The Constitution and the European Convention on Human Rights – conflicts, similarities and contrasts

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In this article, **Dr Tonio Borg** examines the conflicts, similarities and contrasts between the Constitution and the European Convention on Human Rights.

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The juridical relationship in Malta between the Constitution and the European Convention on Human Rights has given rise to interesting issues and problems, cases, and conflicts, but also similarities and contrasts. To what extent does the Convention provide a better protection to the individual, and what happens when there is a conflict between the two, which one does prevail?

The conflict appeared on the jurisprudence horizon practically immediately after the incorporation of the Convention in Malta in August 1987. The Constitution had afforded a protective cover over the main Codes of law in Malta from the human rights provisions, an immunity which came to an end in 1991. One such immunity, relating to pre-1962 laws, still applies when it comes to the right to property under Article 37 of the Constitution. The Convention of course does not accept any such immunities or exceptions to its protection. Therefore, which shall prevail: the immunity contained in the Constitution, or the Convention which till this very day is only an ordinary law- though even this latter point has been debated and contested as well as we shall see.

The introduction of the European Convention on Human Rights into the Maltese legal system followed a very tortuous path. Malta joined the Council of Europe in 1965. It signed the European Convention in 1966, and ratified it in 1967, with two exceptions, the compulsory jurisdiction of the European Court of Human Rights and the individual right of petition. This therefore meant that (a) a signatory state party to the Convention could refer a case against Malta before the European Commission of Human Rights, but not the European Court; and the individual had no recourse at all to the Strasbourg organs and institutions. On 30 April 1987, Malta ratified the compulsory jurisdiction of such Court and the individual right of petition. In August 1987, the Maltese Parliament incorporated the Convention in Maltese law[1] so that any person could institute a human rights action under the Convention before the Maltese courts as well. In such an action one could include also a human rights grievance under the Constitution.

1. Conflict between Constitution and Convention

The first case where the conflict arose was in the ***Pullicino*** case[2]. Just two years after Act No. XIV of 1987 (Chapter 319 of the Laws of Malta) had been enacted. Applicant had been charged with wilful homicide; as the Criminal Code was at that time, no bail could be granted by the Magistrate even if he felt that this was deserving. The Criminal Code was at that time protected from the human rights provisions of the Constitution. Applicant successfully argued that according to

[1] Act No. XIV of 1987, Chapter 319 of the Laws of Malta.
[2] ***Dr L. Pullicino vs Commander Armed Forces et*** **(Constitutional Court)** (CC) (12 April 1989) (Vol.LXXIII.I.54).

Article 5 of the Convention, the lack of discretion by the judicial officer in granting him bail, meant that no proper examination of whether his continued detention was required could be made. Applicant wisely challenged the Criminal Code provision on the basis of the Convention rather than the Constitution. Did this immunity provision prevail over the European Convention; and the answer is that there is nothing at all to prevent the legislator from granting *more* rights to the individual not contained in the Constitution; of course, the ranking of such Convention right in Malta would be that of ordinary law. What the legislator could not do was to grant *less* rights than those contained in the Constitution.

This form of parallel protection has been applied ever since. It came to a head in the case [3] the Nationalist Party had instituted regarding the loss of two parliamentary seats owing to an error by the counting agents during the 2013 general elections. The Party based its case on the right to a free and fair election under Protocol 1 to the Convention. Some had then argued that the only way one can contest an electoral result was through the electoral provisions contained in the Constitution and the electoral laws[4]. The Court ruled otherwise. It stated that this was a human rights case, transcending any electoral contestation under any other law including the Constitution. This makes legal and practical sense; for if it were otherwise, it would have meant divesting the Maltese Courts from scrutinizing the case, without in any way preventing a reference to the European Court, where Protocol 1 would be applied irrespective of what is contained in the Constitution of Malta.

2. Differences between Constitution and Convention provisions

A quick survey of the main provisions of both legal instruments reveal significant similarities. There is no doubt that the constitutional legislator was inspired by the provisions of the European Convention. There are however striking differences. For instance, there is no right to private and family life in Chapter IV of the Constitution even though such right is mentioned in the non-justiciable preamble to the human rights chapter. The list of prohibited grounds for discrimination is longer than that found in Article 45 of the Constitution, indeed the list is indicative rather than exhaustive as is the case with our supreme law. But then Article 14 of the Convention applies only in the enjoyment of the rights and freedoms set forth in the Convention, which is not the case with Article 45.

