

# Diploma in Law (Malta)

## The Constitution

Lecturer: **Dr Antonio Depasquale**

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# Re-Cap of Lecture 2

- Divisions of Maltese Law
- Factors Influencing the Development of Maltese Law
- Law and Language / Communication
- Primary & Secondary (Delegated) Legislation



# Today's lecture

In today's lecture we should be covering the following topics:

- The Constitution of Malta
- Rule of Law
- Separation of Powers
- Courts of Malta – An Introduction



# The Constitution

- Highest law of the country
- Provides for a framework and the parameters in which all other laws should operate, and in which the organs of the state function
- Establishes fundamental rights
- Regulates how the organs of the State should operate



# History

- 1919 revolts
- 1921 Constitution – a first step towards a self-governing Constitution
- 1936 & 1939 Constitutions – less liberal than the 1921 Constitution
- 1947 Constitution – post War, closer to the 1921 Constitution, with universal suffrage allowing for all adults over 21 the right to vote
- 1959 Constitution – revoked the 1947 Constitution, introducing limitations and controls and thus not too popular
- 1961 Constitution – the Blood Constitution giving Malta the title (only) of State of Malta, and giving the Government of Malta full executive and legislative powers for the first time



# History (2)

- 20<sup>th</sup> August 1962 – Prime Minister George Borg Olivier writes to the Secretary of State demanding Malta's Independence
- Professor JJ Cremona – Drafting of a new Independence Constitution
- 16<sup>th</sup> July 1963 – Independence Conference for political parties
- 2<sup>nd</sup> to 4<sup>th</sup> May 1964 – Referendum on the proposed Constitution



# History (3)

21<sup>st</sup> September, 1964

- Parliamentary Government – the Executive (Ministers) being part of the Legislature, elected in the House of Representatives
- Prime Minister is the head of the Executive – the Member of Parliament commanding the majority of the House of Representatives
- Constitution sets up a Parliamentary Democracy with a Separation of Powers



# Doctrines

We shall examine the doctrine of the Separation of Powers and the Rule of Law as the basic principles of the Constitution





# Separation of Powers

- Doctrine first discussed as early as Aristotle (384-322BC), and later rendered popular with the writings of Montesquieu (1689-1755)
- Maltese Constitution follows the Westminster Model
- Checks and balances between the 3 powers / main organs of the State - the Legislative/Legislature, the Executive, the Judiciary
  - **Legislature** - The organ responsible to legislate, enact laws and revoke laws, Parliament
  - **Executive** - Execute the laws and the policy of Government.
  - **Judiciary** - Interpret the law and apply the law in the particular cases brought before it / Checks that laws are in line with the constitution. Completely independent from the Legislative and from the Executive



# Separation of Powers (2)

In summary:

- Laws are approved by the Legislature
- In the Legislature the Executive has the support of the majority of the members therein
- Constitutional Supremacy Vs Parliamentary Supremacy - Courts retain right to scrutinise the Laws as approved by the Legislature
- Checks and balances between the 3 separate powers, ensuring and protecting their distinctiveness



# Separation of Powers (3)

*“Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.”*

National Conference of State Legislatures

<https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview>



# The Rule of Law

- A legal framework for the operation of the State
- Safeguards Judiciary's independence
- Protects rights of the individual persons
- Goes beyond the concept of "equality before the law" and "power to emanate from the law"
- Focus is on the observance of internationally recognised fundamental human rights
- Seeks to eliminate the application of arbitrary power



# The Rule of Law (2)

New Delhi Declaration (1959)

Important elements in the concept of the Rule of Law

- Representative and responsible government
- Protection of the individual's rights and freedoms
- Independent Judiciary
- Effective system allowing for the protection of the above in a manner that allows the people to live in dignity and to fulfil their legitimate aspirations



# Human Rights

- Constitution of Malta – Chapter IV provides for: Fundamental Rights and Freedoms of the Individual
- Chapter 319 – European Convention Act – European Convention on Human Rights, a Council of Europe human rights instrument.
- The Constitutional Court is also empowered by the European Convention Act to deal with Human Rights cases based on the Convention and to declare any laws in conflict with the Convention void



# Human Rights (2)

- European Convention of Human Rights
- Ratification of the individual's right of petition to the European Court of Human Rights

Tonio Borg in his book "A Commentary on the Constitution of Malta" refers to the European Court as the "*ultimate court on human rights in Malta. Laws and executive decisions may therefore be annulled if they are against the Constitution or the European Convention, or both.*"



# Human Rights (2)

Fundamental Human Rights include:

The right to life, protection from arbitrary arrest and detention, protection from forced labour and from inhuman and degrading punishment or treatment, the right to protection from deprivation of property without compensation, and of the privacy of home or other property, provisions to secure protection of the law, freedom of conscience, worship, expression, assembly and association, ...





