HUMAN RIGHTS DOCUMENTATION IN MALTA

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Elaborating on a number of Maltese human rights documents exhibited in Vienna on the occasion of an International Colloquy on Human Rights organized there by the Council of Europe, this paper seeks to bring out the special significance of these documents in the context of the promotion and protection of human rights in Malta. It ends up by focusing on the European Convention Act, 1987, which effectively incorporated the substantive provisions of the European Convention on Human Rights and its First Protocol into Maltese law and made judgments of the European Court of Human Rights against Malta enforceable by the Maltese Constitutional Court in the same manner as if they were its own judgments. In highlighting the far-reaching effects of this important piece of legislation, the paper also dwells on some related problems.

In 1965, as a judge of the European Court of Human Rights, I represented my country, still fresh from the Independence celebrations, in an International Colloquy about the European Convention on Human Rights, which was held in Vienna between the 18th and the 20th October. It was organized by the Faculty of Law of the University of Vienna, in conjunction with the secretariat of the Council of Europe and with the support of the Austrian Government.[1]

What was special about this international gathering was that in its context an exhibition of documents was arranged in the historic Hofburg Palace, with the object of illustrating landmarks in the

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[1] The writer also addressed the gathering on the subject of "prospects of world-wide protection of human rights – positive and negative aspects." See A.H. Robertson (ed.) *Human Rights in National and International Law,* Manchester University Press, 1968, pp. 325-326 (references in the summing up to the writer's intervention are at p. 328). See also *Times of Malta,* 15.10.65, p.19 and 22.10.65, front page, and *Malta Today*, Vol. 1, no. 1, January 1966, p.13.

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protection of human rights and fundamental freedoms in the member States of the Council of Europe. The idea behind the exhibition was to show, by means of suitable documents, *"the part played by national authorities in the protection of human rights, since international guarantees can only play a complementary role."*

Malta participated with seven historic documents selected by me, each of which was, as requested by the organizers, accompanied by a note explaining its place and importance in the development of the protection of human rights in our country. These notes, written by me in English, were circulated in booklet form not only in that language, but also in the French and German translations prepared by the Council of Europe secretariat.

Although, of course, the seven documents exhibited did not purport to exhaust the documentary evidence of the protection of human rights and fundamental freedoms in Malta over the years (the number of exhibits presented by each country had necessarily to be kept within prescribed limits), they are perhaps the most important Maltese documents in this sphere. I therefore collected both the documents and the accompanying introductory notes in a little book, *Human Rights Documentation in Malta,* which was published by the University of Malta in 1966. It was extensively used by students and soon went out of print and for many years later I kept receiving gentle and at times not so gentle reminders from the University of Malta for a second edition. But rather than produce a second edition with just texts and accompanying notes, I thought it might perhaps be more interesting to knit them together into a more cohesive whole, as I propose to do in the following pages.

The first of these landmark documents is a source of great pride to the Maltese people. It is the *Dichiarazione dei Diritti degli Abitanti delle Isole Malta e Gozo* (Declaration of Rights of the Inhabitants of the Islands of Malta and Gozo), which barely a few years after the celebrated French *Déclaration des Droits de l'Homme et du Citoyen* (1789) the Maltese solemnly drew up. On the 2nd September 1798 they had risen against the Napoleonic forces which had captured the Islands from the Order of St John less than three months earlier, and after a bitter struggle, which cost them many lives, they had succeeded with the aid of the British and other co-belligerents, to drive them away from their shores. Of their own accord, the Maltese then offered their homeland to the British Crown. Just as they showed a remarkable degree of political perspicacity in doing this at

that particular moment in history, so too they showed a remarkable degree of political maturity when, on the 15th June 1802, they drew up this memorable instrument.

