COMMENTS

SEXUAL DISCRIMINATION: RECENT JUDICIAL DEVELOPMENTS AND THEIR EFFECTS IN MALTESE LAW

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The European Court has often reiterated the principle that "*the advancement of the equality of the sexes is to-day a major goal in the Member States of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention*". (**Burghartz v. Switzerland,** 22 February 1994 18 EHRR 101; **Schuler-Zoraggen v. Switzerland** 24 June 1993, 16 EHRR 405, **Abdulaziz, Cabales and Balkandali v. United Kingdom** 28 May 1985 7 EHRR 471).

This seems to have been the attitude which the Maltese Constitutional Court has recently taken in the case **Paul Stoner et v. The Hon. Prime Minister et,** decided on 22 February 1996, where the Court went so far as to declare a provision of the Maltese Constitution protecting the right to freedom of movement as being discriminatory on the basis of sex under another provision of the Constitution. Hence this case raises several issues of interest, and in fact the case was the subject of an attempted re-trial. (The Constitutional Court in a judgement of 28 June 1996, declared that re-trial (i.e. the re-opening of a case on certain exceptional grounds) is not possible in constitutional cases. For the purposes of this Article, the analysis will be limited to two aspects: the concept of

sexual discrimination under Maltese law in the light of the European Convention on Human Rights and Fundamental Freedoms; and secondly the question of the possibility of the Constitution to be itself declared unconstitutional on the basis of sexual discrimination.

1. The facts of the case and the judgment of the constitutional court in the Stoner Case

The applicant, an English citizen, and his wife, a Maltese citizen, challenged the decision of the competent authorities not to let the applicant Paul Stoner continue to live in Malta. The competent authorities were insisting that the applicant should be deported from Malta.

Sections 25(1) and 22(1) of the Constitution establish the requirements for a person to be considered a citizen of Malta. Section 26 of the Constitution gives the right to any person – independently of sex, who marries a citizen of Malta, to be registered as a citizen subject to the proviso that the Minister must be satisfied that the grant of citizenship would not be against the public interest. However, Section 44(4)(c) of the Constitution – which deals with the right to liberty of movement – states that for the purposes of this section any person who is the wife of a person who is a citizen of Malta by virtue of section 22(1) or 25(1) of the Constitution and who is living with that person "shall be deemed to be a citizen of Malta by virtue of section 22(1) or 25(1) of this Constitution". It should be noted that under Section 44(1) of the Constitution, the liberty of movement is described as follows: "No citizen of Malta shall be deprived of his freedom of movement, and for the purpose of this section the said freedom means the right to move freely throughout Malta, the right to reside in any part of Malta, the right to leave and the right to enter Malta". In other words, under the Maltese Constitution, a foreign woman married to a Maltese citizen is guaranteed the right to liberty of movement, – since she is deemed to be a citizen of Malta – but this fundamental right is not extended to a foreign man – like the applicant, who is married to a Maltese citizen.

In its judgement of 9 October 1995, the First Hall of the Civil Court declared that the Maltese Government had violated the applicants' right to respect of their private and family life, as protected by Section 32(c) of the Constitution and Article 8 of the European Convention, since there was no reasonable justification

for his deportation from Malta, and the right to non-discrimination on the basis of sex as protected by Section 45 of the Constitution, because of the difference in treatment in the protection of the right of freedom of movement.

On appeal, the Constitutional Court based its decision solely on Section 45 of the Maltese Constitution, which *inter alia* provides as follows:

"(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective description by ..... sex whereby persons of one such description are subjected to the disabilities or restrictions of 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."

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision ..... (b) with respect to persons who are not citizens of Malta ...."

The Constitutional Court held that whilst it is true that in granting Maltese citizenship, the Constitution does not discriminate in an illegal manner and without justification between a foreign married man and a foreign married woman, Section 44 of the Constitution in protecting the liberty of movement does make such a discrimination. The complaints of the applicants were held to be justified on two grounds:

1. if the discrimination in the protection of the freedom of movement were removed, Paul Stoner would be entitled to be deemed by right a citizen of Malta for the purposes of that right – consequently, the exclusion in Section 45(4)(b) above mentioned was held not to be applicable to the case;
2. as the law stands, Evelyn Stoner, a Maltese citizen, was being discriminated against since she was being put in a disadvantage from the fact that she married a foreign citizen, when compared with foreign women who marry male Maltese citizens, and to male Maltese citizens who have foreign wives.

