condition discrimination between different comparable parties without any justification, the consequence of which discrimination is that the parties discriminated against are placed at a competitive disadvantage. The reasoning is that like has to be treated with like. In other words, if a party makes an order, another party who makes a similar order has to be given the same conditions. Any different treatment has to be justified on commercial market forces grounds. Example a party who is given credit does not as a rule accept the same treatment as a party who makes cash settlements. A risky party, a party who carries some risk, should reasonably respect the price margin to reflect the risk. Therefore, it is not a question of treating parties the same. The rule is that any different treatment in price and conditions has to have a commercial and market based justification.

The article mentions some grounds which are relevant to consider whether or not there has been an abuse of dominance. These are the prices involved, any likely or anticipated market variations, the economic value of the product and its importance to the consumers. Comparable prices locally and overseas are also taken into account as is the capital and intellectual resources investment put into the product or service. These factors are taken into account to establish whether or not there has been an abuse of dominant position.

To conclude, a few words about the structure. The authority has an office which is headed by a director of competition. This director is a natural person but of course it is an office. The competition office regularly surveys and monitors different areas of commercial activity from the competition perspective. Of course, consumer interests are also a relevant factor in such survey since as we have seen effective competition leads to better offers available for the consumers.

The competition office may also act if it receives a complaint. Such complaint is normally from a business within the sector claiming that another party is engaging in activities which violate the Competition Act. Whether or not the competition office starts an investigation of its own motion or whether as a consequence of a complaint received, the procedure is for the office to request information from those businesses in the particular sector under investigation. The office, subject to rules of confidentiality, has wide powers to ask for and if necessary take documents, records, electronic records and software, for the purposes of its investigation. All involved parties are normally given an opportunity to make their submissions prior to the office reaching a conclusion. The office may reach a conclusion that there is no violation of the competition act, if it does however, conclude that the behaviour of the business offends the competition act, the office has a wide array of powers and remedies. It can simply order a cease and desist order. In other words, an order to this business stop the for example anti-competitive advertising. It can also impose fines and penalties, which can go up to 10% of the gross turnover of the business over the relevant period.

If the business is aggrieved with the findings of the competition office there is a right of appeal to the competition appeals tribunal where evidence will be heard in depth and detail by the appealed tribunal.

This tribunal has the power to vary, annul or modify the judgement and ruling of the competition office and delivers judgements in this sense. From the judgements from the competition tribunal, there is a right of appeal either to the office of competition or to the business involved to the court of appeal (ordinary courts) but such appeal is limited only to questions of law. In other words, the court of appeal will not reopen issues on fact and merits but purely it is a revision granted on the wrong application of a legal rule or principle.

The Commercial Code

Chapter 13 – article 70 of the commercial code.

Here the discussion is about commercial agents.

We have a definition of a commercial agent which is, a person natural or legal who is not in the employment of the principal and the agent has a continuing authority to negotiate and conclude sale of goods and services on behalf of and in the name of the principal. It is important that we are aware about who are the parties to these agency relationship. There is of course the principal. He is that party whose goods or services are being promoted and advertised by the agent and then there is the agent, who on behalf of and in the name of the principal, markets promotes and concludes contracts relating to the sale of the goods and services of the principal.

Excluded from the definition of agent are those agents whose efforts are unpaid. More importantly, agents on the secondary market are excluded from the definition and also those agents dealing in commodities and also those who engage in financial services. The reason is that in the case of financial services this is again licensed by stock brokers.

To become a commercial agent in Malta, is that it is a regulated activity in the sense that one has to be granted a license from the competent authority and the competent authority is the Malta Chamber of Commerce, Enterprise and Industry. Historically it has always been with the chamber since the middle of the 1940 and it has remained today. Persons who are either public officials or in active practice of a profession cannot apply to be appointed. There is what is known as the fit and proper test, meaning that persons who have been convicted for fraud or crimes against property are excluded. The chamber has a discretion that if it considers a person to be not fit or inappropriate to be appointed as an agent, then it has the power to decline appointment, reject an application.

Finally, this requirement is continuing. In other words, the fit and proper test is not a one-time initial test but has to remain all through for as long as a person is a licenced holder.

General Principles of Commercial Agency

Article 70 - 78J of the Commercial Code

A commercial agent is defined in the articles and refers to a person which may naturally be either a physical person or a legal person. Such person cannot be in the employment of the principal. The agent has continuing authority to negotiate the sale or purchase of goods or services on behalf of another person called the principle, the agent also has continuing authority to negotiate and conclude such transactions on behalf of its principal. The rules which we are speaking do not apply to commercial agents whose activities are unpaid, those agents which operate in the commodity market and also those agents which operate in a secondary market (generally second hand goods, the primary market is when something is put for the first in the market). The essence therefore of the contract of agency is the continuing authority of the agent to sell and conclude business on behalf of the principle and in return the agent gets remuneration which is called commission. Typically this applies to those agencies and sometimes distributorships where foreign brands or companies are locally represented and whose goods are on the local market

How does one become an agent?

There is a procedure whereby ones apply to the chamber of commerce enterprise and industry and evidence of good conduct has to be brought, the application is publicized and authority is then given to a person to start operating the business of a commercial agent. Both the agent and the principal have obligations toward each other. Normally both parties are bound towards each other by means of a contract which will indicate respected duties, rate of commission, and terms of payment condition (when it is due), other important aspects of the agency agreement are provisions relating to duration of the contract (subject to renewal/time period of the contract), choice of law (which law is to regulate the contract whether French, Italian etc.) and which courts have jurisdiction in the case of a dispute. The law is that of the principal as are the competent courts. Each party owes each other a duty to perform the contract in good faith. This good faith i.e. that the contract is given effect to with the proper intentions. The agent owes the principal a duty to negotiate and where appropriate conclude the transactions, the agent is to provide its principal with all necessary information and comply with reasonable instructions given by the principal. Many contracts are made subject to final confirmation by the principal. On the other hand, the principal owes the agent a duty of general support, principally consisted of documentation and market information necessary for the agent to conclude the transactions. There is a specific reference at Article 76 which provides that the consequence of breach of agency agreements is governed by the law chosen by the parties. So what about the commission of the agent?

This is normally expressed to be a percentage of the volume of Sales concluded during the period of the agency. The transaction (sale) has to be the result of direct or indirect intervention of the agent or where it is concluded directly between the principal and a third party which had been introduced by the agent.

What happens when there is certain unfinished business when the contract of agency has expired?

An agent is entitled to a commission even though the deal has been concluded after expiration (expire) of the period of agency if this has been concluded as a result of either the intervention of the agent or an introduction by the agent as we have seen. Where parties do not establish by agreement the rate of commission then it is what is known as the custom/the practice of the place where the deal is concluded that it is applicable. Commission is due immediately on conclusion of the agreement and is due latest at the end of the first month following the quarter when the deal was concluded. Commission will still be due even if the principal finally decides not to go ahead with the deal. Commission is only not due if deal cannot happen through no fault of the principal. In other words, if an agent claims commission in the case of an uncompleted transaction it will be a good defence for the principal to state that it was not a fault that the deal did not go through. An agent is entitled to regular and periodic statements showing the position and entitlement of commission according to the books and records of the principal.

Termination of the Agency Contract and Some Consequences.

Agency contracts are normally concluded for a fixed definite period of time. This can be either automatically renewed unless either a party gives notice to the contrary or an alternative form that it will lapse unless both parties agree in advance prior to conclusion about the extension. Alternatively, it can simply lapse and then it would be up to the parties to contractually renegotiate. The major difficulties arise where a contract is for an indefinite period. The rule is that either party may terminate. However, notice is a critical factor. The reason is that very often an agency. Very often agents may be entitled to an indemnity (compensation) from the principal on two grounds:

- 1. Where the agent has brought to the principal significant increase in the volumes of business.**
- 2. Where the agent can show it will suffer significant commercial loss.**

This compensation is not due if the agent has in any way defaulted (not honoured) on the commercial agreement or if the agency agreement has been terminated due to a consequence attributable to the agent or on grounds of illness or retirement of the agent.

The final point is known as a clause in restraint of trade. This is typically a situation where the agent binds itself not to engage in any business in the line of the principal for a period of time. The reason is obvious the agent knows the business, has the customers, knows the contacts, and it would be easy for an agent to go to the competitor and take the customers of the former principal. A clause on restraint of trade is valid provided it is done in writing, does not exceed two years from the date of agreement and is limited to a particular geographical area which was the area of operation of the agent.

Structure of the Civil Court.

