



**International Covenant on
Civil and Political Rights**

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article 40 of the Covenant**

Second periodic reports of States parties

Malta* **

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Abbreviations

CAT	Convention against Torture
CCF	Corradino Correctional Facility
CJEU	Court of Justice of the European Union
COCP	Code of Organisation and Civil Procedure
CSO	Community Service Order
ECtHR	European Court of Human Rights
EIRA	Employment and Industrial Relations Act
EMWA	Equality for Men and Women Act
ESTA	Electronic System for Travel Authorisation
ETC	Employment and Training Corporation
EU	European Union
FIAU	Financial Intelligence Analysis Unit
ILO	International Labour Organization
IOM	International Organization for Migration
L.N.	Legal Notice
LSW	London Shakespeare Workout
MEC	Malta Emigrants' Commission
MEP	Member of the European Parliament
MHEC	Ministry for Health, the Elderly and Community Care
MHPA	Ministry for Home and Parliamentary Affairs
MITC	Ministry for Infrastructure, Transport and Communications
MJDF	Ministry for Justice, Dialogue and the Family
NCPE	National Commission for the Promotion of Equality
NCW	National Council of Women
NSO	National Statistics Office
OHS	Occupational Health and Safety
OPM	Office of the Prime Minister
PSAT	Probation Services Action Team
PSC	Public Service Commission
PSR	Pre-Sentence Report
S.L.	Subsidiary Legislation
TFEU	Treaty on the Functioning of the European Union
THP	Temporary Humanitarian Protection
TIP	Trafficking in Persons
UNHCR	United Nations High Commissioner for Refugees
YOURS	Young Offenders Unit Rehabilitation Services

I. International Covenant on Civil and Political Rights: introduction

1. Malta is a constitutional republic and a parliamentary democracy. The President appoints as the Head of Government, the Prime Minister, the leader of the party that gains a plurality of seats during the general election for the unicameral legislature. The last general election was held on 8 March 2008. The Nationalist Party was returned to power with a 49.34% majority. The opposition Labour Party obtained 48.79% of the votes. The voter turnout was that of 93.3%.

2. The judiciary is independent. The Chief Justice, the judges and magistrates are appointed by the President on the advice of the Prime Minister. Their mandatory retirement age is 65. The Courts are divided into Superior and Inferior Courts. The Superior Courts are the Constitutional Court, the Court of Appeal, the Court of Criminal Appeal, the Criminal Court and the Civil Court. Judges sit in the Superior Courts. The Inferior Courts are the Court of Magistrates (Malta) and the Court of Magistrates (Gozo). Magistrates sit in the Inferior Courts. The Constitutional Court, has both an original and an appellate jurisdiction. As an appellate court, it hears appeals in cases involving violations of human rights, interpretation of the constitution, and the validity of laws. As a Court of original jurisdiction, the Constitutional Court decides questions concerning disputed parliamentary elections and allegations of electoral corrupt practices. The Court of Appeal hears appeals from decisions of the Civil Court and is the final appellate court in Malta in civil matters. The Court of Criminal Appeal is the final court of appeal in criminal matters. When composed of three judges, the Court of Criminal Appeal (Superior Jurisdiction) hears appeals from judgments delivered by the Criminal Court. When composed of one judge, the Court of Criminal Appeal (Inferior Jurisdiction), hears appeals from decisions of the Court of Magistrates (Malta) and the Court of Magistrates (Gozo) in all criminal matters. In the Criminal Court, a judge sits alone for the determination of preliminary pleas and pleas as to the admissibility of evidence, but for the determination of whether the accused is guilty or otherwise of the charge or charges brought against him, the Criminal Court is composed of a judge and a jury of nine persons. The Civil Court is then divided into three sections, the General Jurisdiction Section (also called the First Hall of the Civil Court), the Family Section and the Voluntary Jurisdiction Section. The Court of Magistrates has both a civil and a criminal jurisdiction. In its criminal jurisdiction, this Court has a two-fold competence, as a Court of Criminal Judicature and a Court of Criminal Inquiry.¹

3. The Executive Police is responsible for the internal security of the country. It is the duty of the Executive Police to preserve public order and peace, to prevent and to detect and to investigate offences, to collect evidence and to bring the offenders before judicial authorities.² The Armed Forces of Malta are responsible for national defence and security and they are tasked with the primary function of safeguarding national sovereignty and interest, with an emphasis on protecting the country's territorial waters and airspace.

4. On 13 September 1990, Malta acceded to the International Covenant on Civil and Political Rights. This consolidated report combines Malta's second and third periodic reports on the implementation of the Covenant, submitted pursuant to Malta's obligation under Article 40. It has been prepared by the Office of the Attorney General under the auspices of the Ministry for Justice, Dialogue and the Family (MJDF) in cooperation with Ministry for Home and Parliamentary Affairs (MHPA), Ministry for Infrastructure,

¹ <http://www.judiciarymalta.gov.mt/the-courts>

² <http://www.mjha.gov.mt/page.aspx?pageid=156>

Transport and Communications (MITC), Ministry for Health, the Elderly and Community Care (MHEC), Ministry of Education and Employment, National Council of Women (NCW), Malta Emigrants' Commission (MEC), Electoral Commission, National Statistics Office (NSO) and the National Commission for the Promotion of Equality (NCPE).

II. Information with regard to the implementation of specific provisions of the Covenant

Article 1

5. Malta is a democratic, neutral State founded on the principles of work and respect for the fundamental rights of the individual. Malta obtained independence from Britain on 21 September 1964 and subsequently became a Republic on 13 December 1974. Malta was elevated to membership of the United Nations General Assembly on 1 December 1964 and has ever since actively pursued a policy of promoting peace, security and social progress among all nations in the other international forums. Furthermore, on 1 May 2004, Malta joined the European Union (EU).

6. The Head of State is the President who serves for a five year term and may not be re-appointed. The Maltese Parliament is composed of the House of Representatives and the President of Malta. Sixty-nine deputies are elected to the House of Representatives for a five-year term. General elections to the House of Representatives and the re-election of candidates are based on the principles of proportional representation by means of a single transferable vote. There are currently a total of 13 electoral divisions from each of which not less than five and not more than seven deputies are elected (Article 52 of the Constitution of Malta).

7. Every citizen of Malta who has attained the age of 18 years is included in the electoral register and is entitled to vote at general elections. Voting is by secret ballot and every individual is entitled to one vote and may not vote on behalf of another citizen. The only exception to this is when a person is unable by reason of illiteracy, blindness, or other physical inability to mark his / her ballot paper. In this case the ballot paper is marked according to the instructions by a person officially supervising the poll at the place of voting.

8. Malta is an active member of the Council of Europe. It has signed and ratified among other Conventions and Protocols, the following Conventions and Protocols:

- European Cultural Convention on 12 December 1966
- European Convention for the Protection of Human Rights and Fundamental Freedoms on 23 January 1967
 - Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms on 23 January 1967
 - Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions on 23 January 1967
 - Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention on 23 January 1967
 - Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those

already included in the Convention and in the first Protocol thereto on 5 June 2002

- Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention on 23 January 1967
- Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty on 26 March 1991
- Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 15 January 2003
- Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 7 March 1998
- Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 7 May 1992
- Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby on 11 May 1995
- Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances on 3 May 2002
- Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention on 4 October 2004
- European Convention for the Peaceful Settlement of Disputes on 28 February 1967
- European Convention on the Adoption of Children on 22 September 1967
- European Social Charter on 4 October 1988
 - Protocol amending the European Social Charter on 16 February 1994
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 7 March 1988
 - Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 4 November 1993
 - Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 4 November 1993
- European Agreement on the Abolition of Visas for Refugees 17 January 1989
- Convention on the Transfer of sentenced persons on 26 March 1991
- European Convention on Mutual Assistance in Criminal Matters on 3 March 1994
 - Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters on 29 March 2012
- European Convention on Extradition 19 March 1996
 - Additional Protocol to the European Convention on Extradition 20 November 2000

- Second Additional Protocol to the European Convention on Extradition 20 November 2000
 - European Convention on the Suppression of Terrorism 19 March 1996
 - European Convention on recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children on 18 October 1999
 - Convention on Laundering, Search and Seizure and Confiscation of the Proceeds from Crime on 19 November 1999
 - Convention for the protection of Individuals with regards to Automatic Processing of Personal Data 28 February 2003
 - European Social Charter on 27 July 2005
 - European Convention on Action against Trafficking in Human Beings 30 January 2008
 - Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism on 30 January 2008
 - Convention on the Protection of children against Sexual Exploitation and Sexual Abuse 6 September 2010
 - Convention on Cybercrime on 12 April 2012
9. On the other hand, Malta signed but did not ratify, amongst others, the following Council of Europe Conventions and Protocols:
- Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms
 - European Charter for Regional or Minority Languages
 - European Convention on the Exercise of Children's Rights
 - European Convention on Nationality
 - Protocol amending the European Convention on the Suppression of Terrorism
 - European Convention on the Prevention of Terrorism
10. Malta is fully committed to free enterprise and trade and encourages private economic entrepreneurship. Every person in Malta may freely own and dispose of property.
11. Malta has no colonies and is not responsible for the administration of any Non-Self Governing territories or Trust Territories.

Article 2

12. Discrimination is defined by Article 45(3) of the Constitution of Malta as follows: “the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

13. The same constitutional provision further provides that no law shall be enacted which is discriminatory either in itself or in its effect. By virtue of subsection (4) of the

same provision, the guarantee against non-discriminatory laws is then curtailed to the effect that it is specifically excluded in the following circumstances:

- For the appropriation of public revenues and public funds;
- With respect to persons who are not citizens of Malta;
- With respect to adoption, marriage, dissolution of marriage, burial, devolution of property on death or any matter of personal law, but not in cases where the discrimination is wholly attributable to sex;
- With respect to persons subjected to any disability or restriction or accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to such persons or to any other provision of the Constitution, is reasonably justified in a democratic society;
- For authorizing the taking of measures during a period of public emergency which are reasonably justified for the purpose of dealing with that situation.

1. Persons acting in official capacity

14. The Constitution of Malta includes a guarantee against any form of discrimination. Article 45(2) of the Constitution states that "... no person shall be treated in a discriminatory manner by any person acting in consequence of any written law or in the performance of the functions of any public office or public authority".

15. Furthermore, Article 135 of the Criminal Code reads: "Any person vested with public authority who, by any unlawful measures devised with other persons, hinders the execution of the law, shall, on conviction be liable to imprisonment for a term from eighteen months to three years".

16. The Criminal Code also makes reference to torture and other cruel inhuman or degrading treatment or punishment by any public officer or servant or any other person acting in an official capacity. It provides that where any such officers exercise their official powers to inflict on a person severe pain or suffering whether physical or mental, for one of the reasons listed therein, they shall be guilty of a criminal offence. The Criminal Code under Article 139A lists four reasons for such occurrence and these are: (a) to obtain from him / her or a third person information or a confession, or (b) to punish him / her for an act s/he or a third party has committed or is suspected of having committed, or (c) to intimidate him / her or a third party or to coerce him / her or a third party to do or to omit to do any act, or (d) on any reason based on discrimination of any kind. On conviction for such an offence, the public officer is liable to imprisonment for a term from five to nine years.

2. Employment of third country nationals

17. Third country nationals are not given the automatic right to work in Malta and are only allowed to do so if their employer has been issued with an employment licence in their respect upon the submission of an application. This does not apply to EU nationals - employment licences are automatically issued for persons who are EU citizens (temporarily excluding citizens of Bulgaria and Romania), as well as for those who have a Norwegian, Swiss and Icelandic citizenship. A third country national may apply directly for a work permit if s/he has set up a company in Malta and is involved in running it or if s/he has made a substantial investment in a local organisation and wishes to occupy a senior position within it.

18. Employment licences are generally valid for a period of one year. In the case of asylum seekers employment licences are issued for six months and in the case of failed asylum seekers employment licences are issued for three months.³

19. The Department of Citizenship and Expatriate Affairs may issue employment licences on humanitarian grounds to children of Maltese emigrants who are residing in Malta with their parent(s) or to a foreign fiancé or fiancée of a Maltese citizen. In the latter case an application for an employment licence has to be submitted not earlier than six months prior to the date of the wedding and on the submission of proof that the wedding is to take place. Unless the request is one for self-employment, such application has also to be submitted by the employer.

20. Upon accession to the EU in May 2004, nationals of EU Member States have the right to work in Malta under the same conditions applicable to Maltese nationals in conformity with the *acquis communautaire* on free movement of persons, namely, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. There are exceptions in case of employment in the public service.

3. Legislation applicable to non-Maltese and non-EU nationals

21. The Immigration Act 1970 sets the conditions for entry into Malta and residence by non-EU nationals. Non-EU nationals who are entitled to freedom of movement are the following: spouses of Maltese nationals, persons entitled to diplomatic privileges and immunities and members of the armed forces of another country who are in Malta in accordance with arrangements with the Government of Malta. Spouses and dependants of any such person are also entitled to the freedom of movement provided, in the case of spouses, that they are still married and living with the person entitled to such freedom of movement.

22. A permanent residence permit may also be obtained on the fulfilment of certain conditions listed in the Immigration Act, which are based on the amount of capital which is annually remitted to Malta and the acquisition of property in Malta. The spouse and dependants of a person holding such a permit are entitled to freedom of movement.

23. The Refugees Act⁴, 2000, establishes the procedures relating to the acquisition of refugee status in Malta and lists the types of assistance to which persons having this status are entitled. Although refugees in Malta do not have the right to seek employment in Malta or carry out any other business without the consent of the Minister responsible for Home Affairs⁵, refugees have access to public education and training and may receive public medical care and services free of charge. In December 2011, the number of asylum seekers in Malta stood at 1686.

Article 3

24. One of the declarations of principles in the Constitution of Malta is that of equality between men and women. Article 14 holds that the State shall promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights.

³ ETC: ELU Guidelines <<http://etc.gov.mt/etc-portal/page/3/ELU-Guidelines.aspx#1.5>> accessed 23 February 2012.

⁴ Refugee Act, Chapter 420 of the Laws of Malta.

⁵ Reception of Asylum Seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06, Regulation 10.

Furthermore the State shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise and also to ensure that women workers enjoy equal rights and the same wages for the same work as men.

25. The past years have witnessed the enactment of a number of laws, introducing various measures which seek to ensure equality between men and women. Side by side with these legislative enactments was the establishment of national machinery specifically mandated to give a voice to women's rights. In 1989 the Government established the Commission for the Advancement of Women which Commission has been replaced by the National Commission for the Promotion of Equality which is in the care of the Ministry for Justice, Dialogue and the Family (MJDF). Another committee is the National Council of Women (NCW) which was founded in 1964. It is a non-governmental organization comprising individual members and national organizations.⁶ Under Table 1 of annex I there is a list of initiatives carried out by NCW.

26. Through the Equality for Men and Women Act (EMWA)⁷, 2003, an independent government funded body was set, namely the National Commission for the Promotion of Equality (NCPE).⁸ The Commission receives and acts on complaints concerning allegations of discrimination. The Act implements a number of European Union directives on equality of treatment between the sexes. Other aspects of the Act involve the introduction of legislation to strengthen existing legislation on equal treatment and equal opportunity for men and women with regard to access to employment, self-employment and educational and vocational training. The act also contains provisions against sexual harassment at the place of work and sexual stereotyping in advertising and the media.

27. Maltese women obtained the right to vote on 5 September 1947 and the first female to be appointed minister was in 1955 when Ms. Agatha Barbara was given the education portfolio. She also served for five years as Minister of Social Services and was finally appointed Head of State in 1982. She is the first and only female to have occupied such a position in Malta. There are currently six women who have been elected members of the House of Representatives, one of whom forms part of the cabinet – Table 2. Women representation on local councils as at 31st January 2012 stands at 7 mayors (10.3%), 11 deputy mayors (16.2%) and 72 councillors (23.4%) – Table 3.

28. During the last decade there has been an increase in women working in senior positions – Legislators, Senior Officials and Managers – both within the public sector as well as in the private sector – there has been an increase of 47.83% of women working in the public sector from 1993 (192 women) till 2011 (368 women), while an increase of 61.64% of women working in the private sector from 1993 (1,500 women) till 2011 (3,910 women), thus a total increase of 60.45% - Table 4. There is one female who has been appointed Permanent Secretary (EU Funds in the Office of the Prime Minister) and 12 female magistrates and judges out of 41, that is 29.27% - Table 5. Furthermore, in July 2002 the first woman resident ambassador was appointed by the President of Malta. At present Malta has two female resident ambassadors, one in Tunisia and one in Madrid. Moreover, the Deputy Attorney General is a female.

⁶ National Council of Women of Malta: Promoting Equality of Opportunities
<<http://www.ncwmalta.com/home?l=1>> accessed 31 January 2012.

⁷ Equality for Men and Women Act, Chapter 456 of the Laws of Malta.

⁸ Welcome to NCPE
<https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/welcome/front_pg.aspx> accessed 31 January 2012.

1. Gender equality under civil law

29. Women in Malta enjoy a situation of parity with men in all civil matters. Thus, women may contract in their own name, sue and be sued and have equal rights as their male counterparts in matters relating to inheritance. This situation was arrived at through a series of legislative enactments starting from 1973. Through the enactment of Act XLVI of 1973, married women were given the right to contract and to sue and be sued in their own name. However, it was not until the 1993 amendments to the Civil Code that married women were placed on an equal footing with their male counterparts, particularly with regard to the administration of the community of acquests and authority over children.

30. Prior to the 1993 amendments to the Civil Code a husband was considered head of the household and had more rights and obligations within the marriage than his partner. The 1993 amendments established that spouses within a marriage are equal partners. The common property of the spouses acquired after the marriage is administered jointly by both spouses and any important decision concerning the family or the matrimonial home is taken jointly. Parental authority replaces paternal authority, endowing the spouses with joint responsibility for their children. The wife can, instead of taking the husband's surname automatically, opt to retain her maiden name upon marriage or add her husband's surname to her own. Children take the surname of the father to which they may add the mother's.

2. Gender equality in employment

31. In 1974, the Parity of Wages National Standard Order (L.N. 111 of 1974) was published, providing for the gradual introduction of equal pay for men and women employees in the same class or category. Full parity of wages was first applied as from 1 April 1976. Moreover, the Minimum Weekly Wage National Standard Order (L.N. 42 of 1976) provides that the wages payable to a female employee may not be less than those payable to a male employee in respect of equal work or work of equal value.

32. Another important year for gender equality in Employment was 1981. Whereas prior to that year women in the public service were bound to resign upon contracting marriage, this requirement was removed through the Office of the Prime Minister (OPM) Circular Number 103/80 dated 31 December 1980. Moreover, in the same year amendments were made to the Conditions of Employment (Regulation) Act, 1952, introducing a safeguard to all women employees in the private and parastatal sectors against dismissal upon their contracting marriage or being pregnant. A 13-week maternity leave with full pay was introduced with effect from 1 January 2001. This period has been extended to 14 weeks in conformity with EU Directive 92/85/EEC. It was then further extended by virtue of the Protection of Maternity (Employment) (Amendment) (no.2) Regulations, 2011 which amended the principal Regulations, namely the Protection of Maternity (Employment) Regulations, 2003, which now provide that the uninterrupted period of fourteen weeks shall be increased to 16 weeks as from the 1st January 2012 and to 18 weeks as from the 1st January 2013 onwards.

33. In the public service a number of measures intended to facilitate the reconciliation of work and family responsibilities were introduced. Moreover, civil servants may opt to work on a reduced timetable in order to look after children under the age of eight years.⁹ On the birth of a child all civil servants may avail themselves of twelve months of unpaid leave, which may be taken by the father or the mother or may be shared by both. Moreover, until the child has reached the age of five, either one of the parents may take a career break of up to three years. This period may also be shared by both parents. A one-year special leave is

⁹ Parental Leave Entitlement Regulations, Subsidiary Legislation 452.78.

available to those employees who foster children and a five-week adoption leave is granted to all full-time employees on the adoption of a child. On this occasion men are granted two working days of paid leave.

34. Furthermore, the Employment and Training Services Act¹⁰, 1990, which establishes the Employment and Training Corporation (ETC), provides that gender discrimination used by the employer against any person in respect of employment constitutes an offence under the Act. A person who is found guilty of this offence is liable to a fine of not less than €1,164.69 and not more than €11,646.87.

35. ETC took the initiative of organising a social marketing campaign with the name of *Nista' – Sharing Work-life Responsibilities* in order to promote work-life balance – this campaign involves females, males, employers and society at large. This campaign is divided in 4 phases:

- (a) Generating awareness amongst society in general;
- (b) Challenging traditional roles for women;
- (c) Promoting men in the family sphere;
- (d) Employers for work-life balance.

36. Through an OPM Circular No. 24/2000 on Gender Mainstreaming, the Government has outlined its policy on the subject and underlined the responsibility of every ministry and government department in implementing it.

37. Complementing the provisions contained in EMWA, the Employment and Industrial Relations Act (EIRA), 2002, contains provisions against victimization and sexual harassment as well as other provisions promoting gender equality in employment and equal pay for work of equal value.

38. More specifically with regards to employment and the enjoyment of equal rights, Article 26 of the EIRA emphasises that it is unlawful for anyone to discriminate while advertising or selecting an applicant for an employment. It is also unlawful to discriminate between employees or any class of employees with regard to conditions of employment or dismissal.

39. Discriminatory treatment under the said article has been defined as:

(a) The engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience;

(b) Actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment;

(c) Actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.

40. Any allegations of breach of these provisions are heard before the Industrial Tribunal.

¹⁰ Employment and Training Services Act, Chapter 343 of the Laws of Malta.

3. Gender equality in education

41. No distinction is made between males and females as far as concerns the right to receive education, and compulsory education between the ages of 5 and 16 applies equally to both. The State has an obligation to provide all facilities for pupils of both sexes. Article 3 of the Education Act, 1988, states that “It is the right of every citizen of the Republic of Malta to receive education and instruction without any distinction of age, sex, belief or economic means.”

42. Tertiary education is equally open to persons of both sexes and is free of charge. The number of female students at the University of Malta has been on the rise since 1988. In 2011, females made up 57.9 per cent of the student population. The number of females that graduated in 2011 amounts to 58.3 per cent of the total graduates – Tables 6 and 7 respectively. Furthermore, there has been a rapid increase in the number of females that furthered their studies after the age of 16: in 1993 the number of females was that of 4,032 while in 2010 the numbers of females was that of 20,824 - Table 8.

Article 4

43. The Constitution under Article 47(2) states that a period of public emergency means any period during which

- (a) Malta is engaged in any war; or
- (b) There is in force a proclamation by the President declaring that a state of public emergency exists; or
- (c) There is in force a resolution of the House of Representatives supported by the votes of not less than two-thirds of all the Members of the House declaring that democratic institutions in Malta are threatened by subversion.

44. A proclamation of emergency ceases to be in force on the expiration of fourteen days from the date on which it was made. The duration of the proclamation of emergency may be extended for a further period of three months by a resolution of the House of Representatives. Similarly, a resolution of the House of Representative declaring the democratic institutions in Malta to be threatened by subversion ceases to be in force at the expiration of twelve months from the date it was passed. The provisions of the Constitution which expressly refer to public emergency are the following:

- (a) Article 34 provides protection from arbitrary arrest or detention. Anything done under the authority of any law shall not be held to be inconsistent with Article 34 where the law authorises, during a period of public emergency, the taking of measures that are reasonably justifiable for dealing with the situation. It appears that the measures could be subject to judicial review to establish whether they are “reasonably justifiable”;
- (b) Article 35 stipulates that any labour required during a period of public emergency does not qualify as forced labour. It appears that during a state of public emergency, judicial review is not possible where any labour is required during such a period;
- (c) Article 45 guarantees protection from discrimination on the grounds of race, etc. The rule that no law shall make any provision which is discriminatory does not apply where the law makes provision for the taking, during a period of public emergency, measures that are reasonably justified for dealing with the situation.

Terrorism under Maltese legislation

45. Malta has been a member of the United Nations since 1964. The Prime Minister is empowered to incorporate a Security Council resolution into Maltese law by issuing Regulations under the National Interest (Enabling Powers) Act¹¹, 1993.¹² Malta's obligation to provide for measures aimed at suppressing terrorism derives from the Conventions and Security Council resolutions promulgated by the United Nations, among others.

46. Malta signed and ratified the Vienna Convention, the United Nations Convention against Transnational Organized Crime (Palermo Convention) and the International Convention for the Suppression of the Financing of Terrorism. The Council of Europe Convention on Laundering Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism was ratified on 30th January 2008 and came into force on 1st May 2008. Although the Palermo and terrorism financing Conventions are in force, there are still reservations about the effectiveness of implementation in some issues. The United Nations Security Council resolutions are implemented through the subsidiary legislation by the National Interest Act (Enabling Powers). Security Council resolutions 1267 (1999) and 1373 (2001) are enforceable in Malta by virtue of Legal Notice 214 of 1999 and Legal Notice 156 of 2002.

47. In 2005, the Criminal Code was amended by means of Act VI of 2005. Act VI introduced a new sub-title entitled 'Of acts of terrorism, funding of terrorism and ancillary offences'. This sub-title criminalises the offences of 'acts of terrorism', 'funding of terrorism' and 'funding of terrorist groups'. It also provides detailed definitions of 'act of terrorism', 'terrorist groups' and 'terrorist property'.

48. 'Act of terrorism' is defined as

- (a) taking away of the life or liberty of a person;
- (b) endangering the life of a person by bodily harm;
- (c) bodily harm;
- (d) causing extensive destruction to a state or government facility, a public transportation system, an infrastructure facility, (including an information system, a fixed platform located on the continental shelf), a public place or private property likely to endanger the life or to cause serious injury to the property of any other person or to result in serious economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons;
- (g) research into or development of biological and chemical weapons;
- (h) release of dangerous substances, or causing fires, floods or explosions endangering the life of any person;
- (i) interfering with or disrupting the supply of water, power or any other fundamental natural resource endangering the life of any person.

¹¹ National Interest (Enabling Powers) Act, Chapter 365 of the Laws of Malta.

¹² For a comprehensive list refer to: <http://gov.mt/frame.asp?l=1&url=http://www.justiceservices.gov.mt/lom.aspx?pageid=27&mode=chrono>

49. Article 328A(2)(j) of the said code extends the applicability of the act of terrorism to also include a threat to commit any of the above mentioned acts (that is, (a) – (i)) is to be considered as an act of terrorism).

50. For a person to be found guilty under the provisions of terrorism, s/he must have committed the act wilfully with the aim of seriously intimidating a population, or compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

51. If a person is found guilty of an act of terrorism, s/he is liable on conviction to a punishment of imprisonment from five years to life.

52. The Criminal Code also makes reference to ‘terrorist groups’ which are defined as “a structured group (that is, a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure) of more than two persons, established over a period of time and acting in concert to commit terrorist offences”.

53. Account is also given to those persons who promote, constitute, organise, direct, finance, supply information or materials to these terrorist groups. When it is shown that such acts are done with the full knowledge that such information is to contribute towards the criminal activities of the said group, s/he is liable to a punishment of imprisonment not exceeding thirty years; when the said participation consists in directing the terrorist group, imprisonment not exceeding eight years is given to those who threaten to commit the act of terrorism and also to those who commit any other acts relating to terrorism.

54. Anybody who receives, provides or invites someone else to provide money (whether lent or given) or other property with the intent of using such funding for the purpose of terrorism, shall be liable to a punishment of imprisonment for a term not exceeding four years or / and a fine (multa) not exceeding €11,646.47. The same punishment is given to someone who is in possession of money or other property, intended to be used or having reasonable cause to suspect that it may be used for committing an act of terrorism. On the other hand, any person who makes use of this funding is punished with imprisonment not exceeding twelve years.

