



Constitutional Law

Constitutional Law is the law which regulates the composition and functions of the three organs of the State, the relationship of those three organs between themselves and the relationship of those three organs with the private individual

Composition: Shall we have a unicameral or bicameral legislature? Why are there two chambers in most countries e.g. House of Lords and House of Commons in UK, The Senate and House of Representatives in USA, Il Senato and Camera dei Deputati in Italy, the Bundesrat and Bundestag in Germany, Different reasons.

What are the functions and composition of the Legislative, the Executive and the Judiciary.

The legislature makes laws and controls the Executive. The Executive governs and applies the laws. The Judiciary interprets laws and applies them to specific cases.

Most legislatures in Europe are bi-cameral. In Malta we had a bi-cameral legislature between 1921-1933.

In the United States, bi-cameralism solved the problem of establishing a balance between large and small states within USA. The Great Compromise. Equal representation of states in Senate (50X 2), representation according to population size in the House of Representatives.

Relationship between the Three Organs of State

This relationship determines whether a Constitution will be classified as Parliamentary or Presidential.

In the Parliamentary system the relationship between Executive and Legislature is very close. In the UK model which Malta has followed, the members of the executive are also members of the legislative. The Prime Minister and Ministers are members of the Legislature.

They are also responsible to it so that if Government loses a majority in the Legislature new elections have to be held

In the United States the two organs are more separate. A member of the Executive cannot be a member of the legislature and the executive is not responsible to the legislature even because the two organs are elected through two separate elections



The Private Individual

This is human rights law. To what extent are the three organs bound to observe human rights in dealing with the private citizen? What powers do the Police have to arrest an individual or search his house; what powers does the State have to take over private property for a public project. To what extent are we guaranteed a fair trial and hearing before a court of law. What rights do we have to exercise our freedom of expression association assembly?. Is discriminatory treatment allowed? Do we have a right to property

Characteristics of a Constitution

It is usually codified in one single document. Exceptions: the United Kingdom, Israel and New Zealand.

Of its very nature a codified Constitution is supreme (Marbury v Madison 1803 US Supreme Court)

If it is supreme there has to be a mechanism, organ or authority which has the right to declare a decision or law as being against the Constitution and therefore null and void. Eg human rights cases

Article 6 of the Constitution of Malta

For a law to be supreme and fundamental, it is logical that such law can only be amended by a special majority. So while ordinary laws may be changed by an ordinary majority i.e. 50% plus one of those MPS who actually vote, most provisions of the Constitution require the approval of a two-thirds majority of ALL the members of parliament.

To what purpose are powers limited and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if these limits do not confine the persons upon whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true then a legislative act contrary to the Constitution is not law; if the latter part be true then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. (Marbury v Madison 1803)



Constitutions may be:

Rigid or Flexible

Unitary or Federal

A Constitution is rigid if a special procedure is needed for it to be amended. A flexible one is a Constitution which may be amended even by an ordinary majority

Federal

In some countries particularly those of a large size e.g. United States, Russia, China and Brazil, government is divided between two levels the Federal and State Level. So in the United States each one of the fifty states has its own legislature, executive and judiciary. Then at Federal level there is the Federal Executive (President USA) the Federal Judiciary (the US Supreme Court) and the Federal bi-cameral legislature namely the Federal Senate and the Federal House of Representatives. The states send representatives to both. The Federal Organs are situated in Washington DC.

Some relatively small states are also a federation eg Federal Republic of Germany, and Austria.

Sources of Maltese Constitutional Law

1. The Constitution
2. Statute /Ordinary Law e.g. General Elections Act 1991, European Convention Act 1987
3. Subsidiary Legislation
4. Standing Orders of HOR and Speaker Rulings
5. Conventions : rules of political practice considered to be binding by those to whom they apply but which are not enforceable in a court of law,
6. EU Law e.g. Directive on Police Interrogation
7. Lacuna Doctrine : Lacuna in public law, Court May apply English Common Law
8. Judgments- Decisions of courts of constitutional jurisdiction interpreting articles of the Constitution
9. Writings of Authors; these can shed light on interpretation of Constitution



Parliament

Parliament is composed of the President and the House of Representatives (HOR).

HOR is composed of 65 members elected by proportional representation by means of the single transferable vote.

Malta and Gozo are divided into 13 electoral districts each returning 5 members (13 X 5 = 65). Gozo is always a separate district on its own.

Elections are run by an Electoral Commission. According to convention, half are appointed by the President on advice of the Prime Minister (PM) from amongst persons enjoying his confidence, the other half enjoying confidence of leader Opposition. Chairman to be chosen by consensus.