In general terms the civil courts resolve and decide disputes on private or commercial matters. The competence of the civil courts also includes those situations where government, authorities or local councils are involved in disputes and litigation. The term commercial nowadays includes a wide sphere of commercial activity such as information technology, intellectual property (IP), banking, financial services such as investment funds, insurance. Other spheres include maritime law relating to the business of ships, aircraft, air law etc. There is the traditional commercial law which involves companies, partnerships, sale of goods etc. The object of proceedings varies according to the remedy being sought. In family law situations it may be disputes relating to property and financial issues, where there is divorce or separation, the issues are normally custody of children, maintenance and division of family property. Then we have the traditional civil law, this includes property, contracts and obligations such as contract of lease, guarantees and an important one is succession.

There are two broad divisions of powers of the civil courts, the first is by reason of subject matter and the other is on the basis of the amount/value involved in a dispute. By subject matter we mean that there is a civil court which has different powers and competence. The first is the family court, this decides disputes on validity of marriages, divorce, separation, custody of children and the property and financial issues relating there to. The family court also hears questions relating to international custody, there are conventions relating to child abduction (when a child is taken from one jurisdiction to another in violation of a court order). A second competence of the civil court is that related to voluntary jurisdiction. This involves the supervision and administration of those persons who are generally considered incapable of administering their own affairs. For example, minor children where there are no parents, those persons who do not have the mental capability to administer their property. This competence includes also a function relating to adoptions and secret wills (testaments). The third competence of the is known as the first hall of civil law of residual competence, relating to money claims, property, contracts, commercial disputes etc. This regards the subject matter aspect.

Courts are divided according to the value or the amount involved. There is a small claims tribunal which decides money disputes up to four thousand euro. There is then the courts of magistrates and the competence is €11 300 circa. Anything in excess falls within the power of the first hall of the civil court. ... By reason of territory with the structure of the courts broadly similar to the one just described there is. Then another aspect of competence known as the vertical point of view meaning the right to appeal to a higher court and there is the right to appeal from judgements of the small claims tribunal and the courts of magistrates to the court of appeal composed of one judge from judgements of the first hall the composed of three judges. There is an appeal to the court of appeal. The competent court in respect of human rights claims is the first hall of the civil court with an appeal to the Constitutional Court (not court of appeal).

How is a civil case conducted?

The claimant commences proceedings by the positing/filing in court a written claim which is then sent to the other party known as the respondent who has the right to apply. Claimant then commences its evidence which is either what is known as Viva Voce which means that the person gives testimony orally or by way of Affidavit (sworn statements) where claimant concludes its evidence with respondent has the opportunity to challenge and dispute the version of the applicant by bringing its own respondents or evidence. Either party has the right to cross-examine testimony and evidence given by the other party. When evidence is concluded parties make concluding submissions (arguments) to the court and the case goes for judgement decision.

Competition Act - Chapter 379

This law is the transposition of the relevant articles of the European Union treaties and relevant council directives and regulations. Brussels can legislate directly in the 28 member states by regulation immediately enforceable. Directives have to be implemented and transposed in national law.

The purpose of this law is to prevent 2 situations:

- 1. Anti-Competitive, Practices and Agreements**
- 2. To prevent the abuse of a business of its dominant position in the market.**

The philosophy of this law is that competition is a fundamental corner stone of an economy based on freedom of goods, services, capital . Therefore competition will ensures businesses to flourish because it is an open market, encourage research and development, innovation. All this benefit will be ultimately passed back to the consumer because competition in the open market tends to make for better choices, price and quality for the consumer.

A transposition of community law. One of the fundamental pillars of the union is freedom of goods and services with the objective of creating the single market. Where a person can buy goods and services with no barriers. The policy to promote competition and make monopolies or cartels illegal is one of the fundamental policies of the union. This policy is formulated into principles.

- 1. Prohibition of anti-competitive agreements**
- 2. The abuse of a dominant position**

The law has important regulations relevant in for example the case where there is a take-over i.e. a business buying a rival competitor business. It is important to note that at the centre of this law is the concept of under taking which means that any person, entity or company which persuades an economic activity. The application of this law is territorial with the juratory in Malta because the EU law then regulates activity within the union. This makes sense because the market conditions of a small territory like ours are obviously incomparable with the wider market in the other member states.

The 1st Rule is at Article 5 of the Law

- Any agreement, decision or common practice by undertakings which has the object or effect of preventing restricting or distorting (any practice which does not allow the market forces: supply, demand both from consumers and undertaking to operate freely) competition within Malta is prohibited. In particular any agreement, decision or practice which directly or indirectly fixes the purchase or selling price or other trading conditions is prohibited. This means that businesses cannot agree together to keep prices high. Ex. The idea is to let businesses compete on the open market so this practice is prohibited.
- Another practice is that which limits or controls production, markets, technical developments or investment. The reason being that if production were to be controlled or development limited, this could be a way to create a scarcity for the demand thereby pushing up prices.
- Likewise, prohibited is an agreement to share markets or sources of supply. This means that undertakings cannot agree that they will respect each other market share and not compete to get each other's business, such an agreement would be anti-competitive because markets should be left to their free operation.
- Another prohibited practice is one which imposes different conditions to the same transactions without any justification thereby placing those parties out of the agreement at a competitive disadvantage. Does this mean therefore, that a supplier has to charge the same prices to all its customers? In principle yes, unless there are factors which on an objective commercial basis justify different treatment. Ex. Trading Volumes.
- Another Prohibited practice is the imposition of conditions which are extraneous (outside) to normal trading conditions on some parties and not on others where such different treatment has no objective commercial or customary by repeated practice.

Any agreement which violates these provisions is null cannot be enforced and will attract significant penalties by the competition authority either by way of penalty or a % of the turnover involved. An exception is where an agreement otherwise anti-competitive has the effect of promoting production, research, investment or economic benefit at the same time giving back to the consumer a share of such benefit. There is what is known as the de minimis i.e. any agreement other uncompetitive will not be within the prohibition if the impact on the market is minimal

Abuse of a Dominant Position

The definitions of the act (Article 2) tells us that a dominant position means a position of economic strength which enables an undertaking to prevent effective competition on a relevant market allowing it the power to behave to a significant extent independently of competitors or customers - factors which affect a business

If an undertaking is so strong on the market that there 3 factors do not really influence its business than it is in a dominant position. The Law does not prohibit dominance but it prohibits abuse of dominance and we are told (Article 9) 4 instances of abuse of dominance:

- 1. Direct or Indirect Imposition of excessive or unfair sales price or conditions**
- 2. Where a dominant undertaking limits production, markets or technical developments to the prejudice of consumers**
- 3. Different conditions including price discrimination are imposed on different parties placing some at a competitive disadvantage**
- 4. Imposition of conditions for the conclusion of contracts differently as between different parties which has no objective or commercial basis.**

The Procedural Framework

The administration of this act is in the hands of the office of the directors general of competition. This office is administered simultaneously with the office of consumer affairs although competition and consumer protection are different, they have an obvious link about which we have spoken.

The competition office generally examines market behaviour with a view to identifying anti-competitive practices or behaviour. It also receives complaints from the public as a consumer or from complaining competitors. If the competition office considers that there are grounds, it will open a formal investigation. Affected parties (those being investigated) are formally informed of the basis of the investigation with a full and proper opportunity to defend themselves.

The competition office has wide powers to ask for and if necessary sees documents, computers, data disks etc. The office will reach its findings whether or not there has been a violation of the law and if there has been, the directors view a penalties is imposed as well as an order to stop anti-competitive behaviour. From the judgement of the competition office there is a right for appeal to the competition and- consumer appeals tribunal. This tribunal is a court presided by a

judge or a magistrate and assisted by economists and accountants with powers to confirm or review the judgement of the competition office.

The concluding point is that this appeals tribunal is directed by the law to follow the rules, directives and regulation of the European Union and the judgements of the European court of Justice on Competition issues.

Elements of Maltese Law

The constitution of Malta

🔗 www.justiceservices.gov.mt

The click:

- 🔗 Laws of Malta
- 🔗 Legislation
- 🔗 Constitution

A constitution is a basic political and legal document which normally sets out the organs of the state and of government and defines the political character of a state (for example : whether it is a monarchy/ French or American presidential model). Typically it will provide for the form of government whether it is in the form of residential style for example US or France whether or not the parliament exists. And very importantly

the powers granted to parliament. This may be for various reasons; for example Italy have two chambers; UK have a parliament and a house of Lords.

Powers can also be shared by parliament and the president.

Other important matters are:

- Who is entitled to vote
- The frequency of elections
- How governments are appointed

Other important issues are:

- Courts
- Judiciary
- Public finances (budgets; how taxes are raised)

In Malta, we use the Westminster model.

Why?

- ✓ This is because we have more or less the British model, meaning parliament prime minister and ministers lead the government of election, periodic elections, a judiciary and public finances.

At the same time a constitution is the highest law because as a general law, the constitution is supreme.