The right to property in Malta under Article 47 is in actual fact a right to adequate compensation *ex post facto*, but does not include a right to contest the validity of the taking possession of private property itself. This on the contrary is guaranteed in Article 1 Protocol 1 of the Convention.

[3] ***Nationalist Party et vs Electoral Commission et*** (CC) (25 November 2016) (26/13).
[4] See Kevin Aquilina: 'An Irreconcilability' *Times of Malta* (17 June 2016) available online on <https://timesofmalta.com/articles/view/An-irreconcilability.615718>.

Another notable difference *ictu oculi* is that while the Constitution in establishing the limits to these rights refers to the concept of reasonableness such as that a restriction has to be reasonably required in some public interest, or that something had to be done which 'is reasonably justifiable in a democratic society', in the case of the Convention, the word used is 'necessary'. Is the restriction necessary in a democratic society? There is no doubt that this standard is stricter than the one adopted by the Maltese Constitution.

However, the most significant difference relates to the right to a fair hearing. The Maltese Constitution is crystal clear that as regards criminal proceedings only a court established by law can preside over such proceedings, while civil or non-criminal proceedings may be decided either by a court or an adjudicating authority. There is a historical reason for this distinction. When the 1961 Constitution which incorporated the first human rights chapter in a supreme law, and which paved the way for independence in 1964, was being discussed, the political climate in Malta was tense. Following the resignation of the Labour Government in April 1958, and the return to direct rule in 1959, the two main political parties were clamouring for independence. Under direct rule, some Maltese had cooperated with the British in running the administration. There was fear that a newly elected government might seek revenge in some way or another.[5] Consequently, it was established that only a court presided over by a judge or magistrate could decide criminal cases. This issue was decided by the Constitutional Court in ***Police vs Emmanuel Vella***[6] where the apex Court in Malta drew this distinction and held that a lay tribunal could not decide a criminal case. This protection was later extended to cover also hefty administrative penalties (***Federation of Estate Agents***,[7] ***Rosette Thake***[8]***, Angelo Zahra***[9]).

3. Pre-1987 Jurisprudence: Convention and Constitution

It is important to note that even prior to the ratification of the right of individual petition in 1987, and the acceptance of the compulsory jurisdiction of the European Court, the jurisprudence of the latter Court was already a source of interpretation of Chapter IV of the Constitution which, after all, in general, was based on the provisions of the Convention.

A notable case where the Constitutional Court affirmed a distinction, in my view erroneous, between the Convention and the Constitution was in the ***doctors'***

[5] See Report of the Malta Constitutional Commission (HMSO (1961) (London): 27 'In view of threats of trial by 'peoples' tribunals' the provisions of section 21(2) of the Nigerian Constitution might be strengthened by substituting for the word 'court' a form of words including the jurisdiction to try criminal offences to the existing courts in Malta.'
[6] (CC) (28 June 1983).
[7] (CC) (3 May 2016).
[8] (CC) (8 October 2018).
[9] (CC) (29 May 2015).

case[10]. In that case, striking medical doctors in the public service had been locked out of state hospitals and then prohibited by law from exercising their profession in private hospitals. The doctors alleged that this amounted, *inter alia*, to an indirect form of forced labour. Arguing that our Constitution, unlike the Convention, prohibited only *forced* labour, and not also *compulsory* labour, the Constitutional Court decided that indirect forms of forced labour while prohibited under Article 4 of the Convention, were not so prohibited under Article 35 of the Constitution.

In another case, the question arose regarding the right to engage the services of a lawyer in criminal proceedings. The Constitution in Article 39 protected the right of the accused to engage the services of a lawyer, while Article 6 of the Convention specified that such right was to a lawyer 'of one's own choosing'. In ***Police vs Michael Falzon***[11], the issue arose whether a law prohibiting lawyer members of Parliament from defending persons in certain criminal cases, was in line with this right. The Constitutional Court stated that it was not, arguing that once applicant was ready to pay for the services of a lawyer, he had a right to engage any licensed lawyer, even though the words 'of one's own choosing' were not included in the Constitution.