We have here a soul-stirring charter of a small, proud, freedom-loving people. It opens with a solemn, spirited (and also rather long) paragraph:

> *"We, the Members of the Congress of the Islands of Malta and Gozo and their dependencies, by the free suffrage of the people, during the siege, elected to represent them in the important matter of assuring our native rights and privileges (enjoyed from time immemorial by our ancestors who, when encroached upon, have shed their blood to regain them), and of fixing a constitution of government, which shall secure to us and our descendants in perpetuity the blessings of freedom and the rights of just law, under the protection and sovereignty of the King of a free people, His Majesty the King of the United Kingdom of Britain and Ireland, after long and mature deliberation, we make the following declaration, binding ourselves and our posterity forever, on condition that our now acknowledged Prince and Sovereign shall, on his part, fulfil and keep inviolate his compact with us".*

The Declaration then affirmed that the King of the United Kingdom was Malta's King, but that he had no right to cede Malta to any other power. If he chose to abandon his sovereignty, the right of electing another Sovereign, or of governing Malta, belonged to the Maltese alone. It also affirmed that the Sovereign's representatives in Malta were bound to observe the Constitution, which the representatives of the people would draw up, that the Maltese had the right freely to make representations to the Crown on any eventual violation of their rights, and that the right of legislation and taxation belonged to the Popular Council composed of the representatives of the people.

The above serves to give the general tenor of the charter. What is particularly important for the purposes of our subject is that other provisions affirmed freedom of religion and religious toleration, and safeguarded the human rights to life, property and personal liberty. *"No man whatsoever,"* the Declaration concluded, *"has any personal authority over the life, property or liberty of another. Power resides*

only in the law and restraint or punishment can only be exercised in obedience to law".

In this we have in substance a solemn affirmation of that cardinal principle of democratic government, the rule of law, which is itself at the very heart of the whole concept of human rights.

This document is interesting not only for its "reception" of certain fundamental human rights but for other reasons as well. In its express reference to "free suffrage" (which is itself also a human right) it also embodies the principle of elective representation, even though at the time the notion of free suffrage, was of course still imperfect and incomplete. It will moreover be noted that the Declaration is stated to be of the "inhabitants" of the Maltese Islands in a broad sense and without distinction between native inhabitants and others who had made these Islands their home.

Historically and politically the document is also interesting because so soon after the celebrated French Declaration and (what is perhaps more striking) at the very inception of the British connection, it combines French revolutionary ideas with British constitutional principles.

As I had occasion to write elsewhere, there are two aspects of the early association of Britain and Malta (themselves in fact reflected in the Maltese Declaration), which strike the modern observer. In the first place, in the conduct of the Maltese at the time, the political scientist may perhaps perceive an early assertion of the principle of self-determination of peoples, which had only a few years earlier found expression in Merlin's report on the Alsatian question for the French Constituent Assembly (1790) and in the Polish Constitution of 1791. Secondly, to the constitutional lawyer the insistence of the Maltese on a sort of "voluntary partnership" status foreshadows in a sense one aspect of the modern development of the notion of the Commonwealth.[2]

Unfortunately, for a number of political and strategic reasons and in spite of the special and indeed unique manner of Britain's acquisition of Malta ("voluntary cession by the consent of the inhabitants themselves") British rule opened with complete autocracy

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[2] J.J. Cremona, *Malta and Britain: The Early Constitutions*, Malta, 1966, p.27 and see also, by the same author, *Selected Papers 1946-1989*, Malta, 1990, pp.264-269.

and the concentration of all power in the hands of the Crown's representative. Strategic considerations at a particularly crucial period in European history overrode all others. If in 1815, with Waterloo, Napoleon's brilliant star was finally to wane, its memory was certainly slow to fade away. In any case, the Maltese were both sorely disappointed and painfully resentful and they strongly voiced their feelings in no uncertain terms. But there was at least one positive element in this rather sombre picture, in the shape of a salutary exercise in judicial and administrative reform in the very first years of the British connection.

Indeed on being appointed first Governor of Malta, Sir Thomas Maitland (also known, for obvious reasons, as King Tom) introduced, by a series of *sui generis* legislative instruments, a number of reforms, especially in the judicial field, which had far-reaching effects, particularly in relation to some significant aspects of human rights protection.