The Constitutional Court considered that although it was true that the distinction between the sexes in regard to the right of freedom of movement was necessary in the Maltese society, until

a few years ago, and used to serve traditional historical, civil and economic needs – as the Government submitted – this is no longer the position to-day. The Court held that this difference in treatment reflects the structure of the family and the organisation of the Maltese society in practice as well as under the Civil law, before the extensive amendments on the status of the woman and the married woman and her legal capacity. The Constitutional Court considered also that in 1987, the Maltese Parliament approved the European Convention on Human Rights and Fundamental Freedoms. Later in March 1991, Government signed the UN Convention on the Elimination of all forms of Discrimination against Women. In July, the Constitution was amended to provide a legal remedy to anyone who suffers sexual discrimination. The Court held that these radical changes in society and in the law, including the Civil Code, were motivated by the principle that man and woman should have equal rights. Hence the Constitutional Court held that this difference in treatment had no justification which was reasonable in a democratic society.

Consequently, the Constitutional Court declared that Section 44(4)(c) of the Constitution was discriminatory on the basis of sex in terms of Section 45 of the Constitution, in so far as it treated in a different manner a foreign husband of a Maltese citizen, from a foreign wife of a Maltese citizen.

2. The notion of sexual discrimination under Maltese Constitutional Law

Protection from discrimination on the basis of sex has come to be an enforceable fundamental right under Maltese law by virtue of Act XIX of 1991. Prior to 1991, the right to non-discrimination on the basis of sex was mentioned in the Maltese Constitution but only under the declaration of principles, which principles are unenforceable in a court of law, and serve only as guiding rules for the State. Moreover it was limited to its application in industrial law. In fact, Section 14 of the Constitution provided that *"The State shall aim at ensuring that women workers enjoy equal rights and the same wages for the same work as males"*.

However, even the Act of 1991 had one important transitory clause which provided in Section 45(10) of the Constitution that "Until the expiration of a period of 2 years commencing on 1 July 1991, nothing contained in any law made before 1 July 1991, shall be held to be inconsistent with the provisions of this section, in so

far as that law provides for different treatment to different persons attributable wholly or mainly to their respective description of sex". Hence the protection from sexual discrimination under the Constitution became only effectively enforceable in Malta as from 1 July 1993.

However, although enforceable Constitutional protection came about only in 1993, it has been possible to challenge a law or an administrative action on the basis of sexual discrimination since 1987, that is since the incorporation of the European Convention on Human Rights into Maltese law by virtue of Act XIV of 1987 (Chapter 319 of the Laws of Malta). The European Convention Act 1987 has the status of an "ordinary law" under Maltese law, and Section 3(2) of the Act provides that *"Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void"*.

Hence, persons who allegedly suffered discrimination on the basis of sex in violation of Article 14 of the Convention could institute proceedings before the Maltese courts to obtain redress, although no such case was presented in court.

In any case, it would not have been possible to challenge, at the domestic level, a provision of the Constitution on the basis of conflict with Article 14 of the European Convention, since, under the European Convention Act *"ordinary law"* is defined as *"any instrument having the force of law and any unwritten rule of law, other than the Constitution of Malta"*. Hence, applicant Stoner could never have successfully challenged the validity of the Section 44(4)(c) of the Constitution under the European Convention in the Maltese Courts. Naturally, the position would have been otherwise, if he had exercised the right of individual petition to institute proceedings before the European institutions.