Any law that goes against the constitution is ultimately null and void. In western style democracies like ours the ultimate sovereignty lies with the people, that's why we periodically vote and those elected to parliament can within the constitutional framework even change the constitution itself, in the constitution certain changes require a simple majority in the parliament, other require a qualified majority, for example 2/3 of majority, others require unanimity (everyone agrees in parliament).

By virtue of European Union membership each member state have voluntarily, when signing the documents of accession, surrendered certain powers to the union. Also European Union Law is supreme over Domestic law

Originally the Maltese constitution began in 1964 as an act of the British Parliament, the Malta independence act which was the independence constitution, over the years it has been amended (for example, dual citizenships- people may now have Maltese and Australian citizenships, local councils), however the model remains as which is known the 'Westminster model', where it is modeled on the British style of parliament. It grew also from the Indian Constitution.

Chapter 1

- Defines Malta as an independent republic with the Neutrality Clause, meaning that Malta in terms of the constitution prohibits membership of military alliances or naval bases.
- The chapter deals with national identity such as Maltese language, national anthem, religion of Malta. The official languages of the admin are Maltese and English at equal level.
- The constitution is the supreme law of the land
- The constitution is the most basic and highest law of the land since it defines the political structure and organization of the state.
- It is the highest law because anything done which goes against or is in violation of the constitution is null and void. For example, there have been instances such as rent in prime areas going very low due to old laws.
- There is a court known as the constitutional court which has the power to annul laws which go against the constitution or any act of government which is considered by the court to violate the constitution.

Chapter 2 – Declaration of Principles

- Modeled from Indian constitution
- A number of principles here which are stated to be unenforceable in any court.
- The constitution states that they will be a sort of inspiration for the state.
- Political and constitutional documents are written at a moment in time and to understand them people need to keep in mind when they were written.
- For example protections of work, private enterprise, education, max working hours, encouragement of artisans and trade, encouragement of artisan are creativity

Chapter 3 – Citizenship

- Citizenship - A political and legal bond between a state and a person
- This happens through a process known as naturalization (for example gaining citizenship when a person gets married to someone Maltese or has been living here for a while)
- Then there is also citizenship of the migration schemes.
- It is imp cos on belongs to a legal community, u own a passport, and u are entitled to the rights of the state(freedom of movement, of speech etc)
- The principle of dual citizenship has been accepted in the constitution.

Chapter 4 – Fundamental human rights

Chapter 5 – President of Malta

- This states how you can become a president (for example if u are a judge u can't be a president)
- President is chosen by resolution by the Members of parliament

- For period of years
- There are procedures of appointment and removal of a president
- Removal – misbehavior
- President is appointed by a simple majority of parliament and has to be a citizen of Malta. Cannot have held the office of judge and holds the office for 5 years and one time only.

Chapter 6 – Parliament and entrance to parliament

- There shall be a parliament known as the house of representatives. It provides who may vote and who may not vote (for example over 18 years and resident for past 18 months).
- Parliament should be elected on the basis of electoral districts.
- This states that there shall be a parliament made up of odd numbers and based on the electoral law
- Electoral law is known as the *proportional representation system of the single transferable vote*
- This means that the citizen votes directly for the candidate.
- This is not always the case, for example the English system is that the 3 or 4 parties nominate the candidates internally. The citizens just choose the party
- In general the number of votes cast represents the composition of parliament.
- The single transferable vote is the reason why voters give preference (number 1,2,3,4)
- This chapter states that parliament is elected on the basis of electoral district which correspond to geographical and demographical data.
- There are criteria of qualification of candidates, MEPs and voters
- This regulates the powers and procedure of parliament
- Parliament is to legislate the good order and peace with regards to European law and principles
- 3 imp nominations
 - Speaker
 - Deputy speaker- relegated by the constitution, and the way they are appointed
 - Electoral commission – the establishment of this is mandatory and there is also the method of appointment, its powers, duties and responsibilities general it is tasked with causing and holding general and local elections, he then has to deliver an official result of the president
- Speaks about the life of parliament. It convenes within 2 months of election, it has to meet once a year at least. The constitution provides that the parliament has two months after the general election and has a life of 5 years apart from some technical extensions.

- Life of parliament is 1 year 3 months after first sitting
- Parliament is vested with the constitution with the power to make laws. It grants the power to legislate.

Chapter 7 – The Executive

- The creation and recognition of familiar constitutions
- The system of a prime minister and cabinet of ministers is created
- The government is carried out by a cabinet of ministers. The constitution provides for the opposition and the leader of the opposition.
- The constitution also considers the appointment of important functions such as the attorney general who has various functions but the point is that in the performance of certain duties such as to prosecute and not prosecute the attorney general. The attorney general acts independently free from any government control.
- The constitution states that the general direction and management and the carrying out of governing the country is vested in the prime minister and cabinet of ministers and it states how the prime minister is appointed.
- The office of parliamentary secretaries is created in this chapter; likewise we find the leader of the opposition. The constitution assumes that there will be an opposition and states that the leader of the opposition is that member of the house who commands the support of those who do not support the government.

Chapter 8 – The Judiciary

- The function of judge and magistrate and the criteria for appointment and eligibility to be appointed is established in the constitution as is also established the method of appointment and method of removal
- The judiciary is mandatory
- The constitution provides for the existence of the courts and there are at constitutional level judges who have to have 12 years experience or magistrates who require 7 years experience.

- Judges are appointed by government and their retirement age is 65. Once appointed, judges and magistrates serve until retirement age. It is not therefore a question of a renewable contract.
- Judges enjoy independence. The independence of the judiciary is a fundamental . The rule of law is not ruled by law because even the worst dictators in history ruled by law. The law can be an instrument of oppression. The rule of law is a political and a legal concept which ensures that nobody is above the law that in the eyes of the law, all persons indistinctly have equal standing and therefore the law applies to and these affected by independently of status and position of society. The role is to ensure and to keep in check that the laws applied to and that nobody is above the law.
- The chapter of the judiciary also provides for a commission to the admin of justice which has various functions and is also a watchdog on the process of the courts without interfering with the independence of the courts .
- Judges and magistrates can be removed through a process known as an impeachment which requires proved establishment incapacity.

Chapter 9 – Public Finances

- Here there are 2 imp principles
 - Establishment of the consolidated fund – one fund where are government money go. The consolidated fund is the public fund by the court. There are many allocations and particular accounts.
 - No taxation without representation- all governments imposed taxes and government expenditure has to be approved by parliament. This is why there is the budget, where taxed, expenses etc is discussed and approved.

This chapter deals with the auditor general and deputy auditor general. The auditor general has the function to regularly and on an ongoing basis audit public money and report to parliament. The auditor general is appointed for a fixed period of time and may be reappointed but during the period of office, the auditor general enjoys the same independence as the judiciary.

Chapter 10 – Public service and local councils

- The existence of local councils is also noted in the constitution. There is not much detail and we find the detail in the local council act.
- Method of appointment and dismissal of public ministers

- Public service commission, responsible for the requirement and dismissal of public servants
- The discretion of the public service commission cannot be challenged or inquired into by any court. This means that it is possible to challenge the public service commission for acting beyond its powers.

Conclusion on the constitution

- Broadcasting authority- this is an independent watch dog, to oversee and ensure that in broadcasting (radio and TV) there is fair allocation of air time in matters of public controversy. It also ensures no serious misrepresentation is made in current affairs. The broadcasting authority also license radio and TV.
- Employment commission. Its function was to ensure that there is no political discrimination on the workplace.

Fundamental human rights

- Freedom of human rights
- Freedom of religion
- Freedom from unreasonable arrest
- Protection of property rights
- Right to peaceful assembly and association

There is the prohibition against discriminatory treatment on certain grants. Protection against the illegal expulsion of persons from national territory. The right for an effective remedy of human rights.

- There are are 3 levels of fundamental rights.
- Fundamental rights:

1. Traditional and civil rights ex. Freedom of expression
 2. Social right ex. Right to welfare, education and employment
 3. Future generation rights ex. Environment, cultural heritage
- Fundamental rights: historically the 19th century developed what were known as the political rights (freedom of expression, peaceful assembly etc.)
 - Later, earlier than the 20th century, there was a movement to increase the scope of human rights in favour of social and economic rights. For example education, health, employment etc.
 - Later came the **third generation of human rights**, those related to the rights of future generations. Principally this referred to environment, planning and heritage.
 - When we speak of fundamental human rights we are referring only to those rights which are legally protected. For example you can take the authorities to court if you claim that you have been illegally arrested or tortured. There is however no protection at the level of fundamental rights for **employment**. It would be good if states and governments could guarantee legal employment for everybody. This would mean that a citizen could take it's government to court for being unemployed (however this is not the case).
 - On the other hand we all know that employment, jobs, education and health care are always high on any political agenda but fall short from being legally protected fundamental human rights, therefore the human rights we are looking at here refer only to those which are granted legal protection.