55. Furthermore, anyone who enters into an agreement or becomes concerned in an agreement, dealing with the facilitation of retention or control of terrorist property, is liable to a punishment of imprisonment not exceeding four years and / or a fine (multa) not exceeding €11,646.47. Here ‘terrorist property’ is to be understood as money or other property which is likely to be used for terrorism, proceeds of the commission of acts of terrorism and proceeds of acts carried out for the purpose of terrorism.

56. When the funding or any other act of terrorism or the commission of the offence is carried out by a corporate body, that is, by its directors, managers, secretaries or other principal officers or persons having powers of representation of such a body or having authority to take decision on behalf of that body, such person is liable to a punishment of a fine (multa) of not less than €11,646.47 and not more than €2,329,373.40.

57. In its capacity as an EU member state, Malta is bound to conform with EU legislation and thus L.N. 199 of 2003 transposed the EU’s Second Money Laundering Directive into Maltese law resulting in the Prevention of Money Laundering Regulations. This was subsequently amended by Legal Notice 42 of 2006 which renamed the Regulation as the Prevention of Money Laundering and Funding of Terrorism Regulations. Through this L.N., measures were introduced which were intended to prevent and detect the financing of terrorism under Maltese law. The Regulation was subsequently repealed and replaced by Legal Notice 180 of 2008. This Legal Notice transposed the EU’s Third Money

Laundering Directive, namely Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The resultant Prevention of Money Laundering and Funding of Terrorism Regulations 2008 brought about an extension of the list of subject persons bound by the obligations set out in these Regulations. The obligations of subject persons required to implement measures to detect transactions related to these financing of terrorism were also extended. ‘Subject persons’ is defined in the Regulation as “any legal or natural person carrying out either relevant financial business or relevant activity”.

58. There have been no local convictions for terrorist financing. Additionally, subject persons have only reported to the Financial Intelligence Analysis Unit (FIAU) a handful of suspicious transactions, activities of persons which may have been connected to terrorism. Since 2003 four suspicious transaction reports have been made to the FIAU.¹³

59. The Maltese authorities indicated that the freezing of terrorist assets as required under United Nations Security Council Resolution 1373, particularly the assets of EU internals, can also be achieved by means of legal notices issued under the National Interest (Enabling Powers) Act, which legal notices would include lists of EU internals identified as being related to terrorism. Penalties for breaches of freezing obligations can also be provided for in such legal notices. Concerning any freezing of funds under the National Interest (Enabling Powers) Act, the situation has changed since the 3rd round report. The above mentioned law would constitute the legal basis for freezing of assets without the need to apply for a court order. However, no EU internals have been the subject of legal notices under the National Interest (Enabling Powers) Act.

60. Where a regulation enacted under the National Interest (Enabling Powers) Act requires a person or an entity to carry out the identification of funds or assets belonging to or in the possession of persons or entities as may be identified or identifiable under the regulation, or where a regulation requires the freezing or blocking of such funds or assets, any person or entity whose activities are subject to a license, shall without delay notify in writing any relevant information in hand to its licensing authority. Such licensing authority is then bound to pass such relevant information to the Sanctions Monitoring Board established under the National Interest (Enabling Powers) Act.

Article 5

61. The provisions of the Constitution, the European Convention Act 1987, and the judicial remedies available to all persons in Malta ensure that the rights enshrined in the Covenant, as contained in Maltese legislation, are fully enforced. Moreover, the Courts interpret legislation according to its plain meaning and no restrictive interpretations are given unless expressly permitted by the law.

Article 6

1. Right to life

62. The right to life is enshrined in Article 33 (1) of the Constitution of Malta which provides that “no person shall intentionally be deprived of his life”. However the exception to this rule is the case when there is the “execution of the sentence of a court in respect of a criminal offence under the Law of Malta of which he has been convicted”. Furthermore

¹³ Financial Intelligence Analysis Unit (FIAU) Malta Annual Report 2010
<<http://www.fiumalta.org/library/PDF/Annual%20Report%202010.pdf>> accessed 16 February 2012.

what is stipulated in Article 33 of the Constitution of Malta is also reflected in Article 2 of the First Schedule to the European Convention which provides that: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

63. Sub-article (2) of both these articles provide that in case of death during the use of force which was reasonably justifiable in the circumstances of the case, this does not amount to deprivation of life. The justifiable reasons common to both sub-articles are: (a) in defence of any person from unlawful violence (or for the defence of property); (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) an action lawfully taken for the purpose of quelling a riot or insurrection. The Maltese Constitution however adds a fourth reason, that is, “in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.”

2. Inferences of the status of unborn children under current Maltese Law

64. The birth rate in 2010 was that of 3,617: 1,865 boys and 1,752 girls, a fall of 29.73% from 1993 where the total birth rate was that of 5,147 – Table 9. On the other hand, the number of maternal deaths for the past three years, was that of zero – Table 10.

65. Under Maltese law abortion is considered a crime. In fact our law includes the crime of abortion in sub-title VII of title VIII of the Criminal Code entitled ‘Of Abortion, of the administration or supplying of substances poisonous or injurious to death and of the spreading of disease’. One notes that the word ‘abortion’ is only used in the wording of sub-title VII but not in Articles 241, 242 and 243, where the word ‘miscarriage’ is used. Article 241(1) holds “Whosoever, by any food, drink, medicine or by violence, or by any other means whatsoever, shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall on conviction be liable to imprisonment for a term from eighteen months to three years”. Sub-article (2) continues by stating that the same punishment shall be awarded to any woman who shall procure her own miscarriage, or who shall have consented to the use or the means by which the miscarriage is procured.

66. Article 242 of the Criminal Code states that: If the woman dies or is severely injured, whether the miscarriage actually took place or not, the offender will be liable to the punishment applicable to homicide or bodily harm, diminished by one to three degrees. This is not a mere aggravation of the crime of abortion but a distinct offence where liability is contracted, in the appropriate circumstances, irrespective of whether the miscarriage has taken place or not. It is not uncommon that means used to procure miscarriage occasion the death of the woman or serious injury to her health. Such death or serious injury may occur without the onset of miscarriage. Maltese law in Article 242 does not make the punishment equal to that provided for wilful homicide or wilful bodily harm because in such cases the more serious consequences were not intended. If on the other hand, the offender intended to cause the death of the woman or to harm her, s/he is guilty of wilful homicide or bodily harm without the decrease in punishment.

67. Finally Article 243 of the Criminal Code states that any physician, surgeon, obstetrician or apothecary who knowingly prescribes or administers means whereby the miscarriage is procured shall on conviction, be liable to the punishment of imprisonment for a term from eighteen months to four years, as well as perpetual interdiction from the practice of the medical profession (that is permanent erasure from the medical register).

68. Article 135 of the Civil Code holds that the parents represent, in all civil matters, their children jointly whether born or to be born. Article 170(1) proceeds then to curators ad ventrem who are appointed in cases where at the time of the death of the husband, the wife declares that she is pregnant. S/he is appointed by the court upon the demand of any person

interested, with a view to prevent any supposition of birth, or substitution of child, and administering the property up to the day of the birth, under such directions as the court may deem it proper to give.

69. Article 283(3) of the Civil Code affirms that in case of abortion, an act of birth shall only be drawn up where the foetus shall have completely assumed the human form. Article 601(1) clarifies the meaning of viability in the law by stating that those who are not born viable are incapable of receiving by will. On the other hand, those who are born alive shall be presumed to be viable. This could be interpreted as meaning that rights of inheritance begin only at birth, and only when the newborn is sufficiently mature to be considered viable.

70. Article 9 of the Commissioner for Children Act declares that the Commissioner shall have several functions, one of which is to promote the highest standards of health and social services for women during pregnancy and to promote special care and protection, including adequate legal protection, for children both before and after birth.

71. Domestic Violence¹⁴ is defined as any act of violence, even if only verbal, perpetrated by a household member upon another household member and includes any omission which causes physical or moral harm to the other. Household members include (ix) the child conceived but yet unborn of any one of the persons mentioned in paragraphs (i) to (viii), both inclusive i.e. persons married or formerly married, other persons sharing the same household, engaged persons and relatives.

72. The foetus is indirectly protected through regulations about Health and Safety at Work for pregnant females, in particular “when an employer takes measures to protect the health and safety of an employee who becomes pregnant or starts breast-feeding, to the satisfaction of the Occupation Health and Safety (OHS) Authority, to prevent the risk of exposure which could jeopardise the health or safety of such an employee, agents, processes or working conditions to which exposure is prohibited in terms of specific provisions made under the OHS Authority Act, provided that the employee has duly informed her employer that she is pregnant or breast-feeding”.¹⁵

73. In the Maltese Constitution one finds nothing mentioned about abortion and the rights of the unborn child but it does mention the right to life which right is also included in the Universal Declaration of Human Rights.

74. In an application brought before the Constitutional Court on the 9th of December 2003 in the names of *Anthony Borg vs. Commissioner of Police*, Borg asked the court to declare that the deportation order issued by the Commissioner of Police against his pregnant girlfriend Nadezda constituted a breach of fundamental rights under Article 32 of the Constitution of Malta and Article 8 of the European Convention which articles deal with the fundamental right to life. The applicant explained that his girlfriend intended to leave Malta for her home country (Russia) to commit an abortion. The Commissioner of Police however in his reply opposed such a request claiming that the Russian lady had a right to decide on what was permitted to be done according to the laws of her country. A judgement was never given because the parties reached an agreement during the proceedings and consequently the application was withdrawn.

75. Another relevant application before the Constitutional Court was filed in the names of *Emilio Persiano vs. Commissioner of Police* dated 24th August 2000. Persiano requested that a prohibitory injunction be issued against the Commissioner of Police as Principal

¹⁴ Domestic Violence Act, Chapter 481, Article 2

¹⁵ Protection of Maternity Employment Regulation, Subsidiary Legislation 452.91, Regulation 4.

Immigration Officer, who wanted to expatriate to Morocco Rajaa Mukada. This Moroccan woman was four months pregnant carrying Persiano's unborn child. The applicant feared that should Mukada return to her country, she would be forced to commit an abortion due to religious and cultural reasons. He asked for protection under the Immigration Act. The Commissioner of Police claimed that the Immigration Act does not give the right to freedom of entry to Malta to persons who are not yet born. The Court decided that since the pregnant woman and the unborn child are inseparable, it was in the best interest of the unborn child that the mother would not be deported.

3. Infanticide

76. The punishment for abortion is by far less than the punishment given to a person who is found guilty of infanticide. Infanticide is regulated under sub-title VIII of title VIII of the Criminal Code entitled 'Of infanticide and of the abandonment, exposure and ill-treatment of children'. It provides that any women who by any act or omission, cause the death of their child under the age of 12 months shall on conviction, be liable to a term of imprisonment not exceeding twenty years. If a mother who has given birth to a child fails to provide the baby with those essential elements, which are considered as vital for the continued existence of the infant, the mother would be found guilty of infanticide, through an act of omission. The law lays down a number of conditions which must be satisfied for the offence of infanticide to result. Primarily, the mother of the child whose death was caused must carry out the crime. Secondly the child must not be more than twelve months of age. Thirdly, at the time of the offence, the balance of her mind must have been disturbed either because the mother had not fully recovered from the effects of giving birth to the same child or by reason of the effects of lactation consequent upon the birth of the child. Fourthly, the child must have been born alive and was not already dead prior to birth.

4. Death penalty

77. Malta has ratified a number of conventions and protocols on the death penalty. These include:

- Convention on the Rights of the Child
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- European Convention for the Protection of Human Rights and Fundamental Freedoms
- 6th Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (concerning the abolition of the death penalty)¹⁶
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances

¹⁶ Article 1 - Abolition of the death penalty - The death penalty shall be abolished. No one shall be condemned to such penalty or executed. Article 2 - Death penalty in time of war- A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

- Statute of the International Criminal Court (which excludes the death penalty)

78. On 29 December 1994, Malta also acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. The death penalty has been abolished by the Maltese Parliament in 3 stages: (a) in 1971 it was abolished for ordinary criminal offences except in cases of military offences committed by the members of the Armed Forces; (b) in 1990 it abolished the death penalty for military persons except in time of war; and (c) in 2000 the death penalty was abolished completely both in time of peace and in war. On 21 March 2000 an amendment to the Armed Forces Act 2000 was promulgated following approval by the House of Representatives and then President Guido de Marco. This law abolished the death penalty for all crimes. The bill was moved by the Minister for Home Affairs, Hon. Dr Tonio Borg, and had the support of both the government and the opposition. Under its provisions life imprisonment replaced the death penalty for all offences.

79. On May 3, 2002 Malta deposited with the Council of Europe the instrument of ratification of Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms banning the death penalty in all circumstances. On 18 December 2008 and 21 December 2010, Malta co-sponsored and voted in favour of the resolutions on a moratorium on the use of the death penalty at the General Assembly (62/149 and 65/206).

Article 7

80. The Constitution of Malta under Article 36 prohibits inhuman or degrading punishment or treatment. It provides that:

(1) No person shall be subjected to inhuman or degrading punishment or treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Malta immediately before the appointed day.

(3) (a) No law shall provide for the imposition of collective punishments.

(b) Nothing in this sub-article shall preclude the imposition of collective punishments upon the members of a disciplined force in accordance with the law regulating the discipline of that force.

81. Malta acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 13 September 1990. Prior to this Convention, on 7 March 1988 Malta ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Furthermore on the 4 November 1993 Malta ratified Protocol No. 1 and Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

1. Definitions

82. The Maltese Criminal Code under Article 54C defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”. A similar

definition is found in the Regulations concerning the Importation and Exportation Control of Goods which could be used for Capital Punishment, Torture or other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷, where “torture” is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or from a third person information or a confession, punishing that person for an act that either that person or a third person has committed or is suspected of having committed, or intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties”. The same Regulations define “cruel, inhuman or degrading treatment or punishment” as any act by which significant pain or suffering, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties”.

2. Laws regarding torture, cruel, or inhuman punishment

83. The same Regulations abovementioned implement the provisions of Council Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. This regulation, as the title indicates, prohibits any person from exporting or importing goods which have no practical use other than for the purpose of capital punishment or torture, inhuman or degrading treatment. The Regulations lay down penalties for failure to comply with the provisions contained therein. Any person in Malta, or any citizen or permanent resident of Malta, whether in Malta or elsewhere who is found guilty of contravening any of these regulations is liable to a term of imprisonment not exceeding five years or to a fine (multa) not exceeding €116,468.67.

84. With regard to the confession of the accused, the Criminal Code holds that a person charged or accused can make a confession which confession can be done orally or in writing. It is imperative that “such confession was made voluntarily and not extorted or obtained by means of threats or intimidation or of any promise or suggestion of favour”.

3. Torture and cruel, inhuman or degrading treatment committed by public officials

85. The Criminal Code makes reference to torture and other cruel inhuman or degrading treatment or punishment by any public officer or servant or any other person acting in an official capacity. It may be the case where these officers exercise their official powers to inflict on a person severe pain or suffering whether physical or mental. This could happen for various reasons and the Criminal Code under Article 139A lists four reasons for such occurrence and these are: (a) to obtain from him / her or a third person information or a confession, or (b) to punish him / her for an act s/he or a third party has committed or is suspected of having committed, or (c) to intimidate him / her or a third party or of coercing him / her or a third party to do or to omit to do any act, or (d) on any reason based on discrimination of any kind. If any of this occurs, than the public officer is liable to a term from five to nine years imprisonment.

¹⁷ Legal Notice 167 of 2006 as amended by Legal Notice 425 of 2007, Subsidiary Legislation 365.22, Regulation 2

4. Deportation and risk of irreparable harm

86. It is the settled case-law that extradition, expulsion or deportation by a contracting state may give rise to an issue under Article 3 of the European Convention, and hence engage the responsibility of that State under the Convention. This will happen where substantial grounds are shown for believing that the person in question would, if extradited or deported, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3.

87. Article 4 of the Fourth Protocol to the European Convention excludes the collective deportation or expulsion of aliens. Recently, a case was heard before the Civil Court, First Hall (Constitutional Jurisdiction), *Abdul Hakim Hassan Abdulle u Kasin Ibrahim Nur vs. Ministry of Justice and Principal Immigration Officer* (Reference Number 56/2007)¹⁸ on the 29th of November 2011, where the court held that due to deportation, the fundamental human rights of the immigrants were violated and thus they were compensated with the sum of €10,000. The facts of the case were as follows: The applicants, two Somali, travelled to Libya and left from Libya to come to Malta. On their way to Malta, a Maltese patrol boat intercepted them and they were accompanied to Malta on 1 October 2004. 20 days after their arrival on the island, they were all sent back to Libya. On their arrival at Tripoli, the Libyan authorities arrested them and took them to a place where interrogations were held. During the interrogation, the deportees were maltreated and tortured; one of the applicants was even electrocuted. After three months of detention in a prison in Ain Zara, they were taken before the court and were sentenced to a year imprisonment. The applicants held that during imprisonment they were tortured as well. When the imprisonment term was over, they were taken in a jeep and were left to die in a desert – 14 days without food and water. Two of the immigrants died, but Abdul and Kasin survived the hardship and on the 23rd of June 2006, they came back to Malta. They brought an action against the Maltese authorities on the basis of Article 36 of the Constitution, Article 3 of the European Convention and Article 4 of the Fourth Protocol.

Article 8

1. Slavery

88. With the exception of the White Slave Traffic (Suppression) Ordinance¹⁹, no domestic legislation makes reference to the plight of persons held in slavery. Nor does the Criminal Code contain any specific provision outlawing slavery, even though a definition is found in the provisions dealing with crimes against humanity. However, although the Criminal Code does not contain a specific provision abolishing slavery and similar practices, the national legal order safeguards the freedom of the individual and upholds the principle of liberty of every individual.

89. The White Slave Traffic (Suppression) Ordinance is a domestic legal instrument, enacted in 1930, which directly tackles the issue of white slavery as a form of sexual slavery. The Ordinance was amended in 1994 to define activities related to trafficking in adults and children as criminal offences. The victim under this Ordinance can be any persons, whether male or female.

¹⁸ An appeal has been filed by the Ministry of Justice and Principal Immigration Officer on 16 December 2011

¹⁹ White Slave Traffic (Suppression) Ordinance, Chapter 63 of the Laws of Malta.

2. Trafficking in Persons

90. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol) defines trafficking in persons as recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs²⁰. The consent of a victim of trafficking in persons to the intended exploitation set forth above is deemed irrelevant where means such as coercion or abduction are used at any stage.²¹

91. Trafficking in persons is to be distinguished from migrant smuggling, which involves the facilitation of irregular migration. Migrant smuggling would involve the payment of a fee by the prospective migrant to the smuggler, in exchange for transportation to the country of destination. The relationship between the smuggler and the irregular migrant would end upon the migrant's arrival at the country of destination. It would however have to be noted that irregular migrants may be vulnerable to human trafficking upon arrival at the country of destination or a country of transit, in particular due to the lack of familiarity with their new environment and circumstances.²²

92. In Malta trafficking for sexual exploitation, exploitation in the production of goods or the provision of services, and exploitation in the removal of organs is prohibited by the Criminal Code (together with the White Slavery Traffic (Suppression) Ordinance). Article 54C(1) of the Criminal Code prohibits enslavement, it holds that "A crime against humanity is committed where any of the following acts is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ... (c) enslavement; ...". Enslavement is to be understood as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

93. Nonetheless, trafficking in persons from Malta for the purposes of prostitution was already a criminal offence under the White Slave Traffic (Suppression) Ordinance. This Ordinance transposed the International Agreement for the Suppression of White Slave Traffic 1904 into domestic law, which was subsequently amended by the Protocol approved by the General Assembly of the United Nations on the 3rd of December 1948. The Ordinance prohibits procurement for prostitution of a person who has attained 21 years to leave or come to Malta. The punishment attached to this offence is that of imprisonment for a term not exceeding two years, with or without solitary confinement. Furthermore the punishment shall be that of imprisonment for a term from two to ten years, with or without solitary confinement if the offence is committed:

²⁰ Under Maltese law, the punishment for trafficking for exploitation in organ removal is imprisonment for a term between four and twelve years.

²¹ Malta Action Plan on Combating Trafficking in Persons: October 2011 – December 2012
<<http://ec.europa.eu/anti-trafficking/download.action?nodeId=9b748a40-54d4-4b0b-8662-c3c1adfe2fa7&fileName=Malta+Action+Plan+on+Combating+Trafficking+in+Persons+October+2011-December+2012.pdf&fileType=pdf>>
accessed 2 February 2012.

²² *ibid.*

- (a) By a relative, that is, ascendant by consanguinity or affinity, adoptive father or mother, husband or wife, brother or sister; or
- (b) By means of abuse of authority, trust or domestic relations; or
- (c) Habitually or for gain.²³

94. On the other hand, whosoever induces a person under the age of 21 to leave or come to Malta for the purpose of prostitution shall be liable to imprisonment for a term from two to five years, with or without solitary confinement. Furthermore, the punishment of imprisonment shall be that of three to ten years if the offence is committed:

- (a) To the prejudice of a person who has not completed the age of 21 years; or
- (b) By means of violence, threats or deceit; or
- (c) By relatives or guardians, that is, ascendant by consanguinity or affinity, adoptive father or mother, husband or wife, tutor, any person charged with the care, education, instruction, control or custody of the person under the age of 21 years; or
- (d) Habitually or for gain.²⁴

95. Act III of 2002 introduced Sub-title VIII bis entitled ‘Of The Traffic of Persons’ into the Criminal Code in accordance with Malta’s commitment to the United Nations Convention against Transnational Organized Crime and the Protocols thereto. Malta ratified the Convention and Protocols, including the Palermo Protocol, on the 14th of September 2003.

96. In 2007, the Regulations concerning the Permission to Reside for Victims of Trafficking or Illegal Immigration who co-operate with the Maltese Authorities came into force.²⁵ These Regulations transposed the EU Council Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking of human beings or who have been the subjects of an action to facilitate illegal immigration, who cooperate with the competent authorities. This legislation gives victims of trafficking or illegal immigrants who cooperate with the Maltese authorities’ permission to reside in Malta for a period of six months (renewable). It also provides for a period of reflection not exceeding two months (prior to the granting of the six months residence permit) to victims of trafficking so as to give them the opportunity to detach themselves from the influence of the perpetrators of the offence and enable them to take an informed decision on the possibility of cooperating.

97. A victim of trafficking may also benefit from the Witness Protection Programme as established by Article 75 of the Police Act²⁶. This programme may be utilised by any victim of trafficking in persons who accepts and “declares that he will testify during any trial of any participant in the crime and any benefit granted shall be forfeited if the witness refuses to so testify”. Benefits within the programme include the resettlement of victims in other countries under the protection of a new identity, protection of the life and provide property for the witness and his family, and payment of a subsistence allowance. The final decision ultimately rests with the Attorney General, who decides whether such a person will be admitted to the Witness Protection Programme, as requested by the Commissioner of Police.

²³ White Slave Traffic (Suppression) Ordinance, Article 2 (1).

²⁴ *Ibid.*, Article 3 (1).

²⁵ Legal Notice 175 of 2007, S.L. 217.07

²⁶ Police Act, Chapter 164 of the Laws of Malta.

98. On 1 March 2012, the Court of Magistrates (Criminal Judicature) in its judgment in the names of *Police –vs- Raymond Mifsud* found Raymond Mifsud guilty of trafficking two Russian females and imprisoned him for nine (9) years and imposed a fine (multa) of €230.²⁷

99. In 2008, the Social Welfare Services Agency (*Aġenzija Appogg*) and the then Ministry for Justice and Home Affairs jointly produced a detailed brochure to raise awareness about human trafficking. It included information about identifying potential victims and where to find assistance. The brochures were distributed at health clinics, community centres, and churches among other locations. They were also distributed in entertainment areas to target potential sexually exploited victims and sex clientele. In January 2009, 60 police officers were trained in the identification and provision of assistance to trafficking victims.²⁸

100. In February 2009, the International Organization for Migration (IOM) Malta organised a “train-the-trainer” seminar followed by a two-day training session which covered relevant EU and national legislation, victim identification and assistance. This training was held in conjunction with the social welfare agency, the Malta Police Force and the non governmental organisation People for Change Foundation. Participants included approximately 80 governmental and non-governmental social workers as well as other professionals. This training was undertaken under the EU AGIS Programme.²⁹

101. Within the Malta Police Force, trafficking in human beings falls under the responsibility of the Vice Squad. In December 2011 a special unit was set up within the vice squad having a dedicated team responsible for prostitution and human trafficking.

102. Statistics show that in 2007 six suspected traffickers were arrested and seven victims were identified. In 2008 one victim was identified, and three alleged traffickers were charged in court. In 2011 four suspects were taken to court while three victims were identified. One suspect was arrested and charged in court and three victims were identified until end of June 2012.

103. The social welfare agency has a liaison officer responsible for matters relating to human trafficking, who liaises with the Malta Police Force and other entities on pertinent cases. The Officer also liaises with other professionals within the social welfare agency itself, particularly with regard to the identification, assessment and support to victims of trafficking.

104. A national Monitoring Committee, which convened for the first time during 2011, has been set up by the Prime Minister. The aims of the Committee are primarily to:

- Contribute to and update the National Human Trafficking Action Plan;
- Monitor the implementation of the Action Plan, and produce reports to inform Government of the state of Human Trafficking in Malta;
- Establish knowledge and information exchange relationships with other States’ authorities;

²⁷ This case has been appealed by the defence.

²⁸ European Commission: Fight against Trafficking in Human Beings Malta <<http://ec.europa.eu/anti-trafficking/showNIPsection.action;jsessionid=yvLFTGgcvnrp9htCN111Mrp8VdVvKfzQ0JT21ScsgjjK7tGn4s282!741669820?sectionId=98fedc5f-f7c7-410f-9c90-a1d0ffb73a62#>> accessed 2 February 2012.

²⁹ *Ibid.*

- Assess the operational practices and procedures of all organisations involved in Trafficking in Human Beings; and,
- To embark on a communication process with groups of people at risk or the general public as necessary.

105. A training programme for government stakeholders and NGOs involved in the fight against human trafficking and victim identification / support has been held on 14-17th June 2011. The training was delivered by experts from IOM (Washington) and was co-financed by the United States G-TIP Office and the Government of Malta. The training addressed the different aspects of human trafficking, including victim identification, and prosecution of offenders among others. Training also addressed the best possible ways to improve networking between service providers in order to envisage an integrated strategy providing for victim support.³⁰ A second training programme delivered by experts from IOM Rome, was held on 27 - 30th March 2012 for government stakeholders and NGOs, was dedicated towards the formalisation of guidelines for the identification of victims of human trafficking, as well as the development of a national Victim Referral System. As a continuation of this training a second training programme will be conducted this year on 17 - 20th July to develop a Manual of Procedures for all stakeholders to be able operate the Victim Referral System. This training programme shall also be delivered by experts from IOM Rome.

106. The government continued to designate anti-trafficking victim care responsibility and funds to Appogg, a Government of Malta social services agency with some private participation. Appogg was empowered to provide shelter, psychological care, and other services to any identified victims of trafficking. This agency runs a social services hotline that could receive calls about human trafficking.³¹

3. Protection of children under Maltese law from slavery and related practices

107. Article 157 of the Civil Code holds that a child is a person who has not attained the age of 18 years. In 2008, the number of child abuses reported to *Agenzija Appogg* was that of 464³².

108. Maltese Law contains numerous provisions aimed at safeguarding the rights of children and protecting them from practices akin to slavery. For instance Article 248D of the Criminal Code provides that whosoever traffics a minor for the purpose of exploiting that person in the (a) production of goods or provision of services; or (b) slavery or practices similar to slavery; or (c) servitude; or (d) activities associated with begging; or (e) any other unlawful activities; or (f) prostitution or in pornographic performances or in the production of pornographic material, is liable to imprisonment for a term of two to nine years. Furthermore if a minor is trafficked for the purpose of removing any organ of the body, the offender is liable to the punishment of imprisonment for a term from four to twelve years.

109. If violence or threats, including abduction; deceit or fraud; misuse of authority, influence or pressure; the giving or receiving of payments or benefits to achieve the consent of the person having control over another person, is used in the commission of the offence referred to in the previous paragraph, the term of imprisonment is to be increased by one degree.