The second, third and fourth documents in the Vienna exhibition after the Declaration of Rights belong in fact to this group. The *Costituzione della Corte Criminale* (Constitution of the Criminal Court) of 1814 is particularly important in connection with the abolition of torture and the protection of the rights of persons criminally charged.

The very first article of this legislative instrument reads as follows: "*All torture, of every description, is hereby entirely abolished and prohibited*". This was in compliance with the wishes of the Maltese themselves, expressed in instructions given by them to their political agent in London, John Richards, and with instructions contained in an 1813 despatch from Earl Bathurst, British Secretary of State, to Maitland (before taking office). In their report the Royal Commissioners of 1812 had also stated that, although the punishment of torture was then already considered as virtually abolished, justice and good policy required that its abolition be made public and formal.

Indeed it is interesting in this connection to note that as early as 1780, when preparations were being made for the drafting of what was later to become the *Codice Municipale di Malta* (known as Code de Rohan), enlightened Maltese jurists had strongly opposed a proposal for its full-scale retention by a grandiloquent and retrograde Neapolitan lawyer, Giandonato Rogadeo, who had been brought over by Grand Master Emanuel de Rohan Polduc to do the drafting. Eventually after Rogadeo's unlamented departure from Malta its

partial retention in the new draft (by the Maltese Federico Gatto) was subjected to severe and important limitations. Even though it had since fallen into disuse, it certainly needed to be expressly and publicly abolished. And so it was.

Other important articles of this instrument provided for the time within which the written accusation against a person committed by the examining magistrate for trial was to be preferred (if not preferred within such time, he was entitled to demand to be brought before the court to be released), the serving of a copy of such accusation on him, the time to be given to him to prepare his defence, and access to his defence counsel. Provision was also made for the summoning of witnesses for the accused as well as for the Crown, the publicity of the trial, the *viva voce* examination of witnesses in open court and in the presence of the accused, the right of the accused to be heard, personally or through his counsel, in his defence, and the time within which the trial had to be concluded.

The principles of the publicity of proceedings[3] and of the *viva voce* examination of witnesses in open court and in the presence of the person charged were affirmed also in the *Costituzione delle Corti di Magistrati di Pulizia Giudiziaria* (Constitution of the Courts of Magistrates of Judicial Police), promulgated a few weeks later, which also imposed a time-limit within which proceedings, whether ending in sentence or committal, had to be concluded. (The word *"Pulizia"*, so spelled, gives a distinctly Maltese tinge to the Italian text of the document.)

Another important document in the same group and of the same year was the *Stabilimento della Pulizia Esecutiva* (Establishment of the Executive Police), which is of particular importance in connection with the right to personal liberty. It was promulgated together with the already mentioned *Costituzione delle Corti di Magistrati di Pulizia Giudiziaria* and provided in particular that, on arresting any person, whoever that might be and whatever the offence with which he might be charged, a police officer or subaltern was bound to bring such person "without the slightest delay" before a magistrate so that he

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[3] On the principle of the publicity of proceedings in Maltese criminal law, see J.J.Cremona, "Les procédures pénales et leur publicité dans la presse," *Revue Internationale de Droit Pénal*, Paris, 1961, pp.113-126.

might eventually be either convicted or committed for trial or else discharged.

It was added that it was to be clearly understood that no person might be detained by the Executive Police longer than forty-eight hours from the moment of his arrest without being so brought before a magistrate. A like provision was also inserted in the contemporaneous *Costituzione delle Corti di Magistrati di Pulizia Giudiziaria*. Magistrates were also empowered to take cognizance of all complaints, which might be made to them in respect of any such detention exceeding the prescribed limit, and to punish the culprits. It is to be noted in this connection that a provision (section 137) of the Criminal Code (another Vienna exhibit, referred to later) lays down that any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint regarding an unlawful detention, and any officer of the Executive Police who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours are liable, on conviction, to a specified term of imprisonment. This provision and that of section 353 of the same code (which practically reproduces the above mentioned provision of the *Stabilimento della Pulizia Esecutiva*), read conjointly with other relevant provision of law, have afforded in Malta as effective a safeguard for the right to personal liberty as the writ of habeas corpus does in Britain.[4]

I would also add as a matter of interest that a framed reproduction of this instrument in the original Italian text hailing from the Vienna exhibition itself, could be seen hanging in the corridors of the European Court of Human Rights in Strasbourg throughout my entire tenure of office (twenty-seven years) as judge and later vice-president of that Court.

