

*E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX*

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN MALTA IN 2003

January 2004

Reference : CFR-CDF.repMT.2003



The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

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* submitted to the Network by Professor Ian Refalo

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.

Les documents du Réseau peuvent être consultés via :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.

The documents of the Network may be consulted on :

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PRELIMINARY REMARKS

As this is the first report it is useful before making the report on the specific points raised in the questionnaire to give a very brief overview of the position of Human Rights in Malta. The ECHR (European Convention on Human Rights and Fundamental Freedoms) was first extended to the Maltese territory by the United Kingdom authorities prior to Malta becoming independent. After independence in 1964 Malta acceded to the Convention in 1966. In May 1987 Malta ratified the right to individual petition and in August 1987 it enacted the Convention into Maltese Law. On a local constitutional level the Constitution of Malta entrenches in law the fundamental rights. The entrenched constitutional rights are very similar, even if not identical on all points, to the Convention rights. Individuals in Malta may have recourse to the courts to secure their rights. It is also useful to point out that as fundamental rights are entrenched in the Constitution the Maltese courts, in particular the First Hall of the Civil Court, and, on appeal, the Constitutional Court, have jurisdiction to review legislation for constitutionality and for compliance with the Human Rights provisions both as contained in the Constitution and in the ECHR Act. Any legislation found to be in violation of those rights will not be applied by the courts. The courts in Malta usually follow the precedents of the European Court of Human Rights in Strasbourg in their decisions.

Although some of the rights and principles found in the Charter refer specifically to action to be taken by Union organs, comments have been included relative to the situation in the domestic jurisdiction in relation to the government organs active within it. It is also important to note that Malta will become a full member of the Union in May 2004 and some of the rights and principles are still in the process of implementation or will become enforceable on accession.

It is also important to note that although in Maltese law fundamental human rights and freedoms are protected as above stated, still the rights contained in the Charter are on a number of points more extensive than the fundamental human rights as found in the European Convention. This does not mean that such rights are not protected under Maltese law but in those cases they would be implemented by ordinary legislation rather than legislation of a constitutional nature. In May 2004 an amendment to the Constitution will come in force as a result of the enactment of the European Union Act in 2003 which provides that Article 65 of the Constitution will read that « *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 law 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 16th April, 2003.* »

In preparing this report organisations working in fields related to the rights recognised in the Charter were asked to hand in their comments. These were then taken into consideration in the drafting of this report.

CHAPTER I : DIGNITY

Article 1. Human dignity

Respect and protection of human dignity is not as such a recognised fundamental right in the Constitution of Malta, however it is recognised and respected through the recognition and protection of other fundamental freedoms¹ and also through the principle of the balance of rights when restricting such fundamental freedoms. The Constitution's first article states that "*Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.*" Such fundamental rights and freedoms are not only listed in the Constitution but through the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms², Malta enjoys a dual protection.

Reasons for Concern

The lack of an official recognition of the importance of respect and protection of human dignity does not give rise to concern as this is in practice covered through the implementation and recognition of the other human rights.

Article 2. Right to life

Protection of the right to life is secured in Malta both under Article 33 of the Constitution and also through the European Convention Act. However the terms used in the Constitution are somewhat different in that Article 33 states that "*No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence under the law of Malta of which he has been convicted.*"

Death Penalty

Although Article 33 of the Constitution may seem to run counter to Article 2 paragraph 2 of the Charter, in that it allows the death penalty as a punishment established by law, Malta has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights and also Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty. Although the Criminal Code did provide for the death penalty this has been amended and the maximum punishment now established is that of imprisonment for life. Protection of life through a policy contrary to the death penalty is also offered to that person in respect of whom an order of his return is not issued by the Minister of Justice following a request by a third country for his extradition, where the offence for which his return was requested is subject to the death penalty in the country which made the request.³ In this case, that person will fall within the jurisdiction of the courts of Malta and will be tried before the Maltese courts.

The death penalty has also been abolished from the Malta Armed Forces Act⁴ in virtue of Act X of 2002.

¹Chapter IV Fundamental Rights and Freedoms of the Individual

² hereinafter referred to as the European Convention, as ratified in Chapter 319 of the Laws of Malta – European Convention Act, 19th August 1987

³ Chapter 9 of the Laws of Malta – Criminal Code, Article 5(h)

⁴ Chapter 220 of the Laws of Malta

Other Exceptions

The Constitution expressly recognises as falling outside the ambit of protection it offers to the right to life four situations by stating that a person shall not be regarded as having been deprived of his life in contravention of Article 33 if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case (a) for the defence of any person from violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

While these exceptions are in general held to be in line with the exceptions made under the European Convention and its Protocols, and consequently by virtue of Article 52(3) of the Charter also in line with the Charter, the exception that is particular to Malta is that which excuses the taking of life when done in the defence of property. A reservation in this sense has been entered by Malta in ratifying the European Convention and this reservation is reflected in Article 224 of the Criminal Code which recognises the defence of one's property as a form of lawful self defence where "a) where the homicide or bodily harm is committed in the act of repelling, during the night-time, the scaling or breaking of enclosures, walls, or the entrance doors of any house or inhabited apartment, or of the appurtenances thereof having a direct or an indirect communication with such house or apartment; or (b) where the homicide or bodily harm is committed in the act of defence against any person committing theft or plunder, with violence, or attempting to commit such theft or plunder;".

Reasons for Concern

Although the reservation made in respect of defence of property is strongly integrated within the Maltese legal order this is not so reflected in the constitutional order of other member states.

Abortion and Euthanasia

Both abortion⁵ and euthanasia⁶ are crimes established under the Criminal Code. While no proceedings have so far been brought before the national courts on issues related to euthanasia, only lately proceedings have been initiated on issues related to abortion. While abortion is a crime and not legally practised in Malta, persons avail themselves of abortion services provided abroad. In December 2003, the national court was asked to issue a warrant of prohibitory injunction to stop a woman from leaving the island on the basis that the applicant being the father of the unborn child would have his right to family life seriously prejudiced were his partner to be allowed to leave the island, since she was planning to obtain an abortion.

The applicant and the mother had enjoyed a relationship, though they had not married, and while she was in her first weeks of pregnancy with his child, she was arrested by the police on the 30th November 2003 and held in custody since she was an illegal immigrant. The applicant was informed by the police that she was to be deported. The applicant submitted that the woman, who was Russian, by origin had told him she wanted to obtain an abortion in the Russian Federation, where it was legal, and he argued that this would be in violation of his right to freedom of family life and also in violation of the unborn child's right to life as

⁵ Chapter 9 of the Laws of Malta, Title VIII Sub-Title VII Articles 241 et seq.

⁶ Chapter 9 of the Laws of Malta, Title VIII Sub-Title I Article 213

protected by both the Constitution and the European Convention of Human Rights. Although the Court has upheld the warrant of prohibitory injunction, the final decision is still awaited⁷.

Article 3. Right to the integrity of the person

Malta has not as yet signed the Convention on Human Rights and Biomedicine adopted by the Council of Europe. Neither has any law been promulgated to deal with issues of eugenic practices and any form of cloning. Consequently, while respect for physical and mental integrity largely depends on respect for the other recognised fundamental rights, in the field of medicine and biology regulation through laws is lacking. In this manner from a legal point of view there is no law that prohibits eugenic practices or any form of cloning, be it therapeutic or reproductive. However, Malta's official policy is against human cloning and it is dubious whether a licence would be issued to an applicant seeking to carry out such scientific work. Yet the situation is unclear since there is no express prohibition of either eugenic practices or cloning.

Reference may also be made of the statement made by the Prime Minister during the general debate at the 58th Session of the United Nations General Assembly⁸ wherein he emphasised that: *“One area where norm setting is in its early stages concerns the issue of cloning. Malta approaches this issue from a moral and ethical standpoint based on the deepest respect for human life. We believe that while scientific considerations are sometimes relevant in matters of this nature, the final decisions must be based primarily on fundamental human, ethical and moral considerations. In this spirit, the proposed draft resolution proposing a convention that bans all forms of human cloning fully reflects our views in this regard. For this reason we will support this draft resolution. At the same time, we also believe that on issues of such deep ethical and moral sensitivities real progress can only be achieved through consensus.”*

Despite the lack of legislation on free and informed consent, eugenic practices, and human cloning, a Bioethics Consultative Committee has been appointed to deal with the various ethical issues that fall within the ambit of the medical and scientific field. This Committee is composed of doctors in medicine and in law and it is the practice that the Minister of Health or his representative appoints the members of the committee for a period of time.

In so far as eugenic practices are concerned, Malta does not run selection programmes that involve campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage or other programmes with similar aims. It must also be said that Malta has ratified the Statute of the International Criminal Court and therefore such practices that would amount to international crimes under its Article 7 would be contrary to Malta's obligations under this Statute.

On the other hand, provisions prohibiting the subjection of the human body and its parts to a source of financial gain have been enacted by Act III of 2002 whereby it has become a criminal offence punishable with a term of four to twelve years imprisonment (a term that may be increased if other circumstances are proved) for the trafficking of a person for the purpose of exploiting that person in the removal of any organ of the body.

Reasons for Concern

The lack of legislation in the field of medicine and biology on issues such as cloning, eugenic practices and on free and informed consent gives rise to an ambiguous situation which may cause some concern.

⁷ These proceedings are pending before the Civil Court in its Constitutional Jurisdiction and are adjourned for the 28th January 2004.

⁸ Statement of the Prime Minister Dr Eddie Fenech Adami given at the General Debate during the 58th Meeting of the General Assembly, 25th September 2003

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Malta has even prior to becoming signatory to international conventions adhered to the prohibition of torture, inhuman or degrading treatment or punishment since its Constitution specifically recognises this as a fundamental human right⁹. Furthermore, Malta has also undertaken obligations under the ECHR¹⁰, under the International Covenant on Civil and Political Rights¹¹, and The Convention for the Prevention of Torture and Inhuman or Degrading Treatment¹², recognising also the jurisdiction of the United Nations Human Rights Committee and also that of the Committee for the Prevention of Torture (CPT).

The latest decision on inhuman or degrading treatment delivered by the national courts was in 1995¹³, wherein the applicant alleged that upon his arrest from his home, he was accompanied by two police officers on foot to the village's police station while he was not wearing shoes and that during interrogation one of the officers had slapped him on the head with his cap and had given him a punch on his ear. The Court condemning this behaviour did not however find a violation of this fundamental right concluding that this behaviour did not reach the gravity and severity required to be considered inhuman or degrading treatment as prohibited by Article 36 of the Constitution or by Article 3 of the ECHR¹⁴.

During the period under scrutiny, there has not been any allegation of torture brought neither before the Eur. Ct. H.R., nor before the UN Committees. In fact, neither of the last two bodies has ever considered any such allegations with respect to Malta¹⁵. Neither have there been visits by the Committee for the Prevention of Torture (CPT) during the period under scrutiny; their last and third periodic visit having been in May 2001. In its report of the third periodic visit to Malta, the CPT noted "*The vast majority of persons deprived of their liberty interviewed during the CPT's third periodic visit to Malta made no allegations of ill-treatment in police custody.*"¹⁶

Although a legal framework, not only on a constitutional and international obligations basis, exists, Malta has also undertaken to give practical force to that constitutional recognition by making torture, inhuman or degrading treatment a criminal offence and has established regulations for disciplinary proceedings against any officer who commits such acts. Article 139A of the Criminal Code¹⁷ stipulates that: "*Any public officer or servant or any other person acting in an official capacity who intentionally inflicts on a person severe pain or suffering, whether physical or mental - (a) for the purpose of obtaining from him or a third person information or a confession; or (b) for the purpose of punishing him for an act he or a third person has committed or is suspected of having committed; or (c) for the purpose of punishing him or a third person or of coercing him or a third person to do, or to omit to do, any act; or (d) for any reason based on discrimination of any kind, shall, on conviction, be liable to imprisonment for a term from five to nine years.*"¹⁸

⁹ Article 36 of the Constitution of 1964 as subsequently amended.

¹⁰ This Convention has been incorporated into national law by virtue of Chapter 319 of the Laws of Malta called as the ECHR Act.

¹¹ Not yet incorporated into national law.

¹² Not yet incorporated into national law.

¹³ Qorti Kostituzzjonali, 14 ta' Gunju 1995, Joseph Briffa v. Kummissarju tal-Pulizija - (Constitutional Court, 14th June 1995, Joseph Briffa v. Commissioner of Police)

¹⁴ see 2 above

¹⁵ According to a statistical survey of individual complaints dealt with by the committee against Torture (updated on 3rd July 2003) CAT had never considered an application on Malta, even though Malta had recognised its competence on the 13th October 1990. – United Nations Website

¹⁶ Council of Europe, European Committee for the Prevention of Torture Report to the Maltese Government on its visit of the 13th to 18th May 2001. – CPT/Inf(2002)16 Paragraph 9

¹⁷ Chapter 9 of the Laws of Malta

¹⁸ This Article was added to the Criminal Code by Act XXIX of 1990.

Furthermore, under the Malta Police Regulations¹⁹ a police officer is guilty of neglect or violation of duty if “*without good and sufficient cause ... (b) uses any violence to a prisoner or any other person with whom he may be brought into contact in the execution of his duty;*” All police officers are further warned of this offence in the Code of Practice for Police Interrogations²⁰ and are also guided as to what constitutes torture, inhuman or degrading treatment.

On the other hand, the Prisons Regulations²¹ also prohibit inhuman punishments or treatment in the following words: “*Collective punishments, corporal punishments, punishment by placing in a dark, darkened or unventilated cell or in a cell which is not within hearing range of human sound or in which the prisoner is exposed to unreasonable degrees of temperature, noise or light and all other forms of cruel, inhuman or degrading punishment or treatment shall be prohibited.*”²²”

While the criminal offence established under the Criminal Code protects all categories of persons if this act is committed by a public officer or by any other person acting in an official capacity, the Prisons Regulations only apply to those places designated as falling under the Prisons Order²³. This excludes their application to persons detained in psychiatric institutions unless detained in the designated wards of the psychiatric or general hospital wherein prisoners who need psychiatric or medical attention are kept. Foreigners detained at refugees centres such as the Hal Far Reception Centre or the Ta' Kandja Centre are also not covered by the Prisons Order, however since both centres fall within the supervision of the police, the rules established under the Police Act and the Police Regulations apply. In the case of detained minors, these are only protected by the specific rules above mentioned if they are held at a place designated to fall under the Prisons Order. On the other hand, the Police Act and Regulations reach anyone wherever held, as long as the purported acts are carried out by a Police Officer.

Most of the regulations above mentioned were in fact introduced in 2001 and 2002 following the CPT visits and report on its third periodic visit. The CPT had therein stated, “*Despite this generally positive state of affairs, certain information emerged suggesting that heightened vigilance is necessary to prevent the ill-treatment and to ensure the safety and physical integrity of persons detained by the Police.*”²⁴” Therein the CPT had made several recommendations for the Government’s consideration. Through the amendments to the Criminal Code of 2002 several of these recommendations have been addressed in the amending law. Attention is here given to such recommendations as are not reflected in national legislation since if there is need for concern this need is only in respect of the practical measures required to truly give effect to such a right. It is to be noted that amendments have not only focused on safeguarding against inhuman and degrading treatment or punishment but also on attaining higher standards in conditions of detention.

Thus for example the CPT recommended the empowerment of a judge, where ill treatment by police is alleged before him or out of his own motion, to immediately request a forensic medical examination of the persons concerned and for him to bring the matter to the attention of the relevant authorities²⁵. In fact, under national legislation a judge/magistrate does not have the authority to do this and he is only competent to consider or to refer to the competent

¹⁹ Subsidiary Legislation 164.01

²⁰ Police Act, Chapter 164 of the Laws of Malta, Fourth Schedule, Added by Act XIII of 2002

²¹ Subsidiary Legislation 260.03

²² Article 85 of the Prisons Regulations, Subsidiary Legislation 260.03

²³ Designation of Places as Prisons Order, Subsidiary Legislation 260.02

²⁴ ²⁴ Council of Europe, European Committee for the Prevention of Torture Report to the Maltese Government on its visit of the 13th to 18th May 2001. – CPT/Inf(2002)16 Paragraph 9

²⁵ ²⁵ Council of Europe, European Committee for the Prevention of Torture Report to the Maltese Government on its visit of the 13th to 18th May 2001. – CPT/Inf(2002)16 Paragraph 12

court an allegation of violation of fundamental rights if the defendant's counsel formally raises this before him.

With regard to persons arrested and held for interrogation, the CPT had recommended that firm and enforceable legal basis be given to the right of notification of custody, for a fully fledged right of access to a lawyer and for a right of access to a doctor even to a doctor of his choice²⁶. An analysis of the 2002 amendments show that no fully fledged right of access to a lawyer has been granted and a lot of room for suspension or postponement of this right has been allowed, even though the CPT had expressed "*serious misgivings*" about the suspension or postponement of this right for the reasons prescribed in the law.

The right of access to a lawyer has not been granted during interrogation even if the new amendments establish rules of inferences from failure to mention facts. In fact, such access is granted for a period not exceeding one hour and its exercise may be delayed for thirty six hours within the discretion of the police officer in charge for reasons such as, that the exercise of this right may lead to interference with or harm to evidence connected with the offence being investigated or interference with or physical injury to other persons, or will lead to the alerting of other persons suspected of having committed such an offence or will hinder the recovery of any property obtained as a result of such an offence.

It must also be noted that although these three rights have been enacted they have not yet been brought into force even though the majority of the other new provisions have already come into force.

