

Constitutional Law

Constitutional Law is the law which regulates the composition and functions of the three organs of the State, the relationship of those three organs between themselves and the relationship of those three organs with the private individual

Composition: Shall we have a unicameral or bicameral legislature? Why are there two chambers in most countries e.g. House of Lords and House of Commons in UK, The Senate and House of Representatives in USA, Il Senato and Camera dei Deputati in Italy, the Bundesrat and Bundestag in Germany, Different reasons.

What are the functions and composition of the Legislative, the Executive and the Judiciary.

The legislature makes laws and controls the Executive. The Executive governs and applies the laws. The Judiciary interprets laws and applies them to specific cases.

Most legislatures in Europe are bi-cameral. In Malta we had a bi-cameral legislature between 1921-1933.

In the United States, bi-cameralism solved the problem of establishing a balance between large and small states within USA. The Great Compromise. Equal representation of states in Senate (50X 2), representation according to population size in the House of Representatives.

Relationship between the Three Organs of State

Relationship between Three organs of the State

- This relationship determines whether a Constitution will be classified as Parliamentary or Presidential.
- In the Parliamentary system the relationship between Executive and Legislature is very close. In the UK model which Malta has followed, the members of the executive are also members of the legislative. The Prime Minister and Ministers are members of the Legislature.
- They are also responsible to it so that if Government loses a majority in the Legislature new elections have to be held
- In the United States the two organs are more separate. A member of the Executive cannot be a member of the legislature and the executive is not responsible to the legislature even because the two organs are elected through two separate elections

The Relationship between the Three Organs and The Private Individual

This is human rights law. To what extent are the three organs bound to observe human rights in dealing with the private citizen ? What powers do the Police have to arrest an individual or search his house; what powers does the State have to take over private property for a public project. To what extent are we guaranteed a fair trial and hearing before a court of law. What rights do we have to exercise our freedom of expression association assembly?. Is discriminatory treatment allowed? Do we have a right to property

Characteristics of a Constitution

- It is usually codified in one single document. Exceptions: the United Kingdom, Israel and New Zealand.
- Of its very nature a codified Constitution is **supreme** (*Marbury v Madison* 1803 US Supreme Court)

If it is supreme there has to be a mechanism, organ or authority which has the right to declare a decision or law as being against the Constitution and therefore null and void. Eg human rights cases

- Article 6 of the Constitution of Malta
- For a law to be supreme and fundamental, it is logical that such law can only be amended by a special majority. So while ordinary laws may be changed by an ordinary majority i.e. 50% plus one of those MPS who actually vote, most provisions of the Constitution require the approval of a two-thirds majority of ALL the members of parliament .

To what purpose are powers limited and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if these limits do not confine the persons upon whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true then a legislative act contrary to the Constitution is not law; if the latter part be true then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. (Marbury v Madison 1803)

Constitutions may be:

Rigid or Flexible

Unitary or Federal

A Constitution is rigid if a special procedure is needed for it to be amended. A flexible one is a Constitution which may be amended even by an ordinary majority

Federal

In some countries particularly those of a large size e.g. United States, Russia, China and Brazil, government is divided between two levels the Federal and State Level. So in the United States each one of the fifty states has its own legislature, executive and judiciary. Then at Federal level there is the Federal Executive (President USA) the Federal Judiciary (the US Supreme Court) and the Federal bi-cameral legislature namely the Federal Senate and the Federal House of Representatives. The states send representatives to both. The Federal Organs are situated in Washington DC.

Some relatively small states are also a federation eg Federal Republic of Germany, and Austria

Sources of Maltese Constitutional Law

1. The Constitution
2. Statute /Ordinary Law e.g. General Elections Act 1991, European Convention Act 1987
3. Subsidiary Legislation
4. Standing Orders of HOR and Speaker Rulings
5. Conventions : rules of political practice considered to be binding by those to whom they apply but which are not enforceable in a court of law,
6. EU Law e.g. Directive on Police Interrogation
7. *Lacuna* Doctrine : Lacuna in public law, Court May apply English Common Law
8. Judgments- Decisions of courts of constitutional jurisdiction interpreting articles of the Constitution
9. Writings of Authors; these can shed light on interpretation of Constitution

Parliament

Parliament is composed of the President and the House of Representatives.(HOR)

HOR is composed of 65 members elected by proportional representation by means of the single transferable vote.

Malta and Gozo are divided into 13 electoral districts each returning 5 members ($13 \times 5 = 65$). Gozo is always a separate district on its own,.