³⁰ *Ibid.*

³¹ <http://www.unhcr.org/refworld/docid/4e12ee622.html>

³² Children 2010 (National Statistics Office)

<http://www.nso.gov.mt/statdoc/document_file.aspx?id=2703> accessed 16 February 2012.

110. Act VII of 2010 introduced two articles in the Criminal Code which deal with improperly inducing consent to adoption of a minor for purposes of exploitation and child labour. In both offences, anyone who commits such a crime is liable to imprisonment for a term of two to nine years in case the adoption or the child labour is for the (a) production of goods or provision of services; or (b) slavery or practices similar to slavery; or (c) servitude; or (d) activities associated with begging; or (e) any other unlawful activities; or (f) prostitution or in pornographic performances or in the production of pornographic material and from four to twelve years imprisonment when the adoption or child labour was for the purpose of removal of any organ. The punishment of imprisonment is increased by one degree when such an offence is committed by violence or threats, including abduction; deceit or fraud; misuse of authority, influence or pressure; the giving or receiving of payments or benefits to achieve the consent of the person having control over another person.

111. Article 3(b)(1) of the Worst Forms of Child Labour Convention prohibits the use, procuring or offering a child for prostitution. In line with this principle, Article 204(1) of the Criminal Code provides that whosoever, in order to gratify the lust of any other person, induces a person under age to practice prostitution or instigates the defilement of such person, or encourages or facilitates the prostitution of such person, shall on conviction be liable to imprisonment. However, if the offence is committed to the prejudice of a person who has not yet attained the age of 12, the punishment is aggravated.

112. A contemporary form of slavery is the exploitation of children for pornography. In line with the International Labour Organization (ILO) Convention Number 182, the Maltese Criminal Code, under Article 208A(1) holds that any citizen or permanent resident of Malta, whether in Malta or outside Malta, as well as any person in Malta, who takes or permits to be taken any indecent photography, film, video recording or electronic image of a minor, or distributes or shows such indecent photograph, film, video recording or electronic image is liable for punishment of imprisonment for the term of twelve months to five years.

113. The offence of unlawful carnal knowledge with violence is an offence against the sexual freedom of the individual. The law gives extensive protection to young children victimised by such circumstances. In fact, where the offence is committed against a child who has not attained the age of 12, there arises the irrebuttable presumption that the unlawful carnal connection was accompanied by violence. The aggravation subsists even if the agent proves that he was unaware of the age of the victim. The offence is aggravated when committed by an ascendant or tutor of a person who has not as yet attained majority, or where it is committed upon a sibling, a natural ascendant or descendant, or other persons who are related to each other by consanguinity or affinity by the third degree inclusively.³³

114. Where a child is held in conditions of sexual slavery, the offence of defilement would also arise. This offence arises where the agent corrupts the minor by means of lewd acts, which acts the minor is forced to withstand and which he does not understand, without him being in a position to refuse. If the defilement is not a one-time occurrence, the child is a victim of sexual servitude. However, if the lewd acts consist in unlawful carnal connection with violence, than the offence of rape would subsist. Minors who end in conditions of sexual slavery may have been previously trafficked, abducted, adopted, sold or subjected thereto by their relatives. In this latter scenario the offence is aggravated. In the offence of defilement of minors, the aggravation arises where the agent is an ascendant by consanguinity or affinity, the adoptive parent, the tutor, or any other person charged with

³³ *ibid.*, 150.

the care of the minor, albeit temporarily (Article 203(1)(c) of the Criminal Code). The offence is also aggravated when threats, deceit or fraud are used.

4. Forced labour

115. The Maltese Government ratified the Abolition of Forced Labour Convention on 4 January 1965. Article 35 of the Maltese Constitution deals with forced labour and states that “[n]o person shall be required to perform forced labour.” It further lists a number of situations which are not deemed to constitute forced labour. These include:

(a) any labour required in consequence of the sentence or order of a court;

(b) labour required of any person while he is lawfully detained by sentence or order of a court that, though not required in consequence of such sentence or order, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained or, if he is detained for the purpose of his care, treatment, education or welfare, is reasonably required for that purpose;

(c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;

(d) any labour required during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community.

116. By virtue of the provisions contained in the EIRA³⁴, the legislator outlaws situations where a person’s labour is exacted and for which no remuneration is awarded. In line with this principle Article 11(1) of the Act requires the payment to the employee of all the wages earned by him without any deductions. Payment is to be affected to the employee directly and the employer is prohibited from indicating to the worker how to employ such wages. Very important in its implications and effect is Article 18 which establishes that remuneration may be in kind, by giving the employee food, shelter, other allowances or privileges, provided that such payment in kind is to be given in addition to the minimum wage payable. In this way, the worker is not denied a substantial cash payment. Furthermore, it is contrary to law to employ any person without paying him the minimum wage established by law.³⁵

117. The Young Persons (Employment) Regulations³⁶ lay down that children under 15 years cannot be employed, on contract or otherwise. The same applies to children of compulsory school age, unless such employment is covered by an exemption issued under the Education Act. Where young persons aged between 15 and 18 are employed, the Protection for Young Persons at Workplace Regulations³⁷ require that these persons be properly trained for the work assigned and that health and safety hazards be taken into account. In addition, children cannot be employed at any time between 8 p.m. and 6 a.m., whereas adolescents cannot be employed between 10 p.m. and 6 a.m. except in the case of approved training schemes or apprenticeships or educational, cultural or sports activities. The Regulations do not apply to hotels or catering establishments, provided the young worker is allowed not less than 12 consecutive hours’ rest within any period of 24 hours, and not less than 2 days rest each week, including Sunday. On the other hand, Article 4 of

³⁴ Chapter 452 of the Laws of Malta

³⁵ National Minimum Wage National Standing Order, Subsidiary Legislation 452.71.

³⁶ Legal Notice 440 of 2003 as amended by Legal Notice of 427 of 2007, S.L. 452.92

³⁷ Legal Notice 91 of 2000 as amended by Legal Notice 283 of 2004, S.L. 424.01

the 2004 Regulations provides that the work time for adolescents shall not exceed eight hours a day and 40 hours a week which shall include any time spent on training by a young person working under a theoretical or practical combined work, training scheme or an in-plant work-experience scheme.

Article 9

118. The Constitution prohibits arbitrary arrest and detention. Article 34 provides:

(1) No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say -

- (a) in consequence of his unfitness to plead to a criminal charge;
- (b) in execution of the sentence or order of a court, whether in Malta or elsewhere, in respect of a criminal offence of which he has been convicted;
- (c) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of the House of Representatives punishing him for contempt of itself or of its members or for breach of privilege;
- (d) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
- (e) for the purpose of bringing him before a court in execution of the order of a court or before the House of Representatives in execution of the order of that House;
- (f) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;
- (g) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
- (h) for the purpose of preventing the spread of an infectious or contagious disease;
- (i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or
- (j) for the purpose of preventing the unlawful entry of that person into Malta, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Malta or the taking of proceedings relating thereto or for the purpose of restraining that person while he is being conveyed through Malta in the course of his extradition or removal as a convicted prisoner from one country to another.

119. Both the Constitution (Article 34(2)) as well as the Criminal Code (Article 355AC(1)) ensure that a person who is arrested or detained shall be informed at the time of his / her arrest or detention of the reasons for his / her arrest or detention. Such information is to be given in a language that s/he understands. In the case where the arrested needs an interpreter and the same is not readily available, then an interpreter is to be appointed as soon as practicable.

120. Furthermore the Constitution provides that when a person is arrested or detained for the purpose of bringing him / her before a court in execution of the order of a court or on the basis of reasonable suspicion of his / her having committed or being about to commit a

criminal offence, he / she shall, within 48 hours be brought before a court or be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he/she appears at a later date for trial or for proceedings preliminary to trial. The same is stated in the Criminal Code under Article 355AJ(3). Article 355AL(2) further provides that before the custody officer orders the release from custody of a person, s/he shall inform the investigating officer and a Magistrate and the final decision shall be taken by the Magistrate.

121. If the police arrest someone and at the moment of arrest, objectively speaking, they had a reasonable suspicion but after ten hours they realised that the person arrested is completely innocent, just because there existed the reasonable suspicion during the first moment does not mean that they have a right to keep the suspect at the police Head Quarters for 48 hours. Thus, if during those 48 hours, this reasonable suspicion ceases to exist then the police have a duty (and the arrested person has a right) to be released even though the 48 hours have not yet elapsed..

122. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the taking during such a period of public emergency measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency.

123. Where any person is arrested, whether with or without a warrant, the arresting police officer or his superior shall, as soon as practicable and unless the person arrested has been released within six hours from arrest, inform a Magistrate, giving all details as to time and place where the person is being held. The Magistrate may order that the person arrested be transferred to another place with immediate effect.

1. Bail

124. As already stated, a person whose release is ordered shall be released unconditionally, unless it appears to the custody officer that there is need for further investigation of any matter in connection with which s/he was detained at any time during the period of his / her detention or that proceedings may be taken against him / her in respect of such matter. Such release is to be reduced to writing and signed by the person to be released, that s/he will not attempt or do anything to leave Malta without the authority of the investigating officer under whose authority s/he was arrested and that s/he will attend at such police station at such time as the custody officer may appoint and / or that s/he will attend before the Court of Magistrates at such time and such place as the court may appoint. Where the bail conditions are no longer in force, the custody officer may give notice in writing to that person that the conditions imposed on him / her earlier are no longer applicable.

125. When a person released fails to comply with any conditions imposed upon him / her, s/he shall be guilty of a contravention. Furthermore, a police officer may arrest without a warrant any person who has been released on bail subject to a duty not to attempt or to do anything to leave Malta without authority or to attend a police station or subject to a duty to appear before the Court of Magistrates, if he / she attempts or does anything to leave Malta without authority or fails to attend at that police station or before the Court of Magistrates at the time appointed for him to do so.

126. Our Criminal Code under Article 355AL(8) states that bail conditions “shall not remain in force for more than three months from the date on which they were imposed unless they are renewed by a Magistrate for further periods of three months each period upon an application by the Police which shall be served for his reply upon the person on whom the conditions were imposed.” On the other hand, at any time during which the bail

conditions are in force the person on whom those conditions were imposed may by an application to be served on the Police for a reply request a Magistrate that those conditions be removed or modified.

127. Article 575(1) provides an exception to the rule of bail. A person accused of any crime against the safety of the Government or a person accused of any crime liable to the punishment of imprisonment for life are granted bail only after taking into account all the circumstances of the case, the nature and seriousness of the offence, the character, antecedents, associations and community ties of the accused, as well as any other matter which appears to be relevant, it is satisfied that there is no danger that the accused if released on bail -

- (a) will not appear when ordered by the authority specified in the bail bond; or
- (b) will abscond or leave Malta; or
- (c) will not observe any of the conditions which the court would consider proper to impose in its decree granting bail; or
- (d) will interfere or attempt to interfere with witnesses or otherwise obstruct or attempt to obstruct the course of justice in relation to himself or to any other person; or
- (e) will commit any other offence.

2. Compensation

128. Article 409A of the Maltese Criminal Code gives the opportunity to the person in custody to file an application to the Court of Magistrates (Criminal Inquiry) if s/he believes that s/he is being unlawfully detained under the authority of the Police or any other public authority. Such application is appointed for hearing with urgency and the application together with the date of the hearing are served on the same day of the application on the applicant and Commissioner of Police or any other public authority. The Commissioner of police or public authority may file a reply by not later than the day of the hearing.

129. On the other hand, when a person in custody for an offence for which s/he is charged or accused before the Court of Magistrates alleges that his / her continued detention is not in accordance with the law may at any time apply to the court demanding his release from custody. This application is appointed for hearing with urgency and together with the date of the hearing are served on the same day of the application on the Commissioner of Police or / and the Attorney General.

130. The Maltese Constitution under Article 34(4) provides that “[a]ny person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person.”

3. Inference

131. Every person accused has the right to remain silent and this silence cannot be understood in any way as an implied admission of guilt. This is true during interrogation and at trial alike. Equally where a person fails to answer as to whether s/he is pleading ‘guilty’ or ‘not guilty’ to the charges in the court, the Court has to assume that silence equates with a reply of ‘not guilty’.

132. Our Criminal Code stipulates that every person has the right to seek legal advice or counsel for one hour prior to interrogation (and not during interrogation). In the event that the suspect avails himself of this right, such a decision shall be noted in writing in a register kept for this purpose.

133. The 2002 amendments to the Criminal Code introduced the notion of inferences from silence. In other words a person accused cannot in trial reasonably rely on facts which s/he has failed to mention during the interrogation. If this actually occurs then an inference can be drawn against the accused which will provide a circumstantial element of guilt against him / her. In simple terms, if a suspect during interrogation remains silent, but then in trial takes the witness stand and refers to facts with a view of exculpating himself, the fact alone will allow the judge or jury to draw an inference against the accused. Such inference can only be drawn if the person accused chose to seek legal advice. A suspect refusing to be interrogated or rather who chooses to remain silent is running the risk of having an inference drawn against him if later s/he takes the witness stand.

4. Prisons

134. Men and women are held separately, as are juveniles and adults. However convicted and non-convicted prisoners are not kept apart. Regulation 12 of the Prisons Regulations (Legal Notice 118 of 1995) provides that as far as possible, there has to be different divisions or sections for male and female prisoners, convicted and non-convicted prisoners, prisoners sentenced to detention and other prisoners, prisoners under 21 years of age and prisoners over that age, prisoners sentenced to imprisonment for the first time and those sentenced more than once and short-term and long-term prisoners.

135. The number of men at Corradino Correction Facility (CCF) as at 31 December 2011 amounted to 562, while the number of women was that of 54. On the other hand, the number of juveniles was that of 14: 10 males and 4 females – Table 11 respectively.

136. Convicted prisoners are allowed to send and receive a letter once a week and may be visited once a week. The duration of the visit is that of 45 minutes. On the other hand, non-convicted prisoners may send and receive a reasonable number of letters, they may be visited for 15 minutes, on any weekday or aggregate of, if so authorised. Furthermore, for the non-convicted prisoners, unlike those for convicted prisoners, visitors need the consent of the Court.

137. Convicted and non-convicted prisoners may be visited at the CCF. On special family occasions prisoners may be given prison leave to visit their relatives at home. Under normal circumstances prisoners may avail themselves of prison leave on two occasions in a year, depending on the family occasion. Prison leave may be granted once a month or once every three months on compassionate grounds, depending on particular circumstances as indicated in the Prisons Regulations.³⁸ These rules apply to both adult and under-21 years of age prisoners. There may be some restrictions or requirements in cases of non-convicted prisoners.

138. Prisoners have access to television and radios. Apart from visitors, the prisoners can contact relatives and / or friends by telephone and / or letters.

139. Prisoners under the age of 21 years of age are kept apart from the rest of the facility population. The Young Offender Unit for Rehabilitation Services (YOURS) operates under a different regime. Teachers are assigned to YOURS. Prisoners enjoy visits with their relatives and friends depending on whether they are convicted or non-convicted.

140. Convicted prisoners with drug problems who are motivated to rehabilitate themselves are encouraged to attend Rehabilitation programmes. Such programmes are conducted outside the CCF premises. Prisoners may also attend University or other educational or vocational courses. In-house educational and vocational courses are also

³⁸ S.L. 260 of 2003

held. During the last three months of their sentence prisoners may be allowed to engage in employment, receive instruction or training or otherwise to help them make the transition from prison life.

141. Between the 6th and 9th of February 2012, a group of about 10 inmates took part in a project being produced by the internationally renowned London Shakespeare Workout (LSW) company. This consisted in a play entitled 'When you hear my voice'. This play was put up at St James Cavalier which led to a documentary film for global distribution. Joanne Battistino, operations manager at CCF, said the cast was an international one, as current YOURS residents include Maltese, UK, Ethiopian, US, Estonian, Spanish and Portuguese nationals. Ms Battistino explained that the project took off following an LSW workshop held at YOURS last September as part of the Annual Conference of the European Prison Education Association.

5. Probation³⁹

142. In 1944, H.M Commissioner of Prisons for England and Malta, Alexander Paterson, delivered a report to the Governor of Malta in which he proposed two major innovations: the release of offenders on licence (parole system) and the introduction of the Probation Services. It was only in 1955 that the latter part of his proposal was partially integrated. This eventually led to the enactment of the Probation of Offenders Act in 1957. The first probation order was issued in August 1961.

143. Since then, the 'Centru Hidma Socjali' was established and its director was appointed Principal Probation Officer. In 1993 the University of Malta, after receiving a proposal from the judiciary and the Government of Malta, organised a post-qualification diploma to train individuals as probation officers. The first course yielded four qualified probation officers. In 1994 the Probation Services Action Team (PSAT), a non-governmental organisation, was set up. This was perhaps the first in a series of measures intended to address the lack of trained specialised resources in the field of probation. PSAT aimed at serving as the cornerstone of the future Probation Services, which was set up within the Department of Correctional Services. In fact it was in 1996 that a group of qualified probation officers were engaged as social workers within this Department. In 1998, another major step was taken with the insertion of a new structure for the Probation Services, within the government structure and once again was incorporated within the Department of Correctional Services. The structure includes the grades of a Principal Probation Officer, senior probation officers, probation officers and trainee probation officers. In 2002, the Probation of Offenders was revised and renamed Probation Act. This newly enacted Act marked the introduction of sanctions such as the Community Service Order and the Combination Order, while at the pre-sentencing stage the Provisional Order of Supervision was included for the first time. The renewed aim of the Probation Services is the strengthening of probation services in our country while expanding the services offered.

144. The Probation Services is a key component of the criminal justice system and works in collaboration with the judiciary, police and various agencies and government departments, among others. The Probation Services addresses the needs of adult and juvenile offenders when demanded by the court at the pre-sentencing stage through the Pre-Sentence Report (PSR)⁴⁰, the Social Inquiry Report⁴¹ and the Provisional Order of

³⁹ Ministry of Justice and Home Affairs: Probation Order

<<http://www.mjha.gov.mt/page.aspx?pageid=136>> accessed 17 February 2012.

⁴⁰ The Probation Officer prepares this report which is required by the Court after guilt is established and before the Court makes its decision. This report contains extensive information about the offender's background and present situation, as well as recommendations to the Court with regard to sentencing.

Supervision⁴². At the post-sentencing stage the services offered include the Community Service Order (CSO)⁴³, Combination Order⁴⁴, Probation Order⁴⁵, and the Suspended Sentence Supervision Order⁴⁶.

145. The Probation Services database reveals that offenders come in contact with the Probation Services for various offences. These offences include drug possession; person offences, such as physical assault and domestic violence; sexual offences, such as prostitution and corruption of minors; property offences, including illegal entry, auto theft and the defilement of public and private property; falsification of documents, money laundering and forgery and internet crime. The Probation Services caters for both male and females, but to date the highest proportion of offenders receiving these services have been male. Through the course of interaction with the offender, the probation officer may also come into contact with the families, employers and immediate peer-groups of the offenders.

146. During 2009, the average number of offenders / clients dealt with was that of 657.

6. Detention of asylum seekers

147. Refugee is defined under the Refugees Act as “a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events is unable or, owing to such fear, is unwilling to return to it”. Furthermore, refugee status is defined as “the recognition of a third country national or stateless person as a refugee”.

148. An irregular immigrant can apply for a refugee status in order to be granted refugee protection. Within 15 days from when the asylum seeker has lodged his / her application, then s/he is informed of any established benefits and of the obligations with which s/he must comply relating to reception conditions (that is, measures that are granted in Malta to asylum seekers). Furthermore, the Principal Immigration Officer provides information to the immigrant on organisations or groups of persons that provide specific legal assistance and organisations that might be able to inform him / her of his / her rights, including health care, schooling and education to minors. Accommodation is provided during the

⁴¹ The Probation Officer compiles this report as requested by the Court at any phase during the criminal proceedings before guilt is established. This report is similar in content to the PSR but does not include any recommendations to the court with regard to sentencing.

⁴² According to the new Probation Act, the Court may deem it necessary to issue a provisional order of supervision of the accused by a Probation Officer at any point during the criminal proceedings.

⁴³ Through this newly introduced sanction the offender is required to perform between 40 and 240 hours of work without pay. Compensation to the community is regarded as a priority when issuing a CSO as the offender tries to make up for the harm he has inflicted upon society in general. The offender is expected to carry out the number of hours as stipulated by the Court in his free time and care is taken in order that such work does not replace paid work.

⁴⁴ This is an amalgamation of the Probation Order and the Community Service Order. The Probation element may be of one to three years duration while the Community Service element of 40 to 100 hours.

⁴⁵ A Probation Order is issued by the Court and can be issued for a minimum period of one year and a maximum of three years. It is a community-based alternative aiming at serving the offender's rehabilitation, protecting society from harm, and preventing further recidivism.

⁴⁶ This is a prison sentence which is suspended for a minimum of two and a maximum of four years. The Court may issue a Supervision Order applicable to this period. The Probation Officer supervising a Suspended Sentence puts more emphasis on the aspect of control.

examination of the application lodged for the status of refugee, accommodation centres which guarantee the adequate standard of living or other premises adopted for accommodating applicants.

149. An asylum seeker, who feels aggrieved by a decision taken against him / her, with regards to his / her application or any other reception conditions, is entitled to appeal to the Immigration Appeals Board.⁴⁷ By the end of 2011, there were 645 appeal applications – Table 12. There is also a Refugee Appeal Board which hears and determines appeals against a recommendation of the Commission. During the hearing of the appeal, the Board makes arrangements to procure the attendance of an interpreter to assist at the hearing. The sitting is heard in camera. Furthermore, the appellant has the right to free legal aid. The decision of the Board is final and conclusive and may not be challenged and no appeal may lie there from before any court of law. A person who has applied for asylum may make a subsequent application after a final decision to the Commissioner for Refugees, however, such application will be considered only on presentation of new elements or findings.

7. Removal order and deportation

150. The issuing of a detention order is not provided for in the Immigration Act – it is an automatic consequence of a removal order or of a decision refusing to grant admission into national territory or the issuing of a removal order in respect of a particular individual. Article 14 of the Immigration Act⁴⁸ holds that “...a removal order is only issued following an application to that effect by the Principal Immigration Officer”. This order is issued after it is ascertained that such person is liable to expulsion because he/she entered or is present in Malta without the required authorisation from the immigration authorities. When a removal order is made, the person against whom such order is issued is to be detained in custody until s/he is removed from Malta. In such a case, the person removed is sent back to the country of his / her origin or to any other state to which s/he may be permitted entry.⁴⁹

151. Regulation (1) of the Status of Long-term Residents (Third Country Nationals) Regulations⁵⁰, provides grounds on which a third country national (who has acquired long-term resident status in Malta) may be expelled from Malta through a removal order. The Principal Immigration Officer will issue the said order when the third country national constitutes an actual and sufficiently serious threat to the public policy or public security of Malta.⁵¹ Neither economic issues nor a disease contracted after the first residence permit was issued are justifiable grounds for expulsion. A number of factors are taken into account when issuing such an order and these are:

- (a) The duration of residence in Malta,
- (b) The age of the person concerned,
- (c) The consequences for the person concerned and family members,
- (d) Links with Malta as his country of residence or the absence of links with his country of origin.

⁴⁷ Reception of Asylum Seekers (Minimum Standards), Subsidiary Legislation 420.06.

⁴⁸ Chapter 217 of the Laws of Malta

⁴⁹ Detention in Europe: Malta <http://detention-in-europe.org/index.php?option=com_content&view=article&id=150&Itemid=183> accessed 6 February 2012.

⁵⁰ S.L. 217.05

⁵¹ The same grounds are found under Article 11 of Refugees Act, Chapter 420 of the Laws of Malta.

152. Article 25A(5) of the Immigration Act provides for the possibility of an appeal from a decision to issue a removal order. Such appeal is presented to the Immigration Appeals Board, within three working days from the date of issue of the removal order. If the removal order is revoked, the immigrant concerned is automatically released from custody. Furthermore, Article 25A(9) of the same Act holds that the Board has the authority to grant the immigrants concerned provisional release from detention, even on a verbal request, pending the final determination of their asylum application or their deportation / removal from Malta, as the case may be. Such a release is given under such terms and conditions as it deems fit. Also, the release will only be granted where the Board is of the opinion that the continued detention of the applicant is unreasonable as regards its duration, in the light of the circumstances of the case, or where there is no reasonable prospect of deportation within a reasonable time. On the other hand, the Board may refuse to grant release where the individuals concerned have refused to cooperate with legitimate attempts to remove them from national territory. Persons released by virtue of this remedy must report at least once a week to the immigration authorities. Moreover, in certain circumstances, they may be taken into custody again, pending their removal from Malta.⁵² By the end of 2011 the number of immigrants in detention amounted to 650 – Table 13.

153. The Maltese Constitutional Court in a number of cases justified the detention of the immigrants on the basis of national security concerns. The Court highlighted the need to “avoid a flood of ‘irregular’ people running around in Malta”.⁵³ Detention was held to be necessary for the stability of the country.

154. Irregularly staying third country nationals may also challenge the lawfulness of their detention in terms of Article 34 of the Constitution of Malta and Article 5 First Schedule of the European Convention Act. Furthermore Article 1 of the Seventh Protocol gives the alien who is lawfully resident in the territory of Malta the right to submit reasons against his / her expulsion, to have his case reviewed and to be represented for these purposes before the competent authority. However there can be the expulsion of an alien before giving the said alien the mentioned rights when such expulsion is necessary in the interest of public order or is grounded on reasons of national security.

155. Article 23 of the Immigration Act makes reference to Directive 2001/40/EC on the Mutual Recognition of Decisions on the Expulsion of Third Country Nationals. Under this provision the Principal Immigration Officer recognises a decision of expulsion by another Member State and also takes the necessary measures to enforce such decisions.

Article 10

1. Right of persons detained – habeas corpus rights

156. The person detained has a right to request that a relative or friend be informed of the fact of his / her arrest and of his / her whereabouts. This information is to be relayed to relative or friends without undue delay [unless such relative or friend is reasonably suspected of being involved in the offence being investigated]. Furthermore, information shall be entered in the detention record of the day and time in which the detained person was informed of his / her right, whether the detained person chose to avail himself of that

⁵² Detention in Europe: Malta <http://detention-in-europe.org/index.php?option=com_content&view=article&id=150&Itemid=183> accessed 6 February 2012.

⁵³ *Essa Maneh et vs. Kummissarju tal-Pulizija et* (First Hall Civil Court (Constitutional Jurisdiction)) 16 December 2009; *Mabrouk Mourad vs. Ministru Ghall-Gustizzja u Affarijiet Interni et* (First Hall Civil Court (Constitutional Jurisdiction)) 4 February 2009.

right or not and if the detained person chose to avail himself of that right, the details of the relative or friend informed of the detained person's arrest and whereabouts together with the day and time in which the information was given. On the other hand, if such relative or friend was not informed, then the reasons for this must be recorded. The arrested or detained person shall be requested to sign the record and should s/he refuse to do so an entry shall be entered in the record to this effect.

157. When the investigating officer deems it appropriate that there should be a delay in informing a relative or a friend, s/he must get the approval of the Magistrate. This is to be done by application to the Magistrate showing that there are reasonable grounds for suspecting that the giving of such information may be prejudicial to the investigation.

158. The arrested person is allowed to consult a medical adviser of his / her choice if s/he so requests.

159. Furthermore, a person arrested and held in police custody at a police station or other authorised place of detention is allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour. This request is recorded together with the time that it was made. Added to this, the superintendent or any rank above that may delay such request. On the other hand, if the right to legal advice is authorised then such authorisation is to be given in writing, if it is given orally then it is to be confirmed in writing as soon as it is practicable. Where the person detained chooses not to seek legal assistance the investigating officer records this fact in writing in the presence of two witnesses and thereupon questioning may proceed immediately.