In so far as, the detention of persons in places designated under the Prisons Order, more importance should be given to the conditions of detention and to making the persons concerned more aware of their rights and of the means of redress since a serious overhaul of the Corradino Facility and of Ward 10 at Mount Carmel Hospital and of the Ta' Kandja Centre for illegal immigrants has been on the agenda of the Government. The CPT had in its report noted the shortcomings in the detention conditions at these places, notably the lack of cleanliness, the need of segregation of convicted and unconvicted prisoners, and the lack of sufficient natural light and ventilation in cells.

The Government has developed a centre for immigrants at Hal Far and has sought to refrain from using the desuetude place at Ta' Kandja, even if a high increase in the arrival of illegal immigrants has often necessitated the use of Ta' Kandja. The Corradino Correctional Facility has also seen the construction of a new modern building to house the persons therein detained in better conditions. The completion of the latter and its full use would constitute a big step forward.

Persons under detention of whatever category are provided with effective means of complaint under various legislations, except for the illegal immigrants who are placed at the Hal Far Reception Centre and who are awaiting refugee status. In the case of the latter category, their only redress is through the non-governmental organisations that help better their conditions. However despite this, that centre is not a designated prisons order establishment and the Refugee Act²⁷ does not provide any means of redress for complaint on conditions of detention. So that the only means of redress available to this category is through the office of the Ombudsman²⁸. In so far as the other categories are concerned, although effective means of redress are readily available the lack of use of these measures could probably stem from the lack of knowledge of rights and of such means.

²⁶ Council of Europe, European Committee for the Prevention of Torture Report to the Maltese Government on its visit of the 13th to 18th May 2001. – CPT/Inf(2002)16 Paragraph 23 et seq.

²⁷ Chapter 420 of the Laws of Malta

²⁸ Established under Chapter 385 of the Laws of Malta

A means of redress that has proved to be most effective for all categories is that provided by the Ombudsman who not only investigates cases brought before him, but also regularly exercises the discretion given to him to examine an issue of his own motion. Since the establishment of such an office²⁹, the Ombudsman has considered the allegation of inhuman treatment at the Corradino Correctional Facility, the detention conditions of female prisoners, a complaint of inhuman and degrading punishment and also conditions of persons kept at the psychiatric hospital of Mount Carmel and the conditions of detention of immigration detainees. Although these reports refer to a period prior to that under scrutiny, mention of some issues therein raised is worth being made.

The reports on the conditions of female prisoners was issued prior to the third periodic visit of the CPT and the elements already mentioned above were also noted by the Ombudsman. This, however, may today be outdated with the refurbishment of the correctional facility. However, the report on allegations of use of solitary confinement as constituting inhuman and degrading treatment should here be mentioned since some of the rules and regulations under which a person may be placed under solitary confinement remain unchanged.

In the Ombudsman's Report of the 6th June 2000³⁰ although he had not found any violation of this fundamental right he had recommended "*confinement to cell for periods not exceeding eight hours during daytime and permission for visits by relatives should be considered. Means to keep the complainants occupied during the out of cell periods should also be identified.*" Albeit that the complainants in this case were although confined to solitary confinement given the facility of a small radio, reading materials, access to a covered yard, indoor games and visits by the lawyer and religious representative, they were still confined to their cell for a maximum of twenty five and half hours on alternate days. The complainants in this case were punished for different terms of solitary confinement, such terms being served successively.

The amended Article 9 of the Criminal Code still provides for solitary confinement describing this as "*The punishment of solitary confinement is carried into effect by keeping the person sentenced to imprisonment, during one or more terms in the course of any such punishment, continuously shut up in the appointed place within the prison, without permitting any other person, not employed on duty nor specially authorized by the Minister responsible for the prisons, to have access to him.*"

Therefore solitary confinement could be that punishment given to an offender by the court upon its judgment. However, solitary confinement handed down by a court must observe the following rules:

- a. Solitary confinement is not to exceed ten days;
- b. More terms may only be applied with intervals of two months;
- c. In case of infringement of prison regulations or for the commission of another offence, solitary confinement may be applied even in that term of interval provided that the terms do not together exceed fifteen days.

Despite these rules, the Director may order then the application of cellular confinement under the Prisons Rules for a term not exceeding thirty days if he finds a prisoner guilty of an offence against discipline³¹.

²⁹ Established since 1995

³⁰ Report submitted to the Ministry for Home Affairs and to the Director, Correctional Facilities on 6th June 2000

³¹ Article 78(1)(f) Prisons Regulations, Subsidiary Regulations 260.03 – However, where the Director orders cellular confinement of more than six days, the prisoner may petition the Appeals Tribunal established under the same regulations seeking a review of that punishment.

On the other hand, with respect to the detention of immigrants by the Police, attention is worth given to the Ombudsman report of the 24th May 2002 since this is the most recent report of authority on the issue, the CPT visit having taken place prior to this and also before the heavy influx of immigrants in Malta. In fact, consequent to the CPT's visit three major developments occurred and that is the opening of the Hal Far Reception Centre in February 2002, the enactment of a Refugees Act and the appointment of a Refugee Commissioner vested with jurisdiction and competence to process requests for refugee status. Despite the Hal Far Centre, Malta still does not have the necessary accommodation capacity to house a large influx of immigrants and this hinders improvements sought to be made. Due to a large increase in numbers, facilities other than the Hal Far Centre have been set up for the emergency with cooperation between the Police Force and the Army. The place of detention that continues to raise doubts as to satisfaction of standards is that at Ta' Kandja, a place that has long been scheduled for closure however this is rendered impossible with the increasing number of illegal immigrants.

At the same time of the CPT's third periodic visit the Mental Health Act³² was amended in 2001 whereby a Mental Health Review Tribunal (Act VI of 2001) was established. No amendments to the Mental Health Act have been made following the observations of the CPT in their report. However following the Ombudsman's report, refurbishment or embellishment of the Mount Carmel Hospital has actually been progressing with one of the wards being temporarily closed down completely.

Under Maltese Law a minor could be considered by national courts to have had a criminal intent from the age of nine years. Although this has repeatedly been noted as a matter of concern by the Committee on the Rights of the Child no amendment to this position has been made, even if in practice, criminal intent is not so declared. The Prison Regulations do provide for specific rules in relation to prisoners under twenty-one years where in respect of allocation and separation of prisoners these are to be kept under conditions taking account of the needs of their age and in conditions that protect them from harmful influences. The judicial system adopted for children under sixteen years of age is that under the Juvenile Court Act³³ of 1980, which is competent to decide proceedings against minors where the offence is one that would normally fall under the jurisdiction of the Court of Magistrates.

Police Officers are also warned of the special attention that must be given to minors under arrest and the Code of Practice for Police Interrogations stipulates that: *“Special attention should be given when persons under 16 years of age are being interviewed. As far as possible, and if this is not prejudicial to the investigation, these persons should be interviewed in the presence of one of the parents, or their tutor, or in the presence of any other person, not being a member of the Police Force, who is of the same sex as the interviewed person, e.g. the person who has the effective care and custody of the young person, or a social worker. Youths and children attending school or other educational institutions, should not, as far as possible, be arrested, or interviewed, at school. Where it is found essential to conduct the interview at school, this should be done in the presence of the head teacher.”*³⁴

Although the Children Act was suggested for enactment some years ago, wherein the rights of the child as protected under the Convention on the Rights of the Child would be better protected, this Act has not as yet been enacted. A Commissioner for Children has also been awaiting appointment under the Commissioner for Children Act³⁵. This Act has been brought into force as of the 5th December 2003, and a Commissioner has been appointed in January 2004.

³² Chapter 262 of the Laws of Malta

³³ Chapter 287 of the Laws of Malta

³⁴ Fourth Schedule to Chapter 264 of the Laws of Malta

³⁵ Chapter 462 of the Laws of Malta

Considering that the Government has been carrying out several reforms in this area, what may raise concern is the lack of knowledge by society as a whole and in particular by those most concerned of their rights and of the means of complaint available to them.

Article 5. Prohibition of slavery and forced labor

Neither the Eur. Ct. H.R. nor any United Nations Committee has during the period under scrutiny declared the State to be in violation of this prohibition. However, the Committee on the Rights of the Child has expressed some concern. This prohibition of slavery and forced labour is enshrined in absolute terms in our Constitution³⁶ wherein it is recognised as a fundamental right. Other laws also safeguard this fundamental right such as the Education Act, the Regulations for the Protection of Young Workers, and the legislative framework on conditions of employment.

Trafficking in Persons:

The issue of trafficking in human beings has only recently been addressed in the Criminal Code with the introduction of a specific sub-title named "*Of the Traffic of Persons*" being introduced by the amending Act No: III of 2002. Three criminal offences were established whereby trafficking of persons for the purpose of "*exploiting that persons in the production of goods or provision of services*" or for "*exploiting persons in prostitution or in pornographic performances or in the production of pornographical material*" or "*for the removal of any organ of the body*"³⁷ The first two types of trafficking carry the punishment of imprisonment for a term from two to nine years, while the latter carries the punishment of imprisonment for a term from four to twelve years. However, for these three offences to be established they must have taken place by any of the following means and that is: "*(a) violence or threats, including abduction; (b) deceit or fraud; (c) misuse of authority, influence or pressure; (d) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person.*"³⁸

In the case of trafficking of persons who are still minors, the offence is found to be established even if such means are not proved. The proof of such means shall in the case of minors increase the punishment of imprisonment by one degree. Aggravating circumstances leading to an increase in the punishment include the following: "*(a) is accompanied by grievous bodily harm; or (b) generates proceeds exceeding five thousand liri; or (c) is committed with the involvement of a criminal organisation ...*"³⁹

Criminal liability of a body corporate is also established providing for fines ranging from 5000 to 800,000 malta liri and from 2,000 to 500,000 malta liri depending on the connection between the individual accused, the activity constituting the offences and the body corporate.

No cases have so far been instituted before the national courts on the basis of these provisions, however this may be expected since the introduction of such offences is very recent.

These provisions are not however the first attempt at safeguarding against Trafficking in Persons especially for purposes of prostitution. The White Slave Traffic (Suppression) Ordinance⁴⁰ has been on the statute book since 1930 and has been amended on several

³⁶ Article 35 of the Constitution

³⁷ Article 248A of the Criminal Code, Chapter 9 of the Laws of Malta

³⁸ Article 248A(2) of the Criminal Code, Chapter 9 of the Laws of Malta

³⁹ Article 248E(2) of the Criminal Code, Chapter 9 of the Laws of Malta

⁴⁰ Chapter 63 of the Laws of Malta

occasions to cater for developments. This Ordinance establishes several criminal offences, often even overlapping with offences established under the Criminal Code. A few of the important offences established under this Act are the following: inducing a person whether she or he has attained the age of 21 years to leave Malta for purposes of prostitution, detention of a person against his will in a brothel, living off the earnings of prostitution and using or renting out premises for purposes of prostitution. In fact, over the years, there have been several proceedings brought under this Ordinance.

Child Labour:

In so far as the abolition of child labour, this has been sought in particular in the Education Act and the Regulations on the Protection of Young Persons. In fact, it is curious that the Constitution in declaring fundamental principles upon which the State is administered the Constitution does not prohibit the labour of minors but provides that: *“The State shall provide for safeguarding the labour of minors and assure to them the right to equal pay for equal work.”*⁴¹

Taking the law on compulsory education together with regulations of young workers' conditions of work has led to a situation whereby children are under compulsory education until the age of sixteen years. It is only once they reach fifteen years that special permission to leave school may be sought from the Minister responsible for Education. The minimum age for employment is that of sixteen years of age, while children under fifteen years cannot be employed. Where those between fifteen and eighteen years contract employment then they are specifically protected by regulations on the protection of young persons which require that they are to be properly trained and that health and safety hazards must be taken into account and they are furthermore prohibited from working between 10pm and 7am.

However, these regulations *“do not apply in respect of approved training schemes or apprenticeship or educational, cultural or sports activities. The Regulations do not apply to hotels or catering establishments, provided the young worker is allowed not less than 12 consecutive hours' rest within any period of 24 hours, and not less than 2 days' rest each week, including a Sunday.”*⁴²

It must furthermore be noted that implementing the EU Directive on Young Workers, the State has chosen to exclude from the term “work” such circumstances where children work within the frame of family business. In fact, it is this issue that even prior to the implementation of the Directive, the Committee on the Rights of the Child had expressed concern. This concern was also expressed in its summary record of the 634th meeting⁴³ wherein the Committee stated that: *“The Committee was concerned that under-age children were allegedly employed during the summer vacation in family businesses and the tourist sector ...”*⁴⁴ In that meeting the Head of the Maltese Delegation expressed that *“the labour inspectorate system in the country was very inadequate and children were expected to contribute to a family's business.”*⁴⁵, even if schooling was held in high esteem by the family. Similar concerns were also expressed in the concluding observations of the Committee on the Rights of the Child⁴⁶.

In relation to the position of minors, in general, it must be noted that the Parliamentary Bill namely the Children Act, reflecting the Convention on the Rights of the Child, has long

⁴¹ Article 16 of the Constitution

⁴² Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention on the Rights of the Child – CRC/C/3Add.56 Paragraph 301

⁴³ Summary record of the 634th meeting: Malta 02/06/2000 – CRC/C/SR.634

⁴⁴ *ibid* paragraph 35

⁴⁵ *ibid* paragraph 13

⁴⁶ Paragraph 45 – CRC/C/15/Add.129

awaited its enactment. The Act on the Commissioner for Children has come into force only in December 2003, while the Commissioner has been appointed in January 2004.

Pornography & Sexual Exploitation:

Sexual exploitation and pornography are in general denounced as criminal offences under the Criminal Code covering exploitation of adults and minors. Article 197 of the Criminal Code establishes offences with punishments of imprisonment with or without solitary confinement for any ascendant by consanguinity or affinity, or being the tutor of a person whether of age or under age if he/she compels such a person with the use of violence or threats or induces such person by deceit to prostitution. On the other hand, under Article 204(1) anyone who “*in order to gratify the lust of any other person induces a person under age to practise prostitution or instigates the defilement of such person, or encourages or facilitates the prostitution or defilement of such person, shall, on conviction, be liable to imprisonment for a term from eighteen months to four years, with or without solitary confinement.*” Aggravating circumstances leading to an increase in punishment include circumstances whereby the person is under twelve years of age or if the offence is committed habitually for gain. In the case of adults a similar provision is found in Article 205 however, this offence requires the use of violence or deceit. Other offences such as defilement of minors are also established.

In as far as pornography, the distribution or display in a public place or accessible to the public, manufacturing, printing or making and the acquisition of pornographic or obscene material has always been recognised as an offence. However, it was only last year by Act III of 2002 that a specific crime in relation to pornography of minors has been enacted. In fact, child pornography was included in the general offence, but with the introduction of the 2002 amendment it is now also a recognised crime to take or permit to be taken or be in possession, distribute or show materials involving indecent pictures of minors, of whatever type including electronic images. Jurisdiction over such an offence applies to any citizen or permanent resident of Malta whether in Malta or outside as well as over any person in Malta.

Case law related to these issues is predominately of a criminal nature. While there is a stronger awareness of the wrongs of exploitation of prostitution of both adults and minors, and the social stigma against making formal reports of incidents is diminishing, there has been an increase in cases brought against the perpetrators of these crimes. Newspapers have also reported a rise in prostitution by persons coming from the Eastern European countries as having been on the increase, and there has in fact been the closure of places that were identified by the police as organising such entertainment. The issue of sexual tourism involving children does not seem to raise concern in the State and this would fall under the above-mentioned legal framework.

Jury Service:

One other comment may be made in relation to an application pending before the European Court of Human Rights in Strasbourg and another pending before the national courts⁴⁷ whereby a complaint has been lodged against the state claiming that the practice adopted in selecting persons for jury service runs counter to Article 4 of the ECHR since it imposes the burden of a civic obligation to the prejudice and discrimination of a few. The application of *Zarb Adami v. Malta* pending before the European Court complains of a violation of the relative article in the ECHR together with an allegation of discrimination, alleging that the applicant has suffered discrimination in the imposition of a civic obligation both vis-à-vis women who represented only a minimal percentage of the list of jurors chosen, and that the

⁴⁷ *Zarb Adami Maurice v. Malta* – pending before the European Court of Human Rights
Cassar Herbert Notary v. Registrar of Courts, pending before the First Hall of the Civil Court (Constitutional Court) 6th April 2004

applicant also suffered discrimination in the imposition of this civic obligation since the practice adopted by the national authorities brought about a situation whereby once a person is put on the list of jury service he remains there until disqualification or death thereby leading to a situation whereby the same person is called more than once for jury service while the majority of the population are automatically exonerated from such a civic obligation. On the other hand, in the case of *Noarty Herbert Cassar v. Attorney General*, proceedings which are still pending before the national courts rely on complaints similar to the last mentioned allegation in the case of *Zarb Adami*. Both these applications are still pending, however in the former case the national courts have already expressed themselves by rejecting *Zarb Adami's* application.

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

During the period under review there seem to have been no negative report on the questions of liberty and security of persons in Malta. The position regarding the liberty and security of persons in Malta has been regulated by the Criminal Code that provides that a person may only be arrested on reasonable suspicion of having committed an offence. Section 347 of the Criminal Code provides that:

“The Executive Police shall have power to arrest any person who has committed, or is suspected of having committed any crime punishable with imprisonment, with the exception of the crimes punishable under the Press Act.”