Elections are run by an Electoral Commission. According to convention, half are appointed by the President on advice of the Prime Minister (PM) from amongst persons enjoying his confidence, the other half enjoying confidence of leader Opposition,. Chairman to be chosen by consensus.

This is only a convention and tradition., The Constitution states that the members are chosen by the President acting on the advice (binding) of the PM after only consulting the Leader Opposition.



Corrective Electoral Mechanisms:

1987: Majority of one over all opposition parties if party gets 50% plus one of first preference votes.

1996: Same rule to apply where only two parties get elected and no one gets absolute majority. Largest party gets a majority of one.

2007. Proportionality between party winning and party losing. Additional seats if one party wins seats more than it should or less than it should.

In 2022. Two additional seats were granted to the Opposition so the gap from 11 seats was reduced to 9.

This applies only if two parties are elected to Parliament.

The Gender Mechanism

If the target of 40% of mp's from under-represented sex is not achieved a **maximum** of 12 additional seats from that gender are distributed equally between the two parties.

In 2022 since the 40% figure was not reached twelve female candidates were elected six for each party.

This mechanism applies only if 2 parties are elected and expires after twenty years from 2022.

This explains why in 2022, 79 members of parliament were elected namely:

65 members elected + 2 additional members granted to Opposition under corrective mechanism,
12 female members under the new mechanism



The Electoral Commission also draws up the electoral districts. Why is this important?

It is important for the candidates. It is important because if a third party is elected the corrective mechanisms do not apply, and the party with a majority of seats will form the government.

Voter Qualification:

(a) citizen of Malta

(b) 16 years old

(c) residing in Malta on aggregate 6 months out of the last 18 months

THE SPEAKER

The Speaker presides over the HOR. He can be elected from within or from outside the House.

He does not have an original vote. He has a casting vote if there is a tie.



He is considered to be a member of Parliament.

Voting in HOR

Voting is by simple majority that is to say 50% plus one who are present and vote

Passing of Bills through HOR

Any MP can propose a Bill. Usually it is Govt since it controls through its majority the parliamentary agenda.

A Minister will usually propose a First Reading. Nothing is read except the title of the Bill e.g. A Bill to amend the Criminal Code.

Then the Bill is published in the Government Gazette.

The Piloting Minister then proposes a Second Reading in the HOR. Debate will be limited to scope not to details. No amendments can be proposed at this stage.

The Bill then goes before a Committee for the Consideration of Bills . Bill examined clause by clause. Amendments can be proposed by both sides.

The Chairman at end of discussion reports to Speaker.

Third Reading by Whole House .

Assent by President- Publication of the Act of Parliament in Govt. Gazette



Tasks of Parliament

It is the only law making body. It can delegate (subsidiary legislation)

Parliament passes laws for the governance of the country. These laws may be challenged before the Courts of law if they are in breach of the Constitution.

Parliament in Malta is supreme but only within the four corners of a more supreme Constitution. Nothing is automatic. For a law to be declared constitutionally invalid, some one has to start litigation in Court

Financial Estimates – BUDGET

Parliament in all democratic countries approves the financial estimates for the next financial year.

All funds in the Consolidated Fund need parliamentary approval for revenue and expenditure.

The Budget debate is a debate on parliamentary authorisation for Government to spend X billion euros in the next financial year.

This has to be done EVERY YEAR. The Minister of Finance will deliver a Budget Speech. The Leader of Opposition replies a week later and the Prime Minister



counter replies.

Then the House resolves itself to go into a Committee of Supply, and there estimates of every Ministry are examined and voted upon

The Opposition spokesman will usually propose that the Minister 's salary is deducted by one euro to trigger off the debate . Govt defends its position. The motion of course does not pass. If a govt is defeated in Budget debate that is considered to be a vote of no confidence.

This happened in 1950 and more recently in December 2012.

When that happens the Constitution provides a breathing space of four months until 30th April of next financial year for the Budget to be approved allowing govt to spend the same amounts for first 4 months as it did in the previous year. If Budget is not approved again before April 30th , no monies can be withdrawn from the Consolidated Fund .

At the end of the debate an Appropriation Act is passed allowing the Govt to spend X billion euros for next year



Parliamentary Privilege

No action can be taken in a court of law for anything said by an MP in Parliament during a sitting. This applies only to what he says in Parliament . Any other action eg hitting someone , is not covered.

In Italy privilege extends to any criminal prosecution whether within or outside Parliament

A person aggrieved can file a complaint with the Commissioner for Standards in Public Life who examines whether an MP has abused of his privilege or else breached the Code of Ethics for MPS.