Chapter 4 of the constitution

- Most important however is the European convention for the protection on human rights and fundamental freedom.
- This convention was done in Rome in 1950 under the auspices of the council of Europe.

- The council of Europe is an organization of states in Europe committed to democracy, human rights and the rule of law.
- The council of Europe was set up immediately after the end of the Second World War with a view to avoid the atrocities of the Second World War. The organization then adopted and sponsored and brought forward this European convention of human rights. Therefore the council of Europe organised and brought forward this constitution which was signed in Rome in 1950.
- Today there are 47 member states of this council of Europe ranging from Azerbaijan, Albania, Turkey etc which are all signatories of this convention.
- The council of Europe, international organization is to be clearly distinguished from the European Union. They are two different things.
- The European Union is more an economic union, it is of course also based on democracy and the rule of law but among its pillars are freedom of goods and services, mobility in working and movement of capital (European single market).
- As we know the declared political and economic objective of the European Union is the single market, meaning that a business can go to sell its goods and services in any of the 28 member states.
- The latest state to join was Croatia

The relationship of Malta with this European convention

- There was the admission to a dates, Malta signed up to this treaty in 1967. This European convention imposes upon member states the duty at international law to guarantee the respect for those within their territory of human rights protected under it. However the real strengths of the convention lies in what is known as the right to individual petition. It means that if you consider that your government has failed you in human rights, you can take your government to court before the European court of human rights.
- This is the strongest provision of this convention.
- There is a rule before going to this court, it is known as **exhaustion of domestic remedies**. This means that you cannot simply take you government to the European court before going through locally at you level and then when everything has been done all domestic remedies exhausted, then you can go to the international court.
- This court, known as the European court of human rights (ECtHR) sits in the French town of Strasbourg. From there the convention is administered by the court. This court has the power and competence to consider complaints on human rights brought both by an individual member state against another state but perhaps more importantly there exists the right of individual petition.

The relevance of the convention to Maltese law

- The European convention was adopted as part of the law of Malta in 1987.
- It is a local law that embodies the European convention (*cheater 319 of the law of Malta*)
- Therefore there are three levels of protection:
 - The constitution of Malta Chapter 4
 - European convention on human rights and fundamental freedoms
 - Chapter 319 of the laws of Malta

Distinguishing the European court of human rights from the court of justice of the European Union

- This second court is the court of justice which is the court of the European Union and has its seat in Luxembourg not in Strasbourg. It is concerned only with the law of the EU.
- Its powers are limited to European Union law not human rights.
- The European Council is not the Council of Europe.
- In 1987 Malta also rounded to its citizens and to those who are within the territory the right of individual petition to the European court of human rights.
- The rights of an individual suspected to be assisted by a lawyer during police interrogation.

Reference to protocols

- Protocols are additions to international treaties.
- When an international treaty is done very often they want to add an extend the protection granted
- Malta is a part of the first protocol, on the peaceful enjoyment of property and the right to periodic free and fair election.
- We have also as a state testified (signed up) the fourth protocol in the convention referring to the abolition to the death penalty.
- Also there was the ratification of the seventh protocol. This protects against the collective expulsion of alien (person who is not your citizen). This protocol also granted the right of appeal in the case of criminal convictions, the right of commutation if it is found that a person has been wrongfully convicted and the right not to be charged or bribed twice for the same offence. This protocol presented the rule of equality between spouses.

Fundamental rights

- The right to life
 - Protection against torture - taken under a broader protection
 - Freedom from inhuman or degrading treatment
 - Protection against forced labour
-
- **Article 32** of the constitution states that every person in Malta is entitled to fundamental rights. These fundamental rights are summarized in 3 headings:
 - Life, Liberty, Security of the person, enjoyment of property, protection of the law
 - Freedom of context, expression and peaceful assembly and association
 - Respect for private and family life
 - This protection is given to all persons regardless of place of origin, race political opinions, color, sex, sexual orientation or gender identity. One cannot discriminate on this basis. One cannot treat persons differently for reasons of creed (political opinions, gender, race etc)
 - Limitations- the rights and freedoms of others and the public interest. The rights and freedom of other acknowledge that other members of the community have an equal and corresponding right and entitlement for protection of the right. Therefore, the exercise of the right has to be kept within the limits of the corresponding exercise by the other members of the community. There may be instances where the Public interest may limit the exercise of any rights.
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- **Article 33** constitution (article 2 of convention). And there we have a statement that everyone's life shall be protected by law and that no one shall be deprived of life intentionally except by order of a court in respect of a conviction for a crime and in which case there is a penalty established by law.
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- **Protocol 6** - to which Malta has subscribed. This protocol prohibits death penalty. Therefore by virtue of this the death penalty for those states who accepted this protocol which was done in 1983 and thus not part of the original convention. For those states who

have ratified this protocol, the death penalty is prohibited. Death is prohibited in certain circumstances in the case of mutiny and in the case of war time. In this case, provided there is a law and a procedure it is possible to legislate to provide for the death penalty in the case of treason(deserting your force and joining the enemy).

- There are a number of exceptions in the convention and the constitution where if they happen, they will be considered not a violations of the right to life. These exceptions therefore are taken away from the protection of the right to life
- The first is *in defense of violence against a person or property*. If therefore there is violence in defense of violence against a person or property. If therefore a person or property is violently attacked and in defending such person or property there is for example a shoot out, and death happens, the police will fire. There is no violation here of the right to life. Likewise if there is loss of life in order to lawfully arrest a person or to prevent the escape of a person lawfully detained, this again is not protected by the convention. Both the constitution and the convention create as an exception situations of serious mob violence. In other words if there is very serious mob violence, in order to control an insurrection, riot or mutiny (a revoke against the authority of the state) loss of life is not considered a violation of rights.
- These exceptions are subject to one overriding requirement and that is that the use of force has to be proportionate and absolutely necessary. In practice, particularly after the event, this is very difficult to establish. In fairness of the army, if a mob is advancing (shooting, throwing stones) it is not always easy to stop and reflect whether this is proportionate or absolutely necessary. On the other hand it is equally clear that the authorities can not and should not overreact.
- We shall look at articles 3 and 4 of the convention, which are treated in a not identical manner in the constitution under articles 35 and 36. Article 3 of the convention provides that *no one shall be subjective to torture, or inhuman or degrading treatment or punishment*. This is partly correspondent to 36 of the constitution, which does not speak of torture but speaks only of inhuman or degrading treatment or punishment, of course the thinking was that torture is anyway included in inhuman or degrading treatment. Now this has been principally applied in conditions of detention(where people are kept under an arrest or detention, where hygiene are relevant to determine whether there has been inhuman or degrading treatment. It was meant to provide at least a minimum of treatment and conditions for those in detention. There cannot be collective punishment. Guilt responsibility and punishment is specific to each person.

- **Article 4.1 of the convention** to which there is no express counterparts in the constitution specifically states that no one shall be held in slavery or servitude. The drafters of the constitution considered that here again slavery or servitude was included in the term *inhuman or degrading treatment or punishment*. Servitude has a history whereby in the past, those convicted were sometimes sent in exiles, but whether or not exiles, servitude meant that prisoners were expected and ordered to work in very harsh conditions, sometimes even dangerous to their health.
- The constitution also on articles 36, under inhuman or degrading treatment, prohibits the imposition of collective punishments. Meaning that punishment and legal guilt has to be person specific. It is your own responsibility. Human trafficking has been held by the European Board to be a violation of article 4, prohibiting slavery or servitude.

The prohibition or petition from forced labour

- This is discussed at article 4 of the convention and 35 of the constitution
- The background to this is very often - what are essential services and which are they'd?
- Locally we have had 3 high profile cases, that of the medics and that of Builders. In the European court there were instances of the police, firefighters and emergency community services. The argument is if these persons are expected and obliged to maintain essential services (for example emergency services) at all times, is this forced labour. And the fact that certain categories, these people cannot go on strike so easily, they cannot simply interrupt essential services, the question is, is this forced labour?
- The general rule is *that no person is required to perform forced or compulsory labour*.
- There are important exceptions, example when subject that it is not inhuman or degrading, a court orders persons to work, either as routine part of detentions (example a person is serving time, and as part of rehab certain skills or grades are taught and work is expected to be performed) or in another case a court may order a number of hours in community service. Likewise this right is restricted in the case of disciplined forces (police, army, navy, Air Force). It is not forced labour when these forces train. Some people are associated, meaning they have an objective in conscience and therefore they are given alternative duties. Military service or work assigned to an objector therefore is not forced labour. Therefore we come to conclusion that any service at a public emergency or which threatens life of the public community is not considered forced.