Moreover the Code also provides that the police may not detain a person for a period longer than forty-eight hours before arraigning the arrested suspect in Court. On being arraigned in Court the accused has the right to ask for bail as well as the right to have the legality of his detention reviewed by the Court in front of which he stands arraigned. This position has not substantially changed in the period under review. It is however important to note that the Maltese Parliament has by Act III of 2002 enacted on the 9th of April, 2002 made a number of amendments to the position relative to the arrest and detention of criminal suspects. These amendments however have as up to the date of writing of this report not yet been brought into force. The amendments now require the Police to obtain a warrant from a Magistrate before proceeding to the arrest of a criminal suspect except in cases where such suspect is caught in flagrante delicto or where the individual arrested has disobeyed the lawful orders of the Police.⁴⁸

An interesting issue has arisen during the period under review relative to the power of the Courts to grant bail to persons detained while awaiting trial.⁴⁹ In terms of Maltese law where a person has been released on bail pending trial and subsequently forfeits his bail due to having breached any of the bail conditions imposed on him, he may not be again granted bail pending the outcome of his trial⁵⁰. In the case in question the accused had forfeited bail and had been rearrested; he then applied to the Court of Magistrates in front of which his case was being heard to grant him bail afresh; the Court refused to grant bail in view of the above-mentioned section of the Criminal Code. Applicant then brought proceedings in front of the First Hall of the Civil Court alleging that his rights under articles 5(1)(c), 5(3) and 5(4) of the ECHR and sections 34 of the Constitution of Malta had been violated. The matter ended up in front of the

⁴⁸ Sections 355V et seq of the Criminal Code (Chapter 9 of the Laws of Malta) as amended by Act III of 2002.

⁴⁹ *Dr. Patrick Spiteri vs l-Avukat Generali et (Dr. Patrick Spiteri vs Attornedy General et)* decided by the Constitutional Court on the 27 of March 2003.

⁵⁰ Section 581 of the Criminal Code (Chapter 9 of the Laws of Malta)

Constitutional Court. The Court held that the wording of section 581 of the Criminal Code rendering it impossible for the Court to consider granting bail afresh to the accused where he had forfeited bail was in violation of article 5(4) of the ECHR. An accused had always the right to apply to the Court to review the continued legality of his detention. The Court also held that it is the right of any accused brought before a Court under arrest to have the legality of his arrest automatically reviewed by the Court before which he is arraigned; failure by the Court to do so would constitute a violation of article 5(3) of the ECHR⁵¹.

Saving the amendments mentioned above under Act III of 2002 there have been no further amendments in the period under review. As to an assessment whether the obtaining position in Malta is a cause for concern relative to the applicable articles of the European Charter I would say no. The present position in Malta safeguards and has so safeguarded for considerable decades the liberty and security of the individual. The individual is protected under the Criminal Code that secures to him the right to apply for bail if he is under detention pending trial, as well as the right not to be arrested unless there is reasonable suspicion of his having committed a crime punishable with imprisonment. Moreover these rights are also protected under the Constitution, and since 1987, by the enactment into Maltese law of the ECHR. The law and the Constitution of Malta guarantee any arrested person an effective and real right of access to independent and impartial Courts.

Article 7. Respect for private and family life

The position of transsexuals has continued, during the period under review, to pose a problem under Maltese law. Malta has not, during this period been found to be in violation of Article 8 ECHR by the European Court of Human Rights. Also the UN Human Rights Committee and the Committee on the Rights of the Child have not issued any negative concluding observations on the issue. In reality the complaints of violations on this score have mainly centred on the position of transsexuals and these have been dealt with by the Constitutional Court in Malta. In *Joseph Hili vs Avukat Generali* (decided by the Constitutional Court on the 30th May, 2003) the Constitutional Court found that Malta had breached the applicant's right to privacy when the Director of Public Registry refused to correct the entry on applicant's birth certificate indicating him as a male and not as a female. Indeed this is now the latest of a rather long series of judgements where this point has been repeatedly raised and decided. The necessary amendments in law to allow the Registrar to effect the correction to the pertinent birth certificates has not been enacted, and this has forced the repeated recourse to the Courts by transsexuals. Of course although this gives them a local remedy it also exposes them to possible undesirable publicity as the proceedings are public, and so, in a sense, it aggravates the violation to their privacy.

A further interesting point was raised in this case in respect of the transsexual's right to marry. In the above case applicant sought also a declaration that he was to be considered as a female as far as the Malta Marriage Act 1975, is concerned. The Court of first instance held that marriage under Maltese law had to be understood as a monogamous union between man and woman to the exclusion of other unions. The Constitutional Court, on appeal, did not endorse this position as it held that in this particular case the question whether applicant could marry or not was purely hypothetical. No pronouncement was needed of the Court, as the applicant had not shown to the Court that he intended or was about to marry anybody in particular, or that the authorities had in any manner prevented him from doing so. The question of whether a transsexual would have the right to marry therefore remains open as far as the Maltese courts are concerned.

⁵¹ This issue regarding the automatic review of an arrest by the Court in front of which an accused is arraigned had already been previously decided by the European Court in the cases of *Ali Sauber vs Malta*, *Aquilina vs Malta* and *T.W. vs Malta*.

Another issue that has arisen in Malta in respect of family life in relation to discrimination has been the position of children born out of wedlock vis-à-vis those born during marriage. At law, children born out of wedlock are disadvantaged vis-à-vis legitimate children for the purpose of for example inheritance rights. The issue was declared by the national courts to be in violation of the child's fundamental rights since such provisions of law were found to be discriminatory. Despite the judgments delivered by the national courts, the House of Representatives has not as yet removed or rectified such provisions of law from the statute book.

In relation to developments in methods of inquiry or research and in the security control of candidates to sensitive jobs, no legislative proposals or developments have taken place within the regulatory framework during the period under scrutiny. These issues remain to be regulated by the Security Service Act⁵² as enacted in 1996 and subsequently amended in 1997. Under this Act, no interception or entry on or interference with property is allowed except that carried out under a warrant issued by that Minister who is designated to this role by the Prime Minister. Although the law regulates the framework within which the Security Services⁵³ is to function, it does not however specify the methods that may be used for inquiry or research. Consequently, decisions related to the method for interception, the use of undercover officers and of informers remains within the discretion of the Security Services as supervised by the Head of the Security Service and by the Minister.

The Act is however silent on the security control of candidates to sensitive jobs and it is not clear whether such control will be deemed to fall within the function of the Security Service for the protection of national security, the economic well-being of Malta or public safety. Reference to the Data Protection Act may here be useful in that under this Act a controller may be allowed to process sensitive data if this is necessary for him to carry out his duties under any law in relation to employment.

The right to private and family life is also sought to be safeguarded in the context of asylum and immigration. Although the Refugees Act⁵⁴ does not provide specific regulation for family reunification, it is however stipulated that "*Dependant member of the family of a person declared to be a refugee, if they are in Malta at the time of declaration or if they join him in Malta, enjoy the same rights and benefits as the refugee.*"⁵⁵

Reasons for Concern

The issues referred to above, would in general not give rise to concern, however the issue of illegitimate and legitimate children and the issue of transsexuals are two cases which do give some rise for concern especially in a situation whereby the Courts have found a violation of fundamental rights, however the provisions of the law giving rise to those violations remain unchanged. These issues would be settled in a definitive manner only if the House of Representatives were to amend the law accordingly.

On the other hand, the regulatory framework concerning interception of communications and similar issues does not on paper give rise to any concern since the individual is also given a means of redress before the Commissioner who is appointed to review the acts carried out by the Security Services and by the Security Committee. Some concern naturally arises in that it is difficult for an individual to know that he is the subject of acts carried out by the Security Services.

⁵² Chapter 391 of the Laws of Malta

⁵³ Article 3 of the Security Service Act establishes the Security Service who is entrusted with the right to monitor and intercept communications.

⁵⁴ Chapter 420 of the Laws of Malta

⁵⁵ Article 11 of the Refugees Act (Chapter 420 of the Laws of Malta)

Article 8. Protection of personal data

There has been no case in which Malta has been held to be in violation of the privacy of an individual in relation to personal data. The matter is now regulated by the Data Protection Act which was enacted in 2001. The Act was brought into force in three different stages, the last being the 15th July 2003. Prior to this enactment there was no general enactment regulating the processing of personal data. The Act establishes the office of Data Protection Commissioner who is to act independently and not subject to the direction or control of any other person or authority. He may only be removed from office during the period of his tenure by the Prime Minister after a resolution by the House of Representatives supported by not less than two thirds of the members thereof⁵⁶. His functions are primarily to verify that any processing of data is done in accordance with the provisions of the Act; this he may do either on his own motion or at the request of a data subject⁵⁷. The Act also provides for the appointment of a personal data representative appointed by the controller who shall independently ensure that the personal data is processed in a correct and lawful manner. The law also establishes a Data Protection Appeals Tribunal giving any person a right to appeal from a decision taken by the Commissioner⁵⁸. The basis for appeal are limited to: a. material error as to facts, b. material procedural error, c. error of the law, d. some material illegality including unreasonableness or lack of proportionality⁵⁹. From the decision of the Tribunal a further appeal is possible to the Court of Appeal but this only on a question of law⁶⁰.

As this Authority has only recently been set up it is very difficult to state, as yet, whether it has the necessary resources to carry out its functions. This is a matter which will have to be verified in the light of the future practise of this Authority and could be the subject of further reports in the future. It is however to be assumed that such resources have actually been put at its disposal by Government.

The right to access to data and to have incorrect data rectified are addressed in sections 21 and 22 of the Act. These basically give a right to the data subject both to be informed about the actual information being processed and matters related to such data, and to request a rectification, blocking or erasing of any data not processed in accordance with the Act.

The processing of sensitive personal data is also specifically dealt with in the Act. The Act specifies the conditions under which such data may be processed; such processing may only take place if appropriate safeguards are adopted and the processing is necessary in order that a. the controller will be able to comply with his duties or exercise his rights under any law regulating the conditions of employment; or (b) the vital interests of the data subject or of some other person will be able to be protected and the data subject is physically or legally incapable of giving his consent; or (c) legal claims will be able to be established, exercised or defended⁶¹.

However, it must be noted that Malta has ratified the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data on the 28th February 2003 and its terms have been brought into force on the 1st June 2003. The Data Protection Act⁶² has been drafted on the basis of the *acquis communautaire* including directive 95/46/ec of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data.

⁵⁶ Section 39 of Chapter 440 of the Laws of Malta.

⁵⁷ Section 40 of Chapter 440 of the Laws of Malta.

⁵⁸ Section 48 of Chapter 440 of the Laws of Malta.

⁵⁹ Section 49 of Chapter 440 of the Laws of Malta.

⁶⁰ Section 51 of Chapter 440 of the Laws of Malta.

⁶¹ Section 13 of Chapter 440 of the Laws of Malta.

⁶² Chapter 440 of the Laws of Malta

Article 9. Right to marry and right to found a family

The Constitution does not include the right to marry and to found a family as one of the fundamental rights it protects, even if the institution of marriage and family are at the core of the society. Despite this legislation is in place for civil marriages⁶³ and it is only a union celebrated in accordance with the rules therein established that is recognised as a family union. So that it is only those unions that are registered as civil marriages in line with the Marriage Act, or those religious marriages that are so registered with the Public Registry that make that union recognised as a family union for other purposes such as social security. In view of this no arrangements other than a marital union are recognised for founding a family.

The position of children born out of wedlock has for some time been problematic and it is only this year that legislation has been proposed so that children born out of wedlock be brought on a par with children born in marriage, abolishing also the term illegitimate child from the laws.

On the other hand, same sex unions are not recognised. Though not specifically defined in law marriage is understood under Maltese law to be the permanent union of man and woman for life. National courts have not so far dealt with the issue of same sex marriages and consequently there is no definition of the public policy on the issue. However statements made in Parliament by the Minister responsible for Internal Affairs following parliamentary questions to this effect have expressed that same sex marriages are not recognised in Malta as they are incompatible with the Marriage Act and that there was no intention to recognise this type of marriage in Malta⁶⁴. It is also pertinent to point out that in the Hili case, above referred to, the Court in First Instance⁶⁵ had decided that applicant had no fundamental to marry a person of his same sex (applicant had in his application alleged both a violation of his right to privacy as well as a violation of his right to found a family), as in Malta only marriages between persons of different sexes would be recognised in terms of law. It is interesting to point out that the Constitutional Court in its judgment refused to be drawn into a decision on this point and limited itself to finding that there was no breach of applicant's claimed right to form a family as the declaration would be purely academic once applicant had not shown that he intended marrying.

Reasons for Concern

The delay in enacting the necessary legislation in relation to transsexuals and illegitimate children may cause some concern. It is however important to note that it appears that the position is now being improved through enacting the necessary legislation.

Article 10. Freedom of thought, conscience and religion

The Constitution declares in Article 2 that the religion of Malta is the Roman Catholic Apostolic Religion and states that the Church has the duty and right to teach its principles. It furthermore provides that the teaching of the roman catholic faith shall be provided in State schools as part of compulsory education. As such, this principle may give rise to doubts as to the protection of religious freedom that is possible in Malta. However, with the recognition of freedom of conscience and worship as a fundamental human right in the Constitution⁶⁶

⁶³ Chapter 255 of the Laws of Malta, Marriage Act

⁶⁴ Sitting no. 487 of the House of Representatives of the 6th February 2001, reply to Question NO. 23089

⁶⁵ First Hall of the Civil Court (Constitutional Jurisdiction) Hili Joseph v. Attorney General, decided on the 16th January 2003

⁶⁶ Article 40

itself together with Malta's ratification of the ECHR religious freedom is in practice exercised.

In fact, although the society is predominately Roman Catholic and Catholicism is deeply rooted in the functioning of Maltese society, several other religions and churches of other religions are found in Malta. Anglicans, Jews, Hindus, Muslims, Coptics and Jehovah Witnesses are among the most commonly represented faiths apart from the Catholic faith. Muslims, who represent a major part of those persons who reside in Malta and who are not Maltese, have their own Mosque, system of education and also a spiritual director who takes care of the Muslim community not only for religious purposes but also for cultural ones. The other mentioned faiths all have their own place of worship as well, and persons offering related services.

Although Article 2 of the Constitution declares that the Roman Catholic faith is the religion taught in compulsory education and in state schools, Article 40 of the same Constitution prohibits the indoctrination of a person into a religion where such person objects to the provision of such teaching. In this way, persons of different faiths and who attend state schools are not obliged to take religion lessons so that in their case the religious teaching so provided is not compulsory.

The Prisons Regulations⁶⁷ also provide for religious freedom and the free exercise of religious beliefs within the designated prisons. Representatives of the various religions represented by the persons detained are appointed in order to see to the prisoners' religious needs and to their welfare. Religious celebrations and activities are carried out within the prison facilities and attendance to these celebrations and to meetings with religious advisors whether in a group or in private are optional for each prisoner. It is furthermore a duty upon the prisons' administration to respect the recognised days of religious observance for the faiths represented by the prisoners.

In so far as limitations on religious freedom are concerned, the Constitution allows those limitations that are allowed under Article 9 of the ECHR in terms that are also very similar to the terms used in the ECHR. Although Maltese laws do not provide for any compulsory military or civil service, the right to conscientious objection would have to be respected as it falls within the ambit of protection as recognised in the Constitution and also with the obligations undertaken under the ECHR.

Article 11. Freedom of expression and of information

Freedom of expression and information is extensively protected in Article 41 of the Constitution. The import of this article is very similar to that of Article 10 of the ECHR and covers all forms of expression and content. In general this article does not give rise to difficulties; however it is mostly invoked by those who are sued for libel and throughout the last year a few complaints have been brought before the national courts alleging that proceedings instituted for libel are in violation of the applicant's freedom of expression.

A judgment⁶⁸ given in the case of a newspaper columnist must be mentioned. Following the publication of an article in one of the local newspapers expressing the columnist's opinion on the conflict between the Palestinians and the Jews, the police instituted proceedings against the author and the editor charging them with incitement to racial hatred. The inferior court had declared both the columnist and the editor guilty of such incitement and had imposed upon them a "symbolic" fine of Lm10 each after the presiding magistrate ruled that, rather than inflicting punishment, it would be better to resort to a measure that suited the media's

⁶⁷ Prisons Regulations S.L. 260.03

⁶⁸ Police v. Simone Zammit Endrich et, Court of Appeal, 7th November 2003

sense of responsibility and integrity. Following an appeal presented by the columnist the Court of Appeal reversed the judgment delivered by the first court, concluding that freedom of expression and freedom of the press were essential elements in a democratic society and that their restriction should be strictly limited to protecting values and rights that are just as important.

The Court noted that among such rights, were the right to protect one's reputation and the right of the individual or group not to be insulted or exposed to public ridicule because of race, belief or ethnic origin. In stating that the article is a personal analysis of the columnist's views on the conflict between the Palestinians and the Jews, the Court concluded that a reading of the article shows that it is an opinion rather than a statement of fact and that an ordinary reader would not have his respect towards the people or races mentioned diminished simply by a reading of that article.

Pluralism in the media is now an established feature in the Maltese system having a variety of radio and television stations run by political parties and private individuals, with the State having both a television and a radio station. All television stations, irrespective of whether they are run by political parties or private individuals, require a broadcasting licence and are to function under the conditions therein imposed in virtue of the Broadcasting Act⁶⁹. The monitoring and licensing of such stations is vested in the Broadcasting Authority, an authority established under the Constitution⁷⁰. One of its main duties is "*to ensure that as far as possible, in such sound and television broadcasting services as may be provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.*" However in the exercise of such functions the Broadcasting Authority is also bound by the principles of fundamental rights and freedoms both as recognised in the Constitution and in the European Convention Act.