Next comes in the same 1814 reform-oriented group of instruments the *Costituzione Generale di tutte le Corti Superiori* (General Constitution of all the Superior Courts), which is particularly important in connection with the human right to have recourse to independent and impartial tribunals. Indeed it was this *Costituzione* that effectively ensured the independence of the judiciary. It provided

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[4] See J.J. Cremona, "The writ of habeas corpus in Maltese Law" in *Selected Papers 1946-1989*, *supra* pp.7-16.

that judges were to hold office during good behaviour (*"quamdiu se bene gesserint"*), could not be dismissed except with the Sovereign's approval signified through one of his principal Secretaries of State, and were to receive fixed salaries payable from public funds. The avowed object of this measure was, as Maitland put it, to *"fix the judges in a state of honourable independence"*.[5]

Under the previous system judges could be removed, even though apparently this seldom happened, without any reason being assigned, on the occasion of the annual *scrutinio*. So in his address to the judges assembled at the Palace in Valletta on the 2nd January 1815 before the start of that year's first forensic term Maitland said:

> *"You are now fortunately no longer liable to be removed at the pleasure of the executive local authority – you are made independent of that authority both with regard to your incomes and the permanency of your situations"*.

As a matter of interest, the President of the High Court of Appeal was mentioned separately in a contemporaneous instrument the *Costituzione dell'Alta Corte d'Appello* (Constitution of the High Court of Appeal), and, oddly enough, he was at first stated to hold his office during pleasure (*"durante beneplacito"*), but this arrangement was indicated as being of a temporary nature and appears to have been dictated by reasons of organizational expediency of the moment.

Provision was also made for the publicity of court proceedings (previously this was not always the case, and it sometimes happened that witnesses were heard at the judge's residence) and since under the old system advocates frequently also had access to the judge in private, any private communication with a judge on the subject of a lawsuit, pending or about to be initiated, was expressly prohibited, and this was also specifically inserted in the judicial oath of office.

The *Costituzione Generale* also provided that the judges were prohibited from receiving any fees or other emoluments of any sort in addition to their fixed salaries. This was inserted because previously the established fees (*propine*), collected by the Notaro and distributed to the judges monthly, were payable by the litigants themselves, which of course provided sufficient room for possible abuse. At the time of

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[5] *Malta and Britain: The Early Constitutions, supra,* pp. 32-33

the Order not only were the tribunals rather numerous, but there were also several possible means of appeal, the multiplicity of appeals being in fact one of the imperfections of the system singled out by the Royal Commissioners of 1812. The *Costituzione Generale* brought about an effective reduction in the number of both tribunals and means of appeal, which of course made for speedier justice, another important principle in the field of human rights.

The independence of the judiciary, which in Malta had its first effective affirmation in this instrument, remains a basic and hallowed principle in our system of government. Under the present Constitution judges and magistrates hold office until the attainment of a fixed age (sixty-five years for judges and sixty for magistrates) and are only removable by the President of Malta upon a parliamentary address, supported by the votes of not less than two-thirds of *all* members (not just those present) praying for such removal on the ground of proved misbehaviour or of proved inability to perform the functions of their office whether arising from infirmity of body or mind or any other cause. Their salaries are permanently charged on the Consolidated Fund and cannot be altered to their disadvantage after appointment.

The relevant provisions are also entrenched in the Constitution.