- On the case of the doctors it was held that failure to provide service does threaten the well being of the community as medical assistance is a basic essential service. It was later regulated legislatively that doctors have to guarantee at all times emergency treatment, operations etc.
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Articles 5 and 6 of the convention and 34 of the constitution

- The articles contemplate to linked by different scenarios. The first refers to article 34 of the constituents, and 5 of the convention, to those circumstances where it is possible to deprive a person of personal liberty- in which circumstances can a person be detained or arrested ? The presumption is that a person is entitled to personal liberty (situation where a person is not under arrest or detentions the presumption therefore is that the person is free). Therefore article 5 and article 34 examine those exceptional circumstances where loss of personal liberty that is to say detention is justified and failure to observe these minimum safeguards results in a violation of the convention. Detention is therefore justified in the circumstances which we will now consider.
- The first is **where there has been a lawful conviction buy a court for a criminal offense.** This is an obvious enough statement, meaning that if a criminal court sentences a person to imprisonment, this is not in any way a violation of ones rights.
- Another basis is **where a person is arrested or detained because there has been a violation of a lawful court order.** When a court order is disobeyed such act of disobedience is called *contempt of court*. Contempt of court is punishable by a fine and sometimes by detention depending on the gravity of the act of contempt. Where a court orders detention for contempt, there is here not violation of the convention of the constitution. Likewise, and this is more in criminal than in civil proceedings sometimes the court imposes on a person certain duties, for example if one is given bail, there are certain obligation, or sometimes a judgement of a criminal court imposed a number of hours in community service. In civil proceedings (one part against the other) detention has become today much less frequent. It happens where there is for example a court order to surrender or deliver something and a party refuses to. Here the court can exceptionally order detention. In the past there was also arrest for civil debt. If one didn't pay bills or creditors they could be sent to jail, however this was abolished in 1994, on the grounds of freedom of movement. Therefore where there is a violation of a court order, imposing an obligation, there is no violation of this right.
- Arrest or detention to ensure appearance or attendance before a court is justified in terms of the convention. As is likewise allowed arrest or detention for purposes of investigation when a person is reasonably suspected of having committed a criminal offense. The authorities have to have some reasonable basis and not a capricious or imagined basis. Likewise the convention and the constitution allow detention to prevent the future commission of an offense and also detention is allowed to prevent a person who is

reasonably suspected of committing an offense, from freeing or escaping trial. There are then wider community grounds which allow detention. For example a minor may be detained and put into an educational institution with movements controlled for purposes of welfare or education. There are wide powers granted to the authorities to detain at least temporarily those who are drug addicts under the influence of alcohol or generally considered a threat for treatment and protection of the wider community.

- This refers to **the case of vagrants**. These are what we popularly call tramps. People who either have no place to live, or those who roam about. In the past these were considered a threat to society and in the early days of the convention the so called vagrancy cases occupied the attention of the court of human rights quite a lot. Can you arrest a tramp?
- The last general ground is **the power to arrest and detain for the purpose of restraining unlawful entry into Malta or for the purpose for what is known as extraditing**. To extradite means when a state/ country forcibly sends to another state a person who is wanted in the other state to be investigated or to face trial.
- When a person is placed under arrest, are there any rights of such person? Can the authorities call you in and leave you there indefinitely as we say in *communicado* (*without access to anyone*). On arrest or detention the person has to be promptly informed in a language which a person understands of the reason for arrest or detention and nowadays very often the investigation process takes the form of an interrogation. One is out before 3 police officers and asked questions. During this process of interrogation and investigation, a person has the right of access to a lawyer. This is because we have the right to remain silent, and a person cannot be detained indefinitely. The police have 48 hours either to release you or to charge you. If they have a case then they have to bring you before the court and not longer kept in a cell with the authorities. There is what is known as police bail, when a person is sent home but obliges himself to appear and go before the authorities when requested. If it is later established that there has been wrongful arrest or detention, then there is a right to compensation.

Articles 6 and 7 of convention, and 39 of the constitution

- Here we talk about when proceedings have commenced.
- We're looking at a situation where court procedures has commenced. You know what you are defending.
- Article 6 is a corner stone of the convention, because it establishes certain minimum guarantees to which a party is entitled during criminal and civil proceedings. In both criminal and civil proceedings the guarantee is of being tried by an independent and impartial court within a reasonable time.
- **Independence of the judiciary** means that whoever is deciding has what is know as security of tenure, meaning that a judge cannot be dismissed or fired if the judge delivers a decision which may not be liked by the authorities. In the past if the judge delivery a decision which was disliked by the king, the judge would have been dismissed. The court has to be independent
- **Impartial** means generally that no person can judge his own cause. Meaning that you cannot have for example in criminal cases a prosecutor deciding. In civil cases you cannot have the judge having an interest in the case. For example a judge cannot judge an issue of property if he owns shares.
- **Within a reasonable time** - complex discussion because All over the world there are persistent complains that proceedings take to long. This right to have judgement and proceedings concluded within a reasonable time, imposes on the stat, the duty to see that there is sufficient man power, support and resources in the judiciary in order to cope. Human resources is a critical factor. Factors relevant are the complexity and lengthy of evidence and whether the parties themselves contributed to the delay.
- As a rule proceedings are **public**. This means that the public and most importantly the media, have full access to the proceedings. On one hand, there is a question of privacy (for example divorce cases etc), on the other hand experience has shown that the access and monitoring of the media generally contribute to greater transparency in proceedings.
- Every party in court proceedings is entitled to the right to defend itself, and adequate time and facilities to defend oneself. In criminal proceedings, there is also the right to be assisted by a lawyer, and if one cannot afford a lawyer, at public expense

Article 7 of the convention

- This is a guarantee that for an act or omission to be punishable, it has to be party illegal and unlawful at the time of commission. Criminal responsibility cannot happen retroactively. For example today something is not illegal, however in a years time they decided that the act performed today is legal. This cannot happen. One can legislate only from today to the future.
- The same rule applies to penalties. More severe, harsher penalties, cannot apply retroactively. If today something carries 12 months in jail, Andover they decide it should be 3 years, it only applied for future cases
- To conclude this is protected in the convention and the constitution. Linked to this is that one cannot be trailed twice for the same offense. If one is trailed, equated (found not guilty) or found guilty, the case cannot be re opened.
- There is also the 7th protocol to the convention which protects this right.

There articles of the constitution and the convention:

- Freedom in conscience and religion
- Freedom of expression
- Freedom of peaceful assembly and association
- Since these three fundamental freedoms tend to overlap, they are often discussed together. They are also often generally known as the three freedoms.

Freedom of conscience - Article 49 of constitution and Article 9 of the convention

- This guarantees that everyone has the right to freedom of thought, conscience and religion.
- This means the right to believe or not to believe in any religion, it also includes the right to change your faith.
- An important extension of this right is the right to practice ones religion alone or with others in private or in community and even to publicly display ones religious faith through meetings, demonstrations and other expressions in public.
- The right to practice includes the right to teach and receive and transmit religious instruction.
- Any right is subject to limitations. The convention imposes that any limitations have to be imposed by law. This is something which regularly incurs and occurs that anything has to be done in accordance with what is known as **due process of law**. Therefore such limitations have to first of all be done on a regular legal basis and not on an adhoc (specific case basis), and any such limitation has to be done and imposed in the interest of public order and public safety. These limitations generally refer to situations where public manifestation may get out of hand. For example when there is a risk of mob violence or clashes between demonstrations.
- There is also the possibility for the authorities to impose a limitation here on the basis of public morality. We are looking at restricting freedom of conscience on the basis of one set of morality as against another set of morality. This is controversial.
- The final limitation imposed on this right which is allowed to be imposed by the constitution is that related to the need to protect the rights of and interests and freedoms of other parties. In other words this limitation is subject to respect to the rights of others.
- If we look at **article 40 of the constitution**, the article is spelt in similar language however there are 2 important limitations here, distinct from the convention. These are :
 - There is the statement that every person in Malta shall have the full freedom to exercise and enjoy the free expression of ones conscience and religion. The obligation that religion is though in state and other schools, is subject to an important rule and this says that in the case of persons under 16 years of age (current school leaving age), these cannot be forced to take religious instruction if their parents or those legally responsible

decide that the minor child should not receive any such instruction. In other words the parents can opt out their child from religious instructions at school.

- The other important rule is of those entering religious order. A Person has freely entered a religious order and has therefore accepted to be bound by the rules of the order, cannot then claim violation of freedom of conscience on the basis that the order imposes and requires a particular way or mode of belief. One cannot for example become a monk or a nun and then believe that their freedom of religion is violated as they have to behave in a certain manner.

Freedom of expression - article 41 of the constitution and article 10 of the convention.