Towards the end of 2002 beginning of 2003 an issue arose with respect to the allocation of time on television relative to information services concerning accession to the European Union. The Broadcasting Authority had allocated time for a number of informative broadcasts by the Malta-EU Information Centre. The Labour Party took issue with such allocation of time, and eventually actions were brought forward also by the Nationalist party and other organisation interested in the issue. The Constitutional Court through its judgments provided for allocation of time to meet the complaints made before it⁷¹.

A judgment connected to this right was delivered by the Constitution Court on the 10th October 2003 in the names of Fenech Adami Eddie Dr Noe et v. Director of Wireless and Telegraphy et, touching upon an incident which occurred in 1996. The applicants represented a political party which was broadcasting from a common antenna. The authorities sought to seize the apparatus which was being used in the broadcasts as they claimed it was not duly licensed. Applicants claimed that their fundamental human rights to property, to privacy, to freedom of expression, and to non-discrimination were being violated. The First Hall of the Civil Court found for the applicants and ordered the Director of Telegraphy to desist from attempting to seize the apparatus pertaining to them and ordered the defendants to give the necessary facilities to applicants to broadcast from the Master Antenna in the same manner as other broadcasters and ordered them to pay applicants the sum of LM20,000 by way of liquidated damages. The Constitutional Court affirmed the judgement in first instance in the

⁶⁹ Chapter 350 of the Laws of Malta

⁷⁰ Constitution of Malta, Article 118

⁷¹ Court of Appeal, Partit Nazzjonalista v. Awtorita tax-Xandir, Decided on the 31st July 2003
Court of Appeal, Dr Alfred Sant noe v. Awtorita tax-Xandir, Decided on the 15th January 2003

main with the exception that it revoked it in so far as it confirmed the warrant of prohibitory injunction originally issued and in so far as it awarded damages to applicants.

Article 12. Freedom of assembly and of association

Article 42 of the Constitution recognises this fundamental right in terms that are very similar to those used in Article 11 of the ECHR. Although the organisation of public meetings or demonstrations requires notice to be given to the Police authorisation is normally a formality. In view of this, it is in practice easy for political parties and civic organisations to hold public meetings or activities.

Freedom of association in any type of organisation finds little hindrance. Any person may become a member of a political party, civic organisation or a member of a trade union and in practice these three types of organisations are heavily embedded in Maltese society. Trade unions and employers' associations are specifically regulated under the Employment and Industrial Relations Act⁷² and any group of seven or more persons may register a trade union or association with the Registrar of Trade Unions thereby gaining official recognition. Becoming a member of a trade union or association is usually encouraged rather than hindered and membership does not bring about negative consequences or discrimination. In a dispute between an employee and his/her employer, representation by the trade union or association is allowed.

The legal provisions found in the laws of Malta relating to political parties and to freedom of assembly and of association do not in any way hinder the possibility for political parties at a Union level and in fact at present Malta is in the process of choosing its representatives at the level of the Union.

During the year under review the First Hall of the Civil Court in its Constitutional Court has delivered a judgment based on freedom of association in the case of the Malta Union of Teachers et v. Permanent Secretary to the Prime Minister, a case decided on the 31st October 2003. The Malta Union of Teachers, a trade union, complained that its fundamental human rights had been breached in so far as its members had been treated in a discriminatory manner and this also in breach of the freedom of association. This was in violation of article 11 and 14 of the European Convention. The First Hall of the Civil Court threw out the plea of defendants that the union had alternative adequate remedies at its disposal but, on the merits, dismissed applicants claims. The union was complaining that in its case a one hour stoppage of work ordered by it had been visited by a deduction in the salary of its members adhering to its directive while no similar deduction had been made in relation to another stoppage of work ordered by the General Workers Union.

The Court decided that treating unions differently could indeed amount to a breach of their rights under articles 11 and 14 of the Convention. The difference in treatment could be seen to impinge on the right to freely associate in a trade union. But in the present case the two instances were not comparable as the directives given by the two unions were intrinsically different. The union could not therefore complain that there was a discriminatory treatment in its respect.

Article 13. Freedom of the arts and sciences

Although this right is not recognised in the Constitution or in the European Convention Act as a separate and distinct freedom, it has always been interpreted to fall within the ambit of

⁷² Chapter 452 of the laws of Malta

freedom of thought and expression. The arts, scientific research and academic freedom are not in any way hindered and their exercise is not regulated. On the contrary these are encouraged through the concerned Ministries and through the system of education. In particular the Ministry for Youths and the Arts, and bodies such as the Council of the Society of Arts, Manufacturers and Commerce, the Malta Council for Culture and the Arts, and the Malta Council for Science and Technology all seek to promote the arts, scientific research and academic freedom.

Articles 8 and 19 of the Constitution must also be referred to since in the declaration of principles it states that the State shall promote the development of culture and scientific and technical research, while it should provide for the protection and development of artisan trades. These provisions of the Constitution are however non-justiciable.

Article 14. Right to education

The right to education including free compulsory education is not as such recognised as a fundamental right under the Constitution, but is recognised as a Principle in the Constitution with which the State must abide. Consequently in Article 10 it is stated that primary education is compulsory and in State schools is also to be free of charge. In fact the State provides free education through its schools that are aimed at the various exigencies of the society and cover academic institutions, trade schools, primary, secondary and tertiary education, vocational and continuing training. The Ministry of Foreign Affairs also offers and advertises a variety of scholarships given to applicants to further their studies abroad, while state schools also participate in educational programmes offered by the Union such as Socrates, Erasmus and other similar programmes. Under Article 11 of the Constitution the state is in fact bound to offer scholarships and contributions to the families of students on the basis of competitive examinations. These provisions of the Constitution are however non-justiciable.

The Education Act⁷³ further strengthens the duty of the State to provide education by stating that: *“It is the duty of the State - (a) to promote education and instruction; (b) to ensure the existence of a system of schools and institutions accessible to all Maltese citizens catering for the full development of the whole personality including the ability of every person to work; and (c) to provide for such schools and institutions where these do not exist.”*

While for primary and secondary education is free for those of a compulsory school age, those who decide to further their studies by following tertiary education also receive free education at the University and an allowance to assist them.

School attendance during the compulsory school age is strictly regulated through a set-up that monitors children’s absences and proceedings are instituted against parents whose children are kept away from school without valid reason.

The establishment of other educational institutes is allowed under national law and a licence is given provided the applicant is *“the Catholic Church or any other voluntary society, religious or otherwise, of a non profit making character, and the school conforms with the national minimum conditions...”* and where the Minister deems it to be in the general interest. It is only private schools that are set up in accordance with licences given to them by the State that do not offer free education.

It must furthermore be said that the State is also bound by Article 2 of the First Protocol to the ECHR as this has been ratified into national law.

⁷³ Chapter 327 of the Laws of Malta

Article 15. Freedom to choose an occupation and right to engage in work

Under Article 7 of the Constitution, an article which is non-justiciable, the “*State recognises the right of all citizens to work and shall promote such conditions as will make this right effective*”. Furthermore work is protected and the State is to provide professional or vocational training and advancement of workers⁷⁴. However these principles are not recognised in the Constitution as fundamental rights and consequently the State cannot be brought before the national courts for an alleged violation of the right to engage in work, even if Malta has undertaken other international obligations to protect and respect this right by becoming a signatory to other international conventions.

In practice no difficulties are encountered in the exercise of this freedom to choose an occupation and the right to engage in work, with the State providing services for choice of occupation and also for finding jobs. Particular groups are then given specific focus to better bring about an effective exercise of this freedom and right. Persons with a disability are protected under the Persons with Disability (Employment) Act⁷⁵ wherein the Minister concerned is authorised to establish quotas for employers, while the State is to undertake vocational and employment training for persons with a disability so as to better enable them to find an occupation.

On the other hand, while with the accession of Malta to the European Union Maltese citizens have gained a right to seek employment in all the Member States, citizens from other member states are to obtain a work permit from the authorities should these seek employment in Malta. In the agreement of accession, Malta has obtained a period of seven years after membership during which safeguards on the right of EU national to work here will be allowed. After accession, the present system of requiring a work permit will be kept, even if it will only be able to withhold work permits in the case of a threat of a disruption to its labour market which is of an urgent and exceptional nature. Restrictions may be imposed if there is a threat that the inflow of EU workers may put a strain on the local labour market either in whole or even in certain sectors. On the other hand, nationals of third countries who are authorised to work in the territories of the Member States once they also obtain such permit will automatically become entitled to the same working conditions as those of citizens of the Union.

Article 16. Freedom to conduct a business

Freedom to conduct business as such is not prohibited in that upon accession foreign businesses and service providers are not hindered in providing such services in Malta or in conducting their business in Malta. However, this must be done in accordance with national laws such as the Companies Act⁷⁶, the Business Promotion Act⁷⁷ and the Competition Act⁷⁸.

Article 17. Right to property

The Constitution offers protection against the deprivation of property without compensation in article 37 using very similar terms to those used in the second sentence of the first paragraph of Article 17 of the Charter. Although the Constitution does not specify the legal rights related to property that are protected as is done in the first sentence of Article 17 of the

⁷⁴ Article 12, Constitution of Malta

⁷⁵ Chapter 210 of the Laws of Malta

⁷⁶ Chapter 386 of the Laws of Malta

⁷⁷ Chapter 325 of the Laws of Malta

⁷⁸ Chapter 379 of the Laws of Malta

Charter, Article 37 of the Constitution has been interpreted to cover all rights relating to property and would certainly include ownership, use, disposal and bequeathing of such possessions. Through the European Convention Act protection for the enjoyment of property is also safeguarded by Article 1 of the First Protocol to the ECHR.

Difficulties continue to arise under these two articles before the national courts predominantly on the lack of “public interest” required for the interference, the lack of fair compensation and even more so the lack of payment of such compensation in “*good time for their loss*”.

Although the issue of restitution of confiscated property (“denationalisation”) has in these last years given rise to several difficulties in other European countries this does not arise in Malta since a democratic non-centralised system of government has been in place for a great number of years. In the light of this, private property was not confiscated under regimes which disapprove of private ownership.

Under Maltese law the Government could take private property for purposes of public interest either by outright purchase or for the possession and use thereof for a stated time, or during such time as the exigencies of the public purpose shall require; or on public tenure under the Land Acquisition (Public Purposes) Ordinance⁷⁹. This has now been amended to allow only taking for purposes of public interest by outright purchase. This law regulates the method of taking of property and also the method of establishing the compensation due to the individual, however it does not establish rules according to which property taken may be returned to the individual. The national courts have been receiving a number of applications over the years seeking a declaration of breach of the right to property as protected under Article 37 of the Constitution and under Article 1 of the First Protocol to the ECHR wherein it has been held that a breach of such a right existed either because the public purpose declared for the taking was not found to be within the meaning of the term public purpose, or because the compensation offered by the State was too low compared to the value of the property taken or because of the lapse of time between the declaration of expropriation or acquisition and the initiation of proceedings to establish the amount of compensation due.

Prior to the period under scrutiny, concern over the right to access to a court was also at issue since it was only the Government Department that had the right to initiate proceedings before the competent tribunal for the establishment of compensation. In this manner, a situation arose whereby the individual had to wait for several years before proceedings were even initiated to establish the amount of compensation due to him. With the introduction of Act XI of 2002 the President’s Declaration of acquisition is to include the amount of compensation being offered by the State whereas the previous position only required establishing the compensation due at a later stage. This however, does not stop concern over such a right of access to a court for the establishment of the compensation for those takings that were made prior to this amendment, thereby leading to a situation of concern over the numerous takings that occurred previously.

Other difficulties arise with respect to the review of the notion of public interest as declared for such takings. Article 6 of the said Ordinance stipulates that no person shall require any proof of the public purpose once this is declared in the declaration of taking of the property. Despite this, the national constitutional court has on several occasions declared that the public purpose declared for every taking may still be reviewed by the courts especially in proceedings related to fundamental human rights.

These issues arise not only where property is taken by outright purchase but also when it was taken for possession and use. In both instances, the compensation offered for outright

⁷⁹ Chapter 88 of the Laws of Malta

purchase and the rent offered for the use of the property taken are regulated by law and do not necessarily always reflect the market value of the property; indeed in the case of property taken on possession and use the compensation offered may be very low when compared to the market value.

The issue of restitution of such properties taken is one of uncertainty. There are no regulations that provide for restitution and this often happens upon the persistent request of the individual concerned when the property in question has not been used in its totality and therefore the Department concerned releases that part which has not been utilized for the public purpose. Such releases are usually made through another President's declaration stating that the land described is no longer required. Release of the land taken when the land has not been made use of by the State may even be ordered by the Courts where the Department fails to release it spontaneously. There are cases where property had been taken upon the request of the Department of Public Works with the purpose of carrying out a government project such as a proposed road or for planning purposes, however such projects do not take place for several years thereby taking the individual's right of enjoyment of his property, without serving any use for the State.

During the period under scrutiny nine decisions have been delivered by the national courts upon applications seeking a declaration of violation of the right to property. Two of these cases⁸⁰, were not taken cognisance of by the national courts since the courts concluded that the applicants had not exhausted ordinary remedies that were available to the applicants. The first judgment, that of *Bezzina v. Chairman of Planning Authority* referred to a complaint based on the service of an enforcement notice issued against the applicants by the Planning Authority as they had developed property without the necessary permission from the competent authorities. On the other hand, in the case of *Sammut v. Planning Authority*, the applicant had submitted that the revocation of development permits already issued to him, without informing him that the Authority was reconsidering the permits already issued to him was in violation of both his right to property and also of his right to a fair hearing in the determination of his civil rights and obligations.

The next two decisions delivered in the period under scrutiny on the right to property were judgments on the merits of the right in question. The case of *Vella v. Commissioner of Lands and Attorney General*⁸¹ referred to the termination of a lease that had been given to the applicants by the Government over agricultural land under the Agricultural Leases (Reletting) Act⁸². The applicants here complained that the termination of their agricultural lease for the purpose of using that land as a public camping site to be managed by private persons at least for a number of years was in violation of their right to property and also an act not taken in the public interest. Neither the First Hall of the Civil Court, nor the Constitutional Court found a violation of the right to property in that they concluded that the termination of the lease in question was done in line with the procedures established by law and also for a public purpose. As an aside, however, the Constitutional Court, did declare a violation of Article 6.

⁸⁰ Qorti Kostituzzjonali, Emanuel u Rita konjugi Bezzina vs Chairman tal-Awtorita tal-Ippjanar ghan-nom u fl-interess tal-istess Awtorita, 18 ta' Gunju 2003 – (Constitutional Court, Emanuel & Rita spouses Bezzina v. Chairman of the Planning Authority on behalf and in representation of the said Authority, 18th June 2003); Qorti Kostituzzjonali, John Sammut v. Awtorita ta' l-Ippjanar u b'digriet tat-28 ta' Mejju, 1999 gew kjamati in kawza l-Avukat Gnerali u l-Ministru responsabbli ghax-Xogholijiet Pubblici, 27 ta' Frar 2003 – (Constitutional Court, John Sammut v. Planning Authority and by virtue of a decree of the 28th May 1999 the Attorney General and the Minister responsible for Public Works were called into the suit, 27th February 2003)

⁸¹ Qorti Kostituzzjonali, Emanuela Vella f' isimha properu u ghan-nom ta' hutha imsiefrin Frnacis, Eugenio u Paul ahwa Borg u zewgha Benigno Vella v. Kummissarju ta' l-Artijiet u l-Avukat Generali, 27 ta' Marzu 2003 – (Constitutional Court, Emanuela Vella in her name and on behalf of her brothers Francis, Eugenio and Paul Borg and her husband Benigno Vella v. Commissioner of Lands and Attorney General, 27th March 2003)

⁸² Chapter 199 of the Laws of Malta

In the fourth judgment delivered, *Abdilla v. Parliamentary Secretary for the Environment*⁸³, the applicant had submitted that the Government had taken possession of his property consisting of a farm and land, had demolished the farm, reconstructed it as it deemed fit and took a part of the land in question without any authority at law. The applicant claimed that this amounted to a violation of his right to enjoyment of property, also because this was not done in the public interest. However, the First Hall of the Civil Court did not find a breach of such right, concluding that the Government had taken possession of the land in question for purposes of development and to prepare a projected road. Upon appeal, the Constitutional Court allowed the appeal and declared that the alleged acts did in fact amount to a violation of the applicant's right to property since the taking of such property was not done in accordance with the procedure established by law. In this case, it was proved that the Government had taken possession of the land in question and had demolished the existing building prior to the issue of the President's Declaration as required by law.

Three further decisions related to the right to property were delivered in October. In *Bezzina Wettinger Francis et v. Commissioner of Lands*⁸⁴ the Constitutional Court declared that the notion of public interest must be proved to the satisfaction of the Court by the State interfering with the individual's property and that the State must not only prove that this public necessity concretely existed at the time of the interference but that it continued to exist until the final act of extradition took place that is until the moment that the ownership of the property passes to the State. Another judgment in which this principle was emphasised is that of *Dr E. Fenech Adami noe et v. Director of Wireless and Telegraphy et*⁸⁵, however the predominant issue discussed in this case relates to the freedom of expression.