160. The grounds for delay are laid down in the law under Article 355AT (5) of the Criminal Code and these are if the authorisation:

- (a) will lead to interference with or harm to evidence connected with the offence being investigated or interference with or physical injury to other persons; or
- (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- (c) will hinder the recovery of any property obtained as a result of such an offence; or
- (d) in the case of a person detained for an offence of drug trafficking, bribery, or money laundering, will hinder the recovery of the value of that person's proceeds from the offence.

161. This delay mentioned in subarticle (3) shall in no case exceed thirty-six hours from the time of the arrest. Where the delay to consult a lawyer has been authorised, the Police may immediately proceed to question the detained person.

162. The right to seek legal advice came into force in 2010. Reference must be made to two landmark judgements namely *Il-Pulizija (The Police) vs Alvin Privitera* (11 April 2011) and *Il-Pulizija vs Mark Lombardi* (12 April 2011). In both these cases the Constitutional Court was requested to strike down statements released by persons arrested and interrogated by the police since the said persons were not given the right to seek legal advice before releasing their statements. In both cases the Constitutional Court found that the fact that these persons arrested were not given their right to legal advice constituted a serious breach to the right to fair trial enshrined in our Constitution.

2. Juvenile Court

163. The Juvenile Court established under the Juvenile Court Act⁵⁴, set up in 1980, is deemed by law to be a Court of Magistrates. A Magistrate usually sits alone in the Court of Magistrates, however, when the court sits as a Juvenile Court the Magistrate sits with two lay assistants one of whom must be a woman⁵⁵. The Juvenile Court hears criminal cases brought against persons who are under the age of sixteen years⁵⁶. It also hears appeals against care orders made by the minister responsible for social welfare under the Children and Young Persons (Care Orders) Act⁵⁷. The Juvenile Court holds sittings both in Malta and in Gozo.⁵⁸ In fact the Criminal Code under Article 28C(3)(b) holds that “the Juvenile Court shall be deemed to be a Court of Magistrates (Malta) or a Court of Magistrates (Gozo), as the case may be.”

164. Sittings are held outside Valletta, namely in Sta. Venera. The Courts hears charges against, and holds other proceedings relating to minors under the age of 16 years, and may also issue Care Orders in their regard. Given the confidential nature of such sittings, attendance to hearings is restricted to persons mentioned in the law establishing the Court.⁵⁹

165. The Juvenile Court does not have competence to hear charges against or other proceedings relating to, a child or young person under the age of 16 who is charged jointly with any other person not being a child or young person.

Article 11

166. Contracts legally entered into have the force of law for the contracting parties. A contract can only be revoked by mutual consent of the parties or on grounds allowed by law. Contracts must be carried out in good faith and are binding not only in regard to the matter therein expressed but also in regard to any consequence which is incidental to the obligation.⁶⁰

167. The contracting party is presumed to stipulate for himself, his heirs and for the persons claiming through or under him. However, a person cannot by a contract entered into in his / her own name bind or stipulate for anyone but himself / herself. Contracts are only operative between the contracting parties and do not prejudice or be of an advantage to

⁵⁴ Juvenile Court Act, Chapter 287 of the Laws of Malta.

⁵⁵ The two assistants are appointed by the President, acting in accordance with the advice of the Prime Minister, from amongst persons who in the Prime Minister’s opinion have previous experience and special qualifications for dealing with problems of juvenile.

⁵⁶ Article 6 (1) of the Juvenile Court Act: “Where in the course of any proceedings before the Juvenile Court it appears to the court that the person charged or to whom the proceedings relate has attained the age of 16 years, the said court ... shall adjourn the case and refer it to the competent Court of Magistrates which shall take cognizance of the case as if the proceedings had been commenced before the said Court of Magistrates”. Furthermore Article 6 (2) reads: “Where in the course of any proceedings before a Court of Magistrates it appears to the court that the person charged or to whom the proceedings relate is under the age of 16 years, the said court shall adjourn the case and refer it to the Juvenile Court which shall proceed with the hearing and determination of the case as if the proceedings had been commenced before the said Juvenile Court”.

⁵⁷ Young Persons (Care Orders) Act, Chapter 285 of the Laws of Malta.

⁵⁸ Il-Gudikatura Maltija: Court of Magistrates <<http://judiciarymalta.gov.mt/court-of-magistrates>> accessed 3 February 2012.

⁵⁹ The Law Courts: The Juvenile Court

<<http://www.mjha.gov.mt/page.aspx?pageid=145&printonly=true>> accessed 3 February 2012.

⁶⁰ Articles 992 and 993 of the Civil Code, Chapter 16 of the Laws of Malta.

third parties. In other words, the contract entered into should not bind or have effect on third parties.

168. Article 1125 of the Civil Code provides that “Where any person fails to discharge an obligation which he has contracted, he shall be liable in damages”. The Code goes on by stating that in case of non-performance of an obligation, the creditor may be authorised to cause the performance of the contract himself at the expense of the debtor. Furthermore, apart from having the action for damages, the creditor may demand that anything done in breach of the obligation be undone and may be authorised to undo it himself at the expense of the debtor.

169. On the other hand, the debtor is not liable for damages if s/he was prevented from performing the contractual obligation due to irresistible forces.

Article 12

1. Free movement

170. The Maltese Constitution protects the right of the individual to move freely, that is, to move freely throughout Malta, the right to reside in any part of Malta, the right to leave and the right to enter Malta.⁶¹

171. Inconsistency with this provision is permitted when such freedom can give rise to a breach in the interest of defence, public safety, public order, public morality or decency, or public health. Imposition of restrictions upon the movement or residence within Malta of public officers is not inconsistent with free movement. Another exception is the imposition of restrictions on the right of any person to leave Malta that are reasonably required in order to secure the fulfilment of any obligation imposed on that person by law.

172. Under European Union law one finds Directive 2004/38 on free movement of persons wherein there are the conditions in which Union citizens and their families exercise their right to move and reside freely within the Member States, the right of permanent residence and restriction to the right of movement on grounds of public policy, public security or public health.

2. Passport and visas

173. The Passport Regulations⁶², hold that passports may be issued to:

- (a) Citizens of Malta; or
- (b) Other Commonwealth citizens; or
- (c) Other persons who are not persons of Maltese nationality and are in Malta without a valid passport

174. Maltese law makes a distinction between people over the age of 18 and under the age of 18 (the latter category is further divided in other levels) and whether it is a renewal of a passport or the issuance of a new passport. In all circumstances, application is done through Form A which form is to be handed personally by the applicant to the Passport Office together with the appropriate fee. In the case of applicants aged 18 or over, passports are biometric, that is, they contain a facial biometric image and fingerprints. On the other hand, applicants under the age of 18 are to provide a passport size photo and no fingerprints

⁶¹ Article 44(1) of the Constitution of Malta.

⁶² S.L. 61.02

are taken. Minors aged between 16 and 18 years of age will have a passport valid for 10 years; valid for 5 years if they are aged between 10 and 15 years and valid for 2 years if they are still under 10 years of age. The same procedure applies when renewing a passport.

175. There are also Refugee Passports. The same rules applicable for Maltese citizens apply to this type of passport. However in this case, the refugee is to bring the Refugee Certificate issued by the Refugee Commission – this is the official confirmation of his / her refugee status. Furthermore, if s/he had a Travel Document, s/he has to surrender his / her previous passport when applying for the new one. On the other hand, in case of Alien Passports, s/he must obtain the relevant application Form (Form H) from Dar l-Emigrant, Emigration Commission which form is to be filed in by the Director of Dar l-Emigrant. As in all types of passports, the application is to be handed in personally by the applicant, however in this case the applicant must also provide the Humanitarian / Subsidiary Certificate issued by the Refugee Commission – this is the official confirmation of his / her status.

176. Presently there are thirty five countries, including Malta, which are designated as participants in the United States (US) Visa Waiver Program. This program enables citizens (of these countries) which hold an e-passport to travel to the United States for up to 90 days without applying for a tourist or business visa in advance. Travellers holding a Maltese e-passport must pre-register their US visit and be approved to travel to the US. Registration is simple and on-line through the Electronic System for Travel Authorisation (ESTA)⁶³ which is an automated system that confirms the eligibility of visitors to travel to the US under the Visa Waiver Program. A Travel Authorisation is currently valid for two years unless the passport expires earlier, in which case the expiry date and travel authorisation validity date will be the same.

3. Schengen Area

177. The Schengen area and cooperation are founded on the Schengen Agreement of 1985. The Schengen area represents a territory where the free movement of persons is guaranteed. The signatory states to the agreement have abolished all internal borders in lieu of a single external border. Here common rules and procedures are applied with regard to visas for short stays, asylum requests and border controls. Simultaneously, to guarantee security within the Schengen area, cooperation and coordination between police services and judicial authorities have been stepped up. Schengen cooperation has been incorporated into the EU legal framework by the Treaty of Amsterdam 1997.⁶⁴

178. On 21 December 2007, Malta joined the Schengen together with eight other new EU member states, thus Malta lifted its sea and land border control. This took place after a gradual process of adjusting to the common visa regime provided by the Convention Implementing the Schengen Agreement.

179. Malta's preparations included the construction of a new wing at the airport and the Valletta sea port to cater for the arrival and departure of Schengen passengers. The police force introduced a new unit, called Sirene, responsible for the administration of the Schengen Information System, an EU-wide Information Technology (IT) data system. This

⁶³ The ESTA is not a visa - in fact, a person from a non-visa waiver country should not even attempt to apply for ESTA. ESTA only pre-screens Visa Waiver travellers in order to allow them to travel to the US. An approved ESTA does not guarantee entry to the US, but it is a prerequisite to travel to the US by air or sea carrier.

⁶⁴ The Schengen Area and Cooperation
<http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm> accessed 3 February 2012.

section employs 40 police officers working on a 24-hour basis all year round. Malta's overseas missions, which will now also start issuing visas on behalf of all EU member states, had to be upgraded to meet high EU standards. Third country nationals (non-EU citizens) submitted to the visa obligation can travel with one Schengen visa within the whole Schengen area and no longer need to apply for a national visa for the new member states. Third country nationals who are in possession of a valid residence permit issued by a Schengen member state can travel on the basis of that valid residence permit and do not need to apply for a visa.

4. Refugees

180. The Refugee Act provides for the granting of refugee or asylum status to persons who meet the definition in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and the Government cooperated with the Office of the United Nations High Commissioner for Refugees (UNHCR). In practice, the Government provided protection against refoulement (that is, the expulsion or return of a refugee from one state to another where his life or liberty would be threatened), and granted refugee status and asylum. The law provides for refugee status, access to free social services and education, residence permits, and travel documents. Work permits for refugees are issued on a case-by-case basis. A refugee commission and an appeals board review asylum applications.

181. The law provides for due process and protection available to refugees applying for asylum. The Government also provides Temporary Humanitarian Protection (THP) to persons who do not qualify as refugees or asylum seekers. From 1st January 2011 till 31st December 2011, the Office of the Refugee Commissioner received 1862 applications for refugee status. It granted refugee status to 72 of these, granted subsidiary protection to 695 of them, granted temporary humanitarian protection to 129 of them and refused 708; 305 remained pending – Table 14.

182. The most common means through which irregular immigrants come to Malta is by boat. Malta is considered as a one step away from the rest of Europe since it is situated between the African countries and Europe. Last year the number of irregular immigrants that came by boat was that of 1,579. 2008 was the year when Malta saw the greatest number of irregular immigrants arriving by boat – it was that of 2,775 – Table 15. A number of EU member states as well as America helped Malta by taking a number of irregular immigrants and helped them re-instate themselves in society by providing employment and lodging.

Article 13

183. A distinction must be made between extradition and deportation. Extradition is when there is a person physically present in Malta (requested state) and authorities of other State (requesting state) want him or her to be extradited to that state because it is believed that s/he has committed a crime in that state. Article 43 of the Maltese Constitution holds that extradition is only permissible by pursuance made by treaty and under the authority of a law. On the other hand, deportation is when the deportee has been found in Malta illegally and s/he is deported back to his / her country of nationality.

184. Article 3 of the European Convention prohibits expulsion of nationals whether collectively or individually. Furthermore, no one shall be deprived of the right to enter the territory of the state of which he is a national. Article 4 goes on to read: “collective expulsion of aliens is prohibited”.

185. The Government of Malta can extradite a Maltese national to a foreign country, but the government cannot expel a Maltese citizen. Article 43 (3) of the Constitution provides

that “no citizen of Malta shall be removed from Malta ...” The Court cannot give expulsion as a punishment to the offence an individual committed.

Removal order and deportation

186. See paragraphs 150–155.

Article 14

187. The Constitution provides for an independent judiciary. The Law Courts’ mission is “to provide both the public and the judiciary effective and efficient services, structures and know-how to enable the public to understand, follow and be informed of the judicial processes in which they may be involved and to provide the judiciary with the necessary staff, tools and services in order that they may dispense justice properly and efficiently.”

1. Judges

188. Judges sit in the Superior Courts. Judges are appointed by the President of Malta acting in accordance with the advice of the Prime Minister. To date there is no Judicial Appointments Board or Committee in Malta, and the Prime Minister is not obliged to consult anyone before advising the President. In practice, however, he confers with the Minister responsible for Justice and he may also confer with the Cabinet. By tradition, the Minister responsible for Justice also confers with the Chief Justice on proposed appointments to the Bench of Judges and the Bench of Magistrates. The Prime Minister may also request the advice of the Commission for the Administration of Justice on any appointment to be made to either Bench.

189. Judges enjoy security of tenure, which means that a Judge can only be removed from office for proved misbehaviour or proved inability to perform the functions of his office. The removal is effected by the President of Malta upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and asking for such removal. Before any motion for removal is brought before the House it must be sent to the Commission for the Administration of Justice for investigation. The motion must contain definite charges against the Judge or Magistrate, as the case may be, on the basis of which the investigations are to be held by the Commission, as well as a statement showing the grounds on which any charge is based. If the Commission, after investigating, reports that there is no misbehaviour or no inability to perform the functions of office, then no further action can be taken upon the proposed motion. If, on the other hand, the Commission finds that there is a *prima facie* case of misbehaviour or incapacity, then it will be up to the House of Representatives to discuss the motion and vote upon it.

190. A Judge’s salary is a charge on the Consolidated Fund and may not be reduced.

191. To be appointed a Judge one must have practised as an advocate in Malta for not less than twelve years, or so practiced and served as a Magistrate for a period amounting in the aggregate to not less than twelve years, or have partly so practised or partly so served.

192. The Constitution provides for a mandatory retiring age for Judges (including the Chief Justice) and Magistrates. Currently this age is set at 65 which, by European standards, is regarded as being an early age.

193. Before commencing to exercise his judicial functions, a Judge must take the oath of allegiance set out in the Third Schedule to the Constitution before the President of Malta,

and the oath of office set out in Article 10 (1) of the Code of Organisation and Civil Procedure (COCP)⁶⁵.

2. Magistrates

194. Like Judges, Magistrates are appointed by the President of Malta acting in accordance with the advice of the Prime Minister. Magistrates sit in the Inferior Courts, and they enjoy the same security of tenure as Judges, with their salary being likewise a charge on the Consolidated Fund and which may not be reduced.

195. To be appointed a Magistrate, one must have practised as an advocate in Malta for not less than seven years. Until very recently a Magistrate had to vacate his office upon reaching the age of sixty years, which was an anomaly since the general retiring age of public officers was sixty-one. This mandatory retiring age has now been raised to sixty-five, thus bringing it in line with that of Judges. Before commencing to exercise his judicial functions, a Magistrate must take, before the President of Malta, the prescribed oath of allegiance and the oath of office.

196. In the Island of Gozo, Magistrates perform the functions of Judges in many civil matters. In fact the Court of Magistrates (Gozo) has a twofold jurisdiction: an inferior jurisdiction by virtue of which it takes cognisance of all causes of a civil nature which in Malta would be heard by the Court of Magistrates (Malta), and a superior jurisdiction by virtue of which it takes cognisance, with some exceptions, of causes which in Malta would be heard by the First Hall of the Civil Court and by the Civil Court (Voluntary Jurisdiction Section). One notable exception is in respect of applications or references alleging a violation of fundamental human rights (whether in terms of the Constitution or in terms of the European Convention on Human Rights), which must always be tried in first instance before the First Hall of the Civil Court in Malta. Appeals from judgments of the Court of Magistrates (Gozo) in its superior jurisdiction are heard in Gozo by a single Judge.

197. According to Article 7(2) of the COCP, the Chief Justice may designate one of the Magistrates as Senior Magistrate. The person so designated, who does not have to be the person who is most senior in terms of appointment to the Bench of Magistrates, is to perform such duties and functions as may be assigned to him by the Chief Justice or as may be provided by any law for the time being in force.

3. Maltese judiciary system⁶⁶

(a) The Constitutional Court

198. The Constitutional Court is composed of three judges. It interprets the Constitution and invalidity of laws, it has original jurisdiction in cases involving human rights violations and allegations relating to electoral corruption charges and decide questions as to membership of the House of Representatives and any reference made to it relating to voting for election of members of the House of Representatives.

(b) The Court of Appeal

199. This Court is composed of three judges when it hears appeals from the judgements of the Civil Court. An appeal also lies to the Court of Appeal from decisions of a number of administrative tribunals, mostly on points of law.

⁶⁵ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta.

⁶⁶ Il-Gudikatura Maltija: Court of Magistrates <<http://judiciarymalta.gov.mt/court-of-magistrates>> accessed 3 February 2012.

(c) **The Criminal Court**

200. In this Court the judge sits with a jury of nine persons to try, on indictment, offences exceeding the competence of the Court of Magistrates as a Court of Criminal Judicature. This court may, in certain exceptional cases, sit without a jury.

(d) **The Civil Court**

201. There are three sections in the Civil Court: the Family Section, the Voluntary Jurisdiction Section and the Civil Court, First Hall. One Judge presides in all three sections. The First Hall takes cognisance of all causes of a civil and commercial nature exceeding the jurisdiction of the Courts of Magistrates. Of particular importance is that it takes cognisance of all applications for redress in respect of alleged violations of human rights and fundamental freedoms protected by both the Constitution of Malta and by the European Convention of Human Rights.

(e) **The Magistrates' Courts**

202. This Court is composed of one Magistrate and it exercises both a civil and a criminal jurisdiction. The Court of Magistrates, in civil matters, has an inferior jurisdiction of first instance, limited to claims exceeding €3,494.06 but not more than €11,646.87⁶⁷. In criminal matters, the Court has a two-fold jurisdiction, namely, as a court of criminal judicature for the trial of offences which fall within its jurisdiction, and as a court of inquiry in respect of offences which fall within the jurisdiction of a higher tribunal. In the second case, it conducts the preliminary inquiry in respect of indictable offences and transmits the relative record to the Attorney General. The Attorney General may send for trial by this court any person charged with a crime punishable with imprisonment for a term exceeding six months but not exceeding ten years if there is no objection on the part of such person. The court asks the accused whether he objects to his case being dealt with summarily and if the accused does not object, the court becomes competent to try the accused and proceeds to give judgement.

(f) **The Gozo Courts**

203. The Court of Magistrates for Gozo in civil matters has a two-fold jurisdiction – an inferior jurisdiction comparable to that exercised by its counterpart Court in Malta, and a superior jurisdiction, both civil and commercial, in respect of causes which in Malta are cognisable by the Civil Court, First Hall. Within the limits of its territorial jurisdiction, this Court has also the powers of a Court of Voluntary Jurisdiction.

(g) **Small Claims Tribunal**

204. The Small Claims Tribunal is presided by an adjudicator who decides cases on principles of equity according to law. Adjudicators are appointed from amongst advocates for a term of five years. Adjudicators decide cases brought before them without delay. The aim is to have claims not exceeding the sum of €3,494.06⁶⁸ decided summarily. Sittings of this Tribunal are held in Malta or Gozo. An appeal from the decision of the Tribunal lies to the Court of Appeal on specific cases listed in the Act establishing the Tribunal.

⁶⁷ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 47 (1).

⁶⁸ Small Claims Tribunal Act (Chapter 380 of the Laws of Malta) Article 3(2).

(h) The European Small Claims Procedure

205. The European Small Claims Procedure Regulation – Regulation (EC) No. 861/2007 established a European Small Claims Procedure. The provisions of this Regulation came into force on 1 January 2009. The aim of this Regulation is to simplify and speed up the settlement of cross-border litigation on small claims. It applies to civil and commercial matters where the claim does not exceed €2,000. This procedure is a written procedure. The claimant shall commence this procedure by filling in a standard claim form including a description of evidence supporting the claim. A copy of the claim shall be served on the defendant and shall be dispatched within 14 days. The defendant shall submit his response within 30 days of service of the claim. The claim form shall be submitted in the language or one of the languages of the court or tribunal. In Malta, the Small Claims Tribunal hears and determines claims arising under the European Small Claims Procedure Regulation.

(i) Local Tribunals

206. A number of minor infringements of the law such as minor traffic offences (parking violations, etc.), illegal disposal of litter, tenancy are penalised and are heard by Commissioners of Justice in Local Tribunals situated in various localities. The Commissioners are selected from among persons holding a law degree and are given a three year appointment. As the offences have been depenalised the case may be decided even in the absence of the accused. Appeals are only possible on points of law.

(j) The Administrative Review Tribunal

207. On 1 January 2009 (with L.N. 345 of 2008) the provisions of the Administrative Justice Act⁶⁹, came into force. The aim of this act is to provide for Administrative Justice in Malta. This act provides for the setting up of the Administrative Review Tribunal, its constitution, the Chairman, sections, panels of assistants, registry, procedure and appeals from decisions of the Administrative Review Tribunal. The Administrative Review Tribunal is an independent and impartial tribunal applying the principles of good administrative behaviour.

208. This Tribunal is set up for the purpose of reviewing administrative acts. It consists of a Chairperson appointed for a period of four years by the President of Malta acting on the advice of the Prime Minister. The Tribunal is assisted by two assistants and holds sittings in Malta and Gozo. Administrative acts include the issuing by the public administration i.e. the government of Malta including its Ministries and departments, local authorities and any body corporate established by law of any order, licence, permit, warrant, authorization, concession, decision or refusal to any demand of a member of the public.

209. Any party to the proceedings before the Tribunal who feels aggrieved by a decision of the said Tribunal may appeal to the Court of Appeal sitting either in its superior or its inferior jurisdiction.

(k) The pre-trial system

210. When a cause has been assigned to a Judge, he shall as soon as practicable give such orders as may be conducive to an expeditious conclusion of the written pleadings. After the written pleadings have been concluded, the judge may give such orders as may be conducive to the proper conduct of the pre-trial or trial hearing. Unless a cause is appointed for a trial hearing, it shall be appointed for a pre-trial hearing. A cause shall be appointed

⁶⁹ Chapter 490 of the Laws of Malta

for a pre-trial hearing not later than two months after the conclusion of the written pleadings.

211. The purpose of the pre-trial hearing, which is presided by a Judge or a judicial assistant acting under the guidance and directives of the Judge, is amongst others to identify the factual and legal issues involved in the case, to examine the possibility of an agreed settlement or application for conciliation and mediation process before proceeding further with the cause and to identify the witnesses and documents necessary for determining the cause. The pre-trial procedure does not apply to the Civil Court (Family Section), the Court of Magistrates (Malta) and to the Court of Magistrates (Gozo) in its inferior jurisdiction.

(I) Reference to the Court of Justice of the European Communities

212. Article 267 of the Treaty on the Functioning of the European Union (TFEU) states:

The Court of Justice of the European Union [CJEU] shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the [CJEU] to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that Court or tribunal shall bring the matter before the [CJEU].

4. Article 39 of the Constitution

213. Article 39(1) deals with the general right to fair hearing in criminal cases which includes contraventions, while sub-article 2 of the same article deals with the general right to a fair hearing in civil cases. Both sub-articles hold that the case should be heard within a reasonable time. The main distinction between the two is that, criminal cases are to be heard before an independent and impartial court, while civil cases can be heard before independent and impartial court as well as before other adjudicating authority. Under Article 39(2) one also finds that existence or the extent of civil rights and obligations are to be determined.

214. Article 39(3) holds that all proceedings whether civil or criminal are to be held in public. However, there are exceptions to this rule. Article 39(4) deals with those cases which are heard in camera and these are: (a) voluntary jurisdiction and other proceedings; and (b) income tax.

215. To sum up all these points, the Maltese Constitution under Article 39 provides that cases are to be held in public except in cases before the Juvenile Court and other proceedings involving minors and income tax cases. These types of cases are held *in camera* in the interest of justice, defence, public safety, public order, public morality or decency, and the welfare of persons. The instances when a case is held in camera are the following:

- (a). The court of its own motion or on an application by any party to the proceedings, direct that the evidence of any person intended to be produced as a witness be taken before a judicial assistant at such place and time under such conditions as may be specified in the order;

(b) On an application by any party to the proceedings, desiring to confirm a fact stated in the application, or in a note accompanying it, by the affidavit of a person named by the party, order the person so named to appear for that purpose before a judicial assistant at such place and time as may be specified in the order;

(c) Either on its own motion or on a note filed by any party to the proceedings, direct that proceedings be stayed for such period as it considers appropriate, and refer the parties to a mediator.⁷⁰

216. Furthermore, the code provides that fair hearing is to be attributed to all cases, that is both civil and criminal cases and it extends to all courts and tribunals which are to be independent and impartial. As will be shown later on, the delivery of a case within a reasonable time is vital although it is not always adhered to especially in civil law cases.

217. Our Constitution then moves on to specific rights which are applicable only to criminal proceedings. Thus while in civil cases there are only general procedures, in criminal cases, the Constitution provides both for general procedures as well as specific procedures. These specific proceedings mainly deal with the right to know on what s/he is being accused of, right to a lawyer, cross examination, the right for an interpreter and the accused must always be present.

5. Competent Authority

218. Under the Maltese Constitution, a person charged with a criminal offence has the right to a fair hearing by “an independent and impartial court established by law”. In civil cases “any court or other adjudicating authority prescribed by law” is able to decide the case. Moreover, the European Convention provides for a fair hearing “by an independent and impartial tribunal established by law”. Thus under our law, a criminal case can only be decided by a judge or a magistrate while in civil cases, the case can be decided not only by a judge or magistrate but also by a tribunal.

6. Innocent until proven guilty

219. Section 39(5) deals with the presumption of innocence. This section corresponds to Article 6(2) of the Convention, which provides that “every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty”. This indirectly implies that the accused has the right to remain silent, as he does not have a duty to prove his innocence.⁷¹

7. Informed promptly

220. Both the Constitution (Article 34(2)) as well as the Criminal Code (Article 355AC (1)) provide that a person who is arrested or detained shall be informed at the time of his / her arrest or detention of the reasons for his / her arrest or detention, even though the arrest may be obvious. Furthermore such information is to be given in a language that s/he understands. In the case where the arrested needs an interpreter and is not readily available, then an interpreter is to be appointed as soon as practicable.

8. Reasonable time

221. Article 6 of the Convention and Article 39(1) of the Constitution both guarantee that when a person is arrested or detained for the purpose of bringing him / her before a court in

⁷⁰ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 173.

⁷¹ Vide paragraphs 131-133 of this report

execution of the order of a court or on the basis of reasonable suspicion of his / her having committed or being about to commit a criminal offence shall be brought “within a reasonable time” to all defendants including those pending trial. It is clear that what amounts to a reasonable time can vary according to the facts of the case.

222. Article 34 of the Constitution holds that any person arrested or detained shall be brought before the courts within 48 hours or be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that s/he appears at a later date for trial or for proceedings preliminary to trial. The same is stated in the Criminal Code under Article 355AJ(3). Article 355AL(2) goes on to state that before the custody officer orders the release from custody of a person, s/he shall inform the investigating officer and a Magistrate and the final decision shall be taken by the Magistrate.