3. The Stoner Case in the light of the jurisprudence of the European Court

The European Court has repeatedly held that Article 14 of the European Convention of Human Rights does not have an independent existence. It complements the other substantive provisions of the Convention and the Protocols. It has effect solely in relation to *"the enjoyment of the rights and freedoms"* safeguarded by those provisions. Although the application of Article 14 does not

necessarily presuppose a breach of those provisions – and to this extent it has an autonomous meaning – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter. (cf. **Van der Mussele v. Belgium** (1983) 6 EHRR 163 para 43). Hence Article 14 does not grant an independent right to the right of freedom from discrimination, including naturally sexual discrimination. It is submitted that such a right ought not be lacking in the Convention.

As the authors **Van Dijk and Van Hoof** observe (**Theory and Practice of the European Convention on Human Rights** pg. 532): *"The Convention thus lags behind the developments in the United Nations, where the elimination of discrimination received and still receives a good deal of attention, as has been expressed in a number of conventions: the UN Convention of 1952 on the Political Rights of Women, the conventions of the International Labour Organisation of 1951 and 1958 on Equal Remuneration and on Discrimination in Employment and Occupation respectively, the UNESCO Convention of 1960 against Discrimination in Education, the UN Convention of 1979 on the Elimination of All Forms of Discrimination against Women, and last but not least Article 26 of the Covenant on Civil and Political Rights".*

One judgement, delivered by the European Court which is very similar to the **Stoner Case**, is that of **Abdulaziz, Cabales and Balkandali v. United Kingdom**, decided on 28 May 1985 (7 EHRR 471). In this case, the applicants were lawfully and permanently settled in the United Kingdom. In accordance with the immigration rules then in force their husbands were refused permission to remain with or join them in the United Kingdom. Under the 1980 Rules, it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country of settlement. The applicants maintained inter alia that they had been victims of discrimination on the grounds of sex, and the Court agreed. Although the Court accepted that the aim of the Rules was that of protecting the domestic labour market, it held that *"the Court is not convinced that the difference that may nevertheless exist between the respective impact of men and of women on the domestic labour market is sufficiently important to justify the difference of treatment, complained of by the applicants".* Indeed, as the Court had previously observed, very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.

Thus, as the authors **D. J. Harris, M'O'Boyle and C. Warbrick** have observed (**Law of the European Convention on Human Rights** pg. 481), the Court has labeled sexual discrimination as particularly serious, making it the equivalent of "suspect categories" in the United States constitutional law: "..... *the function of the "suspect category" is to put a heavy burden on the state to identify a difference between men and women which should allow a state rationally to adopt a policy of treating men as a whole and women as a whole in different ways*".

Another example, is **Burghartz v. Switzerland**, decided on 22 February 1994 (18 EHRR 101) which this time concerned discrimination against men. In this case the applicants complained that the authorities had withheld from Mr. Burghartz the right to put his own surname before their family name, although Swiss law afforded that possibility to married women who had chosen their husbands' surname as their family name. The Court was not persuaded by the government's argument on the Swiss legislature's concern that family unity should be reflected in a single joint surname. The court observed that "*family unity would be no less reflected if the husband added his own surname to his wife's, adopted as the joint family name, than it is by the converse arrangement allowed by the Civil Code. In the second place it cannot be said that a genuine tradition is at issue here. Married women have enjoyed the right from which the applicant seeks to benefit only since 1984. In any event, the Convention must be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination*".

However, the criteria by which "suspect categories" are identified are not clear. The European Commission in the **Abdulaziz Case** noted that: "*.... the elimination of all forms of discrimination against women is an accepted general principle in the member states of the Council of Europe, confirmed in domestic legislation, and regional and international treaties*". That is why states have found it increasingly difficult to convince the European Court of the legitimacy of the justification for difference in treatment on the grounds of sex. This is evidenced by another two cases.

The first one is **Schuler-Zgraggen v. Switzerland,** decided on 24 June 1993 (18 EHRR 405), where the European Court reviewed a rule of evidence in the national proceedings under Article 6(1) – a course it takes only in exceptional cases (cf. **Harris, Boyle and Warbrick** pg. 482 fn. 13). The applicant, a Swiss national, received a full state invalidity pension as a result of illness which

incapacitated her for work. After the birth of her child and a medical examination by the invalidity insurance authorities, the applicant's pension was stopped on the basis that she was 60–70 % able to look after her home and child. The applicant appealed. The Federal Insurance Court adopted in its entirety the Appeals Board's assumption that women gave up work when they gave birth to a child, without attempting to probe the validity of that assumption itself by weighing arguments to the contrary. The Court observed that *"as worded in the Federal Court's judgement, the assumption cannot be regarded – as asserted by the Government – as an incidental remark, clumsily drafted but of negligible effect. On the contrary it constitutes the sole basis for the reasoning, thus being decisive, and introduces a difference of treatment based on the ground of sex only"*.