A judgment delivered on the 2nd December 2003 in the case of *Allied Newspapers Limited v. Advocate General et* also considered the right to property. Applicant brought an action in front of the First Hall of the Civil Court for a declaration that his fundamental human rights, and in particular his right to property and the right to a fair hearing within a reasonable time had been violated by the taking of properties in Valletta pertaining to him. The Government had in 1989 by a President's declaration taken over property in Valletta belonging to applicant for the alleged purpose of developing it into a site to house Parliament. By 2003 the Government had done nothing concrete relative to its projects, had failed to take over possession of the property, and had until 2001 not issued a notice to treat offering compensation to applicants. The taking was made under the authority of Chapter 88 of the Laws of Malta and the taking had to be by outright purchase. The Court of first instance found that there had been a breach both of article 1 of the first protocol and article 6 of the European Convention but not of article 37 of the Constitution. The Constitutional Court, on appeal, confirmed the judgement.

Article 37 of the Constitution was inapplicable to the case as the taking was in virtue of a law saved under the Constitution. But the law was not saved from the operation of the European Convention Act and was controlled by it. The argument that once the taking was saved under the Constitution it could not be impugned under the European Convention Act, an argument brought forward by the Attorney General's office, was characterized by the Court as bordering on the frivolous. In terms of Article 1 the Court had to see that a fair balance was struck between the public necessity and the individual's right to property. In the present case the inactivity of the Government over a long period of time led the Court to believe that there was no public interest in the taking. Moreover the fact that the Government took over 10

⁸³ Qorti Kostituzzjonali, *Salvatore Abdilla v. Onor. Segretarju Parlamentari Ambjent*, 30 ta' Mejju 2003 – (Constitutional Court, *Salvatore Abdilla v. Hon. Parliamentary Secretary for the Environment*, 30th May, 2003)

⁸⁴ Qorti Kostituzzjonali, *Bezzina Wettinger Francis et v. Kummissarju ta' l-Artijiet*, 10 ta' Ottubru 2003 – (Constitutional Court, *Bezzina Wettinger Francis et v. Commissioner of Lands*, 10th October 2003)

⁸⁵ Qorti Kostituzzjonali, *Fenech Adami Eddie Dr noe et v. Direttur tal-Wireless & Telegraphy et*, 10 ta' Ottubru 2003 – (Constitutional Court, *Fenech Adami Eddie Dr noe et v. Director of Wireless and Telegraphy et*, 10th October 2003)

years to issue the notice to treat also led to a violation under article 6 of the Convention, as the applicant was denied a fair hearing within a reasonable time.

The last judgment delivered in the year under review related to the right to property is that of *Joseph Bartolo v. Prime Minister et* delivered by the Constitutional Court on the 2nd December 2003. The applicant alleged he had suffered a violation of his fundamental right to property through the taking of a property of his under the Building Development Act without the payment of adequate compensation. He alleged that this was in breach of article 37 of the Constitution and article 1 of the First Protocol of the European Convention. The Government, among other things, pleaded that he had failed to exhaust available remedies under the ordinary law. In fact proceedings had been taken before the Land Arbitration Tribunal to determine the compensation due to the applicant but no appeal had been entered from the decision of that tribunal. The first Hall of the Civil Court dismissed the plea of the Government; on appeal, the Constitutional Court confirmed the decision in first instance.

The right competent to the Court to decline to exercise its constitutional jurisdiction in cases in which the applicant had a remedy available to him under the ordinary law was a discretion allowed to the Court to be able to exclude such cases as were an abuse of the constitutional remedy available under the law and in no manner implied an obligation on the Court to refrain to exercise its jurisdiction in all such cases. The discretion exercised by the Court of first instance should not be easily disturbed on appeal. The discretion to exclude the hearing of a case should not be exercised where the remedy available was doubtful or would not appropriately address the grievance of the complainant. The Court therefore saw no reason to disturb the findings of the Court of first instance.

Another limitation imposed by the Immovable Property (Acquisition by non-residents) Act⁸⁶ on the enjoyment of one's property is the prohibition of a sale of one's own property to a foreigner where such foreigner does not acquire a permit to do so. Such a permit is only granted where the non-resident declares that the property will be used by him/her as a residence and provided the value of the property is above a certain established value. However once acquired, that property cannot be leased to third parties whether commercially or to other private persons and this under heavy fines imposed in the said Act. Despite Malta's accession to the Union the position will remain the same since Malta has obtained a permanent arrangement to keep such restrictions in place.

However, a restriction that may give rise to difficulties if taken into consideration with other articles of the Charter is that where according to Article 3 of the Immovable Property (Acquisition by Non-Residents) Act a non-resident cannot even acquire property *causa mortis* unless he is the child or other descendant of the deceased or the spouse or any ascendant or a collateral relative up to the fifth degree of the deceased. This may give rise to difficulties since "family unions" outside marriage are not considered to give rise to such ties so that while children born outside a marital union between a resident and non-resident can inherit the resident parent, the non-resident partner will be unable to inherit from the resident partner any property that is found in Malta. Exceptions to this may be obtained upon the approval of the Minister concerned, however such approval is within his discretion.

Although there has been no pronouncement of the national courts on the issue of intellectual property, it would seem that protection would fall within the ambit of the European Convention Act and that national courts would take direction on this issue from the case-law developed by the European Court of Human Rights. Consideration of intellectual property will also be made in the light of three national legislations and that is the Industrial Property (Protection) Ordinance⁸⁷, the Intellectual Property Rights (Cross-Border Measures) Act⁸⁸ and

⁸⁶ Chapter 246 of the Laws of Malta

⁸⁷ Chapter 29 of the Laws of Malta

the Patents Act⁸⁹. These three acts of Parliament together reinforce protection of intellectual property through a procedure of registration and recognition that is monitored by the office of the Comptroller of Industrial Property.

Reasons for Concern

The reasons for concern here relate to the somewhat inordinate length which proceedings for the award of compensation and its actual payment take. There is also some concern in so far as in certain instances the compensation that may be awarded may fall rather short of the full value of the property taken. On the other hand, it is appropriate to point out that a judicial remedy is available to persons who feel aggrieved and that judgments in this area have instigated both legislative reform and an improvement of administrative procedures.

Article 18. Right to asylum

The position of asylum is regulated by the Refugees Act⁹⁰. This law was enacted by Act XX of 2000 and came into force on the 1st October 2001. Since then no amendments to the Act have been made. This Act establishes the office of the Refugee Commissioner who is under Article 4 competent to examine applications for refugee status. Appeals from the decision of the Refugee Commissioner lies before the Refugee Appeals Board as established in Article 5. In seeking asylum, one's application may follow either of two procedures, depending on whether it is considered under Article 18 to require examination through what the Act calls "accelerated procedures", or failing this it will follow the normal procedure.

Under the normal procedure established for both asylum seekers and also for applicants for refugee status, an applicant will first present his case before the Refugee Commissioner. The Refugee Commissioner will consider all the evidence brought before him in confidence and will conclude the case by giving a recommendation for acceptance or refusal. The Act often refers to the decision of the Commissioner by using the term "recommendation". However, although this term may give one the idea that it need not be substantiated as required in a legal sense, the Act in Article 8(5) specifically states that "*Any **decision** by the Commissioner on any application shall be in writing and shall state the reasons supporting it.*"

Following the conclusion of the case by the Commissioner, the applicant is notified of the **recommendation** of the Commissioner. The applicant then has a right to appeal before the Refugee Appeals Board within two weeks from being so notified. This right of appeal is in fact given not only to the applicant but also to the Minister. In entering an appeal the applicant has been granted the right to free legal aid under the same conditions applicable to Maltese nationals⁹¹. In so far as the Appeals Board is considered, the law does not specify the form of its conclusion or the method of serving its conclusion on the applicant. However, it does state in a strong manner that decision of the Board is "*final and conclusive and may not be challenged and no appeal may lie there from, before any court of law.*"⁹², despite this prohibition proceedings that may still be taken under Article 46 of the Constitution or article Article 4 of the ECHR Act, that is proceedings for violation of the fundamental human rights of the applicant.

Notwithstanding this procedure, there are instances where an application will follow an "accelerated procedure" according to Article 18 of the Refugees Act. This procedure applies

⁸⁸ Chapter 414 of the Laws of Malta

⁸⁹ Chapter 417 of the Laws of Malta

⁹⁰ Chapter 420 of the Laws of Malta

⁹¹ Article 7(5) of the Refugees Act

⁹² Article 7(9) of the Refugees Act

to those applicants whose application appears prima facie to be manifestly unfounded, or if he/she is a national or citizen of a safe country of origin, or has a right of residence in a country and has no serious risk of persecution, or if the applicant has already been recognised as a refugee in a safe third country or where he/she had the opportunity to apply there for refugee status before coming to Malta and there is clear evidence of his admissibility to that third country. In these circumstances, the Immigration Officer will submit a report in writing together with the applicant to the Refugee Commissioner and to the Chairman of the Refugee Appeals Board. The Refugee Commissioner must examine the application within three days after receiving the report from the immigration officer, while at the same time and also within three days the Chairman of the Refugee Appeals Board will independently examine the same application. Where they come to the same conclusion that is that the applicant falls within any of the circumstances already mentioned, the applicant will be rejected and this decision will be “*final and conclusive and notwithstanding the provisions of any other law no appeal or action for judicial review shall lie before the Refugee Appeals Board or before any other court of law.*”⁹³ In this case, the decision is communicated to the applicant orally, unless he requests its confirmation in writing, but the decision together with the grounds therefore are to be sent to the Minister, the Chairman of the Refugee Appeals Board, the High Commissioner and the Immigration Officer.

If on the other hand, the Commissioner and the Chairman reach different conclusions or where both of them disagree with the report of the Immigration Officer, the applicant has the right to have his application for asylum processed under normal procedures and in this case the Commissioner shall “*accordingly orally inform the applicant and the High Commissioner in writing immediately.*”⁹⁴

It is to be noted that under normal procedures any individual will have a right to seek judicial review of an administrative decision and also a right to bring proceedings under the Constitution or the ECHR Act alleging a violation of a fundamental right, following the decision delivered by a Tribunal such as the Refugee Commissioner or the Refugee Appeals Board. However, the Refugee Act seeks to exclude the possibility of asking for judicial review of the recommendation delivered by either the Commissioner or the Appeals Board. In so far as the “accelerated procedure” the law is very clear and Article 18(8) completely excludes the possibility of judicial review. However, under normal procedure this is not as clear, since although Article 7(9) states that the decision is final and conclusive it does not like Article 18 specifically exclude judicial review, but simply states that it “*may not be challenged*” before any court of law. In this manner, it is dubious whether judicial review is here also excluded. Despite this, proceedings alleging a violation of fundamental rights as protected under the Constitution or under the ECHR Act cannot be so excluded and such recourse to the ordinary courts remains. For this purpose, it does not seem to be prohibited that such a person be admitted to legal aid. The Refugees Act simply allows legal aid only to a person appealing before the Appeals Board, while under Article 19(1)(c) the Minister may make provisions regulating the provision of legal aid to asylum seekers. No such regulations seem to have been made and therefore it is presumed that such an applicant will fall under the general rules for admission to legal aid as provided under the Code of Organisation and Civil Procedure. Under such rules, there is no requirement of citizenship or nationality.

All decisions and recommendations are held by the Commissioner and by the Appeals Board to be of a confidential nature and therefore access to such decisions is not given to any person. However, despite this it has been established that once the Commissioner concludes a case, he makes “*a communication to the applicant saying the gist of the judgment*” which is usually a one page or half a page letter informing the applicant whether his application has been accepted or rejected and the reasons for such a rejection. It is to be understood therefore that

⁹³ Article 18(8) of the Refugees Act

⁹⁴ Article 18(10) of the Refugees Act

the applicant is not given a judgment as understood in normal court proceedings where the decision delivered is well substantiated with the arguments that have led the court to reach that conclusion and with an exposition of those reasons, since this would presumably require more than a one page document. It is on the basis of this communication that the applicant is expected to present an appeal before the Refugee Appeals Board.

The Refugees Act does not regulate the manner in which the decision of the Appeals Board is to be delivered to the applicant, but it appears that the Appeals Board follows the same practice of sending a communication to the applicant. Under the “accelerated procedure” the Act then provides that the applicant may be informed of the decision orally by both the Commissioner and the Appeal Board, making it only formally possible for an applicant to seek the Commissioner’s decision in writing.

The practice of serving upon the applicant a communication containing a summary of the decision may have been induced with the terminology used in the Refugees Act itself whereby some articles use the term “*decision*” especially when speaking of processing of the application, however when it comes to regulate the notification of such a conclusion upon the applicant the Act speaks of the “*recommendation of the Commissioner*”. However, whatever has led to this position, and taking into consideration also the difficulties that the office of the Commissioner and the Appeals Board face in the light of the circumstances brought forward by the applicants and also in seeking to understand the difficulties encountered by the number of applications presented and the detail that needs to be collected for each application, proper measures to rectify this practice would be advisable since it would better enable the applicant to understand his position and to prepare his appeal.

Considering that proceedings before the Appeals Board are held in camera, are confidential and that access to third parties is only given by the Act to the United Nations High Commissioner for Refugees or his representative, it is not possible to assess on a first hand basis whether the Appeals Board does exercise an effective control on negative decisions given by the Refugee Commissioner. In view of this, the Act itself and statistics will have to be relied on. According to statistics issued in December 2003 issued by the Commissioner for Refugees, refugee status was during the year under review awarded to 53 persons, while humanitarian status was granted to another 328 persons. On the other hand 225 persons were refused refugee status. At the end of the year 11 persons had withdrawn their application, while applications concerning 37 persons were still pending. During the summer of 2003, 94 persons from Iraq were given temporary protection according to a recommendation by the United Nations High Commissioner for Refugees.

These can be compared to statistics issued in July 2003 when it was stated that there are 177 persons currently in Malta and who have been recognised as refugees. 122 of these persons (61 men, 19 women and 42 others under the age of 18 years) have been given refugee status by the UNHCR, while 55 persons (34 men, 15 women and 6 persons under 18 years of age) have been so certified by the office of the Refugee Commissioner in Malta. On the other hand, there are also 351 persons who have been given humanitarian status. 9 of these, all men, have been so certified by the UNHCR while 342 (179 men, 53 women and 110 persons under the age of 18 years) have been so certified by the Office of the Refugee Commissioner. Despite, these there 405 persons detained as illegal immigrants out of which 316 are men, 54 women and 35 (21 boys, 14 girls) are under 16 years of age. It seems therefore that in so far as humanitarian status is sought, a large number of applications are allowed by the Refugee Commissioner with only 9 persons obtaining such status from the UNHCR. Statistics to show whether the number of negative recommendations issued by the Refugee Commissioner, the number of applicants who appeal and the outcome of those appeals were not available.

Despite this, as an Appeals Board the tribunal has full access to the applicant’s file upon which the Commissioner had made his recommendation. The Chairperson of the Appeals

Board is also given the power to administer an oath to any person appearing before it, and therefore although the Act does not regulate in any manner the proceedings before the Appeals Board it does however give the Appeals Board the faculty of calling persons before it and of gathering evidence. Since the application of appeal is essentially based on the communication sent by the Refugee Commissioner, and consequently on the reasons therein given, and since the applicant's file is accessible to the Appeal Board it does seem that the Appeal's Board has at least in theory control on negative decisions in that it is precisely its purpose to reconsider the Commissioner's recommendation on the basis of the facts and evidence collected in the applicant's file. However, since no statistics on this point are available, and since access to documents including recommendations and files and access to the sittings is not possible, comments on this point remain inconclusive.

It may be useful to point out however that proceedings before the ordinary courts of law presented by persons seeking refugee status are still pending. There are at least three proceedings pending before the ordinary courts⁹⁵; two are adjourned for judgment for the 18th May 2004, while the third has been adjourned *sine die* since the applicant has escaped from the Hal Far detention centre and has not been found. These three applications are based on an allegation of violation of the fundamental rights of applicants.

Reasons for Concern

The position of asylum seekers and illegal immigrants continues to be a sore point on the national level, the last few months having seen several uprisings and protests being staged by those held in detention, with one of the migrants committing suicide. The visit of the Council of Europe's Commissioner for Human Rights, Alvaro Gil-Robles, led to harsh criticism by the Commissioner on the position of detention centres used to house illegal immigrants. At the end of his visit he was reported by the media as saying, "In comparison to your prisons, the detention centres here in Malta are shocking. This is an area which needs urgent action." Even if he continued to say that asylum seekers were being treated well, especially by the Armed Forces⁹⁶.

Following this visit the Minister for Home Affairs has announced that the government is planning to accelerate the processing of applications by asylum seekers and set free illegal immigrants whose detention drags on beyond "a reasonable time" even if no definition or indication of these plans has been announced except that such policy reforms are to be introduced in the near future.

Article 19. Protection in the event of removal, expulsion or extradition

A reading of Article 43 of the Constitution and of the Extradition Act⁹⁷ show that removal, expulsion or extradition requires the following of a procedure established in law and that such procedure must be satisfied in respect of each person on the basis of the circumstances of the case surrounding each particular individual. Consequently, collective expulsions as such would seem to run counter to the national position since it requires an examination of the

⁹⁵ Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) Abera Woldu Hiwot Et vs Ufficjal Principali Ta' L-Imigrazzjoni Et, Rikors Numru 24/2002 – First Hall of the Civil Court (Constitutional Jurisdiction) Abera Woldu Hiwot et v. Immigration Principal Officer et, Application Number 24/2002; Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) Hiwot Abera Woldu Et vs Professur Dr Henry Frendo Et, Rikors Numru 25/2002 – First Hall of the Civil Court (Constitutional Jurisdiction) Hiwot Abera Woldu Et v. Professor Dr Henry Frendo Et, Application Number 25/2002; Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali) Raza Ali Awan Malik vs Prim Ministru Et, Rikors Numru 14/2002 – First Hall of the Civil Court (Constitutional Jurisdiction) Raza Ali Awan Malik v. Prime Minister et, Application Number 14/2002

⁹⁶ Times of Malta, 22nd October 2003

⁹⁷ Chapter 276 of the Laws of Malta

circumstances surrounding each person to be expelled. Article 43 of the Constitution permits extradition only in pursuance of arrangements made by treaty and in pursuance of national law. Extradition for an offence of a political nature is then completely prohibited.