- Controversial article because you have on the one hand the right to express yourself and think freely, and of the other hand there are today difficult issues of whether and how to control the media. Before this included the radio etc and now this includes the social media.
- The difficulty in this article is how to balance these 2
- This also has implications on another fundamental right, the right to privacy. How far should freedom of expression of the media be allowed to invade a person's personal and private intimate life ?
- The rule is that everyone is entitled to freedom of expression. This included the right to hold opinions, to secure and transmit and receive information and ideas without interference from the authorities and regardless of frontiers.
- Regardless of frontiers, when written at the time were physical correspondence was still the principal medium of communicating. Today this has changed very differently.
- What are the limitations?
- Firstly the state party to the convention is given the right to license TV, radio and internet communications, also cinema enterprises. This means that the power to the state is acknowledged to licensing. Licensing means; regulating, imposing minimum criteria or thresholds, for a TV station to be licensed. This does not mean that the public authority is not bound to respect fundamental rights, it is simply there to regulate the exercise of the right subject however to full respect of the convention.

- **Article 10.2 of the convention** carries a significant statement that the exercise of this right carries with it responsibility for respect for similar freedoms of others. And therefore it may be subject to some limitations or procedures.
 - The first important limitation is that anything done has to be done as required by **due process of law** and may be subject to certain formalities only to pursue the following legitimate objectives. The first is **territorial integrity and national defense**. This again is a controversial discussion because why should one limit freedom of expression for national defense. Public safety and public order, there has to be a balance between freedom of expression and public safety and public order. Likewise an imposition may be justified to protect public morality. Every society has its customs (mores - its rules which are considered basic, and this is the basis of public morality). Each society has rules of decency which offend and shock the public. This freedom of expression can also be limited to protect the rights and freedoms of others and also to maintain the independence of the courts.
 - Looking at this article of the constitution, the sense is the same, we have however an interesting addition, which is that any person who is resident in Malta may edit or print a news paper, a journal or periodical. Today this includes other types of media, which are online. The only limitations are that the law may impose a minimum of 21 years of age and the residence address of the person who is registered.
 - The **press act** requires a person publishing a newspaper to register and the same applies in the case of radio and TV.

Freedom of peaceful assembly and association - Article 11 of the convention and 42 of the constitution

- The right protected here is to assemble peacefully in public there is no right to assembly in public and this then turns into a violent demonstration, because the moment a public assembly/ gathering is no longer peaceful, this gives the right for the authority to intervene by force. Of course there is then the usual discussion of who started first, whether it was the authorities or the demonstrators and whether the forces used to control the mob was proportionate and necessary.

- Right to associate to protect ones interest, including economic interests. This includes the right to form or join a trade union to advance ones interests.
- We have the usual limitations both in the convention and In the constitution, on the grounds of public safety and public order, national security and prevention of crime, public health and the protection of the rights and freedoms of others.
- Any limitation on the above basis has to be done in accordance with a law (**due process**) and justifiable in a democratic society.
- **Article 42.3**- this came as a result of judgement of the Maltese constitutional all courts which has to decode whether the prohibition of a mass political meeting in Zejtun was justified in a democratic society. The reopening of the authorities was that there was a significant risk of the violence and therefore it was better to prohibit it. The constitutional court held that the prohibition to hold a mass political meeting in the area in Zejtun was not justifiable in Democratic society. Therefore we have article 42.3 which says that any law which prohibits the holding of public meetings on a particular city or locality, will not be considered as reasonably justifiable in a democratic society.

Article 8 of the convention and article 38 of the constitution

- The right to have one sleeps all and private life respected - **the right to be left alone**
- This has acquired nowadays more significant importance due to the social media. You may have heard about the judgement of the European court of human rights on the right to be forgotten on Google. This incident involved s Spanish citizen who had had tax problems, and his house was up for sale. This man had sorted out his situation but the newspaper reports remained online, and when one Rhodes his name the first thing that came up was an old report from a Spanish newspaper which reported the fact. This person challenged Google with leaving all this material online for many years and he was successfully and the European court ordered has given an order whereby citizens have the right ti have their personal data removed online.
- There are other problems today by way of *data processing* and *freedom of information* so the problem is always where to draw the line between the right to privacy and the freedom of the media to investigate and report. This is a rather relevant and controversial protection
- *Article 8* reads that everybody has the right to respect for his private and family life, home and correspondence. This gives the right to be free from surveillance, from having your mobile phone or emails hacked or monitored and is subject only to the limitations imposed by law. This right is further protected and expressed in a positive way. In the sense that 'there shall be no interference except as' This means that the rule is respect for personal life, personal data etc and interference is the exception. Any such interference is therefore exceptional and should first of all be carried out in accordance with a law which establishes a procedure. If the authorities want to listen to your phone class they cannot simply decide to do so, they are required to get prior permission and gave to explain the reason why, from a judicial authority. This article continues the expression in the sense that any such interference has to be done in accordance the law and has to be subject to a necessity in a democratic environment. There are therefore 2 threshold:
 - Legality(has to be in accordance with the law)
 - The burden of proof -what the authorities have on them to show that any such interference is necessary in a democratic society to protect national security (for example army intelligence, public order and public security) maintaining law and order, public health and public morality.

- We have the usual very important exception to be the justification of any such interference to protect the rights and freedoms of others, then there is a compelling different exception, where any such restriction on the right to privacy is justified where necessary to promote the economic well being of the country. This refers principle to the collection of statistics and data processing by governments for economic planning. It is how difficult this article is in practice to apply. For example the social media, if pictures are put up, then we cannot argue that your right to privacy is violated.
- The corresponding article *article 38.1 in the constitution*, protects a person in the sense that no one shall be subjected to a search of person or property unless authorized or exempted by the constitution.
 - The exceptions reflect the European convention, whereby any restriction of such right to privacy is reasonably required in the interests of public defense and public order, public health and morality and the rights and freedoms of others.
 - There is also a different exception, whereby it seems that government compatible with the rule of law a democratic environment, may limit the utilization of natural resources or private property, to promote public benefit.
 - Governments may interfere with the right of privacy on the basis of the utilisation of natural or local resources for a public benefit. - There is no interference with this right, if premises are entered into, for the purpose of carrying out works for a public benefit, or for the purpose of preventing or investigating a crime. Therefore search and arrest for the purpose of preventing or investigating a crime is allowed and not a violation of the right to privacy. The repeated language of the European court is that it is acceptable to be for a proper legitimate purpose

Article 44 of the constitution - partly reflects article 2 of the 4th protocol of the convention

- Freedom of movement
- This goes beyond not being detained or arrested.
- This means the right to move around within a territory, to exit and enter a country.
- Article 2 of the 4th protocol of the convention, protects the rights to anyone lawfully within the territory, to freely move around the territory, and this is called **the liberty of movement, and the right to establish ones residence.**
- This right also guarantees the right to enter and leave lawfully the country. Normally with a valid passport or visa which the convention and the constitution allow entry and exit.
- We find the usual limitations being public order, public safety, public health and morality, the protection of rights and freedoms of others and generally this has to be done in accordance with a law and any such restriction has to be justifiable in a democratic society.
- The constitution at article 44 has the same rights guaranteed, however it allows the imposition of residents requirements in the case of public officers. For example certain medical personnel, may be required to reside, with their family in the institution where they serve. Other examples include the diplomatic service.
- There are two significant point, at a time it was decided to grant the right of immigrants. The idea was to grant such persons the right to apply, either for Maltese citizenship or at least give them the right of residence and therefore those who were citizens of Malta, or at the time was a commonwealth citizen, their spouses or widow or widower were given such rights to apply either for Maltese citizenship or freedom of movement. (the right to live here indefinitely, and not on a tourist basis).

Article 43 of the constitution

- The removal of personas from Maltese territory to face criminal proceedings in a foreign court.
- This process is known as **extradition**.
- Extradition can only be allowed by virtue of a treaty (a treaty is an international contract between states)
- Therefore the sending of a person within the Maltese jurisdiction, to face criminal charges in a foreign jurisdiction, can only take place if there is a treaty in force between Malta and the other state, and also a person can only be sent abroad by virtue of a local court order. The local court will establish that it is true that a person is wanted abroad, but most importantly, that a person will get a fair trial
- It is not the first time that extradition was refused because the Maltese court was convinced that the Maltese court would most certainly, condemn such persons to death.
- Article 43.2- very old rule says that extradition cannot be granted for offense of a political character. This means where it is a criminal offense to disagree with the political system or the government.