223. If the police arrest someone and at the moment of arrest, objectively speaking, they had a reasonable suspicion but after ten hours they realised that the person arrested is completely innocent, just because there existed the reasonable suspicion during the first moment does not mean that they have a right to keep the suspect at the police Head Quarters for 48 hours. Thus, if during those 48 hours, this reasonable suspicion ceases to exist then the police have a duty (and the arrested person has a right) to be released even though the 48 hours have not yet elapsed. A landmark judgement is *Frank Mifsud vs. Commissioner of Police et* (Constitutional Court)⁷². Frank Mifsud got released after 46 hours but the Constitutional Court said that Frank Mifsud could have been released before because it was evident that the suspicion which existed at the moment of arrest had ceased to exist and since the Criminal Code provides that one must be released without undue delay and in no case for a period exceeding 48 hours, the Court ruled that the arrest was illegal even though it did not exceed the period of 48 hours.

9. Presence of the accused

224. In an early reported case *Regina vs. Vella*⁷³, the Criminal Court of Malta affirmed the undisputed principle that Maltese law does not admit trials *in absentia* in criminal matters. The Criminal Code does not say so in these terms, but in several of its provisions clearly postulates the necessary presence of the accused, also providing a sanction for his non-appearance. It is in fact provided in Article 443 that on the day and at the time appointed for the hearing of a case or of any question incidental thereto the accused is to be put, without any restraint, in the place appointed for the purpose. If s/he is in custody s/he is brought to court “in such manner as may be necessary to prevent his escape”. If s/he is not in custody, s/he is required to appear by means of a summons and, in case of non-appearance, an order is to be made for his / her arrest.

225. In Maltese law the presence of the accused at his / her trial is not only a right but also an obligation, which is visited with a sanction. The rule is also that the accused must appear personally, but such rule is relaxed in case of contraventions. The Code under Article 375 (b) and 374 (b) provides that in such cases the Court may, on good cause being shown, exempt the accused from appearing personally and permit the husband or wife, or a near relative by blood or affinity, or any other person having the charge of the accused or authorised by him in writing to appear instead. If the offence charged is not a contravention, then if the accused himself / herself is not personally present, both the judgement and the proceedings are null.

⁷² *Frank Mifsud vs. Commissioner of Police et* (Constitutional Court) 7 March 1990.

⁷³ *Regina vs. Vella* (Criminal Court) 18 November 1898.

226. As it is, in the event of the accused non-appearance at his trial, after having been duly summoned, the Maltese Criminal Code provides no alternative to a warrant of arrest and also makes no exception, reservation or proviso.

227. The necessary presence rule is carried also into the appeal stage. In fact it is provided in the Criminal Code (Article 422) that if on the date appointed for the hearing of the appeal the appellant fails to appear, his / her appeal is taken to have been abandoned and the judgement appealed from is carried into effect. However the appellant has the right to file an application within four days, together with a sworn declaration to the effect that he was, on account of illness or for any other reason independent of his will, which is to be expressly stated in the application, unable to attend on the aforementioned date and the court will appoint another date for the hearing of the appeal.

228. What is interesting is that the Constitution of Malta, which came into force in 1964 and as to its human rights provisions was in great part inspired by the Convention, deals expressly with the important matter of the presence of the accused in his trial proceeding and does so in the provision corresponding in general to Article 6 of the Convention. It lays down that, except with the consent of the person charged, his / her trial cannot take place in his / her absence unless s/he so conducts himself / herself as to render the continuance of the proceedings in his / her presence impracticable and the court has ordered him / her to be removed and the trial to proceed in his / her absence.⁷⁴

10. Right for a lawyer

229. Article 39(6) of the Maltese Constitution holds that the person accused has the right for a legal representative; this right cannot be restricted. Sub-article 11 of the same article defines a legal representative as “a person entitled to practise in Malta as an advocate or, except in relation to proceedings before a court where a legal procurator has no right of audience, a legal procurator”. When coming to the right of legal representation, the European Convention under Article 6(3)(c) of the First Schedule confirmed that freedom to choose one’s lawyer is not guaranteed when the defendant is in receipt of legal aid: “to defend himself in person or through legal assistance of his own choosing or, if s/he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

230. The right for a lawyer extends to the extent that if a party to a case does not have sufficient means to pay for a legal representative, the Advocate for Legal Aid undertakes the case of that party.⁷⁵ The decree granting the benefit shall apply to all courts and adjudicating authorities. The appointment of a legal aid works in rota. The COCP holds that “it is lawful for such party for a good cause, to request the court, through the Advocate for Legal Aid, to substitute the advocate or legal procurator by another advocate or legal procurator from the rota”.⁷⁶ By the end of 2011 there were 16 Legal Aid Lawyers and 25 Legal Aid Procurators – Table 16. The right for a legal aid representative is not limited to criminal cases but it covers also civil cases. For instance, last year 282 persons made use of this right during civil law cases – Table 17.

⁷⁴ J.J. Cremona, *Selected Papers 1990 – 2000*, Volume 2 Human Rights and Constitutional Studies (Publishers Enterprises Group PEG Ltd, 2002).

⁷⁵ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 911 et seq; Court Practice and Procedure and Good Order (Criminal Code) Rules of Court, Subsidiary Legislation 9.11 Rule 2 (2).

⁷⁶ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 918.

11. Examination and cross-examination⁷⁷

231. When a witness fails to attend to a sitting to which s/he has been summoned to appear, the witness is guilty of contempt of court and is punished accordingly (usually a fine). It can also be the case where the court (by means of a warrant of arrest or escort) compels a witness to attend to give evidence. If good cause is shown for not attending before the court, the punishment can be remitted.

232. The witness is sworn before examination and usually testifies *viva voce* in open courts; however there can be instances where the witnesses give their evidence through an affidavit. However in this situation, the court may still compel the witness to appear before the court. During questioning the witness cannot be assisted or advised by any person.

233. The COCP provides for two forms of examining witnesses – the examination-in-chief and cross-examination. No leading or suggestive questions may be put in an examination-in-chief (although a lawyer can ask such questions by special permission of the court). The opposite party has the right to examine (that is, cross examine) a witness and leading and suggestive questions can be asked. During the cross-examination, a witness may only be questioned on the facts deposed in his examination, or on matters calculated to impeach his credit, that is, a party producing a witness is not allowed to impeach the credit of the witness by evidence of bad character but s/he may contradict him / her by other evidence and may also show that s/he has made at other times statements inconsistent with his / her present testimony. However, when the cross-examining lawyer desires to prove a matter on a fact which has not been emerged in the examination, the lawyer will produce that same witness as his / her own witness. Furthermore, the court at any stage of the examination or cross-examination may put questions to the witness. When both the examination and cross-examination have been conducted no further questions may be put by either of the parties, but it is lawful for the court or for the party, with the permission of the court, to ask questions on any answers given in the course of the examination or cross-examination.

234. Moreover, with regard to the examination of the accused, the Criminal Code⁷⁸ holds that the court asks without threat or promise, his / her name and surname, age, place of birth and residence, trade, profession or calling, name and surname of his / her father and whether his / her father is still alive or dead. The following vital question is whether s/he wants to plead guilty or not. However prior to asking the latter question, the court explains to the accused the nature of the charges put against him / her and informs him / her that s/he is not obliged to answer any question nor to incriminate him / herself, that s/he may be assisted by an advocate or legal procurator and that whatever s/he says may be received in evidence against him / her.

12. Interpreter

235. Both the COCP and the Criminal Code give importance to the service of interpreters when the need arises. The COCP provides that the Maltese language is the language of the court, however if any of the parties do not understand the language of the oral proceedings, then the proceedings are interpreted to him / her by the court or by a sworn interpreter. The same applies to the situation when the evidence is given in a language which the court does not understand.⁷⁹ Furthermore, Article 649 (8) of the Criminal Code reads: “The magistrate shall conduct the hearing and where necessary the magistrate shall appoint an interpreter to

⁷⁷ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Articles 577 et seq.

⁷⁸ Criminal Code, Chapter 9 of the Laws of Malta, Articles 390 and 392.

⁷⁹ This is regulated by Judicial Proceedings (Use of English Language) Act, Chapter 189 of the Laws of Malta.

assist during the hearing. The magistrate present shall ensure that the person to be heard is identified and that the proceedings take place and continue at all times in conformity with the fundamental principles of the law of Malta”.

13. Self-incrimination

236. Witnesses have the privilege to remain silent and not answer to any incriminating questions. It is at the court’s discretion to determine when a question is degrading or when the answering of the questions will disclose information which is prejudicial to the public interest. This privilege extends to facts known as *ratione officii*, that is, information derived from or relating to any document belonging to or in possession of any civil, military, naval or air force department of the public service.

14. Juvenile Court

237. The Juvenile Court established under the Juvenile Court Act, set up in 1980, is deemed by law to be a Court of Magistrates. A Magistrate usually sits alone in the Court of Magistrates, however, when the court sits as a Juvenile Court the Magistrate sits with two lay assistants one of whom must be a woman⁸⁰. The Juvenile Court hears criminal cases brought against persons who are under the age of sixteen years⁸¹. It also hears appeals against care orders made by the minister responsible for social welfare under the Children and Young Persons (Care Orders) Act. The Juvenile Court holds sittings both in Malta and in Gozo.⁸² In fact the Criminal Code under Article 28C (3) (b) holds that “the Juvenile Court shall be deemed to be a Court of Magistrates (Malta) or a Court of Magistrates (Gozo), as the case may be.”

238. Sittings are held in Sta. Venera. The Courts hears charges against, and holds other proceedings relating to minors under the age of sixteen years, and may also issue Care Orders in their regard. Given the confidential nature of such sittings, attendance to hearings is restricted to persons mentioned in the law establishing the Court.⁸³

239. The Juvenile Court does not have competence to hear charges against or other proceedings relating to, a child or young person under the age of sixteen who is charged jointly with any other person not being a child or young person.

240. The Court *ex officio* or the lawyers can make requests asking for the restriction of the issuance of the name, address or school of the young person in newspaper reports, radio or television broadcasting. This also extends to other information which may lead to the identification of the child, for instance the name of the parents. Add to this, no pictures of

⁸⁰ The two assistants are appointed by the President, acting in accordance with the advice of the Prime Minister, from amongst persons who in the Prime minister’s opinion have previous experience and special qualifications for dealing with problems of juvenile.

⁸¹ Article 6 (1) of the Juvenile Court Act: “Where in the course of any proceedings before the Juvenile Court it appears to the court that the person charged or to whom the proceedings relate has attained the age of 16 years, the said court ... shall adjourn the case and refer it to the competent Court of Magistrates which shall take cognizance of the case as if the proceedings had been commenced before the said Court of Magistrates”. Furthermore Article 6 (2) reads: “Where in the course of any proceedings before a Court of Magistrates it appears to the court that the person charged or to whom the proceedings relate is under the age of 16 years, the said court shall adjourn the case and refer it to the Juvenile Court which shall proceed with the hearing and determination of the case as if the proceedings had been commenced before the said Juvenile Court”.

⁸² Il-Gudikatura Maltija: Court of Magistrates <<http://judiciarymalta.gov.mt/court-of-magistrates>> accessed 3 February 2012.

⁸³ The Law Courts: The Juvenile Court <<http://www.mjha.gov.mt/page.aspx?pageid=145&printonly=true>> accessed 3 February 2012.

the young person are published in any newspaper or on television. This restriction applies to any young person concerned in a proceeding whether being the person against or in respect of whom the proceedings are taken or as being a witness therein.⁸⁴

15. Right of Appeal

241. The Court of Criminal Appeal⁸⁵ is divided into two: Court of Criminal Appeal (Inferior Jurisdiction) and the Court of Criminal of Appeal (Superior Jurisdiction). The Court of Criminal Appeal (Inferior Jurisdiction) is presided by one judge and hears appeals from the Court of Magistrates in its Criminal Jurisdiction, while the Court of Criminal Appeal (Superior Jurisdiction) is presided by three judges (the Chief Justice who is the President of the court and two other judges) and hears appeals from the Criminal Court. The accused has a *carte blanche* on what to appeal and can appeal in one of these courts depending on the court which handed down the sentence. In other words, the accused can appeal against his / her conviction in all cases or appeal against the sentence passed on his / her conviction. An appeal can never result in a sentence of greater severity. An accused person may also appeal against a verdict of not guilty on the ground of insanity. In certain cases the Court may also order a re-trial. On the other hand, the Attorney General, who is the prosecutor before the Criminal Court, can only appeal from cases handed down by the Court of Magistrates whether in its own competence or whether the case has been heard summarily (that is, the accused stated that s/he is guilty and the said charge is an offence liable to a punishment not exceeding ten years imprisonment). The Attorney General does not have a *carte blanche* like that of the accused. The Attorney General's right of appeal is limited in most cases to appeals on points of law, although increasingly, particular laws are giving a general right of appeal to the Attorney General in connection with some offences (for instance, under the Arms Act and under the Gaming Act). In cases relating to summary proceedings, for offences within the jurisdiction of the Court of Magistrates as a Court of Criminal Judicature, the Attorney General can appeal only on certain grounds, these being when:

- (a) The inferior court does not have jurisdiction over the case;
- (b) The accused has been convicted to a punishment exceeding the jurisdiction of that court;
- (c) The punishment awarded by the inferior court is different from that prescribed by law for the offence for which the convicted has been sentenced;
- (d) The accused has been acquitted on the ground that the fact does not contain ingredients of an offence, of extinguishment of action, or of a previous conviction or acquittal;
- (e) the defendant has been declared to be exempt from punishment;
- (f) the police or the complainant has not been allowed at the trial to produce some indispensable evidence which was admissible according to law.

242. As with regards to the Court of Criminal Appeal (Superior Jurisdiction), the Attorney General can only make a reference under Article 500 (2) of the Criminal Code. This reference, however, will not affect the trial in relation to which the reference is made or any acquittal in that trial.⁸⁶

⁸⁴ Juvenile Court Act, Chapter 287 of the Laws of Malta, Article 8.

⁸⁵ Criminal Code, Chapter 9 of the Laws of Malta, Article 498.

⁸⁶ *ibid.*, Article 500B (3).

243. The Court also hears appeals by the accused and by the Attorney General from decisions on preliminary pleas and from decisions of pleas regarding the admissibility of evidence.

16. Compensation

244. Article 409A of the Maltese Criminal Code gives the opportunity to the person in custody to file an application to the Court of Magistrates if s/he believes that s/he is being unlawfully detained under the authority of the Police or any other public authority. Such application is appointed for hearing with urgency and the application together with the date of the hearing are served on the same day of the application on the applicant and Commissioner of Police or any other public authority. The Commissioner of Police or public authority may file a reply by not later than the day of the hearing.

245. On the other hand, when a person in custody for an offence for which s/he is charged or accused before the Court of Magistrates alleges that his / her continued detention is not in accordance with the law, he/she may at any time apply to the court demanding his / her release from custody. This application is appointed for hearing with urgency and together with the date of the hearing are served on the same day of the application on the Commissioner of Police or / and the Attorney General.

246. The Maltese Constitution under Article 34 (4) provides that “any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person.”

247. In *Sabeur Ben Ali v. Malta*,⁸⁷ the European Court of Human Rights held that an individual detained for drug possession was entitled to compensation for unlawful detention with interest. This occurred after the defendant petitioned to have his detention reviewed for lawfulness and stood before magistrates who didn’t actually have the authority to examine the reasonableness of the suspicion against him. This was found to constitute a denial of a prompt proceeding on the matter. The court noted that the purpose of 5(3) of the European Convention on Human Rights “was to provide persons arrested or detained on suspicion of having committed a criminal offense with a guarantee against any arbitrary or unjustified deprivation of liberty.” Because the magistrates who reviewed the matter did not actually have the power to release the defendant upon a finding of lack of reasonable suspicion of guilt, the review failed the purpose of its objective.⁸⁸

17. Double jeopardy

248. Furthermore Article 39(9) of the Constitution deals with the *nebis in idem* rule:

No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:

⁸⁷ *Sabeur Ben Ali v. Malta*, No 35892/97, ECtHR, 2000.

⁸⁸ Robert Bliss, ‘Memorandum for the International Criminal Court – Article 85: if someone is wrongfully detained or convicted, what recourse does he have? What compensation is he entitled to? Is this monetary, and if do, where does the money come from? What should the court take in into consideration when deciding on compensation?’ (Case Western Reserve University School of Law International War Crimes Research Lab), 46.

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this sub-article by reason only that it authorises any court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so however that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

249. The accused cannot be sentenced twice for the same offence. If a court sentences the person, s/he cannot be sentenced again for the same offence. Moreover, if there was an offence of which s/he could have been prosecuted for but did not, then it cannot be revived later on. The Criminal Code under Article 527 clarifies this point even further: “Where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact.”

Article 15

Penal laws are not retrospective

250. Article 39(8) of the Constitution deals with the fact that penal laws are not retrospective, that is, to say that criminal laws can only be prospective – *lex non abet oculus retro*:

No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

251. Other laws, be they civil, fiscal and so on can be retroactive. If the crime is an offence under the law but when the trial starts the offence is repealed, the offender can still be prosecuted because when s/he committed the offence, that act was considered unlawful / illegal. This does not go against the principle of retroactivity. On the other hand, one cannot be charged for an offence which s/he committed when it was not an offence back then. In the case of *Police vs. Lawrence Cuschieri*⁸⁹ the general rule of applying the law of the procedure at the time of the trial was tested constitutionally. Cuschieri was charged with the offence of bribery of Public Officers by paying them in return for the issuing of licences. In this offence, the code required the corroboration of the evidence of an accomplice. An accomplice giving evidence against the accused is only permitted if the corroboration is supported by an independent witness. When Cuschieri committed the offence, this was still applicable. A law was passed during the trial repealing the rule of corroboration and an accomplice could give evidence without the need of corroboration. In other words, pending proceedings there was the derogation of the general rule (and not of the specific rule, namely that of corruption) and thus this general rule was tested constitutionally and with respect to the Convention. Cuschieri’s pleas were rejected on the grounds that this general rule was not in violation of the Constitution or the Convention. The Constitution states that no person can be punished for an offence that did not constitute a criminal offence when it was committed and a person is not to be punished more severely than he would have been punished at the time of the commission of the offence. The amendments to Article 639(3) of the Criminal Code did not affect these two principles in any way. This was not a substantive rule change because corruption was always an offence. This is a rule of

⁸⁹ *Il-Pulizija vs. Lawrence Cuschieri* (Constitutional Court) 8 January 1992.

procedure – a rule of evidence that changed. Thus the non-retroactivity of penal laws in the Constitution does not include the non-retroactivity of procedural rules.

Article 16

1. Juridical person

252. Our law makes a distinction between a natural person and a juridical person. Section 4(d) of the Maltese Interpretation Act states that whenever the expression ‘person’ is encountered in any Act of Parliament it should be interpreted, unless the contrary is shown, as including body or other association of persons whether such body or association is corporate or unincorporated.

253. Maltese Commercial Law up to 1925 did not expressly recognise the legal personality of commercial partnerships. Professor Cremona states that this juridical character flowed impliedly from a careful analysis of the general principles governing the contract of partnership in general and commercial partnership is particular.

254. Thus the company becomes a separate legal person from its promoters, directors, members and employees. It becomes a person which the law recognises in its own right, an entity with a separate and autonomous juridical character. This is confirmed by Article 4 (4) of the Companies Act⁹⁰ which states that:

A commercial partnership has a legal personality distinct from that of its member or members, and such legal personality shall continue until the name of the commercial partnership is struck off the register, whereupon the commercial partnership shall cease to exist.

2. Natural person

255. On the other hand, the Maltese law does not provide a definition of natural person and thus it is unclear whether an unborn child is to be considered a natural person or otherwise. It is a potential person but it does not have the capacity to act on its own, thus the law does not consider the child as its subject. For a child to be protected it must be an actual person and not a potential one.

256. The Civil Code makes a distinction between children born viable and those which are not born viable. Article 601 (1) holds that those who are not born viable are incapable of receiving by will, or the other hand, those who are born alive, shall be presumed viable. Thus this could be interpreted as meaning that rights of inheritance begin only at birth, and only when the newborn is sufficiently mature to be considered viable.

257. Article 9(h) of the Commissioner for Children Act provides that one of the functions of the Commissioner is “to promote the highest standards of health and social services for women during pregnancy and to promote special care and protection including adequate legal protection, for children both before and after birth”. Prima facie, one might say that the unborn child is protected under this provision but the Parliamentary debates show otherwise because the legislators were not including the unborn child in their concept of children. When the provision is referring to “adequate legal protection” for the unborn child, one can make reference to when curators ad ventrem are appointed in cases where at the time of the death of the husband, the wife declares that she is pregnant. The curator is appointed by the court upon the demand of any person interested, with a view to prevent

⁹⁰ Companies Act, Chapter 386 of the Laws of Malta.

any supposition of birth, or substitution of child and administering property up to the day of the birth, under such directions as the court may deem it property to give.⁹¹

3. Birth registration

258. The Civil Code under Article 272 provides that “in the case of every child born, it shall be the duty of the father and the mother, and in default of both, of the physician, surgeon, midwife or any other person in attendance at the birth, or in whose house the birth has taken place, to give within 5 days of such birth, notice thereof to the officer charged with the duty of drawing up to the act of birth”. The act of birth contains the following particulars:

- (a) The date of the act itself;
- (b) The hour, day, month, year and place of birth;
- (c) The sex of the child;
- (d) The name given to the child;
- (e) The name, surname, identification document, age, place of birth and of residence of the father of the child, of the mother and of the person making the declaration.

259. Thus there is an obligation on the parents to register their child and also to give a name to that child. The child takes the surname of the father, however that of the mother could be added to it too.

260. Article 283(3) affirms that in case of abortion, an act of birth shall only be drawn up where the foetus shall have completely assumed the human form. In the case of a still born child, an act of birth is to be drawn up and must indicate that it was so born.

Article 17

261. The starting point of an analysis of Maltese law on the right to privacy is the Constitution of Malta. Article 38 thereof is entitled “protection for privacy of home or other property”. Having a secure place to live in is one of the fundamental elements for human dignity, physical and mental health, and overall quality of life, which enable one’s development. A violation of this right was always subject to effective legal sanctions.

262. Police officers with the rank of inspector and higher are allowed to issue search warrants based on reasonable grounds for suspicion of wrongdoing. Under the law, special powers such as telephone tapping are available to the security services only under specific written authorization of the Minister for Home Affairs or the Prime Minister; such actions are permitted only in cases relating to national security, including combating organised crime.

1. Search of property

263. Article 38(1) of the Constitution of Malta reads: “Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others in his premises”. However, search on the person and the property and entry in any premises is allowed when there are:

- (a) Reasonable grounds in the interest of defence, public safety, public order, public morality or decency, public health, town and country planning, the development and

⁹¹ Civil Code, Chapter 16 of the Laws of Malta, Article 170 (1).

utilisation of mineral resources, or the development and utilisation of any property in such a manner as to promote the public benefit;

(b) Reasonable grounds for promoting the rights or freedoms of other persons;

(c) The required authorisations given by a department of the Government of Malta, or a local government authority, or a body corporate established by law for a public purpose, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property or installation which is lawfully on those premises and which belongs to that Government, that authority, or that body corporate, as the case may be; or

(d) For the purpose of enforcing a judgment or order of a court, the search of any person or property by order of a court or entry upon any premises by such order, or that is necessary for the purpose of preventing or detecting criminal offences.

264. This article is backed up by other articles in the Criminal Code. An entry and search of a premises, house, building or enclosures can only be carried out after attaining the required authorisation of a Magistrate, who issues a warrant to this regard. However an entry warrant is not required in case of discovery of any property in respect of which an alert has been entered in the Schengen Information System and there is imminent danger that the property may be concealed, lost damaged, altered or destroyed.

265. Entry and search may not be executed after sunset unless the Magistrate has authorised otherwise in the warrant or if the executing police officer has reasonable cause to believe that the purpose of the entry and search will be frustrated if the execution of the warrant is delayed. A copy of the warrant is to be handed to the person occupying and present at the place searched or any other person in charge of the same place and happens to be present. In the case where there is no one present, a copy of the warrant is left in an easily visible place on the premises. One is to note that, the search is only limited to the purpose for which the search warrant was issued, however if in the course of the search, offences other than the offence is mentioned in the warrant are discovered, the search may extend to the extent required for the purpose of such offence. Furthermore a search can be carried out on premises where a person is arrested, even if temporarily, if the police have reasonable ground for suspecting that there is evidence relating or connecting to the offence/s.

266. The power of entry and search may be exercised by a police officer not below the rank of inspector or by officers of a lower rank if so authorised in writing by an officer not below the rank of inspector. However if on the scene there are officers of a lower rank and the matter admits of no delay and the person occupying or in control of the premises is present and his presence is necessary for the effective investigation of the offence, the officers present may proceed to enter and search the premises without authorisation.

267. The police may seize anything which is on the premises if they have reasonable grounds for believing that it has been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence and that it is necessary to seize it to prevent it being concealed, lost, damaged, altered or destroyed for which a receipt is issued for anything seized. The things seized can be retained as long as is necessary.

2. Stop and Search

268. The Criminal Code gives the police officers the right to stop and search in a public place or place accessible to the public, even places which are accessible against payment. The search can be made on the person or vehicle. However to stop and search someone the police must have reasonable suspicion that the search will discover the possession of things which are prohibited, stolen or acquired as the result of an offence, or may be used at the

commission of an offence. Furthermore, the police have the power to seize any things discovered during the search and the possession of which is prohibited or which may be connected with an offence. The things seized are preserved and a report is drawn up by the police who did the search indicating the things seized. The search on the person is to be done by a police officer of the same sex unless s/he is caught red-handed and an official of the same sex is not present.

269. For the police to search a vehicle, the owner of the car is to be present during the search. However there may be instances when the owner cannot be present, so in such case the police officer will carry out the search only if s/he has a warrant of search from an officer not below the rank of inspector.

270. On the other hand, the police may conduct road checks. However this can only be done upon authorisation in writing by a police officer not below the rank of inspector. This power is given to them by Article 355 of the Criminal Code. Road checks are carried out where there are reasonable grounds for believing that a check on vehicles in or passing through a locality may lead to:

- (a) the arrest of a person who has committed or is reasonably suspected of having committed or of being about to commit a serious crime [i.e. crime liable to the punishment of imprisonment]; or
- (b) the discovery of anything the possession of which is prohibited or restricted by law or which is connected in any way whatsoever with the commission of a serious crime or which is evidence of any such crime; or
- (c) the arrest of any person whose arrest has been ordered by a court or any other lawful authority or who is otherwise unlawfully at large; or
- (d) the ascertainment that a person is not abiding by a condition lawfully imposed on him by a court; or
- (e) the ascertainment of violations of any law regarding motor vehicles or traffic regulation; or
- (f) the arrest, or ascertainment of whereabouts, of a person in respect of whom an alert has been entered in the Schengen Information System; or
- (g) the discovery of any property in respect of which an alert has been entered in the Schengen Information System.

271. During the road check the police may stop all or any vehicle and when a vehicle is stopped, that vehicle may be searched by the police. Like in the case of stop and search in road checks, the police may collect evidence which shows an indication of a commission of an offence. However the police also have the power to collect evidence other than that in respect of which the road check was organised. The Police shall investigate such offence and where appropriate institute proceedings for that offence.

3. Personal and body search

272. Intimate search is defined by the Criminal Code as a search which consists of physical examination of a persons' body orifice other than the mouth. On the other hand, non-intimate search is defined as

- (a) a sample of hair other than pubic hair;
- (b) a sample taken from a nail or from under a nail;
- (c) a swab taken from any part of a person's body including the mouth but not any other body orifice;

- (d) urine or saliva;
- (e) a footprint or a similar impression of any part of a person's body other than a part of his hand.

273. Intimate samples can only be taken with the consent of the person arrested. If the arrested person refuses to give his / her consent, the investigating officer informs the Magistrate of such refusal and the latter will decide whether the request is justifiable or not. If the request is justifiable, the Magistrate visits the person arrested to request his consent. However before doing so, the Magistrate will explain to the arrested person the nature of the request and the reasons thereof, the consequence of giving his consent and to refusing consent (that is, in case of refusal, the judges may draw an inference from the refusal or be treated as, or as capable of amounting to corroboration of any evidence against the person in relation to which the refusal is material) and that s/he is entitled to consult a lawyer or legal procurator before deciding whether or not to give his / her consent.