Another landmark document in the Vienna exhibition (of paramount importance in connection with freedom of the press) is Ordinance IV of 1839, which abolished "*the censorship*" and provided against "*abuses of the consequent liberty of publishing printed writings.*" It was ultimately drafted by the Royal Commission of 1836. The Maltese had in fact been clamouring for freedom of the press for several years. The subject figures prominently in practically all the petitions and memorials transmitted by them from time to time to London. Already in the *Appeal of the Nobility and People of Malta to the Justice, Public Faith and Policy of the British Government, for the fulfilment of the conditions upon which they gave up their Island to the King, namely their ancient Rights under a free Constitution,* transmitted to their political agent in London John Richards in 1810, we find a plea for "*a free press but not licentious nor offensive to religion*". Freedom of the press was also one of the first subjects to be discussed by the first Council of Government established in 1835, the members of which showed themselves unanimously in favour of the principle. Luckily, the then Secretary of State in London (Lord Glenelg) was also both receptive and

sympathetic, feeling that the Maltese should not be denied what he called this *"most valuable of civil rights"*.

Censorship had been exercised, in pursuance of what the Royal Commissioners termed a *"jus gentium"*, through the Government monopoly of printing. Since, according to law, no trade or business could be exercised in Malta without a prior government licence, the administration, by simply refusing to grant a licence to exercise the trade of printer ensured that nothing was printed in Malta except at its own press and with its previous permission, which could be withheld without any reason being assigned. Nothing could be passed for printing if it contained strictures on the local government or on that of any neighbouring State, attacks on the Catholic dominant religion or others, and statements injurious to the reputation or interests of individuals. This was of course open to interpretation.

Now a remarkable anomaly was that censorship, as locally practised, did not extend to writings printed abroad. In 1835 a book entitled *The Claims of the Maltese founded upon the Principles of Justice*, which would definitely not have passed the censorship in Malta, was published by the Maltese patriot George Mitrovich in London. Apart from giving the local administration an unexpected jolt, it was largely instrumental in bringing the abovementioned Royal Commission to Malta.[6]

The two opening provisions of the Ordinance read as follows:

> *"Section I. – Whereas printed writings, printed in these Islands, are liable and subjected to the censorship immediately hereafter described, and other printed writings are liable to the same censorship, although in practice they are not subjected thereto. And whereas it is expedient that the aforesaid censorship should be abolished: – Now his Excellency the Governor, with the advice and consent of the Council of Government, hereby enacts as follows:*
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> *From the day of the promulgation of the present Ordinance, no printed writing shall be subjected or liable to the censorship, which is now exercised in these Islands by Her Majesty's government therein.*

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[6] *Malta and Britain: The Early Constitutions, supra,* pp. 66,68

Section II. – Whereas the aforesaid censorship will be abolished by virtue of the enactment in the first section of the present chapter: And whereas a liberty of publishing printed writings (printed in or out of these Islands) will result from the abolition of the aforesaid censorship. And whereas it is expedient that the provisions against abuses of the aforesaid liberty of publishing, which are contained in the second and following chapters, should be substituted for the aforesaid censorship, on the abolition thereof: – Now his Excellency the Governor, with the advice and consent of the Council of Government hereby enacts as follows:

From the day of the promulgation of the present Ordinance, the provisions in the second and following chapters thereof, shall have in these Islands the force of laws."

The Ordinance of 1839, in spite of certain weaknesses, represented at the time a great step forward in the protection of the right to freedom of expression. The matter is at present regulated by the Press Act (Act XI of 1974, as subsequently amended), which also takes due account of technological advances in this field.

The sixth important document is the Criminal Code of Malta, which of course because of its bulk could not be hung on the walls of the Hofburg. Only the title page was symbolically hung instead, together of course with my explanatory note. This Code, promulgated in 1854, is remarkable for the liberal protection afforded to persons charged or accused and for effectively safeguarding the right to a fair trial. While in general elaborating and consolidating the liberal principles contained in the *Costituzione della Corte Criminale* and the other 1814 instruments, it introduced others. It was hailed at the time, both in Malta and abroad (the eminent Italian criminal law writer Enrico Pessina, for instance, had praise for it), as a most enlightened code.