4. Legal Standing or Juridical Interest.

Our Courts have ruled that any constitutional action other than one covered by Article 116 of the Constitution (*actio popularis*), requires applicant to prove juridical interest. This is based on two premises: (a) that Article 116 states that non-human rights actions do not require personal interest; arguing *contrario sensu* therefore, human rights actions, *do*; and (b) Article 46 of the Constitution requires that applicant proves that a human rights infringement occurred 'in relation to him'. This has been extended to cover any non-human rights action, even one relating to the validity or otherwise of an election of a member of Parliament, or an action alleging infringement of the neutrality articles in our Constitution.[12]

The wording of Article 46 including the use of the words '*in relation to him'* are repeated in Article 4(2) of Chapter 319 when applicant institutes a human rights action under the European Convention.

This juridical interest has been interpreted in a strict manner, applying, in my view erroneously, civil law concepts of what amounts to such interest and quoting renowned Italian civil law writers such as Mortara in the process.[13]

[10] ***Walter Cuschieri et vs Prime Minister et*** (CC) (30 November 1977).
[11] (CC) (26 September 1989) (Vol. LXXII.I.48).
[12] For criticism of the application of juridical interest to constitutional cases, see Tonio Borg, *Juridical Interest in Constitutional Proceedings* (GħSL On line 17 February 2017) and Giovanni Bonello, *When Civil Law Trumps the Constitutional Court (Id-Dritt XXIX)* (GħSL) 427.
[13] See ***Emilio Persiano vs Commissioner of Police*** (FH) (30 May 2002) (Hon. Mr Justice JR Micallef).

Although when it comes to filing a human rights action in Malta under the Constitution or the Convention, the wording relating to interest is the same, the situation is not so when one comes to institute an action before the European Court once all domestic remedies have been exhausted. The Convention is adamant that applicant has to prove that he is a victim of a violation of the Convention. It would appear that the word 'victim' is a stronger term than the phrase 'in relation to him' in Article 46. Yet a cursory examination of the European jurisprudence shows that the European Court has interpreted these words in a more liberal fashion than how the Maltese courts have interpreted the words 'in relation to him'. Consequently, the European Court has admitted potential victims, such as homosexual couples whose action in private were criminalised by law, even though there was no actual prosecution against them;[14] similarly, in another case, a non-governmental organization was allowed to challenge an order preventing pregnant women in Ireland from leaving their country to legally perform an abortion outside Ireland.[15] In Malta the strictest interpretation has been given to juridical interest; to the extent that two election candidates who alleged that they should have been elected in the general election proper rather through an electoral corrective mechanism had their case dismissed owing to lack of juridical interest once they had been elected to Parliament just the same.

5. Legal implications and problems of Parallel Protection

These are best explained in the case ***Nationalist Party et vs Electoral Commission et.***[16] In that case relating to the right to free and fair elections under the Convention, respondents claimed that Chapter 319 did not prevail over the Constitution and therefore, the First Hall even in its constitutional jurisdiction, could not have any power over matters such as the validity of elections over which only the Constitutional Court enjoys jurisdiction. It argued that Article 63 of the Constitution provides in the most clear manner that questions related to the validity of elections of members of Parliament are to be decided exclusively by the Constitutional Court. The court of first instance, therefore, had no jurisdiction to declare the 9 March 2013 election result as incorrect or that such result be rectified. Chapter 319 was subject to the Constitution; the Constitution provided that electoral matters had to be decided directly by a court presided over by three judges namely, the Constitutional Court as a court of first and last instance.

The Court ruled that the legislator wanted to *add* to the rights found in the Constitution and that there was no conflict between the electoral mechanisms, procedures, and remedies envisaged in the Constitution on the one hand, and those contained in the sections protecting the right to free and fair elections under Protocol 1, both of which formed part of the Maltese legal system. The Court

[14] ***Dudgeon v.United Kingdom*** (ECrtHR) A 45 (1981).
[15] ***Open Door and Dublin Well Women v. Ireland*** (A246 (1992) 15 EHRR 44 para 42 pc.
[16] Constitutional Court (CC) (25 November 2016).

therefore, adopted the parallel protection theory, and the rule that Convention rights add to the constitutional ones; they cannot subtract from them.