This is only a convention and tradition. The Constitution states that the members are chosen by the President acting on the advice (binding) of the PM after only consulting the Leader Opposition.

Corrective Electoral Mechanisms:

1987: Majority of one over all opposition parties if party gets 50% plus one of first preference votes.

1996: Same rule to apply where only two parties get elected and no one gets absolute majority. Largest party gets a majority of one.

2007. Proportionality between party winning and party losing. Additional seats if one party wins seats more than it should or less than it should.

In 2022. Two additional seats were granted to the Opposition so the gap from 11 seats was reduced to 9.

This applies only if two parties are elected to Parliament.

The Gender Mechanism

If the target of 40% of MP's from under-represented sex is not achieved a **maximum** of 12 additional seats from that gender are distributed equally between the two parties.

In 2022 since the 40% figure was not reached twelve female candidates were elected six for each party.

This mechanism applies only if 2 parties are elected and expires after twenty years from 2022.

This explains why in 2022, 79 members of parliament were elected namely:



65 members elected + 2 additional members granted to Opposition under corrective mechanism, 12 female members under the new mechanism.

The Electoral Commission also draws up the electoral districts. Why is this important?

It is important for the candidates. It is important because if a third party is elected the corrective mechanisms do not apply, and the party with a majority of seats will form the government.

Voter Qualification:

- (a) citizen of Malta
- (b) 16 years old
- (c) residing in Malta on aggregate 6 months out of the last 18 months

The Speaker

The Speaker presides over the HOR. He can be elected from within or from outside the House.

He does not have an original vote. He has a casting vote if there is a tie.

He is considered to be a member of Parliament.

Voting in HOR

Voting is by simple majority that is to say 50% plus one who are present and vote

Passing of Bills through HOR

Any MP can propose a Bill. Usually it is Govt since it controls through its majority the parliamentary agenda.

A Minister will usually propose a First Reading. Nothing is read except the title of the Bill e.g. A Bill to amend the Criminal Code.

Then the Bill is published in the Government Gazette.

The Piloting Minister then proposes a Second Reading in the HOR. Debate will be limited to scope not to details. No amendments can be proposed at this stage.

The Bill then goes before a Committee for the Consideration of Bills. Bill examined clause by clause. Amendments can be proposed by both sides.



The Chairman at end of discussion reports to Speaker.

Third Reading by Whole House .

Assent by President- Publication of the Act of Parliament in Govt. Gazette

Tasks of Parliament

It is the only law making body. It can delegate (subsidiary legislation)

Parliament passes laws for the governance of the country. These laws may be challenged before the Courts of law if they are in breach of the Constitution.

Parliament in Malta is supreme but only within the four corners of a more supreme Constitution. Nothing is automatic. For a law to be declared constitutionally invalid, some one has to start litigation in Court

Financial Estimates - BUDGET

Parliament in all democratic countries approves the financial estimates for the next financial year.

All funds in the Consolidated Fund need parliamentary approval for revenue and expenditure.

The Budget debate is a debate on parliamentary authorisation for Government to spend X billion euros in the next financial year.

This has to be done EVERY YEAR. The Minister of Finance will deliver a Budget Speech. The Leader of Opposition replies a week later and the Prime Minister counter replies.

Then the House resolves itself to go into a Committee of Supply, and there estimates of every Ministry are examined and voted upon

The Opposition spokesman will usually propose that the Minister ' s salary is deducted by one euro to trigger off the debate. Govt defends its position. The motion of course does not pass. If a govt is defeated in Budget debate that is considered to be a vote of no confidence.

This happened in 1950 and more recently in December 2012.

When that happens the Constitution provides a breathing space of four months until 30 th April of next financial year for the Budget to be approved allowing govt to spend the same amounts for first 4 months as it did in the previous year. If Budget is not



approved again before April 30th, no monies can be withdrawn from the Consolidated Fund .

At the end of the debate an Appropriation Act is passed allowing the Govt to spend X billion euros for next year

Parliamentary Privilege

No action can be taken in a court of law for anything said by an MP in Parliament during a sitting. This applies only to what he says in Parliament . Any other action eg hitting someone, is not covered.

In Italy privilege extends to any criminal prosecution whether within or outside Parliament

A person aggrieved can file a complaint with the Commissioner for Standards in Public Life who examines whether an MP has abused of his privilege or else breached the Code of Ethics for MPS.

The Commissioner for Standards is elected by a two thirds majority of all MPs and can be removed in same way for incapacity or proved misbehaviour. He can receive a complaint against an MP or a member of the private secretariat of a member of the Executive.

He files a Report with the Standards Committee, the only parliamentary committee where govt does not enjoy a majority. In fact it is composed of Speaker and two mps from each side.

Sanctions can include fines, naming and shaming.