The second case is **Schmidt v. Germany,** decided on 18 July 1994 (18 EHRR 513), which concerned a law which required all male adults to serve as firemen or pay a fire service levy in lieu, without imposing the same obligation upon women. The Court observed that; *"Irrespective of whether or not there can nowadays exist any justification for treating men and women differently as regards compulsory service in the fire brigade, what is finally decisive in the present case is that the obligation to perform such searches is exclusively one of law and theory. In view of the continuing existence of a sufficient number of volunteers, no male person is, in practice, obliged to serve in a fire brigade. The financial contribution has – not in law but in fact – lost its compensatory character and has become the only effective duty. In the imposition of a financial burden such as this, a difference of treatment on the ground of sex can hardly be justified"*. Thus, it seems, that since sexual discrimination has emerged as a "suspect category", reasons for differentiation which once would have been objective and reasonable, may cease to be so.

However, although there seems to be developing a European standard as far as protection from sexual discrimination is concerned, it is also true that the less evidence there is that the state's differential treatment departs from a common standard in the States parties to the Convention, the less likely is the Court to condemn it. This was in fact what happened in the case **Rasmussen v. Denmark**, decided on 28 November 1984 (7 EHRR 371). The applicant complained of the fact that under the relevant law his right to contest his paternity of a child born during the marriage was subject to time limits, whereas his former wife was entitled to institute paternity proceedings at any time. On

examining the Contracting States' legislation regarding paternity proceedings, the Court found that in most of them the position of the mother and that of the husband are regulated in different ways. Hence the Court came to the conclusion that the distinction did fall within the state's margin of appreciation. As the authors **Van Dijk & Van Hoof** observe (pg. 546) *"the approach taken by the Court waters down the significance of Article 14 to the bare minimum"*. One should note however, that this was one of the very first cases on sexual discrimination which came before the Court, and seems to have remained the only one decided on the question of the margin of appreciation. The Court was quick to reconsider its position the following year in the **Abdulaziz Case**, and the principles enunciated in the latter case have guided the Court till the present day.

Although in the **Stoner Case**, the Maltese Constitutional Court does not refer directly to the jurisprudence of the European Court – since it was dealing with the relevant provision in the Maltese Constitution only – it is clear from the manner in which the Court handled the case, that this jurisprudence was at the back of the Court's mind. The Constitutional Court has treated sexual discrimination as a "suspect category" and put the burden of proof on the Government to convince it of the reasons justifying the unequal treatment – something which the Government was considered to have failed to do. The Constitutional Court seems to have adhered to the view that since the advancement of the equality of the sexes is to-day a major goal in the Member States of the Council of Europe – including of course Malta – then unless there are weighty reasons to hold the contrary, a difference of treatment on the sole ground of sex is to be regarded incompatible with the Maltese Constitution, even if this difference of treatment happens to emerge from another provision of the Maltese Constitution itself. The stand taken by the Court is clear: nothing is to hinder the attainment of this goal, not even the Constitution itself!

4. The supremacy of the Maltese Constitution

According to Section 32 of the Constitution: *"Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:*

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
(b) freedom of conscience, of expression and of peaceful assembly and association; and
(c) respect for his private and family life;

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

This obviously means that the exception in the application of fundamental rights has to be sought in the same provisions which create those rights. However, Section 32 is itself non-enforceable in a court of law, in terms of Section 46 of the Constitution.