The Commissioner for Standards is elected by a two thirds majority of all MPs and can be removed in same way for incapacity or proved misbehaviour. He can receive a complaint against an MP or a member of the private secretariat of a member of the Executive.

He files a Report with the Standards Committee, the only parliamentary committee where govt does not enjoy a majority. In fact it is composed of Speaker and two mps from each side.

Sanctions can include fines, naming and shaming.

The Executive

The Executive is covered by Chapter VII of the Constitution. Though the executive authority is vested in the President of Malta it is exercised by the Government of the day. As we saw in article 85 of the Constitution .

The Prime Minister and Cabinet

A Prime Minister(PM) is appointed by the President . He appoints the member of the House of Representatives who in his judgment is best able to command the support of a majority of members of the House. Then **on the advice of the PM**, he appoints the Ministers again from members of the House.

Our Executive is a parliamentary Executive, It sits in Parliament . It is also responsible to it. In fact if the House passes a motion supported by a majority of ALL the members to the effect that it has no confidence in the Govt, the PM has to resign or advise dissolution.

Powers of the PM

1. He hires and fires Ministers
2. He is the Head of the Cabinet. He decides agendas date and time. He is not necessarily bound by Cabinet decisions. But BEWARE: A PM is always stronger than any individual Minister but never stronger than a Cabinet united against him e.g resignation of PM Margaret Thatcher in Nov 1990.
3. He has the right to advise Dissolution of HOR. Double edged sword
4. He is usually the Leader of the Party and Leader

1. of Govt
2. **Patronage.** Most offices are filled by the PM in practice e.g. ambassadors chairpersons of public authorities , decorations, etc
3. Exposure; He is considered as representative of nation abroad e.g. The European Council
4. RESTRICTIONS
5. Political Realities. If the PM has a slim majority in Parliament, or heads a Coalition his absolute power to hire and fire Ministers is limited.
6. Even if he heads a one party govt, he will take into consideration popularity, geographical distribution, competence etc., But his only legal limitation is that a Minister has to be an MP.
7. Abusing of his power can lead to a motion of no confidence or a palace coup where he is forced to resign. A govt whose Ministers resign or are ousted regularly appears like a sinking ship. E g the Night of the Long Knives under the UK Macmillan Govt.

The Attorney General and the State Advocate

For some inexplicable reason these two offices are included in the Chapter relating to the Executive. **The Attorney General** is the person who decides who is to be criminally prosecuted. In this capacity he is guaranteed independence to the extent that he can only be removed from office for proved misbehaviour and incapacity by a two-thirds of all the members of the HOR

The **State Advocate** enjoys similar security of tenure. He is responsible for the legality of acts of the State and is counsel to the government of the day. He defends the Govt in non-criminal cases eg constitutional cases. Gives legal advice to Govt and assists in the drafting of legislation,.

The Leader of the Opposition

The Leader of Opp. In Malta is not only a political but also a constitutional figure. He is actually appointed by the President acting according to his own deliberate judgment.

Unlike the case of appointment of PM, the Leader Opp. must not only be a member of parliament but also leader of the largest party in Opposition.

This formality is necessary since the Constitution provides that the Leader of OPP has to be consulted in certain appointments, He also has the exclusive right to give binding advice to President on appt. of 2 members of the Employment Commission and one member sitting on the Commission Adm. Justice

The Judiciary

The Courts of law are divided into Superior Courts presided over by Judges and Inferior Courts presided over by Magistrates (15.000 euros in civil cases up to 2 years imprisonment in criminal cases)

One of Superior Courts to be the Constitutional Court composed of three judges . The assignment of duties is made by the President of Malta on the advice of Chief Justice.

Jurisdiction

- (a) Any matter relating to Election of members of Parliament and Speaker;
- (b) Suspension by Electoral Commission of election; or action instituted by any voter challenging validity of an election;
- (c) appeals from judgments of First Hall Civil Court (FHCC) on human rights cases ;
- (d) appeals from FHCC regarding interpretation of Constitution other than human rights;
- (e) Appeals from, judgments relating to validity of laws on ground other than human rights; (art 116 of Const) .

(f) Appeals from judgments of Hybrid cases involving civil and constitutional issues

The European Convention Act (CH 319) allows appeal from human rights cases decided by FHCC on ECHR ;

(g) The Referenda Act (Ch 237) empowers the Constitutional Court to examine admissibility of a question put to an abrogative referendum following collection of signatures by 10% of voters; and verification of signatures at the initiative of any voter (actio popularis),

(g) According to art 101C a member of judiciary removed by the Comm. Adm. Justice can appeal such decision to CC.