274. An intimate search is only carried out after the Magistrate issues a search warrant, thus the arresting officer or custody officer requests the magistrate to order an intimate search of the persons arrested. The magistrate then appoints an expert (who cannot be a person of the opposite sex unless the expert is a medical practitioner and the person to be searched consents thereto in writing) to carry out the search under safeguards that are considered necessary for the purpose of decency and to report to the Magistrate on his / her findings. The report is to be forwarded to the arresting or custody officer without delay.

4. Surveillance, interception of any form of communication, wire-tapping and the recording of conversations

275. Legal protection with regard to surveillance and interception of communications in Malta pre-dates the introduction of the Data Protection Act. Such protection was introduced by the Security Service Act, 1996. This Act introduced a new concept with respect to the privacy of communications between persons. More recently, the Processing of Personal Data (Electronic Communications Sector) Regulations issued under the Data Protection Act, specifically regulate this aspect within the electronic communications sector.

276. The Electronic Communications (Regulation) Act refers to privacy in Article 4. In Article 4 (c)(iii), the objectives of the Malta Communications Authority include inter alia that of promoting the interest of users within the Community by contributing to ensuring a high level protection of personal data and privacy. Article 47(1)(k) also refers to privacy in the context of Data Protection law

- (1) The Minister may, either on the recommendation of the Authority or on his own initiative after consultation with the Authority, make regulations to give better effect to any of the provisions of this Act and in particular to:

- (k) provide for data retention obligations, and for rules regarding the access by the Authority and by the Police to data retained by undertakings, and prescribe measures to be taken by any person for the purpose of ensuring the inviolability of electronic communications transmitted and their confidentiality and the protection of privacy in relation to any electronic communications service including data protection measures in the electronic communications sector and data protection measures related to the use of information obtainable in the electronic communications sector for the purpose of direct marketing

277. Data protection and privacy are also referred to by both the Malta Communications Authority Act as well as the Postal Services Act. Article 34 of the Broadcasting Authority Act, on its part, lists a number of instances in which the Authority has the power and duty

to consider complaints relating to “unwarranted infringement of privacy in, or in connection with the obtaining of material included in, sound or television programmes so broadcast”.

278. A substantial reference to privacy is found in the Data Protection Act. The first instance where such reference is made is in the opening sentence of the Act itself, which states that the aim of this Act is to “make provision for the protection of individuals against the violation of their privacy by the processing of personal data and for matters connected therewith or ancillary thereto”. The same act holds that non-sensitive personal data may be processed where such processing is necessary for a purpose that concerns a legitimate interest of the controller or of such a third party to whom personal data is provided, except where such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and in particular the right to privacy”. Furthermore, the Data Protection Act outlines nine principles to ensure the protection of personal information⁹², namely to ensure that:

- (a) personal data is processed fairly and lawfully;
- (b) personal data is always processed in accordance with good practice;
- (c) personal data is only collected for specific, explicitly stated and legitimate purposes;
- (d) personal data is not processed for any purpose that is incompatible with that for which the information is collected;
- (e) personal data that is processed is adequate and relevant in relation to the purposes of the processing;
- (f) no more personal data is processed than is necessary having regard to the purposes of the processing;
- (g) personal data that is processed is correct and, if necessary, up to date;
- (h) all reasonable measures are taken to complete, correct, block or erase data to the extent that such data is incomplete or incorrect, having regard to the purposes for which they are processed;
- (i) personal data is not kept for a period longer than is necessary, having regard to the purposes for which they are processed.

279. It further lays down a number of criteria on the sole basis of which personal data processing may be justified when the data subject:

- (a) has given his explicit consent to processing; or
 - (b) has made the data public.⁹³
- (13) Sensitive personal data may be processed if appropriate safeguards are adopted and the processing is necessary in order that:
- (a) the controller will be able to comply with his duties or exercise his rights under any law regulating the conditions of employment; or
 - (b) the vital interests of the data subject or of some other person will be able to be protected and the data subject is physically or legally incapable of giving his consent; or

⁹² Data Protection Act, Chapter 440 of the Laws of Malta, Article 7.

⁹³ *ibid.*, Article 12 (2).

(c) legal claims will be able to be established, exercised or defended.

280. These criteria are more stringent for the processing of sensitive personal data than for non-sensitive personal data.

281. The Security Act prohibits the interception of communications ('wiretapping'). This prohibition is established under Article 15 (1) thereof⁹⁴. However the same act has the authority to preserve Malta's national security by creating exceptions to this general rule. Under the Security Services Act, special powers such as telephone tapping are available to the security services only under a specific written authorisation of the Minister for Home Affairs or the Prime Minister and such actions are only permitted in cases related to national and public security and defence, including combating organised crime. Furthermore, interference is permitted when the person whose communication is going to be intercepted has consented to the said interception or interference. Interception is to be understood as obtaining possession of, disrupting, destroying, opening, interrupting, suppressing, stopping, seizing, eavesdropping on, surveilling, recording, copying, listening to and viewing of communications and the extraction of information from such communications".

282. The Processing of Personal Data (Electronic Communications Sector) Regulations implement the provisions of Directive 2002/58/EC. Regulation 5(1) of the Regulation provides that: "... no person other than the user, shall listen, tap, store or undertake any other form of interception or surveillance of communications and of any related traffic data, without the consent of the user concerned". However, Regulation 11 establishes exceptions to the prohibition from interception when the information is in the interest of national security; defence; public security; the prevention, investigation, detection and prosecution of criminal or administrative offences or of breaches of ethics for regulated professions; an important economic or financial interest including monetary, budgetary and taxation matters; a monitoring, inspection or regulatory function connected, even occasionally with the exercise of official authority; the protection of the subscriber or user or the rights and freedoms of others."

283. Reference to the concept of privacy is also made by subsidiary legislation. This ranges from legislation in the health services sector (Mental Health Review Tribunal (Regulations)), administration and secretarial functions (Local Councils (Financial) Regulations), personal privacy (Merchant Shipping (Crew Accommodation) Regulations) or regulations that simply refer to other laws dealing with privacy such as data protection (Cable Systems (General) Regulations).

Article 18

284. The church occupied a predominant position in the Maltese social structure. This remained till sometime after the Second World War. At this time the Church alone had universal presence which operated effectively at all levels of social life. Today though one can no longer speak of this predominance of the Catholic Church in Malta, it still has a major influence on the lives of the people and religion is still relatively widely practiced.

⁹⁴ "A person who intentionally intercepts or interferes with a communication in the course of its transmission by post or by means of a radiocommunications or telecommunication system or by any other means shall be guilty of an offence and shall be liable, on conviction, in respect of each offence to imprisonment for a term not exceeding two years or to a fine (*multa*) not exceeding €11,646.87 or to both such imprisonment and fine."

285. The Constitution under Article 2 establishes the Roman Catholic Apostolic as the state religion. In fact the predominant religion is Roman Catholicism and most Maltese claim to be catholic and participate in catholic religious services. Moreover, Catholicism is also present in various elements of Maltese culture. Article 2 also holds that the authorities of the Roman Catholic Church have the duty and the right to teach which principles are right and wrong and the religious teaching of the Roman Catholic faith shall be provided in all state schools as part of compulsory education. However students may opt to decline participation in catholic religion lessons. In 2009, a total of 867 students in government schools were exempt from religion classes.⁹⁵

286. Malta is a signatory to Protocol No. 1 to the European Convention on Human Rights and made a declaration saying that it accepts Protocol 1 Article 2 (that is, parent's rights to have their children educated in line with their religious or philosophical views) only in so far as it is compatible with the provisions of efficient instruction and training and the avoidance of unreasonable public expenditure, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic.

287. Malta together with the other nine states, fully supported the Italian authorities and presented written observations in the *Lautsi v Italy* judgement which case was heard by the Grand Chamber of the European Court of Human Rights (ECtHR) over the exhibiting of the crucifix in class rooms.

288. Three articles of the Maltese Criminal Code deal with "Crimes against the religious sentiment". Article 163 provides that public vilification or offence of Catholicism and the vilification of its believers, ministers or objects of worship through words, gestures, written matter (printed or not), pictures or visible means carries from one to six months imprisonment. Article 164 extends the previous article to other cults tolerated by law but with a maximum prison term of three months. Article 165 refers to impeding or disturbing a function, ceremony or service, whether Catholic or of any religion tolerated by law, carrying a maximum prison term of one year extendable by a further year in case of threat of violence. Article 338(o) of the Criminal Code makes the unauthorised wearing of ecclesiastical habit or vestment a contravention against public order.

289. According to a Eurobarometer Poll held in 2005, 95% of respondents from Malta said that "they believe there is a God". An additional 3% of Maltese respondents answered that "they believe there is some sort of spirit or life force" with only 2% answering that "they do not believe there is any sort of spirit, God or life force".⁹⁶

290. Vatican data for 2006 show that 93.89% of the Maltese population is Roman Catholic, making the nation one of the most Catholic countries in the world. In a report published in the same year, it was reported that 52.6% of Maltese attended Sunday mass (down from 75.1% in 1982 and 63.4% in 1995). Around a fifth of mass attendees said they are active members of a Church movement, group or initiative.⁹⁷

⁹⁵ 867 exempted from attending religion classes, *Times of Malta* (Malta, 10 November 2009) <<http://www.timesofmalta.com/articles/view/20091110/local/867-exempted-from-attending-religion-classes.281153>> accessed 17 February 2012.

⁹⁶ Eurobarometer Poll 2005: Social values, science and technology (January – February 2005) <http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf> accessed 21 February 2012.

⁹⁷ <<http://www.clerus.org/clerus/dati/2008-12/05-6/proportioncathos08.htm>> accessed 21 February 2012.

291. During the reporting period, there were no reports of societal abuses or discrimination based on religious affiliation, belief or practice. Neither were there any reports of abuses, including of religious prisoners or detainees in the country.

292. Most congregants at the local Protestant churches are British retirees who live in the country or vacationers from other countries. Coptic and Greek Orthodox Christians, the Bible Baptist Church, a union of 16 groups of evangelical churches consisting of Pentecostal and other nondenominational churches, as well as Jehovah's Witnesses, the Church of Jesus Christ of Latter-day Saints (Mormons), Seventh-Day Adventists, Zen Buddhists, and Baha'is are also present. Of an estimated 6,000 Muslims, approximately 5,250 are foreigners, 600 are naturalised citizens, and 150 are native-born citizens. There is one mosque (and two informal mosques) and a Muslim primary school. There is a Jewish congregation with an estimated 100 members. There are approximately 4,500 irregular migrants resident in Malta, approximately two-thirds of whom are Muslim (included in the 6,000) total previously mentioned. The remainder of the migrants adhere to various Protestant denominations, Catholicism, Coptic Christianity, indigenous African forms of worship or are non-religious.⁹⁸

293. Despite the fact that Article 2 of the Constitution establishes Roman Catholic as the religion of the state, individuals are free to choose and change their religion and to manifest their religious beliefs publicly as they choose. The Constitution provides that "all persons in Malta... have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship". Thus if Article 2 is in conflict with the rights guaranteed under this Article, that is Article 40, the provisions of the latter prevails. Citizens have the right to sue the government for violations of religious freedom. These protections also apply in cases of religious discrimination or persecution by private individuals or by public officials in the performance of their duties.

294. There are no restrictions on religious publishing or broadcasting or on religious groups owning or operating media facilities. The law does not punish or otherwise restrict importation, possession, or distribution of religious literature, clothing or symbols. There are no restrictions on religious clothing either. All religious organisations have similar legal rights. Religious organisations can own property, including buildings, and their religious leaders can perform marriages and other functions. Religious groups are not required to be licensed or registered. Religion affiliations are not designated on passports or other official documents. There is no restriction on forming political parties based on a particular faith, religious belief or absence of belief or interpretation of religious doctrine.⁹⁹

Article 20

295. The Constitution does not prohibit propaganda for war, however what one finds under the Maltese law is that war crimes are considered as criminal offences. Article 54D of the Criminal Code enlists what offences amount to war crimes. These are:

- (a) Grave breaches of the General Conventions of 1949 (wilful killing, torture or inhuman treatment, wilful causing great suffering or serious injury to body or health, etc);
- (b) Other serious violation of the laws and customs applicable in international armed conflict within the established framework of international law (intentionally

⁹⁸ International Religious Freedom Report 2010 – Malta, Bureau of Democracy, Human Rights and Labour, United States Department of State <<http://www.state.gov/j/drl/rls/irf/2010/148961.htm>> accessed 21 February 2012.

⁹⁹ *ibid.*

directing attacks against the civil population or civilian objects, intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peace keeping mission, etc.);

(c) Serious violations to the four Geneva Conventions, committed against persons taking no active part in the hostilities (individual members of armed forces who have laid down their arms) and those placed *hors de combat* by sickness, wounds, detention or any other cause, any offence following offences: violence to life and person, committing outrages upon personal dignity, taking hostages and the passing of sentences and the carrying out of executions without previous judgement. This does not include situations of international disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature;

(d) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law against buildings, material, medical units and transport attacks against personnel, installations, material, units or peacekeeping missions, intentionally directing attacks against buildings, dedicated to religion, education, art, science or charitable purposes, historic monuments, hospital and places where the sick and wounded are collected, pillaging a town or place, etc. However this does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

296. Whoever publicly condones, denies or grossly trivialises war crimes, is on conviction liable to imprisonment for a term from eight months to two years.

297. Article 82A of the Criminal Code reads: “Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial hatred or whereby violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.” Violence or racial hatred is to be understood as violence or hatred against a group of persons in Malta defined by reference to colour, race, religion, descent, nationality (including citizenship) or ethnic or national origins or against a member of such a group.

298. No war crime occurred during the reporting period.

Articles 19, 21 and 22

299. The right to freedom of assembly and association falls under the canopy of the right to freedom to speech, or wider still freedom of expression.

300. The right of expression, association and assembly have statutory permissible derogations, that is, exceptions to the human rights. The derogation has five tests and all must be assessed to prove that one’s action is justified to these fundamental human rights:

- (a) The exception must be contained in a law;
- (b) The interference must be in accordance to law, that is, authorised by law;
- (c) The action done under that law must be reasonably required;
- (d) It must be reasonably required in some public interest expressly mentioned in the constitution; and
- (e) The exception (derogation) must not only be limited to the four just mentioned derogations but must also be reasonably justifiable in a democratic society.

1. Freedom of expression

301. The Constitution under Article 41 provides that “Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.” Thus this article ensures that there is the freedom of speech and of the press, in other words, the freedom to hold opinions and communicate them. An independent press, an effective judiciary, and a functioning democratic political system combined in Malta to ensure freedom of speech and of the press including academic freedom.

302. The freedom of expression is not enjoyed only by the Maltese, but any person in Malta enjoys the right of freedom of expression. Furthermore the said freedom includes the right to address public meetings.

303. In February 2012¹⁰⁰, the Ombudsman, Chief Justice Emeritus Joseph Said Pullicino, issued recommendations on the compositions and functions of a new film classification board which will replace the Board of Film and Stage Classification. This recommendation came after a complaint was made by KRS arguing that 28% of the films released locally were given a higher rating than that in the UK. In the proposed legislation, the Ombudsman suggested that the Film and Stage Classification Board will be abolished and a new separate board, Board of Film-Age Classification, will be created having similar functions to those of the current Board.

304. The Ombudsman said that the persons appointed should represent the Maltese community and should include a mixture of men and women of different ages so that there is a reasonable spread of age amongst the members. The board should include persons who:

- (a) Can assess equality issues and concerns of vulnerable persons and persons with special needs;
- (b) Are well versed in issues affecting children and young people, either as a parent or through previous employment or other activities.

305. Furthermore, members should be able to articulate their views, appreciate the opinions of others and be flexible enough to change their views following discussions with the other classifiers.

306. The Film Board may decide to discuss the film to be classified with the applicant prior to the certification of the film by the Board. The proposed legislation requires the Film Board to issue, concurrently with the classification, notices to the public containing additional information as to the content of the films classified (e.g. coarse language, violence, drug use, nudity etc), a practice which is not yet in place in Malta. Thus this proposal marks a shift in policy from one exclusively based on censorship to one where the emphasis is on self-regulation, which necessarily presumes an adult audience, mature enough to assess the content of a theatre production or a film and to decide accordingly, whether to attend the performance or not. Although the new proposal does away with censorship, the board will still retain a measure of control over the showing of films through their pre-viewing in order to classify their content according to the age of the

¹⁰⁰ Joseph Said Pullicino, ‘The ombudsman on the role, functions and policies of the Board of Film and Stage Classifiers’
<<http://c256.r56.cf3.rackcdn.com/8bd7007efa408dcacbe789da69bd9c031554461705.pdf>> accessed 20 February 2012.

audience. The main reason of retaining a level of control is to protect children and vulnerable persons as well as for the common good.

307. The Ombudsman in his report wrote that:

Today, there is no longer a sense of duty of the State to impose in absolute terms its own standards of morality or conduct on adults. Rather than on censorship, the emphasis of the new regulations should therefore be to provide an objective assessment that will serve more as a guidance to help create an informed audience to make a choice, rather than an unwanted, imposed protection, forcibly limiting the adult's freedom to choose.¹⁰¹

2. Libel and defamation

308. The law of libel and slander is regulated by the Press Act.¹⁰² Article 3 of the said act reads that “[t]he offences mentioned in this Part [i.e. Part II] of the Act are committed by means of the public action or distribution in Malta of printed matter from whatsoever place such matter may originate or by means of any broadcast”. Offences that fall under this part include incitement to take away life or liberty of the President, etc, contempt towards the flag, racism and similar offences, obscene libel, divulging professional secrets, defamatory libel, etc.

309. The Maltese Press Act does not define libel or defamation. The Courts, however, have adopted the standard of *in medio stat virtus* which refers to the average right thinking man. The meaning of words may depend on the public opinion and on the circumstances or the context in which they were published. If a person is found guilty of libel, s/he would be liable to a fine (*multa*). However the Act provides what is called qualified privilege. This notion was added by the 1996 amendments to the Press Act. The years between 1974 and 1996 had shown that a certain amount of blanket provisions were required for certain publications or broadcasts that should enjoy immunity from libel proceedings, provided of course, that the provisions of the law were observed. Article 12A can be raised by an editor or publisher. In fact this provision states:

In proceedings instituted under this Act it shall be a defence for the editor or the publisher to prove that the information published consisted of an accurate report of a speech made at an important public event by an identified person who knew or could have reasonably known or expected that the content of that speech was to be published in a newspaper or in a broadcasting medium and that the publication of the said speech was reasonably justifiable in a democratic society.

310. On the other hand, Article 21 provides for the right of reply and thus any person whose actions or intentions have been misrepresented or who has been subjected to an attack on his / her honour, dignity or reputation, or to an intrusion into his / her private life by means of or in a newspaper or in any broadcast to demand and have published forthwith a statement by way of contraction or explanation. The reply must be dealt with as a separate article and without being interpolated with any comments or other material that does not form part of the reply. The section makes it unlawful to shorten or edit this reply in such a manner as to prejudice the effective exercise of the right of reply under the section. The fact that the editor cannot comment or edit the reply was introduced in 1996. The situation is similar in broadcasts with due consideration being given to the time in which it is broadcasted so that it receives the same audience. This right lapses within a month from the

¹⁰¹ *ibid.* 17.

¹⁰² Chapter 248 of the Laws of Malta

date of the publication of the newspaper or of the broadcast. Furthermore, a right of reply is not available in the case of privileged communication.

311. Article 32 provides a list of privileged documents and these include:

- (a) publications made in pursuance of an Act of Parliament or by authority of the President of Malta or of the House of Representatives;
- (b) publications consisting of communications between public officers, or between such officers and contractors of the public service or officials of public corporations, reports of inquiries held in terms of any law, or statements by public officers that are made in good faith in the interests of national security, territorial integrity, public safety, for the prevention of disorder or crime or for the protection of health or morals;
- (c) publications of bona fide reports of debates of the House of Representatives;
- (d) publications of reports of any proceedings in a court of justice in Malta.

3. Freedom of peaceful assembly and association

312. The right to freely associate with whoever a person chooses is recognised and upheld by Article 42 of the Maltese Constitution, according to which (1) “Except with his own consent or by way of parental discipline no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade or other unions or associations for the protection of his interests”. As may be appreciated, there is a close connection between this section and Article 11 of the European Convention on Human Rights: (1) “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”. Both sections make special reference to particular applications of the right to form or belong to trade unions and the right to form or belong to associations for the protection of the interests such as a political party.

313. Under the Maltese Constitution there is an important provision limiting the exercise of the right of freedom of association for political purposes in Article 117(1) “It shall be unlawful to establish, maintain or belong to any association of persons who are organised and trained or organised and equipped for the purpose of enabling him to be employed for the use of display of physical force in promoting any political object”. This section, therefore, prohibits unlawful assemblies that aim to promote their political objectives by violence and use or display of physical force.

314. When a person incites an assembly of ten or more persons unlawfully, s/he is liable to imprisonment for a term from one to three months or a fine (multa). On the other hand, whoever takes active part in an assembly of ten or more in number shall be liable to imprisonment of a term from three days to three months or a fine (multa).

315. This must be distinguished from the offence of unlawful assembly with seditious intent. If three or more persons assemble unlawfully and by public speeches, exhibition of flags, inscriptions, or other means or devices, excite hatred or contempt towards the person of the President of Malta or Government of Malta, each of those persons is liable to imprisonment for a term of six to eighteen months.

4. Trade unions

316. The Maltese Constitution does not merely guarantee association but it also specifies the right to form a trade union, which trade union or association must have a lawful

objective. The Constitution provides workers with the right to associate freely, and workers exercise this right in practice. The first trade union was registered in Malta on 15 July 1945.

317. According to the annual report issued by the Registrar of Trade Unions, by the end of June 2011 there were 50 organisations on the Register made up of 32 Trade Unions and 18 Employers Associations – Table 18. The number of employees who are members of these organisations as at 30 June 2011 amounts to 95,369.¹⁰³ The two largest trade unions are the General Workers Union with 43,002 members and the Union Haddiema Magħqudin with 26,592 members. The largest employers' association is the GRTU – Association of General Retailers and Traders with 7,863 members. Membership of trade unions and employers' associations is equally open to persons of both sexes.

318. Malta is a party to the International Covenant on Economic, Social and Cultural Rights and to ILO Conventions which include Right of Association (Agriculture) Conventions, 1921 (No. 11), Freedom of Association and Protection of the Right to Organise Convention, 1948, (No. 87), Workers' Representatives Convention, 1971 (No. 135) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The whole list of Conventions that Malta ratified under the ILO Conventions is found in annex I, Table 19.

319. The rules and procedures which are necessary in order to establish a trade union or employers' association are laid down in the EIRA. This Act lays down that a minimum number of seven persons may proceed to register the statute of a trade union or an employers' association with the Registrar of trade unions. For the purposes of registration, the statute must contain certain details as laid down in the law. These details include, the name of the trade union or employers' association, the purpose for which and the manner in which any property or funds of the union or association are authorised to be applied or invested, the procedure for the election of a governing body and its re-election at specified intervals and the offences for which a union or association may expel a member or take other disciplinary action.

320. The Registrar of Trade Unions, after ascertaining that the objects of the trade union or association are lawful, proceeds with registration and issues a certificate attesting this fact. Prior to registration, no member or official of the union may perform any act in the name of the union or association and in contravention thereof the offender shall be liable to a fine not exceeding €1,164.69. Should the Registrar of Trade Unions refuse for any reason to proceed with registration, an appeal may be lodged with the Court of Appeal, which will decide the issue.

321. Members of a disciplined force, as defined in Article 47 of the Constitution of Malta, are excluded from Title II (dealing with Trade Unions) of the EIRA. Article 47 of the Constitution defines disciplined force as follows:

- (a) A naval, military or air force of the Government of Malta;
- (b) The Malta Police Force;
- (c) Any other police force established by law in Malta;
- (d) The Malta Prison Service.

322. Article 34 of the Police Act, 1961, lays down that it is an offence against discipline for any police officer to be or become a member of any trade union, or any body or

¹⁰³ Industrial and Employment Relations: Report 2010/11
<http://industrialrelations.gov.mt/industryportal/publications_and_archives/archives1/trade_union_reports.aspx> accessed 8 February 2012.

association affiliated to a trade union. The Malta Police Regulations¹⁰⁴ provide for the setting up of the Malta Police Association. This Association has the main purpose of drawing the attention of the police authorities to all matters affecting the welfare and efficiency of the police force. The Association may also be concerned with questions of discipline, transfers, individual promotions and other matters affecting individual. The Association is made up of all serving members of the police force below the rank of superintendent.

323. Article 67 of the EIRA moreover lists two further instances in which trade union membership is restricted. The first instance relates to the case where the Prime Minister declares an office the holder whereof may not be a member of a trade union in respect of which s/he may be required to represent or advise the Government in industrial relations with the union or unions representing the employees. The second instance concerns persons holding a managerial or executive position in any corporation, body established by law, company or partnership or in any other body having a distinct legal personality (hereafter referred to as “corporate employer”) and such position would require the holder thereof to represent the other employees. It is an implied condition of the contract of employment that the holder of such a position must not be a member of any trade union while holding his post. The number of persons who are restricted to union membership due to this clause may not exceed three in respect of any one corporate employer employing not more than 200 persons and not more than seven in the case of a corporate employer employing more than 200 employees. The employer must moreover give written notice of this fact to the trade unions.

324. Air traffic controllers, employees of the Airport Fire Fighting Section, Assistance and Rescue Force and other categories of professions whose right to strike is excluded or limited due to the essential service limitation in accordance with Article 64 (4) of the EIRA have nonetheless full right to establish or join a trade union.

325. There are no restrictions imposed through legislation or administrative practice whatsoever, on the right of local trade unions to affiliate, join or federate with international trade unions or organisations.

5. Right to strike and restrictions to the right to strike

326. As laid down in the EIRA every employee with few exceptions has the right to strike pursuant to a directive issued by a trade union as a consequence of a trade dispute. Article 64(4) of the relevant Act clearly states that whenever a person is out on strike in furtherance or in contemplation of a trade dispute, such an act shall not be actionable on the basis of breach of contract of employment provided that the action does not violate an industrial agreement, a settlement, a decision or an agreement which is binding. An employer may not dismiss the employee for going on strike and may not discriminate against him. Furthermore, the period during which the employee has been on strike shall not constitute a breach in the service of such person.

327. Article 64(4) provides:

An act done by a person in contemplation or furtherance of a trade dispute and in pursuance of a directive issued by a trade union, whether he belongs to it or not, shall not be actionable in damages on the ground only that it consists in a breach of a contract of employment; and any act done as aforesaid, not being an act in breach of a collective agreement, or of a settlement, decision or agreement ... or of a decision or award of the Tribunal, shall not by itself entitle the employer to terminate the

¹⁰⁴ S.L. 164.01

contract of employment of, or discriminate against, any person doing any such act as aforesaid, and shall not constitute a break in the service of such person.

328. A certain number of professions are excluded from the right to strike whilst other professions have limitations placed on this right due to the fact that they provide an essential service to the community. The right to strike is prohibited in the case of members of the armed forces and police force.