It provided for bail, fixing the limits of the amounts involved, and for legal aid to be given gratuitously to all those who had not briefed an advocate of their choice. It extended trial by jury, which since its introduction in 1815 had had a limited scope, to all indictable

offences.[7] It expressly and specifically required for the admissibility of confessions by the party charged or accused, that they should have been made voluntarily and not have been extorted or obtained by means of threats or intimidation or by any promise or suggestion of favour, it made provision against double jeopardy and retroactive penal legislation (the prohibition of which has an important place in the field of human rights) and sanctioned the inviolable right of the person charged or accused to his silence both before the examining magistrate and at the trial. In general it provided for the essential ingredients of a fair and public trial and for the proper observance of the presumption of innocence, two principles which again have a prominent place in the field of human rights so far as the protection of a person charged or accused is concerned.

The law of evidence was substantially modelled on English Law. The procedural part of the Code is contained in the Second Book. It is interesting to note that while the substantive criminal law of Malta was modelled, like many other continental codes, on the *Code Napoleon,* the law of procedure drew inspiration from English law and, like the English criminal system, the Maltese one is essentially weighted in favour of the accused.

Indeed the Maltese system may be regarded as a sort of felicitous marriage of convenience between the continental tradition so far as substantive law is concerned and the English tradition so far as procedural law is concerned, and some marriages of convenience are known to have worked remarkably well.

This document was followed, in the Vienna exhibition, by Chapter IV of the Malta Constitution, incorporating an extensive and enforceable bill of rights. The Independence Constitution of 1964, (which was drafted at the request of the Maltese government by the present writer, then Attorney General),[8] in fact devotes a whole chapter to *"the fundamental rights and freedoms of the individual"*. These comprise the rights to life, personal liberty, privacy of the home and other property, freedom of conscience, freedom of

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[7] On trial by jury in Malta see J.J. Cremona, *The Jury System in Malta* (American Journal of Comparative Law, University of Michigan, Vol.13, No.4. Autumn 1961 pp, 570-583).

[8] See *Malta Independence Conference,* 1963, Cmnd 2121, HMSO, p.6.

expression, freedom of assembly and association (including the right to form and belong to trade unions), freedom of movement, the right to a fair administration of justice and freedom from forced labour, from inhuman or degrading punishment or treatment, from collective punishments, from deportation, from deprivation of citizenship or juridical capacity by reason of political opinion, from discrimination and from deprivation of property without adequate compensation. Many of these rights, as is normal and understandable, are not absolute but are guaranteed subject to permissible statutory limitations, related to specified purposes in principle linked to the public interest and based on a democratic standard. The inspiration of the European Convention on Human Rights ("the Convention") is very evident.

Thus, for instance, section 41 provides that all persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective modes of religious worship. This is then followed by the rider that nothing contained in, or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the protecting provision to the extent that the law in question makes provision that is reasonably required in the interests of public safety, public order, public morality or decency, public health, or the protection of the rights or freedoms of others, and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.

It will be noted that the constitutionally protected human rights are essentially the by now classic ones. The historical justification for the provision against deportation of Maltese citizens is that a number of Maltese political internees were during the last war deported by the British without a trial to Uganda. True, two decades had passed when the Constitution was drafted, but the historical wound was, so to speak, still open. Interestingly, a paragraph against banishment figures also in some of the Maltese memorials of the early years of the British connection.

Although the Constitution came into force in 1964, it is interesting to note that some of the human rights provisions in it, like the one just mentioned and freedom of movement, took effect before their counterparts in some of the additional Protocols to the Convention.

While in the European Convention human rights are sometimes worded rather broadly and some of them are also made subject to

regulation by or pursuant to law, in the Malta Constitution they are in general enunciated in specific and very detailed terms. The rights protected are basically the traditional civil and political ones. Political rights, essential in a democracy, are in fact safeguarded by other provisions in other parts of the Constitution, which essentially enshrine the principles of free and periodic parliamentary elections by secret ballot and of representative parliamentary democracy. The Constitution also formulates in Chapter II a set of social and economic rights, which, although not judicially enforceable, are nevertheless held up as objectives of State policy.