With the ratification of the ECHR, Malta is bound with the case law of the European Court of Human Rights and consequently the national courts must consider the risk of the death penalty, torture or other inhuman or degrading treatment or punishment in deciding the outcome of a request for extradition or expulsion. In deciding on the removal, expulsion and extradition of a person from Malta the national authorities and Court must also consider the obligations and rights recognised under the Constitution and also Malta's obligations under international treaties.

It is also worth referring to Article 5 of the Criminal Code which subjects a suspect to the jurisdiction of the Maltese Courts where following a request by a country for his extradition from Malta, this request is not granted on the basis that the offence for which his return was requested is subject to the death penalty in the country which made his request.

CHAPTER III : EQUALITY

Article 20. Equality before the law

The principle of equality before the law is a constitutional principle within the national order as part of the democratic principles upon which the State is organised. As such it is recognised and protected under the Constitution in Article 45 whereby protection from discrimination is secured.

Article 21. Non-discrimination

Protection from discrimination is secured in the Constitution on the basis of race, place of origin, political opinions, colour, creed, or sex. Although the Constitution does not mention all the basis for non-discrimination as are mentioned in Article 21 of the Charter the principle of non-discrimination is widely interpreted by the national courts and widely secured through ordinary laws in such a way as a basis for discrimination will be accepted provided discrimination is proved and consequently this should not give rise to any difficulties. Both these principles are furthermore protected within the national order in accordance with the ECHR.

During the year under review two decisions were delivered by the national courts on allegations of discrimination. The first is that of *Fenech Adami Eddie Dr noe et v. Director of Wireless and Telegraphy et* delivered on the 10th October 2003 wherein the applicants represented a political party which was broadcasting from a common antenna. The authorities sought to seize the apparatus which was being used in the broadcasts as they claimed it was not duly licensed. Applicants claimed that their fundamental human rights to property, to privacy, to freedom of expression, and to non-discrimination were being violated. The First Hall of the Civil Court found for the applicants and ordered the Director of Telegraphy to desist from attempting to seize the apparatus pertaining to them and ordered the defendants to give the necessary facilities to applicants to broadcast from the Master Antenna in the same manner as other broadcasters and ordered them to pay applicants the sum f LM20,000 by way of liquidated damages. The Constitutional Court affirmed the judgement in first instance in the main with the exception that it revoked it in so far as it confirmed the warrant of prohibitory injunction originally issued and in so far as it awarded damages to applicants.

Another judgment relating to the principle of non-discrimination was delivered on the 31st October 2003 in the case of Malta Union of Teachers et vs. Permanent Secretary to the Prime Minister wherein the applicant the Malta Union of Teachers, a trade union, complained that its fundamental human rights had been breached in so far as its members had been treated in a discriminatory manner and this also in breach of the freedom of association. This was in violation of article 11 and 14 of the European Convention. The First Hall of the Civil Court threw out the plea of defendants that the union had alternative adequate remedies at its disposal but, on the merits, dismissed applicants claims. The union was complaining that in its case a one hour stoppage of work ordered by it had been visited by a deduction in the salary of its members adhering to its directive while no similar deduction had been made in relation to another stoppage of work ordered by the General Workers Union.

The Court decided that treating unions differently could indeed amount to a breach of their rights under articles 11 and 14 of the Convention. The difference in treatment could be seen to impinge on the right to freely associate in a trade union. But in the present case the two instances were not comparable as the directives given by the two unions were intrinsically different. The union could not therefore complain that there was a discriminatory treatment in its respect.

In considering the second paragraph of Article 21 of the Charter together with Article 45 paragraph 1 and 4(b) of the Constitution some doubts arise as to whether difficulties may arise in this respect. While upon accession Malta will be bound by Article 12 of the EC Treaty and while it is already bound to prohibit discrimination on grounds of nationality under its various international obligations, Article 45 (1) which states that “*no law shall make any provision that is discriminatory either of itself or in its effect*” does not apply according to Article 45(4)(b) “*with respect to persons who are not citizens of Malta*”. It may be that this exception although it seems at first sight to be conflicting with the principle of non discrimination on the basis of nationality will not in practice give rise to difficulties since in ratifying the ECHR Malta has undertaken to protect any person found on its territory whether being of Maltese nationality or otherwise from a violation of the rights therein secured.

Article 22. Cultural, religious and linguistic diversity

Although the Charter seeks the respect of cultural, religious and linguistic diversity on the part of the Union, the position of Malta on this issue is as follows. As such no minority as defined in the international treaties exists in Malta. No Roma community has been established in Malta and the State has declared that no minorities exist in the declaration it made upon signing the Framework Convention for the Protection of National Minorities. However a situation where a number of persons who do not have Maltese citizenship and yet who reside in Malta does exist. The nationality of such persons varies from persons coming from the European continent to those from the Arab continent and those from the African continent. While those coming from European Union states usually come here for retirement, others from the Balkans, Eastern Europe and Russia have arrived here following the difficulties encountered in their countries. Being very close to the Arab continent, Malta sees a large influx of Arab immigrants who settle in Malta, often even establishing their family here especially when their spouse is Maltese. As for persons arriving from the African continent, these often arrive here as illegal immigrants seeking refugee or asylum status. These who are given such status are then integrated within the Maltese society.

This situation brings about a varied mixture of cultures, religions and languages. Despite this, integration of such varieties into society is often effective and without much difficulty since the Maltese culture and society itself is well receptive of foreign cultures.

Although the society is predominately Roman Catholic and the Catholic Church is deeply rooted in the running of the daily life of each village and town, however churches of other religions are also found in Malta catering for several other religions. Anglicans, Jews, Hindus, Muslims, Coptics and Jehovah Witnesses are among the most commonly represented faiths apart from the Catholic faith. All these have their place of worship and meeting with their own priests and spiritual advisors. Muslims, who represent a major part of those persons who reside in Malta and who are not Maltese, have their own Mosque, system of education and also a spiritual director who takes care of the Muslim community not only for religious purposes but also for cultural purposes. The other mentioned faiths all have their own place of worship as well, and persons offering related services.

The society is also well receptive of languages other than Maltese and English. In fact, as a culture knowledge of various languages is given a lot of importance even in the education system. The most common known languages in Malta besides the Maltese language, is English, Italian and French. However, other languages are also offered at secondary school. These include German, Arabic, Russian, and Spanish amongst others. Persons who are not knowledgeable of either Maltese or English are given the opportunity of learning such languages by classes given for this purpose. However, the use of any language is also safeguarded whether it is used for religious purposes or social and cultural purposes. Therefore, although Maltese and English are the languages of the State, the use of any other language is not in any way prohibited or hindered.

Although the right to freedom of religion and belief, the right of association and the right to freedom of expression and prohibition from discrimination have long been safeguarded in the Constitution⁹⁸ as fundamental human rights to be enjoyed by everyone, under the ECHR Act⁹⁹ the protection of such rights is furthermore enhanced giving the individual irrespective of nationality or citizenship the right to petition not only the national courts for redress but also the European Court of Human Rights in Strasbourg.

Despite these safeguards, the Advisory Committee on the Framework Convention for the Protection of National Minorities¹⁰⁰ did note that the European Commission against Racism and Intolerance and the European Union and the 14th periodical report of Malta submitted under the International Convention on the Elimination of all Forms of Racial Discrimination had all mentioned that although discrimination was not widespread in Malta rare cases are reported especially in the issues related to the renting out of accommodation and in access to certain places of entertainment. Measures seeking to prohibit such actions have since then been taken predominately in the form of legislative measures.

The Press Act¹⁰¹ has seen the introduction of a new offence whereby anyone who by means of a publication or distribution in Malta of printed matter or by means of any broadcast threatens, insults or exposes to hatred, persecution or contempt, a person or group of persons because of their race, creed, colour, nationality, sex, disability or national or ethnic origin, becomes liable on conviction to imprisonment.

Furthermore, three offences that seek to safeguard the fundamental rights above-mentioned are also expressed in the Criminal Code¹⁰². Sections 163, 164, 165 and 82A all seek to promote and safeguard the free exercise of one's religion, culture and language. Section 163 and 164 makes it a criminal offence for anyone who by words, gestures, written matter, pictures or other visible means publicly vilifies or gives offence to any religion or cult

⁹⁸ Article 40, 41, 42 and 45 of the Constitution

⁹⁹ Chapter 319 of the Laws of Malta

¹⁰⁰ Advisory Committee on the Framework convention for the Protection of National Minorities – ACFC/INF/OP/I(2001)006

¹⁰¹ Chapter 248 of the Laws of Malta

¹⁰² Chapter 9 of the Laws of Malta

tolerated by law, or who vilifies those who profess it or anything that forms the object of or is consecrated to or necessarily destined for worship by any of the religions or cults.

In a similar manner it is also a criminal offence to impede or disturb the performance of a function, ceremony or religious services which is carried out with the assistance of a minister of religion or in any place of worship or in any public place or place open to the public.

A further offence that was introduced only last year is that of using threatening, abusive or insulting words or behaviour, displaying any written or printed material which is abusive, insulting or abusive or to otherwise conduct oneself in such a manner, with intent to stir up racial hatred or whereby racial hatred is likely, having regards to all circumstances, to be stirred up.

As for access to education, children of whatever nationality are given the option to follow their education in any of the state schools or private and church schools where a policy respectful of their faith is adopted with regard to religion classes. The employment of any person irrespective of their nationality is regulated by the Conditions of Employment (Regulations) Act¹⁰³, however a non-national who is not a dependant of a Maltese citizen nor his/her spouse requires a work permit from the Principal Immigration Officer before taking up employment¹⁰⁴.

In conclusion, except for few cases which involve private individuals, discriminatory acts in Malta are in fact negatively looked upon by the Maltese culture which is of its nature well receptive and respectful of diversity.

Article 23. Equality between man and women

Equality between men and women has long been recognised as a principle in Article 14 of the Constitution whereby the State is bound to “*promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men.*”

This has only recently been translated into legislation with the introduction of Act 1 of 2003 named Equality for Men and Women Act¹⁰⁵. Despite the introduction of this Act which takes into account several EU directives on the issue such as Directive 86/613/EEC on the participation of spouses in the activities of a self-employed partner and Directive 76/207/EE on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, this Act is not yet in force and still awaits the approval of a date for its provisions to come into force.

Prior to this Act amendments in the Civil Code¹⁰⁶ were also introduced whereby men and women were made equal partners within the family and for family decisions. These amendments were brought into force in 1995 and sought to promote equality of the spouses in family matters. Furthermore, Malta has ratified and is implementing the major international conventions that impact favourably on women’s advancement such as: The UN Convention on the elimination of all forms of Discrimination against Women, The European Social

¹⁰³ Chapter 135 of the Laws of Malta

¹⁰⁴ Immigration Act, Chapter 217 of the Laws of Malta

¹⁰⁵ Chapter 456 of the Laws of Malta

¹⁰⁶ Chapter 16 of the Laws of Malta

Charter, ILO Convention 100 - Equal Remuneration, ILO Convention 111 - Discrimination in respect of Employment and Occupation.

Yet despite this the number of women on the workforce remains relatively low and amounts to about 30 to 34% of the workforce, with the majority of women occupying jobs which are not high offices in the country. Despite the increase of women in professions aided also by the educational system in place discrepancy in pay between female and male workers shows an average gap of 20% even if both perform the same profession or employment. In seeking to better the situation a Joint Assessment Paper (JAP) was signed by Malta and EU Commissioner for Employment and Social Policy and following this a Gender Equality National Plan has been drafted to target several gender issues at the workplace.

Article 24. The rights of the child

Malta has ratified the Convention on the Rights of the Child thereby reinforcing the position of children's rights that were already reflected in the Constitution in a general manner. The principle of the child's best interests, his/her maintenance and education and protection of the child from abuse have long been on the statute book under the Civil Code and the Criminal Code. However, particular focus on the rights of the child is still somewhat lacking in that it is only during the year under review that the Commissioner for Children Act¹⁰⁷ has been brought into force on the 5th December 2003. This Act establishes the office of Commissioner for Children whose principal duty is that to foster and seek to protect the best interests of the child by (a) promoting and advocating for the rights and interests of children; (b) ensuring that children are being given the opportunity to express their opinions and that these are in fact considered; (c) promoting the protection of family unity; (d) advocating for adequate support to parents for the upbringing of their children; (e) fostering the development of alternative care to children who need such care with special reference to fostering and adoption; (f) seeking to ensure that the rights and interests of children are properly taken into account by government departments, local authorities, other public bodies and voluntary and public organisations when decisions on policies affecting children are taken; (g) promoting the protection of children from physical or mental harm and neglect, including sexual abuse or exploitation; (h) promoting the highest standards of health and social services for women during pregnancy and to promote special care and protection, including adequate legal protection, for children both before and after birth; (i) promoting the highest standards of health, and education and social services for children; (j) promoting the highest standards of leisure, play and recreational facilities for children; (k) ensuring that all possible measures are taken by the relevant authorities to prevent and remedy poverty and social exclusion among children; (l) promoting compliance with the United Nations Convention on the Rights of the Child as ratified by Malta and with such other international treaties, conventions or agreements relating to children as are or may be ratified or otherwise acceded to.

However despite the establishment of this office a Children's Act proper whereby the rights of the child are specified and recognised is still lacking even if Malta's representative has repeatedly mentioned the preparation of this Act before the United Nations Committee on the rights of the child. In the absence of this specific Act, some issues have been tackled through other legislation such as through legislation on child labour and child exploitation.

In so far as the abolition of child labour, this has been provided for in particular in the Education Act and the Regulations on the Protection of Young Persons. However consideration of this aspect will be made under the comments on Article 32 of the Charter.

¹⁰⁷ Chapter 462 of the laws of Malta

Sexual exploitation and pornography are in general denounced as criminal offences under the Criminal Code covering exploitation of adults and minors. Article 197 of the Criminal Code establishes offences with punishments of imprisonment with or without solitary confinement for any ascendant by consanguinity or affinity, or being the tutor of a person whether of age or under age if he/she compels such a person with the use of violence or threats or induces such person by deceit to prostitution. On the other hand, under Article 204(1) anyone who "*in order to gratify the lust of any other person induces a person under age to practise prostitution or instigates the defilement of such person, or encourages or facilitates the prostitution or defilement of such person, shall, on conviction, be liable to imprisonment for a term from eighteen months to four years, with or without solitary confinement.*" Aggravating circumstances leading to an increase in punishment include circumstances whereby the person is under twelve years of age or if the offence is committed habitually for gain. In the case of adults a similar provision is found in Article 205; however, this offence requires the use of violence or deceit. Other offences such as defilement of minors are also established.

In as far as pornography, the distribution or display in a public place or accessible to the public, manufacturing, printing or making and the acquisition of pornographic or obscene material has always been recognised as an offence. However, it was only last year by Act III of 2002 that a specific crime in relation to pornography of minors has been enacted. In fact, child pornography was included in the general offence, but with the introduction of the 2002 amendment it is now also a recognised crime to take or permit to be taken or be in possession, distribute or show materials involving indecent pictures of minors, of whatever type including electronic images. Jurisdiction over such an offence applies to any citizen or permanent resident of Malta whether in Malta or outside as well as over any person in Malta.

Case law related to these issues is predominately of a criminal nature. While there is a stronger awareness of the wrongs of exploitation of prostitution of both adults and minors, and the social stigma against making formal reports of incidents is diminishing, there has been an increase in cases brought against the perpetrators of these crimes. Newspapers have also reported a rise in prostitution by persons coming from the Eastern European countries as having been on the increase, and there has in fact been the closure of places that were identified by the police as organising such entertainment. The issue of sexual tourism involving children does not seem to raise concern in the State and this would fall under the above-mentioned legal framework.

Consideration of the opinions of the child on matters which concern the child and protection of the child's best interest is also now being sought through the appointment of a child's advocate in proceedings relating to family issues. In general in such proceedings the child's right to maintain on a regular basis as personal relationship and direct contact with both his/her parents is also sought and in making such a decision of access and visitation rights the child's best interests is usually established with the help of court appointed experts.

Article 25. The rights of the elderly

Although the rights of the elderly are not gathered in any national law respect for the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life is carried out mainly through the Ministry of Social Policy which offers and manages several services for the elderly. These services and social benefits include an age allowance, an age pension, a carer's pension, a contributory retirement pension, the operation of day centres and old people's homes, the provision of medical and health services, the provision of house help services and of meals and also the provision of financial assistance for adaptation works in their homes. The appointment of a National Council for the Elderly also aids in protecting the rights of the elderly. Another important issue that is to be mentioned is that once retired from employment, an elderly person will receive a retirement pension based on

the social security payments effected by that person during his/her work life and that such a pension is not lost if that person remains in employment on a part-time basis provided the hours of work do not exceed a maximum amount stipulated in law.

Article 26. Integration of persons with disabilities

The integration of persons with disabilities has largely been sought through the Equal Opportunities (Persons with Disability) Act¹⁰⁸. While the Constitution prohibits discrimination in general and as such persons with a disability are also protected through this, the Equal Opportunities Act further enhances the rights of persons with disabilities and provides for enforceable rights and means of protection and redress in all aspects of life with the aim to aid their integration into society.