329. Another category relates to the professions subject to the essential service limitation. These categories are exhaustively listed in Article 64(6) of the EIRA and its Schedule. The persons falling under this limitation are the following:

(a) Persons employed as Air Traffic Controllers at the Malta International Airport and in the Airport Fire Fighting Section of the said airport;

(b) Members of the Assistance and Rescue Force;

(c) Persons employed to provide pilotage and mooring, tug services, fire fighting, medical health services and pollution combating services as may be required in cases of port emergency;

(d) Such minimum number of persons needed to guarantee that life is not endangered through the non import or discharge into Malta of wheat, grain, domestic gas, aviation fuel, diesel and petrol and oil fuel for the operation of air transport facilities and power generation and water facilities, as agreed upon by their respective employer and the recognised trade union or in default of such agreement, as shall be decided by the appropriate controlling body or in the absence of such body, the Industrial Tribunal;

(e) Such minimum number of persons as may be required to guarantee the combined production, provision and distribution of water and electricity, as agreed upon by their respective employer and the recognised trade union or in default of such agreement, as shall be decided by the Industrial Tribunal;

(f) Such number of persons as may be required to maintain the continued and uninterrupted services listed in the Schedule to this Act and required to be manned at all times for the continued provision by the Government of essential services to the community;

(g) Such number of persons in such posts as the Minister responsible for transport may by notice in the Gazette prescribe, as being necessary to provide service at the level of one-half of the public passenger transport services in Malta and Gozo and one-half of the scheduled public ferry services between Malta and Gozo and it shall be deemed to be an implied condition of the contract of employment of any employee employed in the public passenger transport services and scheduled ferry transport services that the said employee shall be obliged to perform duties as directed by the employer thereof in order to constitute the number designated as aforesaid and any employee failing to perform such duties without justification shall be liable to dismissal.

330. The Malta Armed Forces Act stipulates that any person who is subject to military law and who goes on strike is guilty of insubordinate behaviour and would be guilty of an offence. The punishment to be inflicted would not be more than two years if the offence was not committed while an active service and did not involve the use of violence against a superior officer. This is expressly stated in Article 46 (1) of the Malta Armed Forces Act, which provides that “any person subject to military law who strikes or otherwise uses violence to, or offers violence to, his superior officer ... shall on conviction by court-martial, be liable to imprisonment or any less punishment provided by this Act”.

Article 23

1. Meaning of ‘family’ in Maltese society

331. Maltese society attaches great importance to the family as a unit consisting in the great part of the union of a man and a woman in marriage, and includes any children they may have as natural offspring, or adopted children. Single parent families are also recognised, but marriages between persons of the same sex or polygamous marriages are not. Baldacchino¹⁰⁵ describes the Maltese family as a “modified nuclear family” because it is not uncommon to find parents living with their children after the latter get married and have their own children. Neither is it uncommon to find parents living very close to their married children and helping out in various domestic chores including babysitting.

332. The opening article (Article 2) of the Civil Code reads that “the law promotes the unity and stability of the family”, but the same Civil Code does not give us a definition of the term family. Other articles in the same book of the Civil Code show that the law has the purpose of protecting marriage and that the basic idea of family is that of a married couple and their children. The Civil Code regulates the rights and obligations between spouses, their duties and obligations towards children as well as their inheritance rights vis-à-vis each other. Under the Social Security Act, however a household includes two or more persons who, in the opinion of the Director of Social Security of the Government of Malta, are living together as a family.

333. One’s right to a private and family life is enshrined in the Constitution under Article 32(c) and this right is not conditioned by the race, place of origin, political opinion, colour, creed or sex of the individuals concerned.

334. Marriage is still popular in Malta and Gozo and the number of marriages has been rather constant over the past decade. The State recognises both civil and religious marriages. In 2011 the number of marriages celebrated stood at 824 civil marriages (36.5%) and 1,436 (63.5%) religious marriages, total of 2,260 marriages. Religious marriages continue to outnumber civil marriages (see annex, Table 20)

335. The average age for first time marriages in Malta in 2010 stood at 28.0 years for females and 30.6 for males.¹⁰⁶ More young people are choosing to get married at a higher age due to the fact that more are choosing to pursue tertiary education and decide to marry after they have finished their studies.

336. The divorce referendum was held in Malta on 28 May 2011 to consult the electorate on the introduction of divorce, and resulted in a majority of the voters approving legalisation of divorce (53.2% voted yes and 46.8% vote no). As a consequence of the referendum outcome, a law allowing divorce under certain conditions was enacted in the same year. For instance, one of the conditions is that the spouses have lived apart for at least four years, in other words, the spouses filing for divorce need not be legally or *de facto* separated. Another condition is that there is no reasonable prospect of reconciliation between the spouses. The last condition is that, the spouses and their children are receiving adequate maintenance.¹⁰⁷ By the end of the same year that the bill came into force, that is 2011, there were 166 applications for divorce and another 13 applications for divorce but who already had attained separation. Furthermore, cohabitation is not only becoming increasingly common among persons who are legally or *de facto* separated but also among

¹⁰⁵ Godfrey Baldacchino, *Introducing Social Studies: A Maltese Reader*.

¹⁰⁶ Malta in Figures 2011: General Statistics, NSO Publication
<http://www.nso.gov.mt/statdoc/document_file.aspx?id=3192> accessed 9 February 2012.

¹⁰⁷ Civil Code, Chapter 16 of the Laws of Malta, Article 66B.

single persons who were never married. In 2011 the Civil Court issued at least¹⁰⁸ 491 separation decrees.

2. The right of men and women to enter marriage with full and free consent

337. Marriage is celebrated between a man and a woman who come forward of their own free will and who have the capacity to understand the rights and obligations arising from marriage.

338. The minimum age for contracting a marriage is 16 for both males and females. The full and free consent of both parties to the marriage is necessary and if consent is vitiated the marriage would be null. If the bride or groom have not yet reached the age of majority, the consent of the person exercising parental authority is necessary for the marriage to be contracted. Failing such consent, the Court of Voluntary Jurisdiction may, upon an application made, grant its authorisation for the marriage to take place.

339. A marriage may not be contracted between the following persons:

- (a) An ascendant and a descendant in the direct line;
- (b) A brother and a sister of full or half blood;
- (c) Persons related by affinity in the direct line;
- (d) an adopter and the adopted or a descendant and the husband and wife of the adopted person.

340. Furthermore the parties to a marriage must not be bound by a previous marriage. If either of the parties enters into a second marriage during the subsistence of the first marriage, the second marriage would be void¹⁰⁹ and the person who knowingly commits the crime of bigamy would be subject to imprisonment for a term from thirteen months to four years.¹¹⁰

341. Marriage in Malta is regulated by the Marriage Act, 1975, in relation to formalities relating to marriage whilst the Civil Code lays down the rights and obligations arising from marriage. Marriage in Malta may be contracted in civil or religious forms. Both forms have the same standing before the law. To be valid both forms must be in conformity with the procedures laid down in the law. If the procedures set forth in the Act are not followed the marriage may be declared void by an action to be brought within two years of the celebration of the marriage.

3. Formalities preceding marriage

342. Persons who wish to be married must at least six weeks preceding the date of the marriage apply in writing to the marriage registrar requesting publication of the banns of marriage. This application has to be signed by both parties to the marriage and shall include a declaration made on oath by both parties that to their knowledge there are no legal impediments as to why the marriage cannot take place. Banns of marriage have to be posted at the marriage registry which may be accessed by the public, and in another place where official acts are usually posted within the town, village or parish in which each of the persons to be married resides. The banns will be posted for eight consecutive days

¹⁰⁸ The phrase 'at least' is used here due to the fact that the statistics collected is limited to those females that reverted to their maiden surname, thus those females that retained their marital surname are not included in this figure.

¹⁰⁹ Marriage Act, Chapter 255 of the Laws of Malta, Article 6.

¹¹⁰ Criminal Code, Chapter 9 of the Laws of Malta, Article 196.

excluding Saturdays and Sundays and public holidays and shall contain the name, surname, place of birth and residence of each of the parties, the place where the marriage will be contracted and the names of the parents of the parties. Any marriage contracted before the sixth day in which the banns are to remain posted or after the expiration of three months from the day when the banns are first posted shall be void. If such time elapses the publication of the banns has to be started anew. In exceptional circumstances the registrar may shorten the time period relating to the publication of the banns. Such can be the case where one of the parties is in imminent danger of death.

343. After the publication of the banns and if the registrar is satisfied that there is no legal impediment to the marriage taking place, the registrar shall issue a certificate stating that the banns have been published and the marriage can henceforth take place. In the event that the parties intending to marry feel that the registrar has unjustly withheld his / her consent for the issue of the certificate the couple may apply to the court of voluntary jurisdiction and such court shall decide whether the banns are to be published or not.

4. The celebration of marriage

344. A marriage takes place before the clergy or marriage registrar, as the case may be, officiating at the marriage and in the presence of two witnesses who must be over 18 years of age. Each party to the marriage is asked whether s/he will take the other as the lawful spouse and upon declaring their consent without any qualification, they will be declared husband and wife.

345. A marriage will have effect for all purposes of law when the appropriate act of marriage is completed and delivered for registration.

5. Termination of the marriage bond

346. The marriage bond is terminated by the death of either one of the parties or if the marriage is declared null and void. There is also the possibility of having a judgement of divorce obtained from a court overseas registered in Malta if one of the parties to the marriage is domiciled or is a national of the country in which the judgement is given out and as from last year (2011), divorce can also be obtained from local courts.

347. When a marriage is annulled, the effects of a valid marriage shall always be deemed to have existed with regards to the children born or conceived during a marriage declared to be void.

348. The grounds giving rise to lack of consent and hence to the nullity of the marriage must have existed during the celebration of marriage. This was stated in *MM vs. JM*, a judgement given by the Court of Appeal on 9 March 1994. The Court stated that the husband had sufficient powers of intellect to enter marriage at the time of the celebration of the marriage; the fact that the husband started suffering from mental illness after the celebration of the marriage was not sufficient ground to render the marriage null. In another judgement, *E vs. F* given by the First Hall, Civil Court on 1 July 1994 the Court stated that the fact that the wife, upon entering the marriage, excluded the possibility of children showed that she had simulated her intentions to get married and therefore the marriage was null and void.

349. Malta recognises two forms of marriage annulments, civil annulments and religious annulments. These annulments are regulated by different laws and are handed down by different courts. The civil annulments are regulated by the Marriage Act¹¹¹ and are handed

¹¹¹ Chapter 255 of the Laws of Malta

down by the Civil Courts. On the other hand, the religious annulments are regulated by Canon law and are decided by the Ecclesiastical Court. Last year there were 30 religious annulments and 163 civil annulments – Table 21.

350. Until 1975, marriage in Malta had been regulated by Canon Law and the Ecclesiastical Tribunal had jurisdiction to decide on matters relating to the validity of marriage. Upon enactment of the Marriage Act, the Civil Courts were vested with exclusive jurisdiction to decide on all cases of validity of marriage and personal separation. The State only recognised the decisions handed down by the Civil Courts. In 1995 amendments were made to the Marriage Act providing for the civil recognition of decisions given by the Ecclesiastical Courts. Provided that one of the parties to the judgement is a citizen of Malta, registration is affected through the Registry of the Court of Appeal, which will in turn check that certain procedures have been followed and the parties were given certain rights. The court has jurisdiction to consider the following

- The competency of the Tribunal to judge the case
- The right of action and defence of the parties
- That no contrary judgement binding the parties, pronounced by a court on the same grounds of nullity, has been given and has become *res judicata*.

351. Article 33 of the Marriage Act recognises a foreign pronouncement that will effect the status of a married person, as long as the decision is given by a competent court of the country in which either of the parties to the proceedings is domiciled or of which either of such parties is a citizen. Thus by opening up its laws to acknowledge foreign divorce decrees, the Maltese state recognised the dissolubility of marriages. This article is a reflection of what one finds under Brussels II bis (EC 2201/2003). Article 3 of Brussels II bis defined jurisdiction on divorce, legal separation and annulment as follows:

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

- (a) in whose territory:
 - the spouses are habitually resident, or
 - the spouses were last habitually resident, in so far as one of them still resides there, or
 - the respondent is habitually resident, or
 - in the event of a joint application, either of the spouses is habitually resident, or
 - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
 - the applicant is habitually resident if he or she resided there for *at least six months* immediately before the application was made *and is either a national* of the Member State in question *or*, in the case of the United Kingdom and Ireland, has his '*domicile*' there;
- (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the domicile' of both spouses.

352. However, the Regulation holds that a divorce, legal separation or marriage annulment shall not be recognised if such recognition is manifestly contrary to public policy of the member states in which recognition is sought.

6. Provisions concerning the family under the Civil Code

353. The Civil Code contains several provisions intended to protect the family unit and regulates the rights and obligations which members of the family, including ascendants and descendants, have towards each other. Amendments introduced in 1993 abolished the concept of the husband as head of the household and placed the spouses on an equal level. Children have a right to be maintained by their parents. Parents and other ascendants of the spouses also have a right to be maintained but their claim is subservient to the right of the children and of the other spouse. The Code also lays down rules relating to parental authority, custody of children, adoption, tutorship and curatorship.

354. Another amendment introduced in 1993 provides that in the case of any disagreement the spouses may apply to the Court of Voluntary Jurisdiction for assistance. The judge, will after having heard the parties and any person above the age of 14, seek to bring about an amicable settlement of the disagreement. If the spouses so request and if the matter in question is of fundamental importance, the judge will determine the matter himself.

355. The Family Section of the Civil Court came into being in December 2003. Prior to this date matters concerning family relationships and duties were heard before the First Hall of the Civil Court, with certain preliminary procedures, however, having to be conducted before the Voluntary Jurisdiction Section of the Civil Court. Thus, for instance, if spouses wanted to separate they had first to obtain the consent of the Civil Court (Voluntary Jurisdiction Section). The Judge sitting in this court would attempt to reconcile the parties, and if reconciliation failed he would authorise them to proceed to the court of contentious jurisdiction, that is to go before the Civil Court, First Hall, where the plaintiff would commence litigation by writ of summons. In December 2003 the Voluntary Jurisdiction Section ceased to have anything to do with separation proceedings, and instead compulsory mediation before specially trained mediators was introduced as part of the set up of the Family Section of the Civil Court.

356. The Family Section of the Civil Court deals with cases of annulment of marriages, personal separations, custody and maintenance of children (whether born in or out of wedlock), paternity and filiation, and matters which are regulated by the Child Abduction and Child Custody Act. Adoption, however, is dealt with by the Voluntary Jurisdiction Section of the Civil Court. The Judge sitting in the Family Section also has to approve deeds of personal separation, that is, when the spouses agree to what is called "separation by mutual consent". Even in this kind of separation, however, the spouses must first go before a mediator of this court. Separation proceedings can be brought by any one of the spouses against the other. Furthermore, Article 38 holds that "either of the spouses may demand separation on the ground of adultery on the part of the other spouse".

357. In matters involving children the Civil Court (Family Section) can appoint an advocate to represent and promote the best interests of the children concerned notwithstanding that for the purpose of the litigation in hand they may be represented by one of the parents.

358. If any question arises whether a particular matter falls to be determined by the Family Section or by some other section of the Civil Court, such a question is referred by the registrar to the Chief Justice. The Chief Justice decides the matter, and no appeal lies from that decision.

359. In Gozo, matters which would be dealt with in Malta by the Civil Court (Family Section) are dealt with by the Family Section of the Court of Magistrates (Gozo) in its Superior Jurisdiction, with the same structure, including mediators, as in Malta.

360. The obligation of maintenance still remains on the spouses after separation is pronounced; the spouse against whom the separation is pronounced is still under the obligation to supply maintenance to the other spouse (after taking into account the ability to work and needs of that spouse) and the children (their needs, disability, circumstances of illness, education, accommodation requirements, etc). Maintenance can be paid in lieu of the whole or part of such maintenance or a lump sum which the court deems sufficient in order to make the spouse to whom maintenance is due financially independent or less dependent of the other spouse. It is for the court to decide whether a lump sum is to be paid or whether the maintenance is to be paid on equal or unequal instalments – this depends on the circumstances of the case.

361. Apart from maintenance, there is also the issue of custody. During the pendency of the action the court gives directions concerning the custody of the children as it may deem appropriate, and in so doing the paramount consideration is the best interest of the children. The children, when the court considers such measure to be strictly necessary, can be placed in custody of third parties or in alternative forms of care. In this case however, the spouses still maintain their right to watch over their maintenance and education and are still bound to contribute thereto. It may also be the case that the court will deprive one or both parents wholly or in part of the rights of parental authority. The court at any time can revoke or vary such directions respecting the children.

362. The spouse that was not entrusted with the care and custody of the children or both spouses when the children are placed in the care of third parties, have the right of access to their children. The time, place and manner is fixed by the court. However it can be the case where access to the minors is forbidden if it may be detrimental to the welfare of the said children.

7. Cohabitation

363. Maltese law, till to date does not recognise cohabitation. Thus the rights and duties of cohabiting partners are not explicitly written down in Maltese law. The Civil Code makes reference to the matrimonial home and thus it deals solely with the home established through matrimony and these sections cannot be applied to cohabitants. Thus normal property law is applicable to cohabitants. Furthermore non-married couples still have moral duties towards each other and they still contribute to their family and have duties towards their children, even though these might not be specified in the law. Irrelevant of the status, be it single mothers, non-married couples, etc every person has the duty to look after his/her children. This has been ascertained by the Maltese courts in *Melissa Micallef vs. Konrad Sant*¹¹². Furthermore, the breaking up of the cohabitation of the parents neither interrupts nor does it eliminate the obligation of maintenance and parental authority of the parents in favour of the children, matrimonial or otherwise. Undoubtedly, the obligation on the part of the parents for supplying maintenance and assisting their children still stands even where the cohabitation of the parents ceases.

364. Article 16 of the Civil Code binds the spouses to maintain each other thus a cohabiting partner has no protection under law to request maintenance even though for several years s/he may have contributed to the house of the family. In other words, married couples are bound to maintain each other during the relationship and even in the event of relationship breakdown. Cohabiting couples are not granted similar protection even during the relationship as the laws dealing with the economic relationship between couples are restricted to marriage as well. This relationship is not regulated by any financial regime. Married couples could opt between keeping the automatic regime of Community of

¹¹² *Melissa Micallef vs. Konrad Scott* (First Hall Civil Court) 27 June 2002.

Acquests or else opt out and choose between Separation of Estates or Community of Residue under Separate Administration (CORSA).

365. The law dealing with custody is written in relation to personal separation, automatically applying to married couples. As there are no separate laws dealing with custody of children of cohabiting couples it would seem that by analogy these apply to them as well.

366. A case dealing with cohabiting couples disputing custody is *Lourdes Magro vs. Carmelo Bonnett*¹¹³. The couple was living together for 12 years prior to the relationship ending and a dispute arose regarding who should be awarded custody of the child. In this case the safeguarding of the best interest of the child was emphasised. In its decision whether the care and custody of the child should be given to one parent or the other the court must solely be guided by what is most beneficial to the child. In this case the Court after hearing the expert's opinion felt that the child will have a more tranquil life with the mother giving visitation rights to the father. Therefore, even though the law does not explicitly cater for custody disputes between cohabiting couples, the same provisions apply and the courts deal with both instances, that is, married couples and non-married couples, at the same level taking the best interest of the child into consideration.

367. As with regards to succession, according to the law there are no rights attributed to the cohabiting partner at the demise of the other partner. In fact cohabitants are not even mentioned with regards to intestate succession as the section in the law mentions an exhaustive list, including the descendants, the ascendants, the collateral relatives and the spouse of the deceased and the Government of Malta.

368. Cohabitants are not allowed to enter into a *unica charta* will as the law specifies that a valid will made by husband and wife is considered to be one and the same instrument, and is commonly known as *unica charta*. The surviving spouse and descendants have in favour of them a reserved portion, the surviving cohabiting partner has no such portion although with the recent amendments the child born out of wedlock are still entitled to a reserved portion. Thus even though the partner may not be entitled to such, the children born from cohabiting couples have the same rights as children born out of marriage.

Article 24

1. Protection and assistance to children and young persons

369. The Criminal Code contains a number of provisions for the protection of children generally. These provisions include:

- (a) Parents and step-parents enticing or forcing their children into prostitution commit a crime punishable with imprisonment (Article 197);
- (b) Defilement of minors is a crime punishable with imprisonment (Article 203);
- (c) Whosoever encourages, helps or facilitates the prostitution of minors commits a crime punishable with imprisonment (Article 204);
- (d) Instigating with violence of persons under age to prostitution or to participation in a pornographic performance (Article 204A);
- (e) Inducing persons under age to prostitution or to participation in a pornographic performance (Article 204B);

¹¹³ *Lourdes Magro vs. Carmelo bonnet* (First Hall Civil Court) 11 December 2003.

- (f) Participation in sexual activities with persons under age (Article 204C);
- (g) Unlawful sexual activities with persons under age (Article 204D);
- (h) Indecent photographs, films, etc of persons under age (Article 208A);
- (i) Solicitation of persons under age (Article 208AA);
- (j) It is a crime (punishable with imprisonment) to abduct or hide a child or to change, conceal or falsely announce the birth of a child (Article 210);
- (k) Neglect of a child below the age of 7 may lead to imprisonment (Article 246);
- (l) Should a person find a newborn baby abandoned, that person has the duty to do all that is needed to save the child and inform the police within 24 hours, failure to do so can lead to imprisonment (Article 247).

370. Under the Civil Code, the Court has the power, upon good cause being shown, to give directions as regards the person or property of a minor as it may deem appropriate in the best interests of the child.

2. Age when parental authority ceases

371. The age at which young people in Malta cease to be minors is 18. At that age, young people will henceforth cease to be subject to parental authority and are vested with all legal rights and obligations under Maltese law. The Civil Code also holds that parental authority ceases on the death of both parents, on the marriage of the child, and if the child, with the consent of the parents, has left the parental home and set up a separate domestic establishment. Furthermore, the Civil Code under Article 154 also holds that parental authority ceases if the parent, exceeding the bounds of reasonable chastisement, ill-treats the child or neglects his / her education, if the conduct of the parent is such as to endanger the education of the child, if the parent is interdicted or under a disability as to certain acts, if the parent mismanages the property of the child and if the parent fails to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the child.

3. Alternative care

372. Children might find themselves deprived of their family environment for a number of reasons. The removal from the family environment and subsequent admission into care can be voluntary or involuntary. Voluntary temporary removal of children from their family environment refers to the instances when the parents might need to place their child in residential care or in the care of some other person for a number of reasons such as illness of one or both parents, cases where the parent/s feels unable to take care of a child with behavioural problems, breakup of the family, violence in the family, or imprisonment of one of the parents. On the other hand, it might be the case that the parents decide that they cannot take care of their children and give up such child permanently. This situation is very rare and very few children are voluntarily given up permanently.

373. In Malta a child needing alternative care is usually placed in residential care, unless a foster placement is found. Another method of alternative care available in Malta is adoption.

4. Foster care

374. Foster care is defined in the Foster Care Act as a service for a determinate period whereby a child is placed in the continuous care of a foster carer and through which the child is brought up in a family environment according to his / her best interests. The foster

carer is anyone who is approved to be so by the Fostering Board, whether single or married, as long as the foster carer is ready to help the child. Child under the Foster Care Act is defined as anyone below the age of 18 years.

375. The Fostering Service aim is to offer a family experience to those children who, for some reason or another, could not live with their birth parents. The familiar situations which may lead to fostering include parents; death, familiar crises, conflicts arising between parents, difficulties in parental capacity, illnesses, drug and / or alcohol abuse, imprisonment of parents and child abuse that includes physical, sexual and emotional abuse or neglect.

376. Furthermore, if it transpires that it is in the best interest of the child to return back with his or her birth parents, fostering too can help the children re-integrate within their natural family. Throughout the foster care placement, these children would be provided with the opportunity to live within a family environment, whereby they can get the love and security they need. This opportunity can offer the stability much required by the children in order for them to be able to develop their abilities and character. Therefore, the benefits reaped from the experience of living with a foster care family are long-lasting.

377. Article 23 of the Act provides that persons interested in becoming foster carers are required to attend a pre-service training course. An assessment will follow, prior to the compilation of a home-study report which will be used to determine whether the applicants would be approved as foster carers. The foster carers are provided with all information necessary for the well being of the child, including medical information. A team of qualified social workers provide monitoring, supervision, guidance and support to foster care families. A review report is drawn up by the social workers at least once every two years so that it may determine whether the foster carer is fulfilling the obligations in accordance with the provisions of the Foster Care Act and whether such carer should be allowed to continue caring for the child.

378. A foster care placement can be terminated if:

- (a) The foster carer does not conform with the foster care agreement; or
- (b) The Fostering Board decides that the foster carer is no longer suitable to provide foster care; or
- (c) The foster care placement is no longer in the best interest of the child

379. It is the right of the child in the foster care to be maintained, instructed and educated according to the child's abilities, aspirations and natural inclinations. Add to this, the child has access to the social worker who takes care of the placement.

380. In 2009, there were 160 children in foster care – 81 boys and 79 girls. 65 children are fostered by members of the extended family while 98 are fostered by families which are not biologically related.¹¹⁴

5. Adoption

381. When children in foster care or in residential care cannot return to their birth parents, adoption can be used to provide these children with permanent homes and a family environment. Unlike fostering, adoption is a permanent solution, where the adoptive

¹¹⁴ Children in alternative care (National Survey January 2010, 2nd edn) 133 <http://www.eurochild.org/fileadmin/user_upload/Publications/Eurochild_Reports/Eurochild%20Publication%20-%20Children%20in%20Alternative%20Care%20-%202nd%20Edition%20January2010.pdf> accessed 24 February 2012.

parents get all the parental responsibilities that a natural parent has and the child is considered as if s/he were the son or daughter of the person who adopted him / her.

382. Article 114 of the Civil Code reads: “Adoption may only take place with the authority of the competent court ... granted by decree ... made on the application of a person of either sex”. It goes on to hold that “an adoption decree may be made on the application of two spouses, who have been married to each other and are living together authorising jointly to adopt a person and may not be made on the application of one only of such spouses”. An exception to this rule is where the person to be adopted is the natural offspring of either of the spouses.

383. The Code holds that an adoption decree is not made unless the applicants or one of the adopting parents must have attained the age of 28 years and is at least 21 years older but not more than 45 years older than the child to be adopted – in the case of adopting siblings, this restriction is deemed to be satisfied if there is the required age difference at least with regards to one of the children, and if the adoption will be in the interests of the siblings involved.

384. Furthermore an adoption decree is not made in respect of a person who has attained the age of 18 years unless the applicant is the mother or the father of the person to be adopted or if the person to be adopted have lived with that parent for at least five consecutive years and the person adopted does not object to the adoption, and in favour of a foster carer who has adopted for at least five consecutive years. Furthermore adoption cannot be made in favour of a person who is in holy orders or bound by solemn religious views. A tutor cannot adopt the person under his tutorship.

385. In the case of adoption of a child born out of wedlock, the consent of the mother is required even if s/he has not attained 18 years while in the case of children born in wedlock, the consent of both parents is needed if they have not attained the age of 18 years. Add to this, both parents are to consent to the adoption of their child. When the child has attained eleven years, the child is to give his / her consent to the adoption after s/he has been assisted by a children’s advocate.

386. Before an adoption decree is made, the court hears any person who has been entrusted with the care or the custody of the child to be adopted. When the child is born out of wedlock, the court is to hear the natural father if he has acknowledged the person to be adopted as his child, and that he has maintained and showed genuine and continuous interest in the child. In the case of a child being under tutorship or is living in a foster family, the court is to hear the tutor and the foster carers. The court is to hear also the child’s advocate and / or social worker appointed by the court to protect the best interest of the child and secure his / her representation.

387. The Civil Code empowers the court to dispense with any consent or hearing if:

(a) The person who is required to give his consent is incapable of giving such consent, or

(b) The parent cannot be found or has abandoned, neglected or persistently ill-treated or has persistently either neglected or refused to contribute to the maintenance of the person to be adopted; or

(c) Either of the parents are unreasonably withholding their consent; or

(d) Either of the parents may be deprived of parental authority over the child to be adopted; or

(e) The child to be adopted is not in the care and custody of either of the parents and the Adoption Board declares that there is no reasonable hope that the child may be reunited with his mother and / or father; or

(f) The parent/s have unjustifiably, not had contact with the child to be adopted for at least eighteen months; or

(g) It is in the best interests of the child to be adopted for such consent to be dispensed with.