Enforcement provisions of fundamental rights

- **Article 13** requires all those parties/ states who are members of the convention to ensure that within their territory there is an effective machinery to ensure that a citizen who feels aggrieved has proper mechanisms and channels through which a complain alleging human right violations can be lodged.
- This is also linked with article 6 about that right of a fair trial and a fair hearing because one of the requirements of article 6 is that a party has access to a court.
- This is relevant because the moment there is in motion a procedure before a court then the guarantees of article 6 take effect.
- The corresponding provision is article 4 which provides that any person who claims that the rights protected in chapter 4, have been violated or are likely to be violated. The possibility of an imminent violation of a fundamental right, can also be a basis for a procedure

- The term person here includes both natural and legal persons. Such as companies, corporations or foundations.
- The competent court is the first hall of the civil court with a right of appeal to a court called the constitutional court.
- In this connection there are two relevant considerations:
 - The first is that the first hall and the constitutional court have very wide powers to grant appropriate remedies.
 - ... (Lexie's) qallayment has to first peruse what are known as ordinary remedies. It means that under then general law there are remedies. These have to be availed of an exhausted before the constitutional comeuppance is addressed. The court has a discretion not to grant any remedy, if it considers that other adequate remedies are availed off and not taken.
- The same rule applies in the case of a right of individual petition granted to persons before the European court of human rights. There is here the rule of exhaustion of domestic remedies, meaning that in taking a case to Strasbourg a party has to show that all what could have been done at national level has been unsuccessfully tried. If one doesn't cross this threshold, the case will be thrown out thus one has to be sure that all domestic remedies are exhausted.

The rule of law

- A political and legal process which is closely linked to human rights protection. This basically means that citizens and authorities are all subject without distinction to the law. In other words, the law is supreme.
- The political organization of the state is based on the law and there is the traditional distribution of power between a legislator (parliament), government and the courts.
- The traditional definition is that the rule of law has this division of power and creates a system of "checks and balances". This means that if an authority over steps it's powers it can be called to check by the courts but then the courts themselves are subject to the law and derive their power from the law.
- Another consequence is that all parties/ persons/ citizens/ authorities are subject to the law because no one is above the law.
- These fundamental rights are linked to the rule of law because they are an added guarantee to the procedure to enforce the law and the rights and duties of citizens in a civil society.

Commercial law

An interdiction of the law of industry

● **The commercial code: chapter 13**

- The parties are principal and agents. The basis is what is known as the contract of agency. This is normally an ongoing commercial relationship formalized in a contract whereby an agent is tasked and empowered to promote the business of the principal.
- This is done in various ways through first of all publicity and promotion first of all in the market and also the all important securing and concluding sales for the business of the principal.
- The business may be goods or services and is generally defined by a territory and may be exclusive or non exclusive.
- Nowadays for the term agent often the word distributed is used. The reason is that distributors may tend to have perhaps less claims against the principal than an agent would have. Therefore the contract of agency gives a measure of representation to the agent on behalf of a principle.
- The widespread practice is that the agent does not have the power to conclude on terms and conditions, but has to transmit an order recovered from a customer for confirmation by the principal.
- The agent cannot close the order but can negotiate terms but is always subject to confirmation. The agent is usually paid by way of commission, which is an agree percentage on volume of sales, neither as negotiated and agreed between the parties or as is customary in the line of business.
- From the definition of agents are excluded the following;
 - Persons in employment of the principal
 - Insolvency practitioners – these are those who work to conclude and wind up companies, a process of administration and liquidation
 - Those dealing in secondary markets – second hand markets
 - Those dealing and trading in commodities – the reason is that in this case it is a different method of legal regulation.
- To conclude, how does one become an agent;
 - There is a process of application to the chamber of commerce and industry enterprise and a party has to demonstrate that it is fit and proper, has not been bankrupt and does not have a criminal record and is generally capable of conducting the business of agency. Any refusal to grant a license may be challenged before the court and the license is subject to annual renewal and may after due process be withdrawn if an agent no longer satisfies the requirements. For example an agent cannot be a warranted professional person who actually practices the profession. Likewise

licensed stock brokers cannot be commercial agents as they gave a different line of business.

- There are sanctions and penalties for either representing oneself as an agent or acting as an agent without the required authorization and license.

The fundamental human rights and freedoms

European Convention was made to protect human rights and fundamental freedoms.

After the Second World War, there was an effort to put in place a machinery to control and avoid the human rights abuses that happened during this war. The original contracted parties were European states who signed in Rome in 1950.

Apart from this convention there were subsequent additions, known as '*protocols*', of which there are 14. These refer to the right to enjoyment of one's possessions, access to education, fair and free elections at regular intervals, the right to a person to not be tried twice for a criminal offence and also the progressive abolition of the death penalty. Originally, the death penalty could be applied to war crimes. Subsequently, even that exception was removed so that the death penalty was not allowable in any circumstance.

The Human rights that are protected here refer to principals but not exclusively to the political rights. There is generally 3 categories known of human rights, normally known by generation.

1. The first generation refers to the political rights and relates to minimum guarantees in proceeding and rights of freedom of expression, association and conscience. These rights are of the 19th century.
2. The second generation refers to social and economic rights, such as the right to employment and the right to social, basic medical care. These are not generally enforceable at the current stage of development. This means that a citizen cannot take action against his government on the basis that he or she is not employed. The current stage of development has not provided human rights protection machinery for such situations.
3. The third generation of human rights refers to the environment, cultural, and artistic rights. The subject of development is not so much the right of the individual but the right of future generations. The thinking behind this is that the environment, climate, historical and artistic patrimony of a country belonging to not merely an individual but to present and future communities. Here, enforcement is principally at multi-state level and still at a very limited stage of development.

Chapter 4 of the Constitution of Malta talks about fundamental rights and freedoms of an individual. This chapter was written in the Independence Constitution of the 1964 and was updated over the years. This is sometimes known as the 'bills of rights'.

In 1966/67, Malta joined the European Convention of Human Rights. The right of individual petition was not yet granted. In 1987 the next development occurred. Here, we have chapter 319 of the laws of Malta which we know as the European Convention Act. This means that in the year 1987, the convention for the protection of human rights and fundamental freedoms was transposed as local domestic law. It therefore became part of the legal system and not merely an obligation of the state to secure certain human rights. This also brought with it the right of individual petition. This means that in the year 1987, the convention for the protection of human rights and fundamental freedoms was transposed as local domestic law. It therefore became part of the legal system and not merely an obligation of the state to secure certain human rights. This also brought with it the right of individual petition. Meaning that a person, citizen, company or organisation is entitled to bring its

case directly against Malta in an international form, which is the European Court of Human Rights. In general terms, a citizen has to first exercise all domestic, local remedies before taking a procedure to the European Court of Human Rights.

The European Court is therefore vested by the terms of the Convention in deciding whether there has been a violation in the protection of the rights of constitution and therefore providing a remedy thereof. Importantly, both the convention and constitution provide methods of enforcement of judgements of the European courts. It is important that the 2 institutions of the Council of Europe and the European Union are kept distinct, to avoid a common error of confusing them.

European Union has 28 member states and originally started as an economic union. Whereas the Council of Europe has cultural and wider reach than certain functions of the European Union. Membership of the Council includes former states of the Soviet Union and Turkey which are not members of the European Union. Also, the Baltic States are members of the Council, but not the European Union.

On the other hand, all the 28 members of the European Union are in the Council of Europe. Also their institutions and organs are different.

The courts of the European Union sits in Luxemburg while that of the Council sits in the French town of Strasbourg.

There are 3 levels of protection of fundamental human rights.

1. Chapter 4 of the Constitution.
2. The local transposition of Chapter 319 which is the European Convention Act.
3. The European Convention itself, which imposes on its member states not merely the obligation to secure and guarantee the rights protected in the convention but also the right to citizens and those present within jurisdiction, the right of individual petition.

The relation between the articles of the Constitution of Malta and the European Convention

Article 33 of the Constitution and Article 2 of the Convention:

The first rule is that originally, the death penalty was only allowed following a court judgement in respect of a conviction for a crime. This has been superseded by the protocols referred to earlier. The death penalty was prohibited except in times of war yet later it was totally prohibited. For these protocols to be enforced in a state, such state has to accept them through a formal declaration. Not all states of the Council of Europe have accepted this proposition.

Regarding the use of force, the articles are helpful, yet helpful to a point. There is no consideration of the deprivation of life, in contravention of the article when this follows from use of force, which is no more than absolutely necessary. These are 3 instances mentioned.

1. Defence of any person from unlawful violence
2. Affect unlawful arrest or to prevent escape of a person who is lawfully detained.
3. To control or quell a riot or insurrection.

The test of proportionality means that the assessment will be whether this was a proportional, reasonable reaction. The amount of thinking time in each circumstance is taken into account.

Article 3 is a general prohibition in the sense that no one shall be subjected to torture or inhuman or degrading treatment.