As already stated above, Section 45(1) of the Constitution provides that *"Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect".*

The only exceptions to the right of non-discrimination which Section 45(1) of the Constitution makes are with reference to subsections (4), (5) and (7) of the same section and does not make an exception for any other provision of the Constitution. Subsections (4) and (5) are irrelevant for the purposes of the present article, whilst subsection (7) will be discussed further hereunder. Therefore, Section 45(1) does not *prima facie* exclude the possibility that another provision of the Constitution may be in conflict with it, and consequently null and void. Furthermore, Section 124 of the Constitution defines *"law"*, as *"includes any instrument having the force of law and any unwritten rule of law"*. Therefore it could be argued that the term *"law"* in Section 45(1) could include as well another provision of the Constitution, which is also law, albeit the supreme law of the land.

One should not forget that the Maltese Constitution, like many other constitutions, claims to possess the authority not of law only, but of supreme law. As **Wheare** observes in his book **Modern Constitutions** (pg. 56), the justification of this is generally based on the very nature of the situation. From the very nature of a Constitution, it must follow that it has superiority over the institutions which it creates. This is the whole idea of a Constitution. It is not just an ordinary law. Its function is to

regulate institutions, to govern government, to be the law behind (and above) the law. Furthermore, it is the product of a body which has power to make supreme law – in the case of Malta it was enacted by the then supreme Maltese law-making authority, the British Parliament.

However, if one considers Section 6 which enshrines the supremacy of the Maltese Constitution, this provides that ".... *(I)f any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void*". The phrase "*any other law*" clearly denotes that it is excluding the Constitution itself in the definition of "*law*". This seems to suggest that it is not possible to annul any provision of the Constitution on the basis that it is in conflict with another provision of the Constitution.

This is further confirmed by Section 45(7) of the Constitution – which as stated above is an exception to the rule enshrined in Section 45(1) – dealing with the rule of non-discrimination, which provides "*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision (not being provisions specifically relating to sex) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 38, 40, 41, 42 and 44 of this Constitution, being such a restriction as is authorised by section 38(2), 40(2), 41(2), 42(2) or 44(3)*". Strangely enough this provision was not considered by the Constitutional Court.

Apart from the proviso relating to sexual discrimination, which was introduced in 1991, this provision seems to make it clear that laws giving effect to the restrictions to fundamental rights contained in the Constitution, should not be considered to be discriminatory. Here the term "law" cannot be deemed to include the "Constitution", and this is quite clear from the drafting of the provision, since otherwise the provision would not make any sense. Since the Constitution is declaring that laws giving effect to its own restrictions on fundamental rights are not to be deemed discriminatory, *multo magis* the restrictions themselves in the Constitution are not to be deemed discriminatory under Section 45.

If the term "*law*" in Section 45(7) does not include the Constitution itself, then the proviso relating to sexual discrimination, can only refer to provisions relating to sex in the ordinary law, and not in the Constitution itself. So, even on this

basis it would not have been possible to declare that Section 44(4)(c) of the Constitution was discriminatory.

From this point of view, it does not seem that the drafters of the Maltese Constitution contemplated a situation where the validity of the provisions of the Constitution could be tested by other provisions of the Constitution.

There is no doubt that the **Stoner Case** raises several doubts about whether it is possible to declare a particular provision of the Constitution, particularly if it is a provision on fundamental rights, unconstitutional itself. One concept which immediately comes to mind is whether it can be said that there is a hierarchy in the provisions of fundamental rights themselves, i.e. that certain rights may be more fundamental than others.

It is true that in a previous case, the Constitutional Court had hinted at the concept of a hierarchy of fundamental rights. This was the **Case of Martin Vella** decided on 22 April 1991. In this case, the applicant alleged a violation of his fundamental rights to privacy and non-discrimination on birth and status, because the Civil Law precluded him as a natural father to insist on bringing up his child himself, when the mother had opted to give the child out on adoption, in contrast with the position of the legitimate father who had a right to veto the adoption. The Constitutional Court sought a balance between the inhuman treatment of the natural father and the inhuman treatment of the child – who if not given in adoption would be condemned to a situation of illegitimacy for life, with all its implications. In the circumstances it held that the fundamental rights of the natural father had to give way to the more fundamental rights of the child. Moreover in its judgement, the Constitutional Court held that in the field of fundamental human rights there are diverse situations of conflict between the fundamental rights of different persons who find themselves in conflicting relations, and these conflicts have to be resolved by an examination of the hierarchy of the same rights, as well as the hierarchy imposed by the order of preference according to the rights of persons in their relations with other persons. However, this case concerned the hierarchical order of fundamental rights of different persons and not the hierarchy between the different human rights themselves in relation to the same person.