388. Upon adoption the adopted child is considered to be the child of the adopter/s born to him / her or them in lawful wedlock and as a child of no other person. On the other hand, the relatives of the child to be adopted shall lose all rights and be freed from all obligations with respect to such person. The tutors, if any, shall terminate their administration and within 3 months from the date of the adoption decree render an account to the adopter. If the court decides to give an open adoption, then the parents retain the right to maintain contact with the child.

389. The child shall assume the surname of the adopting family. Upon attaining 18 years, the adopted person has the right to apply to the court for a copy of the relevant adoption decree of details of the adopted person's natural family and also the right to apply to the court for authorisation to obtain a copy of his / her original birth certificate from the Public Registry.

390. The Director of the Public Registry is informed of such adoption and an entry will be made in the Adopted Persons Register.

391. The Civil Code makes it clear that:

No person shall make or give or agree or offer to make or give, or receive or agree to receive or attempt to obtain any payment or other reward for or in consideration of -

- (a) the adoption by that person of any person;
- (b) the grant by that person of any consent required in connection with the adoption of a person;
- (c) the transfer by that person of the care and possession of the person to be adopted with a view to his adoption;
- (d) the making by that person of any arrangements for the adoption of a person.

392. Furthermore, nobody can publish by any means or medium, without authorisation of an accredited agency, that a child may be adopted or that a person intends arrangements with a view to the adoption of a child. Add to this, the name of the applicant/s, the name of the person who is or will be adopted, the name of the father, mother, curator or tutor of the adopted child or any details which can help in identifying the child or else to be published by any means or medium. Any person who publishes such information is liable to imprisonment for a term of not less than three months but not exceeding six months or / and to a fine (multa) of less than €1,164.69 but not more than €2,329.37. The same punishment is given to anyone who uses or threatens to use any force or restraint or injures or threatens to injure, or causes or threatens to cause anything to the detriment of a parent of a child with the intention of including a parent to offer or refrain from offering the child for adoption or influencing a parent to offer or refrain from offering the child for adoption.

393. In the case of a false statement made in relation to an adoption or impersonation or false representation, s/he shall be liable to imprisonment for a term not less than three months but not exceeding six months or / and to a fine (multa) of not less than €582.34 but not more than €1,164.69.

394. When documents are forged or obtained by fraud or duress, that person will be liable to imprisonment for a term of not less than six months and not more than one year and / or to a fine (multa) of not less than €1,164.69 and not more than €2,329.37.

395. A parent who consents to the adoption of his / her child and proceeds to the removal of the said child from the care and custody of the adopters, is liable to imprisonment for a term of not less than two months but not exceeding four months or / and to a fine (*multa*) of not less than €582.34 and not more than €1,164.68.

Article 25

1. Citizenship under Maltese law

396. The Maltese Citizenship Act under Article 3 distinguishes between persons who were born before 21 September 1964 (i.e. Independence Day) and those born after that date. This is due to the fact that, together with Chapter III (on Citizenship) of the Independence Constitution, it had to determine which persons would, as from Independence Day, assume the new status of citizens of Malta. With regards to persons born before the 21 September 1964 it further distinguishes between those born in Malta and those born outside Malta.

397. In order for persons born in Malta before the appointed day (Independence Day) to automatically acquire Maltese citizenship on the appointed day, they had to be Citizens of the United Kingdom and Colonies on the day preceding the appointed day and one of their parents had to be born in Malta. This provision introduces the concepts of both the *jus soli* and the *jus sanguinis* because the acquisition of Maltese citizenship automatically on Independence Day did not depend only on birth within Maltese territory but also descent from a parent who was himself/herself born in Malta.

398. Different provisions applied to persons born abroad before the appointed day. In order for such persons to become Maltese citizens on the appointed day, they had to be Citizen of the United Kingdom and Colonies on the day before Independence Day and their father became a citizen of Malta by birth in Malta on the appointed day. Therefore until the coming into force of Act X of 2007, the position was that a person born outside Malta pre-Independence to a foreign father and a mother born in Malta did not become a citizen of Malta at birth.

399. Act X of 2007 allowed persons born outside Malta pre-1964 to mothers who were or would, but for their death, have become Maltese citizens on the appointed day due to being born in Malta, to file an application and be registered as citizens of Malta. Thus while in the case of persons born to a Maltese father, acquisition of Maltese citizenship is *ipso jure*, in the case of persons born to Maltese mothers outside Malta, a voluntary act through the filing of the application is required. However, the acquisition of Maltese citizenship by such persons is as of right and once they file the prescribed application, they are to be granted Maltese citizenship.

400. In relation to persons born after Independence Day the Maltese Citizenship Act makes a distinction between persons born in Malta on or before 31 July 1989 and persons born on and after 1 August 1989. Those persons born in Malta between 21 September 1964 and 31 July 1989 are to be deemed citizens of Malta at birth. During this period the acquisition of Maltese citizenship depended merely on the *jus solis* that is by mere birth in Maltese territory. In this period many persons who have no links with Malta acquired Maltese citizenship merely because they were born in Malta. On the other hand, in order for persons born in Malta on or after 1 August 1989 to have the status of citizens of Malta, their father or mother has to either be a citizen of Malta, regardless of the mode of acquisition of their citizenship.

401. An all-comprehensive and quite liberal principle was introduced by Act X of 2007 in Articles 3 (3) and 5 (3). These new provisions state that any person born outside Malta at any time, shall by way of right be entitled to be registered as a citizen of Malta, if s/he proves that s/he is a descendant in the direct line of an ascendant born in Malta of a parent

likewise born in Malta. This therefore means that all persons born outside Malta who can prove descent from a person born in Malta shall be registered as citizens of Malta. This amendment further extended Maltese citizenship since it made it possible for persons born outside Malta who prove descent from a person born in Malta, to acquire Maltese citizenship without the need to take up residence in Malta. This provision based on *jus sanguinis* is not, however, open for all, because the law makes it clear that the person applying shall prove that at least two of his / her ascendants were born in Malta. There is the need, therefore, for a strong and close link with Malta.

402. Citizenship can also be acquired through marriage. The right of a foreign person to be registered as a citizen of Malta upon marriage to a Maltese citizen has been granted since the coming into force of the Constitution. According to the 'Maltese Citizenship Act' a person who on or after the appointed day marries another person who is a citizen of Malta or who becomes a citizen of Malta shall be entitled to be registered as a citizen of Malta upon making the prescribed application. However, in order to be registered as a citizen of Malta the applicant shall satisfy either of the following requirements:

- On the date of the application s/he is still married to and living with the citizen of Malta and must have been so married for at least five years; or
- On the date of application is *de facto* or *de jure* separated from the citizen of Malta but has lived with the citizen of Malta for at least five years after the celebration of marriage; or
- On the date of application s/he is a widow/widower of a citizen of Malta, but had lived with such citizen of Malta for at least five years prior to his/her death and was still living with him at time of death; or
- On the date of application s/he is a widow/widower of a citizen of Malta and on the date of death he/she has been *de facto* or *de jure* separated from such a citizen but has lived with such a citizen of Malta for at least five years after the celebration of the marriage.

403. In the case of a foreign person who was married to a citizen of Malta but whose Maltese spouse died before the fifth year of marriage, such person would also be entitled to apply for Maltese citizenship when five years would have elapsed from the date of celebration of marriage and as long as the said foreign spouse was still living with the Maltese spouse at the time of his / her demise. This right and these requisites do not apply only in case of foreign persons who married Maltese citizens on or pre-1964, but also to foreign persons who on the day pre-1964 were or had been married to a person who became a citizen of Malta in 1964.

2. Elections

404. Malta elects its national legislature by way of a method called the Single Transferable Vote (STV). Under this method, Maltese citizens are asked to give a preference ranking to as many candidates on the ballot as they wish, in numerical order: 1st, 2nd, 3rd, 4th, etc. When indicating their preferences voters may choose candidates from different political parties.

405. In order to win a seat, a candidate must receive a quota of votes in the district. This quota is determined by taking the number of valid votes and dividing them by the number of seats plus one. For instance, if in a particular district 5 candidates are to be elected and 12,000 votes have been cast altogether, then the quotas would be 12,000 divided by 6 (5 +1) or 2,000.

406. When the ballots are first counted, the first number (number 1) preferences on all ballots are examined, and any candidate who received enough first preference votes to meet

the quota will be declared elected. It often happens that some candidates have more first preferences votes than the quota actually required for election. In that case, all votes which a candidate received in excess of the needed quota are declared surplus votes. But these votes are not disregarded; instead they are transferred to the candidate who was indicated on the ballot as the voter's next-ranked choice. Once these votes have been transferred, a second count will be made to determine whether any other candidate has now achieved the quota.

407. Additional counts will usually be necessary to determine the various winners in succession. If on any count no candidate meets the quota, the candidate with the fewest number of votes is eliminated and his / her votes are transferred to the candidate who is the next-ranked choice on the ballot paper. These transfers of votes, from candidates who have either been elected or eliminated, continue through successive counts until all seats have been filled.

408. Thus the most important features of the STV method are that:

- (a) Several candidates will be elected in each district;
- (b) Voters cast their votes for individual candidates in preferential order, not for a list of party candidates; and
- (c) Voters are free to distribute their preferences among candidates of different parties or independent candidates.

3. Electoral Commission

409. The Electoral Commission is established under the Constitution of Malta (Article 60), which Commission shall consist of a Chief Electoral Commissioner as chairman and who is appointed from the public service, and eight members as Electoral Commissioners. This Commission is appointed by the President, acting in accordance with the advice of the Prime Minister, after he has consulted the Leader of Opposition.

410. The Commission is responsible for the registration, transfer, correction and cancellation of voters, the compilation of the Electoral Register and the election of the Electoral Office. Furthermore, the Chief Electoral Commissioner shall be responsible for the day to day running of the Electoral Office and the implementation of the decisions of the Commission.

411. Add to this, the Electoral Commission shall be a body corporate having a distinct legal personality and is capable of entering into contracts, of acquiring, holding and disposing of any land or property for the purposes of its functions, of suing and being sued and of doing all such things and entering into all such transactions as are incidental or conducive to the exercise of its functions.

412. The Electoral Commission is responsible of the following elections:

- (a) General Elections;
- (b) Local Councils Elections;
- (c) Elections for Members of the European Parliament;
- (d) Referenda.

4. General Elections

413. The election of members of the House of Representatives is the sole responsibility of the Electoral Commission. The holding of such elections is regulated by the General Elections Act¹¹⁵.

414. The electoral system existed since 1921 and sanctioned by various constitutions is that of proportional representation by means of the Single Transferable Vote (STV).

415. The Maltese Islands are divided into 13 electoral divisions each returning five members to the House of Representatives. A list of eligible voters, in the form of an electoral register, is revised and published every April and October in the Government Gazette. When elections are called, by means of a writ under the hand of the President of the Republic, the Electoral Commission prints and distributes voting documents to voters according to the last-published electoral register. As at October 2011, the number of eligible voters amounts to 328,088 – Table 22. The Electoral Commission proceeds to carry out all the administrative and organizational functions necessary to ensure the correct and smooth-running of such elections.

5. Local Councils Elections

416. A law providing for the setting-up of Local Councils was passed through Parliament in 1993 (Act XV) establishing 67 localities, 53 in Malta and 14 in Gozo. In December 1999 an amending Act (XXI) added a new locality (the 68th) – Mtarfa. The first elections, always based on the same principle used in general elections, were held between November 1993 and May 1994 while the first election for councillors of Mtarfa was held in March 2000. The 1999 amendment also included an additional Schedule listing ten hamlets within established localities. These are Fleur-de-Lys in Birkirkara, Santa Luċija in Kerċem, Gwardamanga in Pietà, Paceville in San Ġiljan, Kappara in San Ġwann, Ibraġ and Madliena in Swieqi, Marsalforn in Żebbuġ, Gozo, Bubaqra in Żurrieq and Xlendi in Munxar.

417. Until 2009, staggered local elections for 22 or 23 localities were held every March such that every council was voted in for a period of 3 years. Except that in 2004 and 2009, elections due were postponed to June to coincide with the national elections to select five members for the European Parliament (MEPs).

418. The number of councillors for each locality is determined according to the population in the locality, where five is the minimum and thirteen the maximum number of councillors. For various reasons, including deaths, a number of seats are vacated throughout the year. The Electoral Commission undertakes to carry out the resultant Casual Elections to replace the councillors or committee members. When no candidates are forthcoming or no one is elected, the seat is allocated by co-option.

419. Between 1993 and 2003, British citizens satisfying the electoral qualifications as set out in the Local Councils Act were entitled to stand as candidates and to vote for their respective council, together with Maltese electors. From 2004, these rights were extended when the list of eligible voters included all EU nationals, resident in the Maltese Islands, who are registered and possess a Maltese identity card.

420. Further legal amendments have established that local councils' term of office should be raised from three to four years. For this reason the terms of office of some councils were extended such that half of Malta and Gozo's council elections would be held in March 2012

¹¹⁵ General Elections Act, Chapter 354 of the Laws of Malta.

with the remaining half in March 2013. These would be repeated respectively in 2016 and 2017.

6. Elections for Members of the European Parliament

421. Act XVI of 2003 provided for the first-ever holding of elections of Members to the European Parliament (MEP). This was held on Saturday 12th June, 2004.

422. The Electoral Commission published a new European Union Electoral Register after it drew the attention of EU citizens resident in Malta and of Maltese nationals residing in EU member countries that they could apply to be listed in this register to eventually be able to vote in Malta to elect five members to the European Parliament. With the Lisbon Treaty the number of members Malta elected has been increased to six members but not all Member States ratified the process so till now Malta is represented by five members. Again, the voting system applied was by Single Transferable Vote and most of the regulations were similar to the ones used in general elections. In fact, Article 21 states that the conduct of elections and the counting of votes shall apply according to the provisions in the General Elections Act. A basic difference was that the Maltese Islands were considered as one electoral district.

423. For someone to be registered in the European Union Electoral Register, s/he:

(a) Is a national of a member state whose name does not appear in the Electoral Register; and

(b) Is in possession of an identity card, and

(c) Attained the age of 18 years and is resident in Malta (residence in any member state is deemed to be resident in Malta);

(d) Declares that he will exercise his right to vote for election of member of the European Parliament in Malta only; and

(e) Has not been deprived of the right to vote in his home member state.

424. On the other hand, any person who is interdicted or incapacitated for any mental infirmity by a court in a member state, is serving a sentence of imprisonment exceeding twelve months imposed on him by a member state or is disqualified for registration as a voter by or under any law in Malta by reason of having been convicted of any offence connected with the election of member of House of Representative, members of the Local Councils or member of European Parliament, are disqualified to be registered in the European Union Electoral Register.¹¹⁶

425. For the June 2004 MEPs election twenty-seven candidates contested the five seats. While five persons stood as independent candidates, the other 22 contested under the names of seven parties. A second election for MEPs was held on the same lines on Saturday 6th June, 2009. This time there were thirty-four candidates running for the five seats under the name of 10 parties but three were elected from the Labour Party and two from the Nationalist Party.

7. Referenda

426. The objective of the Referenda Act (Chap 237) is for registered voters to decide whether they approve a proposal/s set out in a resolution passed by the House of Representatives or whether they agree that a provision of law should be abrogated.

¹¹⁶ Chapter 467, European Parliament Elections Act, Article 12.

427. On the 8th of March, 2003, the electorate was asked to decide by means of a referendum on the proposal that Malta becomes a member of the EU on its enlargement due on 1st May 2004. The outcome was that Malta should become an EU member state. Prior to this, the last-held national referendum had taken place 39 years before. This concerned the confirmation of the Independence Constitution. Another national referendum was held on Saturday 28th May 2011. The question was to establish whether the electorate agreed on the introduction of divorce.

8. Qualifications of voters

428. The Constitution under Article 57 sets out the qualifications for one to be a registered voter for the election of members of the House of Representatives or any other election that is under the responsibility of the Electoral Commission. The qualifications are:

- (a) S/he is a citizen of Malta;
- (b) S/he has attained the age of 18 years;
- (c) S/he is resident in Malta and has during the 18 months immediately preceding his / her registration been a resident for a continuous period of 6 months or for period amounting in the aggregate to 6 months. However this requirement does not apply to a person who is ordinarily resident in Malta but has not been resident in Malta due to service abroad in the public service, or as a member of disciplined force (i.e. naval, military or air force of the Government of Malta, the Malta Police Force, other police force established by law in Malta and the Malta prison service)

429. The right to vote at elections is a right enjoyed by every person that is registered as a voter in an electoral division. However, the Constitution puts forward a list of who is disqualified from being a voter:

- (a) S/he is interdicted or incapacitated for any mental infirmity by a court in Malta;
- (b) S/he is under sentence of death imposed on him by any court in Malta¹¹⁷ or is serving a sentence of imprisonment exceeding 12 months;
- (c) S/he is convicted of any offence connected with the election of members of the House of Representatives.

9. Qualifications for membership of House of Representatives

430. The same qualifications indicated for voters, apply also to those who can be elected as members of the House of Representatives and is not qualified to be so elected unless he has the qualification for registration as a voter for the election of members of the House of Representatives. Thus anyone who is not a citizen and a resident in Malta and who has not attained the age of 18 years cannot contest elections.

431. The Constitution provides a list of disqualifications for membership of House of Representatives:

- (a) If s/he is a citizen of country other than Malta having become such a citizen voluntarily;
- (b) If s/he holds or is acting in a public office or is a member of the armed forces of the Government of Malta;

¹¹⁷ This part of law is no longer applicable since the death penalty has been removed from our laws as has been indicated earlier.

(c) If s/he is a party to or is a partner with unlimited liability in a partnership or a director or manager of a company which is a party to a contract with the Government of Malta;

(d) If s/he is undischarged bankrupt;

(e) If s/he is interdicted or incapacitated for any mental infirmity;

(f) If s/he is under sentence of death imposed on him / her by any court in Malta¹¹⁸ or is serving a sentence of imprisonment exceeding 12 months, however, two or more sentences that are to be served consecutively are to be considered as a separate sentence if none of them exceeds 12 months and also no account is to be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine;

(g) If s/he holds or is acting in any office the functions of which involve any responsibility for, or in connection with, the conduct of any election of members of the House of Representatives or the compilation or revision of any electoral register.

10. Public service¹¹⁹

432. The Public Service is the core of the permanent administrative machinery of the Government of Malta. Its mission is to:

- Offer policy advice to the Government;
- Implement Government policies and to administer legislation efficiently and effectively;
- Deliver services to the public impartially, without errors and in a customer-friendly manner.

433. The Public Service is part of the wider public sector, but the two are not the same. Broadly speaking, the Public Service consists of staff recruited under the authority of the Public Service Commission (in legal parlance, public officers) who serve in Ministries and Departments and are subject to a common framework of rules and regulations.

434. On the other hand, the wider public sector includes many public corporations, statutory authorities and other entities which are not part of the Public Service. Teachers in state schools, for instance, are public officers; university lecturers are not. Police officers are also members of the Public Service, but soldiers are not.

435. The Public Service has undergone a wide-ranging programme of reform over the last decade to improve its efficiency and responsiveness to Government and to the public. The Service has led the way in Malta in its application of information and communications technologies (ICT). The Service boasts a state-of-the-art ICT infrastructure which has served as the springboard for electronic government. Standards of service to the public are being improved thanks to this investment in ICT as well as the Quality Service Charter initiative.

¹¹⁸ *ibid.*

¹¹⁹ Office of the Prime Minister: Public Service <<https://opm.gov.mt/servizz-pubbliku?l=1>> accessed 14 February 2012.

11. Public Service Commission (PSC)¹²⁰

436. The PSC is established by the Constitution under Article 109 which consists of a Chairman, a Deputy Chairman and from 1 to 3 other members. The members are appointed by the President, acting in accordance with the advice of the Prime Minister after consulting the Leader of Opposition.

437. The PSC contributes to an impartial Public Service with a high standard of competence, efficiency and integrity by giving advice and making binding recommendations to the Prime Minister on:

- The making of appointments to public offices (or posts in the Public Service)
- The removal of persons from such office
- The exercise of disciplinary control over public officers

438. The PSC provides assurance that all actions concerning recruitment, promotions and appointments within the Public Service are made in an equitable, fair and impartial manner, free from favouritism, patronage and discrimination and based on the principle of merit. It is also the duty of the Commission to ensure that disciplinary action against public officers is fair, expeditious and effective.

439. Appointments in the Public Service are made by the Prime Minister on the advice of the PSC – which means that the Commission tells the Prime Minister who to appoint. There are a number of exceptions to this general rule – as in the case of Permanent Secretaries, who are appointed by the President acting in accordance with the advice of the Prime Minister, given after the Prime Minister has consulted with the Public Service Commission. Appointments to positions of head of department are made by the Prime Minister from amongst senior public officers acting after consultation with the Public Service Commission. Moreover, the power to make appointments can be delegated by the Prime Minister on the Commission's recommendation. For example, the Principal Permanent Secretary has been delegated the authority to make appointments to posts which are filled on the basis of a competitive public examination.

440. In the making of appointments in the Public Service, the selection process is generally conducted by a selection board that serves as an “agent” of the Public Service Commission. This means that the selection board, which is composed of members appointed by the Commission, is part of the machinery of the Public Service Commission and is therefore accountable only to the Commission.

441. The Selection Board is obliged to ensure that it conducts the selection process in a fair and objective manner on the basis of the selection criteria, which are approved in advance by the Commission. The Selection Board submits its report and draft result to the Commission for approval. The Commission will scrutinise these documents with a view to ensuring that the selection process has been fair, and if it gives its approval the Commission will direct that the result be published. The Commission will also recommend that the first-placed candidate be appointed to fill the vacant post.

442. The Commission may investigate the selection process, either on its own initiative or on receiving a petition from a candidate, and the Selection Board will then be expected to satisfy the Commission concerning the regularity, fairness and consistency of the selection process undertaken by the Board. If the Commission is not satisfied on these

¹²⁰ Public Service Commission <<https://secure2.gov.mt/PSC/funzjonijiet?l=1>> accessed 14 February 2012.

counts, it may order changes in the selection result, or even annul the entire result and direct that the selection process be undertaken afresh by a new Selection Board.

12. Removal, suspension and dismissal

443. The Prime Minister in terms of Article 110 of the Constitution of Malta, has delegated to heads of department the authority to exercise disciplinary control over public officers under their jurisdiction. This means that in the case of discipline, unlike selection, departments do not need to refer to the Commission at every stage in the process. Delegation thus helps to speed up proceedings, and makes possible greater efficiency and accountability.

444. The PSC has the discretion to enquire into the exercise of disciplinary control by any head of department and to investigate whether such delegated authority has been abused or misused. Moreover, public officers can appeal disciplinary sentences directly to the PSC, which then reviews the case. If need be the Commission can even withdraw a head of department's delegated authority to exercise discipline. The Commission can also take disciplinary steps against heads of department or other officials who abuse their disciplinary powers.

445. Although discipline has been delegated, the Commission retains authority over the following matters:

- The interdiction of public officers charged with serious offences;
- Penalties, including dismissal, to be imposed on public officers found guilty of criminal offences;
- Cases where a serious disciplinary offence is considered by the head of department concerned as leading to dismissal; and,
- The forfeiture or otherwise of money withheld from the salary of public officers during the period of interdiction.

446. In terms of Regulation 30 (1) of the 1999 Regulations (Disciplinary Procedure), the PSC hears appeals by public officers against decisions made by heads of departments under delegated authority. Moreover, regulation 33 of the same Regulations entitles any person who is or has been a public officer and who had been penalized under the Disciplinary Regulations to petition the Commission to review his or her case for the purpose of amending or revoking the recommendation which the Commission had tendered against him or her.

447. A public officer has a right of appeal to the Commission against a finding of guilt and the corresponding penalty imposed by a Head of Department in any of the following circumstances:

- (a) When the officer has been found guilty of charges which are considered by his/her department to be a serious disciplinary offence;
- (b) Where the penalty imposed by the Head of Department is or includes a "warning of dismissal";
- (c) Where the officer can prove that there has been a gross disregard of the procedures laid down in the Disciplinary Regulations and such disregard had prejudiced the interests of the officer.

Article 26

448. Discrimination is defined by Article 45 (3) as follows: “the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

449. Furthermore, the State guarantees that no law shall be enacted which is discriminatory either in itself or in its effect. By virtue of sub-article (4) of the same constitutional provision, the guarantee against non-discriminatory laws is curtailed to the effect that it is specifically excluded in the following circumstances:

- For the appropriation of public revenues and public funds;
- With respect to persons who are not citizens of Malta;
- With respect to adoption, marriage, dissolution of marriage, burial, devolution of property on death or any matter of personal law, but not in cases where the discrimination is wholly attributable to sex;
- With respect to persons subjected to any disability or restriction or accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to such persons or to any other provision of the Constitution, is reasonably justified in a democratic society;
- For authorizing the taking of measures during a period of public emergency which are reasonably justified for the purpose of dealing with that situation.

1. Persons with disability

450. The Equal Opportunities (Persons with Disability) Act, enacted on 19 January 2000, prohibits the discrimination against a person with disability in five specific areas: employment, education, access to premises, provision of goods, facilities and services and accommodation. This legislation seeks to create a balance between the rights and obligations of the person providing employment or service and the right of the person with a disability. A disabled person has the right not to be discriminated against and to have equal access to the above services. The person providing such services has an obligation to ensure that s/he is in a position to provide such a service. However, if in providing such a service unjustifiable hardship to the employer or service provider ensues, then such person may be justified in discriminating.

451. The act provides for the establishment of a National Commission Persons with Disability, which was set up on 3 November 1987. The commission was originally known as the National Commission for the Handicapped and a change to its present name was made in 1993. The National Commission, which is made up of 14 members, has the power to investigate allegations of discrimination against any person who claims that s/he has been subject to discrimination on the basis of disability. The Commission may also initiate investigations on its own accord.

2. Legislation sanctioning incitement to racial hatred

452. The development of Maltese law with regard to racial discrimination is relatively recent. The Independence Constitution of 1964 was the first legislation in Malta to embody a justifiable set of fundamental rights and freedoms, including the right of protection from discrimination *inter alia* on the grounds of race, colour and place of origin. Prior, the Seditious Propaganda (Prohibition) Ordinance of 1932 was the only law that dealt with race

relations. The Ordinance prohibited the publication, printing, exposure, offering for sale, or distribution of any newspaper, book, poster, etc., with contents that were likely or had the tendency “to promote feelings of ill will and hostility between different classes or races of her Majesty’s subjects.”

453. Since independence, Malta is a signatory to number of international conventions that prohibit racial discrimination, namely the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the European Convention on Human Rights (ECHR), the ILO Convention No. 111 on Discrimination, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Framework Convention for the Protection of National Minorities (FCPNM), and the Revised European Social Charter. The substantial rights guaranteed under these conventions, except the ECHR, are not directly enforceable by the Maltese Courts. The accession of Malta into the EU in 2004 has had a profound effect on the development of anti-discrimination law, and in particular racial discrimination in Malta. the most significant development in the Maltese legal framework with regards to racial discrimination was the transposition into Maltese law of the Employment Equality Directive and the Race Equality Directive which directives introduced non-discrimination legislation in the fields of employment and the provision of goods and services, including education, social security and health, into the Maltese system.

454. The Constitution, under Article 45, guarantees protection from laws that are discriminatory in their substance and in their effect and also safeguards the individual from discriminatory treatment by public officers or public authorities.

455. Amendments to the Criminal Code were enacted in 2002 whereby the crime of incitement to racial hatred has been constituted. Thus, any person that uses any threatening, abusive or insulting words or behaviour, displays any written or printed material which is threatening, abusive or insulting or abusive otherwise conducts himself in such a manner which is likely to stir up racial hatred shall be liable to a term of imprisonment from six to eighteen months. Racial hatred is defined as hatred against a group of persons based on colour, race, nationality or ethnic or national origin.