The Act touches upon various aspects of life and regulates the access of persons with disability to employment, education, participation in trade unions and associations, access to public premises, participation in the provision of goods, facilities and services, and accommodation facilities.

The Act establishes a National Commission Persons with Disability entrusted with several functions to promote and ensure the integration of persons with disability. The following are some of the specific functions entrusted to the Commission and that is to:

- (a) identify, establish and update all national policies directly or indirectly related to disability issues;
- (b) identify the needs of persons with disabilities, their families and voluntary bodies working in the field of disability issues and to take all necessary steps or propose appropriate measures in order to cater for such needs as much as possible;
- (c) ensure that all government programmes concerning the affairs and interests of persons with disabilities, their families and voluntary bodies working in the field of disability issues, are implemented in accordance with national policies for disability issues;
- (d) ensure the necessary co-ordination between all government departments and agencies in implementing measures, services or initiatives proposed by government or proposed by the Commission from time to time;
- (e) monitor the provision of services offered by government or its agencies or by any other person or group of persons, where the clients of such services are persons with disability;
- (g) work towards the elimination of discrimination against people with disabilities;
- (h) carry out general investigations to determine whether the provisions of this Act are being complied with;
- (i) investigate such complaints as may be made to them of failure to comply with any provision of this Act in an individual case and, where it seems appropriate, conciliate in relation to such complaints;
- (j) provide, where and as appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under this Act; and
- (k) examine enactments, and propose enactments, for the purpose of ascertaining whether the enactments are consistent with or contrary to the objects of this Act.;

The Act also provides a means of redress for persons with disability who feel aggrieved by an act contrary to the provisions of the Equal Opportunities Act. Complaints may be presented before the Commission who must determine the allegation brought before it. However in supervising the proper enforcement of the rights recognised in this Act, the Commission may itself initiate investigations without requiring a complaint. This ensures an effective

¹⁰⁸ Chapter 413 of the Laws of Malta

protection of the rights of persons with disability and their effective integration into the various areas of life.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

Worker's rights are generally regulated in the domestic level in the Industrial Relations Act¹⁰⁹, in the Conditions of Employment (Regulation) Act¹¹⁰ and in the Employment Relations Act of 2001. Neither of the first two mentioned Acts specifically speaks of the workers' right to information or consultation within the undertaking. However, a reading of the Industrial Relations Act which regulates the functions, rights and duties of trade unions and workers' or employers' associations necessitates this right of information and consultation at least to the representatives of the workers. In participating in the settlement of trade disputes and in reaching collective agreements on the terms and conditions of workers' rights, their representatives necessarily require access to information.

In practice, it is the order of the day that trade unions represent employees in Malta not only on trade disputes which concern a group of employees but also in disputes that regard an individual worker. Trade Unions also participate in situations of collective redundancies, in transfers of undertakings, and also in transacting collective agreements on the terms and conditions of workers with their employer.

However the regulations made under the Collective Redundancies (Protection of Employment) Regulations, 2001 specifically provides a duty on the employer proposing to declare the redundancies to notify in writing the employees' representatives before terminating the employment of such employees. Upon this notice a procedure must follow wherein the workers' representatives are to be given all the information related to the employers' decision to declare the redundancies including the reason for such redundancies and the names of the employees that will be effected.

Furthermore Information to Employees Regulations, 2001 also provide for the giving of information to employees and their representatives in the normal course of employment. According to Article 4 of these Regulations where no agreement of employment has been entered into in writing the employer must within eight working days from the commencement of employment deliver information to the employee related to the identity of the employer, wages payable, overtime rates, hours of work, periodicity of payment, the duration of the contract, the paid, vacation or sick leave, the title, grade and nature of the work of the employee, the notice periods applicable and information on the collective agreement if this is in place. The regulations also specify the information that must be given to employees who are required to work abroad including in such information the benefits that are due to the employee for employment abroad.

In view of this, the national legislation has been brought in line with the relative directives of the Union on this issue.

¹⁰⁹ Chapter 266 of the Laws of Malta

¹¹⁰ Chapter 135 of the Laws of Malta

Article 28. Right of collective bargaining and action

The right of collective bargaining and collective action is regulated under the Industrial Relations Act. Article 18 of this Act regulates collective action in contemplation or furtherance of a trade dispute exonerating a person from actions in tort or quasi-tort for actions carried out in workers' strikes and protecting the employment of those who choose to strike. However the right to collective action is somewhat restricted in relation to certain employees such as persons employed at the Air Traffic Control Centre at the Malta International Airport, members of the Assistance and Rescue Force, persons employed to provide Port safety and emergency services, such minimum number of persons as may be required to guarantee provision of water and electricity and certain public officers.

In contemplation or furtherance of a trade dispute peaceful picketing is allowed however the right of those who choose not to participate in the collective action is also protected by making it an offence for a person to compel another with the use of threats of violence against his person or that of his family or property, or by persistently following that person from place to place or watches or besets the house of another.

Article 29. Right of access to placement services

The Employment and Training Corporation has been set up with the objective of facilitating the finding of employment for persons depending on the demand of the market and the personal circumstances of the applicant. Several schemes have been put in place to assist both employers and employees to find the right placement of work and the right person for the job. Schemes of training for employees are also subsidised by the Government so as to provide persons with skills sufficient to fill in the demands of the market. An Employment Training Placement Scheme (ETPS) has also been set up to assist employers to provide the necessary training to unemployed persons during the probationary period. The scheme also provides the opportunity for the unemployed to upgrade their skills or acquire new skills that are relevant to the present labour market.

Article 30. Protection in the event of unjustified dismissal

The Industrial Tribunal established under the Industrial Relations Act is given exclusive jurisdiction to consider and decide all cases of alleged unfair dismissal. So that where it is alleged that a worker has been unfairly dismissed by an employer, the matter may be referred to the tribunal for a decision. Such referral is made by the employee or by his representative wherein he is to state the facts of his grievance within four months from the effective date of the alleged breach. Where the alleged unfair dismissal is found to be well founded the Tribunal may order the reinstatement or re-engagement of the employee and/or award compensation. A decision delivered by the Tribunal is binding upon both the employee and the employer. In such a way, the Tribunal offers a means of redress for unjust dismissal where other forms of redress such as discussions between the employee's representatives and his employers fail.

Article 31. Fair and just working conditions

Article 13 of the Constitution provides that the maximum number of hours of work per day shall be fixed by law while it states that the worker is entitled to a weekly day of rest and to annual holidays with pay; he cannot renounce this right. This is in turn expanded upon in the regulations made under the Employment and Industrial Relations Act and under the Conditions of Employment (Regulation) Act. Under these Acts several regulations have

been made stipulating the days of rest and the annual vacation leave, the minimum wage, weekly allowances due and other similar issues.

Article 32. Prohibition of child labor and protection of young people at work

In so far as the abolition of child labour, this has been sought in particular in the Education Act and the Regulations on the Protection of Young Persons. In fact, it is curious that the Constitution in declaring fundamental principles upon which the State is administered the Constitution does not prohibit the labour of minors but provides that: *“The State shall provide for safeguarding the labour of minors and assure to them the right to equal pay for equal work.”*¹¹¹

Taking the law on compulsory education together with regulations of young workers' conditions of work has led to a situation whereby children are under compulsory education until the age of sixteen years. It is only once they reach fifteen years that special permission to leave school may be sought from the Minister responsible for Education. The minimum age for employment is that of sixteen years of age, while children under fifteen years cannot be employed. Where those between fifteen and eighteen years contract employment then they are specifically protected by regulations on the protection of young persons which require that they are to be properly trained and that health and safety hazards must be taken into account and they are furthermore prohibited from working between 10pm and 7am.

However, these regulations *“do not apply in respect of approved training schemes or apprenticeship or educational, cultural or sports activities. The Regulations do not apply to hotels or catering establishments, provided the young worker is allowed not less than 12 consecutive hours' rest within any period of 24 hours, and not less than 2 days' rest each week, including a Sunday.”*¹¹²

It must furthermore be noted that implementing the EU Directive on Young Workers, the State has chosen to exclude from the term “work” such circumstances where children work within the frame of family business. In fact, it is this issue that even prior to the implementation of the Directive, the Committee on the Rights of the Child had expressed concern. This concern was also expressed in its summary record of the 634th meeting¹¹³ wherein the Committee stated that: *“The Committee was concerned that under-age children were allegedly employed during the summer vacation in family businesses and the tourist sector ...”*¹¹⁴ In that meeting the Head of the Maltese Delegation expressed that *“the labour inspectorate system in the country was very inadequate and children were expected to contribute to a family's business.”*¹¹⁵, even if schooling was held in high esteem by the family. Similar concerns were also expressed in the concluding observations of the Committee on the Rights of the Child¹¹⁶.

In relation to the position of minors, in general, it must be noted that the Parliamentary Bill namely the Children Act, reflecting the Convention on the Rights of the Child, has long awaited its enactment. While although the Act on the Commissioner for Children has been enacted it has only come into force as of the 5th December 2003.

¹¹¹ Article 16 of the Constitution

¹¹² Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention on the Rights of the Child – CRC/C/3Add.56 Paragraph 301

¹¹³ Summary record of the 634th meeting: Malta 02/06/2000 – CRC/C/SR.634

¹¹⁴ *ibid* paragraph 35

¹¹⁵ *ibid* paragraph 13

¹¹⁶ Paragraph 45 – CRC/C/15/Add.129

Article 33. Family and professional life

In seeking to reconcile family and professional life by protecting the individual against the dismissal for a reason connected with maternity and parental obligations and in seeking to address the Union's Directives on these issues, the law has been amended to incorporate Maternity, Parental and Urgent Leave Entitlement Regulations. These regulations regulate the three types of leave entitlement thereby establishing also an offence where such regulations are not adhered to.

In so far as maternal leave is concerned an employee is entitled to an uninterrupted period of fourteen weeks with the total financial benefits to which a pregnant employee will be entitled becoming equivalent to thirteen weeks on full pay. In benefiting from this maternal leave, six weeks of leave must necessarily be taken following the day of confinement, while the remaining eight weeks are to be taken at the discretion of the employee before or after such date.

Moreover, parental leave is also allowed following the birth or adoption of a child and the natural or adoptive parents are entitled to such parental leave without pay equivalent to a maximum of three months. Following such term the right of the employee to return to work is safeguarded and is entitled to return to the same job that he or she occupied prior to the granting of parental leave. Moreover parents on parental leave remain entitled to all rights and benefits which may accrue to other employees of the same category of employment at that same place of work, including also the right to apply for promotion.

Another type of leave that is recognised for the benefit of the family is urgent leave which entitles the employee to time off from work on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the employee indispensable. Urgent leave includes not only accidents to members of the immediate family of the employee but also to situations of sudden illness of a member of his/her family and absence for participating in the birth, wedding or funeral of members of the immediate family. In these cases no advance notice is required to be given by the employee except where it is possible to give at least twenty four hours advice. The minimum hours of time that an employer is bound to grant to every employee for urgent leave is that of ten hours of work with pay per year while it is within the discretion of the employer to establish the maximum limit of hours for urgent leave.

Article 34. Social security and social assistance

Article 17 of the Constitution secures this protection by declaring that “ (1) Every citizen incapable of work and unprovided with the resources necessary for subsistence is entitled to maintenance and social assistance. (2) Workers are entitled to reasonable insurance on a contributory basis for their requirements in case of accident, illness, disability, old-age and involuntary unemployment.” This principle is then implemented through the Social Security Act and regulations made thereunder providing for security benefits and social services in cases of maternity, illness, industrial accidents, dependency or old age, and unemployment among others. Upon satisfying criteria that are set up for each type of social assistance an individual will become entitled to such social benefits depending on his/her individual situation taking into consideration his financial and family circumstances.

These benefits are managed by the Social Services Department who receive applications for the mentioned benefits and who decides whether such benefit is to be granted or not. However, should a refusal to grant such benefit be decided upon, or where a benefit already being given is stopped the individual concerned may appeal against that decision before the Board established under the same Act thereby providing the individual with a measure of

redress where the discretion given to the Social Services Department in granting or refusing social benefits may be challenged and reviewed.

Another form of assistance that is provided is through housing assistance where through the Housing Authority established under the Housing Authority Act¹¹⁷ the State provides subsidized housing to applicants who show that such assistance is required. Subsidized housing is also given on the basis of financial, personal and family criteria so that such housing is aimed at persons who are of a poor financial standing, persons at a disadvantage such as single parent families, persons with a disability, or dependent persons.

In this respect Article 34 of the Charter is consequently mirrored by the provisions of the Social Security Act which extensively regulates a variety of social assistance benefits.

Article 35. Health care

Until the year under review health care in Malta was provided free of charge to all nationals through the various health centers spread around villages and through the general state hospital. This ensured an effective health system for all nationals. However the Health Department and its various committees also run vaccination and other medical programmes to ensure preventive health care targeting various groups who are at risk of illness. However health care is not only provided for traditional purposes and that is for the prevention or cure of illnesses but care for persons suffering from forms of abuses such as drink or drug abuse is also provided.

Health and care programmes are various covering preventive health, treatment of sick persons and recovery help, however these are also accompanied by various health campaigns aimed at different issues.

Health care is however not only provided through state hospitals and state care but also through the establishment of private hospitals and clinics which are licensed to operate as medical centers. However, private health care is only monitored by the State to ensure standards of medical care, but are not subsidized and patients choosing such hospitals or clinics are fee paying patients.

Until the year in review, state health care was free to all nationals however as of the following year patients who have a medical insurance will start to be charged for such services. This has however not yet come into force and its effects on the health care system cannot as yet be commented upon.

Article 36. Access to services of general economic interest

The State in Malta has been in the process of privatising most economic enterprises in which the State formally had a predominant interest. At the same time the State has retained certain basic services to guarantee access to same to everybody. An example would be the retention by the State of a public broadcasting service side by side with private broadcasting stations.

¹¹⁷ Chapter 261 of the Laws of Malta

Article 37. Environmental protection

Environment protection on a national level is regulated by the Environment Protection Act¹¹⁸ which establishes a duty to protect the environment not only on individuals but also directly on the government. While Article 3 states that *“It shall be the duty of everyone together with the government to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner.”* ; Article 4 then gives the limits of the duty of the Government to protect the environment by listing certain specific duties such as *“(a) to manage the environment in a sustainable manner by integrating and giving due consideration to environmental concerns in decisions on socioeconomic and other policies; (b) to take such preventive and remedial measures as may be necessary to address and abate the problem of pollution and any other form of environmental degradation in Malta and beyond, in accordance with the polluter pays principle and the precautionary principle; (c) to collaborate with other governments and entities in the protection of the global environment; (d) to disseminate information on the environment and to facilitate the participation of the public in decisions that affect the environment; (e) to apply scientific and technical knowledge and resources in determining matters that affect the environment; (f) to ensure the sustainable management of wastes and to promote its reduction and the proper use, reuse and recovery of matter and energy; (g) to safeguard biological diversity; (h) to combat all forms of pollution; (i) to consider the environment as the common heritage and common concern of humankind; and (j) to provide incentives leading to a higher level of environmental protection.”*

However these duties are somewhat lacking in strength since none of these duties are directly enforceable in any court but are only declared to be principles fundamental to the Government of the State and principles which must be considered when interpreting the provisions of the Environment Protection Act. The Act uses several measures through which environmental protection is sought and this through the establishment of an Authority, a National Commission for Sustainable Development, the requirement of an Environment Impact Assessment in development permits, the requirement of licenses for the performance of certain acts related to the environment and the creation of an Environment Protection Fund administered by the Authority appointed.

The Act also provides for liability in cases of damage to the environment. In this way while a person may run into civil liability to make good any damages caused by him/her, a person who causes damage to the environment may also become liable to pay to the Fund such sum as agreed upon between the parties or in default of such agreement as fixed by the Court. A person becomes so liable where he is found to have caused damage to the environment suffered by the community in general by the non-observance of any law or regulation whether this is caused by negligence, willful act or inability in his art or profession. Actions taken against the individual for such damage are prescribed by a term of eight of years.

Another means of enforcement of environment protection is through the creation of environment inspectors who are given powers of entry and power to demand and exact information. Environment inspectors are also to assist the police in the investigation of offences causing damage to the environment.

In seeking the implementation of the duty placed upon the Government members of the public or categories of persons as prescribed by the Minister in regulations made by him shall be entitled to request from such Government departments, authorities, public corporations or other persons such information that they may have in their possession and relating to the environment.

¹¹⁸ Chapter 435 of the Laws of Malta

Despite this Malta has long been trying to seek a solution to environmental hazards caused by the main dumping site and to bring its position in line with international obligations on the issue of protection of the environment.

Article 38. Consumer protection

Consumer protection on a national level is secured through the Consumer Affairs Act¹¹⁹ by not only listing the rights of the consumers but also by providing regulation of transactions that effect consumers such as declarations of goods harmful to health, regulation of unlawful or unfair trading practices, regulation of commercial guarantees and definition of commercial terms used. The Act furthermore provides means of redress to consumers who feel aggrieved by traders by establishing a Consumer Claims Tribunal to hear and decide such complaints as presented by a consumer before it. However means of redress is also sought through the appointment of a Consumer Affairs Director who is given wide powers of entry and of demanding information from traders in order to seek protection of consumers' rights.