A similar attitude had been adopted in ***Allied Newspapers Limited vs Attorney General et*** decided by the Constitutional Court on 2 December 2003. Article 47(9) of the Constitution still provides that any pre-March 1962 law as it stood on the promulgation of the Independence Constitution, can never be declared in conflict with the human rights provisions of the Constitution. In that case, property had been expropriated under Chapter 88 which had been enacted in the thirties. When this action by government was contested, Government pleaded, in line with the following syllogism, that:

(a) according to Article 47(9) anything done under the authority of Chapter 88 could be considered to be in breach of Article 37 of the Constitution (the right to property section);

(b) this meant that anything done under and according to Chapter 88 was according to the Constitution, constitutionally valid;

(c) Chapter 319 is an ordinary law;

(d) Consequently, one cannot review under Chapter 319 any action under a law which is protected by the Constitution, since otherwise one would be making use of an ordinary law Chapter 88, to review the Constitution.

The Court remarked as follows:

> *Frankly speaking, this Court has not seen this type of sophism for some time in cases brought before it. What appellants are evidently and conveniently forgetting is that Chapter 319, through the European Convention and its Protocols reproduced in the First Schedule to that Chapter, grants protection to the fundamental rights and freedoms which is altogether independent of that provided for in the Constitution. In fact, it is well known that there are certain provisions of the Constitution which are more liberal than those of the Convention (e.g. before the introduction of Article 4 of the 7th Protocol in the First Schedule, it was the Constitution and not the Convention which embraced the principle of ne bis in idem (Article 39(9)). There is therefore nothing extraordinary-as is being held by appellants – that what was done under Chapter 88 is considered in conflict with Article 1 of the First Protocol to the Convention, even though it is not in breach of Article 37 of the Constitution, owing to what is provided for in Article 47(9) of the said Constitution.*

This does not mean that these conflicts have always been considered as not being

conflicts at all. One eminent jurist[17] opined as regards the electoral case abovementioned, that the Constitution prevailed over Chapter 319. In this respect he criticized the judgments of the civil court as a court of first instance which has acceded to the requests of the PN, later confirmed by the Constitutional Court. This refutes the position that the Convention can grant *more* rights not contained in the Constitution. The author expressed a contrary opinion.[18]

The contrary argument, as shall be explained, is also not valid; namely, the fact that the Constitution affords more or better rights than the Convention, does not mean that our constitutional provisions are in violation of the Convention, a violation which can give rise to an action before the European Court. This is confirmed by the fact that Article 60 of the Convention provides that:

> *Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting State or under any other agreement to which it is a Party.*

In practical terms this means, for example, that the fact that the Convention allows criminal proceedings to be conducted before an adjudicating authority while our Constitution does not, does not mean that our constitutional provision is in breach of the Convention.

6. Enforcement of European Court judgments

This issue has raised thorny and complex issues. How does one transform a favourable judgment into concrete terms in Malta? Act No. XIV of 1987 introduced Article 6 which states that following a judgment by the European Court an individual may file an application before the Constitutional Court to enforce that judgment. Is it possible that this provision was only meant to cover the case of a failure by the respondent Government to pay expenses, damages, and costs indicated in the judgment? Or was it intended to allow the Constitutional Court, which incidentally would have previously ruled against plaintiff, thereby provoking a reference to the European Court to give flesh to the dry bones of the European Court judgment. Everyone knows that the European Court never annuls a law or government action, but, being an international court, merely declares that a situation, whether arising from a law or an administrative measure or action, is in violation of the Convention. It is up to the political organ of the Council of Europe, namely the Committee of Ministers, to conduct the follow-up, and ensure that the proper domestic law changes are affected.

[17] Professor Kevin Aquilina, 'An Irreconcilability' *Times of Malta* (17 June 2016) available online on <https://timesofmalta.com/articles/view/An-irreconcilability.615718>. With reference to the PN electoral case he stated: 'the remedy under the European Convention Act is not additional to the constitutional remedy; it is in contravention thereof. The solution to such legislative conflict is parliamentary not judicial'.

[18] See Tonio Borg, Constitution and Convention, *Times of Malta* (22 June 2016) available online on <https://timesofmalta.com/articles/view/Constitution-and-convention.616342>.