Human Rights Law in Malta

1. The rights listed in Chapter 4 are enforceable. Those Ch 2 are not.
2. Apart from Chapter IV of Const. we also enjoy the rights listed in the European Convention on Human Right (ECHR) incorporated in Maltese law by Chapter 319; Parallel to each other .
3. One can present **one action** before FHCC invoking protection of both Const. and ECHR. The Court will apply the widest protection theory.
4. The rights are enjoyed by any person in Malta not necessarily Maltese citizens (except for freedom of movement and prohibition of deportation)
5. No right is absolute. All rights (with exception of protection from inhuman treatment and fair hearing)contain exceptions . Human rights stop at the frontier of human duty. These restrictions (see Preamble art 32) may be either in the public interest or for the protection of rights of others)

1. List of Rights under Constitution and ECHR

In some cases our Constitution provides a better protection ; in other cases the ECHR provides better protection. e.g. in criminal cases under Maltese Const. only a court may decide cases; under ECHR there is right to family and private life

Chapter IV Constitution

1. Right to life
2. Protection from arbitrary arrest and detention
3. Protection from Forced Labour
4. Protection from Inhuman Treatment
5. Protection from Deprivation of Property without compensation
6. Protection for privacy of Home or other property
7. Provision to secure protection of law
8. Protection freedom of Conscience /worship
9. Freedom of Expression
10. Freedom Assembly and Association
11. Prohibition of Deportation
12. Freedom of Movement
13. Protection from Discrimination

1. Right to Life

This includes the positive obligation of the State to protect life e.g. by ensuring safety in state owned enterprises (*Brincat et v Malta-Asbestos Drydocks*); and that proper investigations are held in killings of journalists eg *Caruana Galizia* case
Exceptions: self defence of life and property; reasonable use of force in cases of preventing offences, catching fugitives, suppressing insurrections and riots, lawful acts of war

2. Protection from arbitrary arrest and detention:

Reasonable suspicion of having committed offence;

Warrant to arrest and search issued by Duty Magistrate

Reasons have to be given for arrest:

No detention may exceed 48 hrs maximum

Right to inform someone of arrest

Right to medical exam.

Right to assistance by lawyer

Right to remain silent

Police to inform suspect of his rights

Disclosure of docs as a rule .

Right to Request Bail (Pullicino Case 1989)

Reasonable Conditions

Protection from Forced labour

Exception work ordered to members of Discipline Force' ; Emergency or Calamity that threatens life or well being of society

Protection from Inhuman or Degrading Punishment or Treatment:

Not only physical but also mental anguish and ill treatment eg eviction from one's home, not being eligible for parole if serving life sentence, (*Walid*) (conditions of place of detention).

Right to Property

- (a) Property can be taken over by the State in public interest (ECHR not CONST)
- (b) Right to adequate compensation (not necessarily market value ; principle of proportionality no excessive burden on one person; right balance eg de facto expropriation *Mintoff* case); restrictive rent laws ;
- (c) Right to challenge compensation and right of appeal to Court of Appeal

Protection of Privacy of one's home or property

No one can enter property of others

Exceptions Police search; arrest; Reasonable restrictions in some public interest

Right to A Fair Hearing

Applies to both criminal and civil cases;

No definition of Fair Hearing

Within a Reasonable Time :No definition

By an impartial and independent court or tribunal(in criminal only court)

Emmanuel Vella case(1983): Lombard Bank case) (2023)

Publicity of Proceedings as a rule

Specific Rights of Accused

Presumption of innocence; Prosecutor *onus probandi*;

Accused to be informed in writing of charge

Adequate time to prepare defence

Right to a lawyer (*Michael Falzon case*)

Right to legal aid

Right to produce witnesses and cross examine witnesses

Right to be present

Non-Retroactivity of Penal Laws (Substantive not Procedure)(*Cuschieri Case*

Rule against Double Jeopardy

Rule against Self-Incrimination

Freedom of Conscience, Worship, Expression, Assembly, Association

The Five Tests

- (a) A law *Buttigieg v Borg Olivier* ;
- (b) restriction to be authorised by law;
- (c) reasonably required (*Massimo Gorla*) ;
- (d) In some public interest mentioned in Constitution;

Gianni Camilleri

- (e) Reasonably justifiable in a democratic society ;

Does Constitution protect the right to strike

NO(*Cuschieri* –Doctors case 1977)

Individual chooses method of expression (*Mgr Philip Calleja* (1976); *Emmanuel Delia* 2020)

Prohibition of Deportation

No Maltese citizen may be deported. Extradition yes provided there is a treaty

Freedom of Movement Applies to Maltese citizens only and Foreign spouses of Maltese citizens, and their children up to age of 21;

The right to reside anywhere in Malta to leave Malta and come back to Malta

Protection from Discrimination

(no unjustified discrimination by a Public authority or Law *Buttigieg* Case – discrimination against children born outside marriage in succession law.)