This dictum of the Constitutional Court in the **Case of Martin Vella**, is reminiscent of the concept of "preferred freedoms" under the constitutional law of the United States, and the concept of

"suspect classes" above-mentioned forms part of the former concept. According to the so-called "preferred freedoms approach" there was a two-tiered framework of constitutional adjudication. Where legislation abridges a preferred freedom on its face, the usual presumption of constitutionality is reversed, that is legislation directly infringing a fundamental freedom is presumed to be unconstitutional until the government demonstrates otherwise. **Ducat**, in his book "Modes of Constitutional Interpretation" argues that (pg. 200): *"The justification offered for the use of the double standard was the assertion that there were some liberties which were so fundamental to the democratic order that their preservation merited special consideration. After all, who could imagine democracy existing without freedom of speech, or thought, or association, or of the press? Yet democracy, it was argued could survive without the ownership of private property"*.

However, as the author **Wheare** clearly states (pg. 305): *"Courts, it must be emphasised, cannot amend a Constitution, they cannot change the words. They must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words. ..... (T)he fundamental point to remember is that the judge's proper function is to interpret, not to amend, the words of a statute or of a Constitution, and such changes as courts may legitimately bring about in the meaning of a Constitution, spring from this function of interpretation, not from any inherent or secret function of law-making"*. From this point of view, it is quite difficult to justify the conclusion of the Constitutional Court, that it is possible within the Maltese legal system to test the validity of particular provisions of the Constitution by holding them in conflict with other provisions of the same Constitution.

On the other hand, it is also true that the fundamental right to protection from sexual discrimination was introduced in the Maltese Constitution as an amending law. As already stated above it was promulgated by Act XIX of 1991 with the approval of two thirds of the House of Representatives – and this in accordance with the provisions of the Constitution itself. Hence it can be argued that Act XIX of 1991, being a *lex posteriori*, has amended not only the provisions which it expressly stated that it is going to amend, but also all those provisions in the Constitution which by implication also have to be amended to bring them in conformity with the provisions of the Act and thereby render the Act effective. According to this argument, Act XIX of 1991 by implication amended also those provisions of the Constitution which were not in conformity

with the principle of non-discrimination on the basis of sex, and there was no need for it to expressly amend them, for it was an unavoidable consequence of the Act itself. This argument neatly avoids the problem of whether the Constitution could be declared to be inconsistent with itself, for according to this line of thought since a *lex posteriori* enacted in accordance with the Constitution, inserted this fundamental right in the Constitution, then the whole Constitution had to be revised and construed in the manner which the amending Act intended.

5. Conclusion

From the above considerations, it seems clear that the Maltese Constitutional Court was prepared to go a long way to protect the right to non-discrimination on the basis of sex, and its judgement is consistent with the jurisprudence of the European Court. One of the concerns of the Constitutional Court – and which perhaps prompted it to declare the relevant section of the Constitution unconstitutional – was that if the case was lost at the domestic level, there was a strong chance that the case would be taken in front of the European Court. If this had happened, then Malta would have faced the embarrassing situation where a provision of its Constitution would be challenged on the basis of being in violation with the European Convention. In view of the European Court's previous case-law, Stoner would have most probably won the case at international level, with all the repercussions on the concept of the sovereignty of the state in so far as Malta was concerned. From this point of view, the stand taken by the Constitutional Court is understandable, in the sense that it tried to solve the conflict in the Constitution at the domestic level, preventing it from being publicised at the international level.

In fact, it must be observed, that although the import of the **Stoner Case** is unprecedented in Maltese legal history, it did not raise the debate which one would have expected and seems to have been generally well accepted by the Maltese legal system.

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