The human rights chapter of the Constitution is also important in another respect, and this is that it makes all the protected rights judicially enforceable. An effective remedy in case of breach or violation (actual or even reasonably apprehended as probable) of any of them is also provided in that the person concerned may apply to the competent court (the First Hall of the Civil Court) for redress, and powers are conferred upon the court for the purpose of enforcing or securing the enforcement of any of them. From the decisions of this court there is an appeal as of right to the Constitutional Court. Free legal aid is available in the normal manner. All the provisions of this chapter of the Constitution are also safeguarded by entrenchment, and thus cannot be altered save by a law supported by the votes of not less than two-thirds of all members of parliament.

The time factor, of special importance in this field, has not been lost sight of. Rules of Court, made in pursuance of power conferred by the Constitution, in fact provide that the competent court must set down a human rights application for hearing within a maximum of eight working days, and the procedure to be followed must then ensure that, consistently with the due and proper administration of justice, the hearing and disposal of the case is as expeditious as possible. Procedural formalities have been reduced to a minimum. It will thus be seen that with us human rights really have teeth, and good ones too.

This was the last of the Maltese documents in the Vienna exhibition, and indeed at the time it was also a brand new one, having been promulgated only the previous year. But for the sake of completeness I should add that if the Vienna exhibition were to be mounted again today, then one additional document would certainly and indeed rightfully claim an important place in it. This is the European Convention Act, 1987 ("the Act"), which followed closely

on the heels of Malta's acceptance of the optional Articles 25 and 46 of the European Convention concerning the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights ("the European Court").

Apart from providing that no person (which expression is stated to include any physical person, non-governmental organization and group of individuals) may be hindered in the right to take a case to Strasbourg under section 25, the 1987 Act took the important step of incorporating the substantive provisions of the Convention and its First Protocol ("Convention provisions") into Maltese law and made them judicially enforceable here as part of Maltese law, vesting the competent Maltese courts in relation to alleged violations of such rights with the same jurisdiction and powers as in the case of alleged violations of the constitutionally protected ones.

Indeed in the matter of giving direct effect to the Convention provisions Malta has gone quite far. Not only have these provisions been declared to be part of the law of Malta and enforceable as such (section 3), but eventual judgments of the European Court against Malta have also been declared to be enforceable by the Maltese Constitutional Court "*in the same manner as judgments delivered by that Court and enforceable by it* "(Section 6) and thus without the need of resorting, as in various other contracting States, to administrative means.

In particular, as to the enforceability of the European Court judgments Malta's position may be considered as certainly among the most *avant-garde*. But daring, however admirable in itself, is not always devoid of possible problems. Indeed the Convention substantive provisions and the constitutional ones may be regarded to a large extent as mutually complementary. They are often invoked together and the Act itself in fact provides expressly for their joining together. Difficulties, however, start in the event of inconsistency.

Indeed in the matter of human rights provisions the Act has established a certain hierarchy of norms. In case of inconsistency the Convention provisions prevail over ordinary law provisions (these being, to the extent of their inconsistency, void – Section 3); but "ordinary law" is defined (section 2) as excluding the Constitution, so that the Constitution ultimately prevails over both the Convention and of course "ordinary law".

In particular, where a Convention human rights provision is more favourable to the person concerned but is inconsistent with a

constitutional one the Constitution clearly prevails. But then it is questionable whether in the last analysis this prevalence is indeed real since if the matter is taken to the European Court, which applies only the Convention, and this Court finds in favour of the applicant (contrary to the domestic court's decision *grounded on this prevalence)* the Strasbourg decision must under the Act be enforced here and this, rather uncomfortably, by the Constitutional Court itself as if it were its own decision, unless (I can hypothetically add) the enforcement provision of the Act is itself conceivably held by the national court to be *pro tanto* unconstitutional.[9]

Even though in principle not binding on Maltese courts, judgments of the European Court have been judicially cited in Malta as having, in pertinent cases, persuasive authority well before the 1987 Act and indeed not very long after the bill of rights in the Independence Constitution took effect, which in fact roughly coincides with the "effective" start of the European Court's jurisprudence.

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[9] See *Selected Papers 1946-1989, supra.* pp.228-236 and *The Maltese Constitution and Constitutional History since 1813, supra*, p.84.