# Human Rights (3)

... prohibition of deportation, protection of freedom of movement and protection from discrimination.

In more recent years adding the extension of the prohibited grounds of discrimination to include discrimination based on gender (1993) and discrimination based on sexual orientation (2014)



# The Judiciary

- Importance of the Judiciary's independence being guaranteed
- A Judge of Magistrate can only be removed for serious cases of misconduct, illegalities, incapacity to perform functions and this by the Commission for the Administration of Justice
- The Constitution empowers the Judiciary to scrutinize legislation



# The President

- Malta got its first President upon becoming a Republic on the 13<sup>th</sup> December, 1974 - Sir Anthony Mamo, until then the Governor General (the representative of the monarch in Malta exercising most of the powers of the monarch)
- Elected for a 5 year term by a resolution (2/3 majority) of the House of Representatives
- Bound to act on the advice of the Prime Minister (save for certain stipulated exceptions)



# Parliament

- Made up of the President and the House of Representatives
- Minimum 65 members of the House of Representatives, known as Members of Parliament
- Corrective electoral mechanisms in place apportioning additional parliamentary seats to ensure the proportion between the electoral result obtained by the political parties and the seats in the House of Representatives



# Parliament (2)

## Corrective Mechanisms:

- 1987 – Any political party obtaining an absolute majority of first count votes to be guaranteed a majority of one seat over the opposition party or parties
- 1996 - Any political party obtaining a relative majority of first count votes to be guaranteed a majority of one seat over the opposition party or parties (only when two parties are elected in the House of Representatives)



# Parliament (3)

## Corrective Mechanisms (continued):

- 2007 – The difference in votes between the political parties at first count reflected in the number of seats in the House of Representatives (only when two parties are elected in the House of Representatives)
- 2021 – a socially oriented corrective mechanism triggered off when less than 40% of members of Parliament are from the under represented sex. An addition of a maximum 12 parliamentary seats assigned to the under-represented sex



# The Executive

- Formally vested in the President
- Exercised through the Cabinet which is composed of the Prime Minister and Ministers
- The Cabinet has the general direction and control of the Government of Malta, and responds to Parliament
- Prime Minister appointed by the President from amongst the members of the House of Representatives (who is deemed to be best able to command the support of the majority)
- Ministers in turn appointed by the President on the advice of the Prime Minister



# The Attorney General and the State Advocate

- Attorney General (AG) – the chief prosecuting officer. Has the power to institute, undertake and discontinue criminal proceedings
- State Advocate (SA) – a new office created in 2019 taking over the responsibility of the chief legal advisor to the government, formerly the AG's responsibility as well

AG and SA enjoy security of tenure and can only be removed from office by the President with a 2/3 support of the members of the House of Representatives for proved inability or misbehaviour





# The Commission for the Administration of Justice

- Presided by the President
- Regulates amongst other things discipline over members of the Judiciary and the legal profession
- Supervises the workings of the law courts and the legal system
- Can remove members of the Judiciary



# Other Commissions / Authorities

- Electoral Commission
- Public Service Commission (PSC)
- Broadcasting Authority (BA)
- Employment Commission



# Constitution of Malta / Chapters

I The Republic of Malta

II Declaration of Principles

III Citizenship

IV Fundamental Rights and Freedoms of the Individual

V The President

VI Parliament

VII The Executive

VIII The Judiciary

IX Finance

X The Public Service

XA Local Councils

XI Miscellaneous



# Courts of Malta – An Introduction

## Chapter 12 Code of Organization and Civil Procedure

- 2. (1) The courts of justice of civil jurisdiction for Malta are either superior or inferior. Each court may be divided into different sections.
  
- 3. The superior courts are:
  - (a) the Civil Court;
  - (b) the Court of Appeal; and
  - (c) the Constitutional Court.



# Courts of Malta – An Introduction (2)

4. The inferior courts are:

- (a) the Court of Magistrates (Malta) for the Island of Malta;
- (b) the Court of Magistrates (Gozo) for the Islands of Gozo and Comino.



# Courts of Malta – An Introduction (3)

## Chapter 9 Criminal Code

- Court of Magistrates as a Court of Criminal Judicature
- Court of Magistrates as a Court of Criminal Inquiry
- Appeals from Judgments of the Court of Magistrates as a Court of Criminal Judicature
- The Criminal Court
- The Jury
- The Court of Criminal Appeal



# Courts of Malta – An Introduction (4)

## Tribunals and Boards (some examples)

- The Industrial Tribunal
- The Rent Regulation Board
- The Agricultural Leases Control Board
- The Small Claims Tribunal
- The Administrative Review Tribunal
- The Environment and Planning Review Tribunal



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