While unlawful and unfair trading practices are prohibited, including pyramid selling schemes, the Act provides measures of ensuring compliance of traders with such prohibitions, establishing also offences for lack of compliance. The establishment of a Consumer Affairs Council ensures that policies protecting consumers are established and followed and represented in the government's policy and laws. The Act also provides for consumer associations and for their regulation thereby seeking to ensure the protection of consumers on different levels.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

The right to vote and to stand as a candidate at elections to the European Parliament in Malta is now regulated by the European Parliament Elections Act of 2003¹²⁰. This act has as yet not been brought into force but it is expected to be brought into force in the beginning of 2004 well in time for the elections to be held in May of that year. The Act recognizes the right to vote to all persons over eighteen years of age who are citizens of any of the member States of the Union and who reside in Malta and opt to exercise their right to vote in Malta. The duty to keep an electoral register for the European elections in Malta as well as the duty to oversee the holding of the elections in Malta is entrusted to the Electoral Commission set up under Malta Constitution. It is in particular the duty of the Commission to ensure that all persons entitled to vote in Malta will be duly registered, and that any person not so entitled to vote will be removed from the appropriate register. The Commission also is responsible to see that the elections are held fairly in due respect of the free and secret ballot. The elections to the European Parliament in Malta will be held on the basis of the system of proportional representation by way of the single transferable vote; for this purpose Malta is deemed to be a single constituency.

The national authority in Malta entrusted with the holding and overseeing of all elections in Malta is the Electoral Commission. In terms of the Constitution the Electoral Commission shall consist of a Chairman, who shall be the Chief Electoral Commissioner, and who shall be

¹¹⁹ Chapter 378 of the Laws of Malta

¹²⁰ Chapter 467 of the Revised Edition of the Laws of Malta

appointed to that office from the public service, and such number of members not being less than four as may be prescribed by any law for the time being in force in Malta. The number of commissioners is at present fixed by law at nine, including the Chief Electoral Commissioner. The Commissioners may not be removed from office except for inability to perform the functions of their office or for misbehaviour. They are appointed to their office by the President of the Republic on the advice of the Prime Minister after consultation with the Leader of the Opposition. The practice has developed that of the eight electoral commissioners appointed besides the Chief Electoral Commissioner, four are chosen by the Prime Minister and another four by the Leader of the Opposition.

Political parties in Malta closely follow and participate actively in the whole process of overseeing the electoral process. Especial attention has been focused on the process of voter registration with a view to securing a faithful and correct reflection of persons entitled to vote in Malta. Turnout at elections is very high.

Article 40. Right to vote and to stand as a candidate at municipal elections

The right to vote and to stand as a candidate at municipal elections is regulated by the Local Councils Act, 1993¹²¹. In terms of this legislation all persons of eighteen years of age resident in a locality may vote and stand for elections as candidates for local council elections provided they are citizens of Malta or citizens of a country which is a member of the Council of Europe and which is listed in the ninth schedule to the Act¹²². Up to the end of December, 2003 the only country listed in the ninth schedule was the United Kingdom of Great Britain and Northern Ireland. By a legal notice of the 1st of January, 2004 an amendment to the Local Councils Act was brought into force. This amendment substitutes the ninth schedule to the Local Councils Act completely and provides that ‘every person who is a national of a Member State of the European Union whose name appears in the last published European Union Electoral Register and who has not been convicted of any offence connected with the election of members of Local Councils shall be entitled to vote in elections of Local Councils¹²³.’ The position is now therefore that all citizens of the European Union resident in Malta will be entitled to vote in Local Council Elections in Malta. The principal criterion giving the right to vote as well as to stand as candidate in local council elections is residence in a particular locality. The law lays down that the persons entitled to vote are those registered as resident in a particular locality¹²⁴. Elections to each local council are held on the basis of the system of proportional representation by way of the single transferable vote; each locality is considered as a single constituency for the purposes of Local Council Elections.

The whole electoral process relative to Local Council elections is overseen by the Electoral Commission.

Article 41. Right to good administration

This right mainly concerns action by the European Union authorities and therefore there is nothing to be added in this report on the local situation.

¹²¹ Chapter 363 of the Laws of Malta

¹²² Article 5 of Chapter 363 of the Laws of Malta.

¹²³ Article 24(c) of Chapter 467 amending article 5(2) of Chapter 363 brought into force on the 1st January, 2004

¹²⁴ Article 7 of Chapter 363 of the Laws of Malta.

Article 42. Right of access to documents

This right mainly concerns action by the European Union authorities and therefore there is nothing to be added in this report on the local situation.

Article 43. Ombudsman

This right mainly concerns action by the European Union authorities and therefore there is nothing to be added in this report on the local situation.

Article 44. Right to petition

This right mainly concerns action by the European Union authorities and therefore there is nothing to be added in this report on the local situation.

Article 45. Freedom of movement and of residence

During accession negotiations Malta has obtained difference exemptions from Union principles applicable under the freedom of movement and residence principle. In relation to freedom of movement for purposes of work Malta has obtained a seven-year period during which Malta may apply safeguards on the right of EU workers to seek work in Malta. Restrictions may be imposed unilaterally by Malta in urgent and exceptional cases where the inflow of EU workers puts a strain on the local labour market or parts of it. However after the seven year period, in the event of a disproportionate influx of EU workers, Malta may still seek a remedy through the EU institutions.

In relation to the freedom of residence and of obtaining property in Malta, once again Malta has obtained a permanent arrangement to restrict the right of EU citizens to buy property in Malta. Being a permanent arrangement, it will not come to an end after a number of years but will continue to apply indefinitely. Such conditions are already stipulated in the Immovable Property (Acquisition by Non-Residents) Act and a non-resident requires approval for the acquisition of immovable property. Some of the criteria that are to be satisfied depend on the value of the property that is to be acquired, and that such property will be used solely as a residence for the non-resident or his family without any possibility of leasing out the said property to third parties.

Article 46. Diplomatic and consular protection

No significant developments to be reported.

CHAPTER VI: JUSTICE**Article 47. Right to an effective remedy and to a fair trial**

In so far as and to the extent that the Charter rights and freedoms are reflected in the laws of Malta everyone in Malta whose said rights are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. In particular most of the rights listed in the Charter enjoy special protection under the Constitution of Malta. Moreover the fundamental human rights listed in the European Convention on Human Rights

and Fundamental Freedoms have been enacted into law in Malta and a violation of those rights would entitle the person suffering such violation to a judicial remedy.

As regards to a fair and public hearing within a reasonable time by an independent and impartial tribunal this is guaranteed both under the terms of the Constitution and through the enactment into law of the European Convention on Human Rights and Fundamental Freedoms. During the last year a number of cases have been decided by the Constitutional Court of Malta touching upon this right. A particular problem has been the time taken to conclude judicial proceedings; in *John Bugeja vs l-Avukat Generali*¹²⁵ et the Constitutional Court held that the right of the accused to a fair hearing within a reasonable time had been breached as the proceedings had taken far too long to be concluded. In the instant case complainant had been accused of defilement of minors and had been sentenced to a term in prison by the criminal court seized of his case. The Constitutional Court, while finding that there had been a violation of his fundamental rights awarded him monetary compensation in the amount of LM3000 for the breach, but upheld the punishment of imprisonment imposed on him by the criminal court. A similar finding of unreasonable delay was made by the Constitutional Court in the case *Nazzareno Zarb vs Avukat Generali*¹²⁶ but the damages awarded were only in the amount of Lm100. In a case linked to the Zarb case, and that is *Melchior Spiteri vs Avukat General*¹²⁷ the Constitutional Court refused to make a finding of unreasonable delay as it held that it was mainly the accused himself who had provoked the delay. In another case, *Francis Theuma vs Avukat Generali*¹²⁸, the Constitutional Court came to the conclusion that there had not been any unreasonable delay. The Constitutional Court pointed out that the time during which a person was under arrest was relevant in considering whether a person had been given a hearing within a reasonable time and this independently from any breach under article 5(3) of the Convention. On the other hand the fact that the time a person has spent in preventive custody awaiting trial is taken in consideration in determining the punishment must also be kept in mind in deciding on whether the applicant could actually be considered to be a victim. The relevant points to consider to determine whether the trial had been held within a reasonable time were the following: 1. the complexity of the case; 2 the behaviour of the accused; and 3 the behaviour of the prosecution and the Court. Each case had to be considered on its own merits. When you analysed the whole manner proceedings had been conducted, as well as the difficulty presented by the technical report in the case, the Court concluded it could not be said that the proceedings had taken an unreasonable time.

The Constitutional Court also had occasion of making findings that unreasonable delay had taken place in connection with hearings and proceedings after the forceful taking of property by the Government in the public interest. In some of these cases a further finding by the Court was that a public interest had not been proved and that therefore the taking was in breach of the fundamental right to property of complainant. The following cases may be referred to in this context - *Allied Newspapers Limited vs Avukat Generali*¹²⁹ et and *Bezzina Wettinger Francis Et vs Kummissarju Tal-Artijiet*¹³⁰. The Court also made a finding of unreasonable delay in a purely civil case in which the government was not involved at all ; this was a case concerning the termination of an empheteutical grant which had taken over ten years to

¹²⁵ *John Bugeja vs Attorney General* et decided by the Constitutional Court on the 11th of August 2003.

¹²⁶ *Nazzareno Zarb vs. Attorney General* decided by the Constitutional Court on the 31st of October, 2003.

¹²⁷ *Melchior Spiteri vs. Attorney General* decided by the Constitutional Court on the 31st of October, 2003.

¹²⁸ *Francis Theuma vs. Attorney General* decided by the Constitutional Court on the 27th of June, 2003.

¹²⁹ *Allied Newspapers Limited vs Advocate General* et decided by the Constitutional Court on the 2nd of December 2003

¹³⁰ *Francis Bezzina Wettinger vs Commissioner of Lands* decided by the Constitutional Court on the 10th October 2003.

decide. This was Central Mediterranean Development Corporation Limited vs Avukat Generali¹³¹.

It is to be pointed out that the national authorities are keenly aware of the negative implications that unjustified delay has in judicial proceedings and have taken steps to effectively address the situation. In particular as far as expropriation cases are concerned the law has been amended in order to make it mandatory that on the taking the Government establishes and offers to the individual whose property has been taken fair compensation for it¹³². The Government has also made an attempt to redistribute the work load of the judiciary by raising the threshold values for cases coming before the Superior Courts; this has meant that the more serious cases get a fairer time share allocated to them, while cases of a lower value are left to be dealt with by the Inferior Courts and by Small Claims Tribunals. A further strategy was to raise the level of Court registry fees payable by the parties in order to discourage vexatious litigation.

As far as the independence and impartiality of the adjudicating authorities are concerned this is guaranteed by appointing judges and magistrates '*quam diu se bene gesserint.*' Indeed a judge or magistrate can only be removed from office on the basis of a finding of proved misbehaviour or proved inability to perform the functions of his office after an address by the House of Representatives to the President supported by the affirmative vote of two-thirds of the members thereof. This has not prevented the possibility of complaints being made in particular cases where the party concerned felt he would not receive a fair hearing. In such cases not only is it possible for the individual to challenge the judge presiding the trial, but in the event such challenge fails, proceedings may be brought before the courts in their constitutional jurisdiction to secure a fair hearing. Should it appear to the Court that there is actual bias or the likelihood of same then it would be duty bound to quash the trial. In *M. Calleja vs Attorney General* the applicant complained that there was potential bias as the presiding judge had already presided over the trial of the accused's alleged accomplices and had in the accused's case given a number of rulings relative to bail applications filed by accused. The Constitutional Court held that there was no apparent likelihood of bias in such a case¹³³.

In relation to legal aid this is regulated by law. While the position in criminal trials is satisfactory as it not only caters for the impecunious defendant but for any accused who finds himself not assisted by legal counsel, in civil cases the position may not be completely satisfactory. In civil cases legal aid depends not only on the applicant showing that he has a reasonable case to make or defend but also upon the applicant satisfying property and income criteria which are set rather low. The result is that there may be some situations where real hardship can ensue in the conduct of a defence of a civil case.

Reasons for Concern

The position in Malta generally relative to the impartiality and independence of the judiciary is not one to raise concern. On the other hand some concern exists relative to the time taken for the trial of causes. It is admitted that in certain instances cases can take an inordinate time to be decided. Evidence of this is the courts' own decisions cited above. On the other hand it is also correct to state that the position is contained and being currently addressed in an attempt to eliminate all unjustifiable delay.

¹³¹ Central Mediterranean Development Corporation Limited vs Avukat Generali decided by the Constitutional Court on the 8th of May, 2003.

¹³² Act XI of 2002 amending Chapter 88 of the Laws of Malta.

¹³³ *Meinrad Calleja vs Avukat Generali et* decided on the 18 June 2003

Article 48. Presumption of innocence and right of defence

The presumption of innocence is generally respected under Maltese law. Article 39(5) of the Constitution of Malta specifically provides that “every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subarticle to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.” This rule has given rise to two particular problems in Malta, one relating to specific rules raising extensive presumptions relative to the proof of material facts, and the other concerning pre-trial publicity. Proceedings are presently pending before the Malta Courts of Civil jurisdiction to have presumptions created under the Customs legislation and the Interpretation Act relative to company directors declared to be in breach of the presumption of innocence. The matter is still sub-judice¹³⁴. The other case relates to pre-trial publicity; the situation is further aggravated where the public authorities, including the police and the Government, issue statements relating to their findings on alleged crimes. In *M Calleja vs Attorney General* the Constitutional Court¹³⁵ held that in a democratic country it was both necessary and expected that the media would cover the more serious trials; the Court pointed out the necessity to ensure that such publicity did not degenerate to an extent that it would prejudice the possibility of holding a fair trial; a fine balance had to be struck between the interests of the accused and those of the public to be informed. A case with similar implications was *Ithe Police vs Dr. N Arrigo et*¹³⁶ where the accused complained that public statements made by the Prime Minister in connection with the offences with which the accused were charged had breached the presumption of their innocence and had irremediably prejudiced their right to a fair hearing. The Court found that the public statements made by the competent authorities and the attendant publicity had breached their right to be presumed innocent but that a fair trial could still be held notwithstanding. The Court provided that as a remedy to the breach suffered by the accused the findings of the Court should be brought to the attention of the trial Court when the case comes up for trial. No further remedy was provided to the accused.

The other right contained in this article concerns the right of defence competent to the accused. The Constitution of Malta specifically guarantees this right. It provides that: “Every person who is charged with a criminal offence - ... b) shall be given adequate time and facilities for the preparation of his defence; c) shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense.”¹³⁷ Moreover the Constitution of Malta also safeguards the right of the accused to be informed in detail and in a language he understands of the offence with which he is charged, to be present at all stages during his trial, to hear and cross-examine witnesses, and to be afforded an interpreter if he does not understand the language in which the trial is conducted.¹³⁸ It is also pertinent to point out that Article 6 of the European Convention on Human Rights and Fundamental Freedoms is applicable in Malta as a result of the enactment of that Convention into Maltese Law.

It is the practice of the Courts in Malta when seized with the trial of a criminal offence to appoint a lawyer to represent the interests of the accused if the accused is not himself assisted by a lawyer. Allowing a trial to proceed without accused being assisted by legal counsel, especially in those cases where he insists on being so assisted, but even in cases where the

¹³⁴ *A Ellul Sullivan vs Attorney General* presently pending before the Court Court

¹³⁵ *Meinrad Calleja vs Avukat Generali et* decided on the 18 June 2003. Mr. Calleja has referred his complaint to the European Court in Strasbourg.

¹³⁶ *Il-Pulizija vs Dr. N Arrigo et* decided by the Constitutional Court on 29th October, 2003.

¹³⁷ Article 39(6) of the Constitution of Malta.

¹³⁸ Article 39(6) of the Constitution of Malta

matter is not raised, would be deemed to be in breach of the accused's right to a fair hearing in front of an independent and impartial Court.

Reasons for Concern

The reasons for concern here are the same as those arising in any truly democratic State. It is not always easy to strike the proper balance between the need of society to defend its legitimate interests and the necessity that each accused enjoys the full presumption of innocence when undergoing trial, as it is not easy to strike a proper balance between the freedom of the press and the interests of fair hearing to be provided to the accused.

Article 49. Principles of legality and proportionality of criminal offences and penalties

The principles stipulated in paragraphs 1 and 2 of this article are directly mirrored in the Constitution of Malta and in the European Convention Act in almost identical terms. Interpretation of such principles has always been given by the national courts in line with Malta's international obligations undertaken under the ECHR and under the International Covenant on Civil and Political Rights. However during the year under review no comments or decisions have been given on these principles by either the bodies established under the International Covenant on Civil and Political Rights or the European Court of Human Rights or the national courts.

However paragraph 3 of Article 49 of the Charter does not find its counterpart in the domestic legal order. Despite this effect is given to this principle by the establishment of a maximum and minimum level of punishment that may be given by the adjudicating body for both punishments of imprisonment and detention and also for the imposition of fines. This creates a situation whereby the judge in passing sentence upon an accused must abide with the principles established in the Criminal Code and consider not only the offence but also the circumstances of that offence in delivering sentence. The discretion given to the judge is aimed to bring about the proportionality of penalties to the criminal offence under review. Appeals against the exercise of such discretion is allowed for the accused who may present an appeal before the Court of Criminal Appeal seeking a reduction of the sentence and punishment passed on to him.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

The non bis in idem principle is specifically recognized as a fundamental right in Article 39 (9) of the Constitution which states that "*No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence*". This principle has not given rise to a lot of case-law from the national courts and there seems to be no particular difficulties in the protection of such principle. However, where a complaint to arise before the national courts, it would be incumbent upon the courts to consider the case-law of the European Court of Human Rights on this issue and to interpret such principle not only in line with the provision of the Constitution but also in line with Malta's international obligations. This principle is normally also reflected in treaties and agreements concluded between Malta and third countries in respect to extradition of persons to those countries.