One has to compare Like with Like;

Grounds of prohibited discrimination exhaustive (ECHR indicative)

Positive discrimination to accelerate equality between sexes allowed if reasonable.

PROCEDURE

(By application before First Hall Civil Court Prim Awla;

One has to prove juridical interest actual and personal;

Court may decline to hear case if there are alternative adequate ordinary remedies at law;

A court may refer to courts of const.t jurisdiction human rights issue which arises before it;

Right to appeal to Const. Court (3 judges)'

For individual only :one may refer case to the European Court of Human Rights in Strasbourg; within 4 months ;

Remedies make such orders ,issue such writs and give such directions ; eg additional parliamentary seats

Commissions and Authorities Established in Constitution

This Commission is composed of a Chairperson and four members. Public officers cannot be appointed as members. Though the Const. in art 109 states that the members are appointed by the President on advice of PM after consulting the Leader of Opposition, in practice a convention has arisen whereby half the members are appointed from amongst persons enjoying the confidence of Govt , other half of Opposition and an attempt is made to reach consensus on Chairperson.

Recruitment, promotions and discipline are exclusively exercised by the Prime Minister acting on the binding recommendation of PM. Latter can send back recommendation once but final decision of PSC.

Art 115 Ouster Clause diluted by Courts. Does not apply to alleged breaches of human rights, of own rules of procedure and alleged unreasonable acts

Not subject to control or direction of any other person or authority.

Prohibition engagement public officer within 3 years

Electoral Commission (art 60)

Chairperson Chief Electoral Commissioner (Public Officer) Other members not public officers.

Same appointment as PSC. Same Convention.

Monitors and supervises and conducts all elections general. local and European plus referenda

May suspend election in case of widespread abuses and report to Const. Court

Not subject to control of others

DRAWS UP THE BOUNDARIES OF ELECTORAL DIVISIONS.

Revision not less than 2 not more than 5 years.

Plus or Minus five per cent of the Mean

Gozo always a separate Division

Revision Report sent to PM and Leader Opposition

Gerrymandering: not effective for there are corrective mechanisms: but if 3rd Par ty is elected , the mechanisms do not operate

PM lays the Report on Table of HOR

HOR approves or send back for reconsideration

Electoral Commission then takes FINAL decision

Commission for Administration of Justice (CAJ) (Art 101A)

Composed of nine persons

President of Malta, Chief Justice, two judges, two magistrates, person nominated by PM, person nominated by Leader Opp. And President Chamber of Advocates

Sub Committee for Advocates and P.L. Decides cases of discipline of legal profession. Commission acts on Committee's Report. Appeal to CAJ;

Discipline of members of the Judiciary

A Sub Committee of Judges and Magistrates composed of 3 members of judiciary (2-1) depending on whether judge or magistrate;

Disciplinary proceedings triggered off by Chief Justice or Justice Minister

Committee may decide no case or decide to warn suspend, fine or remove :
CAJ to decide

Appeal to CC by aggrieved member

Ouster Clause art 101A (14) does not apply to human rights alleged breaches

Broadcasting Authority (art 118)

Members appointed by President on advice of PM after consulting Leader Opp.

Same Convention as to selection

Ensure that so far as possible in such sound and television broadcasting services, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.

Prohibition engagement public officer within 3 years

Courts may review decision of BA. See *PBS v Broadcasting Authority* (CC 15 January 2003)

“Art 118(8) is intended to strengthen the autonomy of the Authority in the exercise of its duties given by the Const and the law; However this should certainly not mean that the Authority can do what it pleases beyond any control putting the Authority in a position above the supreme law of the land.” “

See also art 124(10) : “No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Const. **shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed this functions in accordance with Const. or any other law.**

Employment Commission(art 120)

Chairman and four members: 2 members President acts on advice of PM two on advice of Opp. Chairperson on advice of PM after consulting Leader Opp.

To ensure that in respect of employment no distinction exclusion or preference that is not justifiable in a democratic society is made or given in favour or against any person by reason of his political opinion,.

Prohibition engagement public officer within 3 years