Article 36 for reasons difficult to understand only prohibits inhumane or degrading treatment but does not make any specific mention of torture. The difficulty is why legislators should find it difficult to write a specific prohibition against torture. Inhuman and degrading treatment is linked with torture in the sense that it is a more extreme case. It is also invoked very often during periods of interrogation by the police, meaning physical or psychological in treatment of a person who is often as the term goes *incommunicato* (*unable to communicate with relatives*). There is also the question whether those in detention can be forced to work. It is established in the Constitution that the imposition, the order; to work as a routine part of treatment during detention is not considered inhuman or degrading treatment.

There is however a clear rule against the imposition of *Collective Punishment*. Punishment in this case is person specific in the sense that the measure of responsibility of the person has to be established and it cannot simply be that because you are part of a group, a punishment is imposed. One has to see what role or involvement is established in respect of each person. There is another exception in the Constitution which allows this time for the imposition for a collective punishment in the case of a discipline force.

The Prohibition against forced labour

It is agreed that nobody should be ordered to work against his will. The balance between what is essential and at what time it is essential and the rights of the community.

The general rule is that no person shall be required to perform forced labour (*article 35 of the Constitution*). The *EU Convention in article 4* speaks in wider sense in the sense that no one shall be required to perform forced or compulsory labour. The other is that no one shall be held in slavery and servitude (the state of being a slave or completely subject to someone more powerful). There is some important and far reaching exception;

- What is routinely imposed during a period of detention for purposes of education, rehabilitation, hygiene or the proper maintenance of a place of detention.
- Community service. Is a punishment which is imposed by the courts and says for example that a person has to do 40 hours working as a cleaner because of his bad actions.
- Refers to members of a discipline force and also includes consciences objectors (those who do not believe that they should not go and give their contribution to a military force) some they have to do indirectly community service. Any order or discipline here is not considered to be a violation of the right to protection from forced labour.
- Labour required during a period of public emergency or a calamity which threatens the life and the well being of the community. Our courts have held that bakers is an essential service and therefore the bakers were not entitled to protest in the context of dispute by refusing. Today even the employment and industrialization act there is a category of essential or not

essential. Certain medical tasks have to give support and be available at all times meaning therefore that this obligation does not go against the rule against collective or forced labour.

Guarantees during detention periods and during a trial period.

The first refers to when a person is arrested which are the minimum rights at a point then such person has to be brought before a court or charged with something.

Article 5 of the Convention & Article 34 of the Constitution

This essentially *looks at the minimum rules relating to arrest and detention*. The rule is that every person is entitled to the right of liberty and security of the person. This means that personal freedom is the rule and detention is the exception. Therefore detention, arrest or deprivation of personal liberty has to fall under one of the specific exceptions relating to deprivation of personal liberty. Therefore the Convention and the Constitution lists a number of specific exceptions whereby arrest or detention, that is to say deprivation of personal liberty can be justified.

Exceptions of personal liberty

- Where there is a *conviction by a competent court*. A person is found guilty by a court having the power and authority to pass judgement and this court decides for imprisonment. It has to be a court of criminal jurisdiction in terms of the constitution while the language of the convention is wider in the sense that it speaks of a competent court including therefore but not limited to a criminal court.
- *The lawful arrest of a person in order to secure the execution and fulfilment of an obligation imposed by law*. In other words, there are situations where a court may order arrest, for e.g. if a person disobeys a court order, there the court has the power to order the arrest of a person until such person complies with the court order. There is an important exception. The authorities have the right to detain a person upon reasonable suspicion that such person has committed a criminal offense. The exception also applies if the authorities have reasonable ground to believe that such person is about to commit a criminal order. Therefore detention in these circumstances is justified. It is however subject to one very important condition and this is that it has to be based on erasable ground. The legality of an arrest may be challenged or questioned on the basis that the authorities did not have in their possession facts and evidence which objectively could lead to a reasonable conclusion of a suspicion, based on facts that either an offense has been committed or may be about to be committed.
- *The detention of a person who is a minor for the person of the education or welfare of the minor*. In some instances those under the age of 18 are sent to corrective institutions or to institutions for those who have no family. In this event it is most likely that the minor persons are not at liberty to leave the institutions they are being detained there, not as a form of arrest but kept in the institution for their own benefit and education. Therefore in this case the person is not allowed to leave such institution is not a violation of this right of liberty of the person.

- This refers to more *social cases*. It refers to those who are or are reasonably believed to be of unsound mind (those who cannot have the full control of their mental facilities) or addicted to drugs or alcohol or vagrants (no fixed residents).

The 3 Freedoms :

- Article 9 : Freedom of thought ,conscience and religion . (Article 40 of the constitution).
- Article 10 : Relates to freedom of expression (Article 41 Constitution)
- Article 11: Freedom of assembly of association (Article 42 in constitution)

NB: 3 freedoms tend to overlap .In the sense that a violation of freedom of conscience can very easily also involve a violation of freedom of expression.

Article 9 : Freedom of thought ,conscience and religion . (Article 40 of the constitution).

This article protects freedom of thought, conscience and religion, this means that not only is the right to personally hold beliefs and opinions but also includes the right to believe in which religion one thinks. This may seem an obvious statement but underlying it is the acknowledgment that the state as a general principle and subject to the limitations here under recognizes all religions whether Catholic, Islam etc...

The right to believe includes the right not to believe meaning that a party s under no obligation to practice any religion as it is often expressed there is the right to disbelieve as against the right to believe. Also this right extends to changing one's faith. The articles acknowledge and protect the rights of citizen to publicly or in private manifest their believes .Therefore this includes the right to public demonstrations of one's faith and also the public manifestation of practice and worship and also the right to teach and spread one's believes .The constitution adds that any requirement in the case of minor children to follow religious instruction is not a violation of the right to believe or not to believe provided that the choice is made by those who are legally entitled to take decisions for minor children(Example : normally parents or guardian etc). Like wise the constitution provides that in the case of those who choose to enter a religious life , once this is done voluntarily there can be no question of violation of this article .Meaning that if a person choses to enter in a religious order ,one is bound by the rules of the order and cannot go against the right.

The only limitation imposed here is that necessary in the interest of public safety ,public order, public health ,public morality or decency or the protection of rights and freedoms of others. The concluding point is that when it was drafted it was normally considered as a tranquil article but today states have to deal with fundamentalism which sometimes could be based on extreme religious believes. So this article has now acquired considerable relevance because of this factor.

Article 10 : Relates to freedom of expression (Article 41 Constitution):

The emphasis in article 10 is that the freedom to hold opinions brings with it the right to receive ideas ,vies and information and also the right to transmit such ideas and information. A person has the right to express publicly and in private one's views to transmit them ,to make them known and similarly the right to receive in any public or private medium ideas ,opinions, views and information.

This right is linked with 2 important and controversial questions:

1. The relation between freedom of expression and the media.
2. Freedom of expression and information and censorship.

The relation between freedom of expression and the media: There is the right to edit and publish a news paper in paper form or online ,a radio station ,or a television station , as right consequent to this freedom of expression.(because have the right to express myself this means that I have the right to right in news papers etc.. NGOs have the right ot have their means of media such as radio station)However the convention and constitution acknowledge the right and power of governments to regulate radio , tv licenses ,etc. In other words the authorities are entitled to impose conditions in the issue of such licenses and these conditions are subject to the test and scrutiny of the convention and constitution. Because condition may be so excessive or unreasonable that it may effectively prohibit the exercise of such right.

Freedom of expression and information and censorship: No right is absolute . There are limits within which a right has to be exercised .On one hand the right of the state to limit the exercise of this right for the protection of 'vulnerable people ' is acknowledged . On the other hand this treads is a difficult balance with freedom of expression. Therefore the power is acknowledge by the convention and constitution to impose conditions in the public interest (defense ,public safety ,public order ,public morality or decency or public health). Like wise the state may impose limitations to protect the reputation of others. There is a fine distinction between saying that you are incompetent and attributing certain facts. The law of Libel (when a persons reputation is said to be prejudiced/damaged) example the EU court held that persons involved in politics and public life , the test of protecting one's reputation is less than that of an ordinary citizen.

Article 11: Freedom of peaceful assembly of association (Article 42 in constitution):

This means that every citizen has the right to publicly demonstrate with others for a particular cause. The limitation imposed here is that it has to be peaceful . In other words there is no right to demonstrate /break up shops etc. Any such exercise of this right can only be placed under a reasonable limitation in a democratic society . Therefore the authorities may only limit this right in the interest of public order, national security or safety, protection of public health and the rights and freedoms of others.

This right has an other important implication since it guarantees the right to associate for the protection of one's interest . Including the right to form trade or other unions. In other words there is the right to take an industrial action, the right to strike , the discussion here is what about those who are on essential services (police etc). The convention allows freedom for member states to regulate this aspect domestically/ locally. However the convention does recognize the right of states to regulate the exercise of such rights.(in our case urgent and essential medical services cannot go on strike).