In the ***Aloisio*** judgment[19], the Constitutional Court did exactly the opposite. It ruled that it would only enforce what is expressly stated in the judgment. It would not read between the lines or translate the provisions of the judgment into a practical remedy, in that particular case ordering the re-appointment of an appeal application which had been deemed abandoned, a fact which was considered to be in breach of the right to a fair hearing by the European Court.

One eminent jurist,[20] has criticized the mere existence of Article 6 of Chapter 319 arguing that with the ratification of the Convention and the compulsory jurisdiction of the European Court, the moment a judgment is delivered by that Court, it has immediate effect in Malta without further ado.[21]

7. Is the Convention part of the written Maltese Constitution?

When Malta joined the European Union in 2004, an amendment was introduced to Article 65, an unentrenched part of the Constitution. The amendments are indicated in italics in the following excerpt:

> Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta, *in conformity with full respect for human rights, generally accepted principles of international and Malta's international and regional obligations, in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16 April 2003.*

These amendments were introduced by the European Act 2003 (Chapter 460 of the Laws of Malta), and since at that time there was no consensus on Malta's membership of the European Union, Government chose a section to introduce such amendments which could be altered by a majority of fifty *per centum* plus one of all the members of the House (absolute majority) to introduce a reference to the EU.

In the ***Vodafone*** case,[22] the Constitutional Court ruled that this article gave constitutional status to the Treaty of Accession and, consequently, EU law was part and parcel of the Constitution; meaning that any provision in Maltese law which ran counter to the EU treaties, would be unconstitutional. Applying the

[19] ***Raphael Alosio et vs Attorney General et*** (CC) (28 September 2012).
[20] Giovanni Bonello former judge of the European Court of Human Rights (1998-2010).
[21] See Giovanni Bonello, 'Bad law? Worse Remedy' *Times of Malta* (2 May 2012) <https://timesofmalta.com/articles/view/Bad-law-Worse-remedy.417940> and by the same author 'How the Constitutional Court betrays Malta's Constitution' *Times of Malta* (19 May 2013) <https://timesofmalta.com/articles/view/How-the-Constitutional-Court-betrays-Malta-s-Constitution.470259> and 'The Supremacy delusion Unconstitutional Laws and Neo Colonial Nostalgia' in the President's Forum (Part One) (Office of the President) (2013).
[22] ***Vodafone Malta Ltd vs et Attorney General et*** (CC) (23 March 2014).

same reasoning to 'Malta's international and regional obligations', one can reasonable argue that the ratification of the European Convention creates such an obligation, and therefore ranks at *par* with the constitutional norms. If this interpretation were to be accepted by the local Courts, the possible conflict between the Constitution and the Convention would be mostly resolved.

8. Conclusion

The co-existence of these two legal instruments, the Constitution of Malta and the European Convention has been generally peaceful and reasonable. The Court has avoided an application of too formal or byzantine an interpretation, accepting the parallel protection theory in spite of some resistance. What is certain is that the momentous decision to incorporate the Convention in Maltese law has changed the legal landscape; it has changed our laws, practices and traditions, but above all the new access to an international court of human rights, at least in theory, is supposed to have made the local Courts vigilant about aligning our laws and practices with international human rights standards. As rightly pointed out by Judge Emeritus Giovanni Bonello:

> *The European Court of Human Rights is just as influential in what it determines, as it is through the mere fact that it is there. The reality of its existence, in itself, exercises enormous restraint on states subject to its jurisdiction. Since 1987 the three organs of the State – the Legislature, the Executive and the Judiciary- are on notice that theirs is no longer the final word. They know they have to meter every step they take against the strictest parameters of respect for human rights. The awareness that a supranational authority will scrutinize all their activity, that it will condemn them in damages and expose them to international opprobrium should they be found lacking, has, in itself, had a tremendously salutary effect in keeping the court, Governments and Parliament on the straight and narrow.*[23]

The Constitution of Malta and the European Convention are today inseparable and irrevocably intertwined. They offer a double protection to individuals seeking redress. They exist side-by-side supplementing and complementing each other. They serve as a shield of protection from arbitrariness and injustice. Long may this relationship endure!

[23] Giovanni Bonello: 'Malta's Debts to the European Court of Human Rights' (2014) <http://lawjournal.ghsl.org/viewer/85/download.pdf>.


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