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**Rapport national / National report / Landesbericht /
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&
Synthèse / Summary / Kurzfassung / резюме**

**RÉPUBLIQUE DE MALTE / REPUBLIC OF MALTA /
REPUBLIK MALTA / РЕСПУБЛИКА МАЛЬТА**

**The Constitutional Court of the Republic of Malta
Il-Qorti Kostituzzjonali tar-Repubblika ta' Malta**

Anglais / English / Englisch / английский

XVIth Congress of the Conference of European Constitutional Courts in 2014

Cooperation of Constitutional Courts in Europe –

Current Situation and Perspectives

National Report of Malta

Summary

As a court of a member state of the European Union, the Constitutional Court of Malta (like all Maltese domestic courts) is bound to consider and apply European Union Law. It is also bound to consider and apply the European Convention of Human Rights which has been incorporated in domestic law. Moreover, it has also had occasion to consider other instruments of European and international law. In practice, most of the case-load of the Constitutional Court concerns complaints of breaches of the European Convention of Human Rights and the corresponding human rights provisions of the Constitution. The jurisprudence of the Constitutional Court is therefore heavily influenced by judgments of the European Court of Human Rights which are often referred to in judgments of the Constitutional Court. Nevertheless, there have been isolated cases where the Constitutional Court departed to some extent from the jurisprudence of the European Court of Human Rights. The Constitutional Court is also influenced to some extent by the jurisprudence of other European Constitutional Courts.

Questionnaire for the national reports

I. Constitutional courts between constitutional law and European law

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

The Constitutional Court (and all national courts) are obliged to consider and apply European Union Law by virtue of the principles of supremacy and direct effect, which have themselves been incorporated into domestic law by virtue of the European Union Act (Chapter 460 of the Laws of Malta¹).

The Constitutional Court is also obliged to consider and apply the European Convention of Human Rights which has been incorporated into domestic law by virtue of the European Convention Act (Chapter 319 of the Laws of Malta²).

2. Are there any examples of references to international sources of law, such as:

¹ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8926&l=1>

² <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8795&l=1>

a) the European Convention on Human Rights,

Since the European Convention of Human Rights has been incorporated in domestic law (see answer to question 1 of Section 1), the Constitutional Court inevitably refers to it in its judgments. In practice, most of the case-load of the Constitutional Court is concerned with complaints of violations of the Convention and of the corresponding human rights provisions of the Constitution.

b) the Charter of Fundamental Rights of the European Union,

In terms of art. 51, “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. The occasions for the applicability of the Charter in cases before the Constitutional Court are limited.

c) other instruments of international law at European level,

The Constitutional Court has had occasion to consider the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children which was signed in Luxembourg on 20th May, 1980. This Convention has been incorporated into domestic law by virtue of the Child Abduction and Custody Act (Chapter 410 of the Laws of Malta³).

d) other instruments of international law at international level?

The Constitutional Court has had occasion to consider the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on the 25th October, 1980. This Convention has been incorporated into domestic law by virtue of the Child Abduction and Custody Act (Chapter 410 of the Laws of Malta⁴).

3. Are there any specific provisions of constitutional law imposing a **legal** obligation on the constitutional court to consider decisions by European courts of justice?

Art. 5 of the European Union Act (Chapter 460 of the Laws of Malta⁵) provides as follows:

5. (1) For the purposes of any proceedings before any court or other adjudicating authority, any question as to the meaning or effect of the Treaty, or as to the validity, meaning or effect of any instruments arising therefrom or thereunder, shall be treated as a question of law and if not referred to the Court of Justice of the European Communities, be for determination as such in accordance with the principles laid down by, and any relevant decision of, the Court of Justice of the European Communities or any court attached thereto.

(2) Judicial notice shall be taken ... of any decision of, or expression of opinion by, the Court of Justice of the European Communities or any court attached thereto on any such question as aforesaid ...

These provisions are binding on the Constitutional Court and on all domestic courts.

³ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8876&l=1>

⁴ See note 3.

⁵ See note 1.

There is no corresponding provision concerning judgments of the European Court of Human Rights. Such judgments are enforceable in terms of art. 6 of the European Convention Act (Chapter 319 of the Laws of Malta⁶) but are not legally binding as precedent.

4. Is the jurisprudence of the constitutional court influenced **in practice** by the jurisprudence of European courts of justice?

The jurisprudence of the Constitutional Court is in practice heavily influenced by the jurisprudence of the European Court of Human Rights.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

The Constitutional Court invariably refers to the jurisprudence of the European Court of Human Rights when dealing with complaints concerning alleged violations of the European Convention of Human Rights. Reference to the jurisprudence of the Court of Justice of the European Union is less frequent.

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

As stated above in the answer to question 3 of Section I, the Constitutional Court is legally bound to observe the jurisprudence of the Court of Justice of the European Union.

As regards judgments of the European Court of Human Rights, although as a rule the Constitutional Court seeks to conform with such jurisprudence, sometimes the circumstances of a particular case are such that the court will “distinguish” that case. Recent examples of divergence include a departure from the judgment of the European Court of Human Rights in Christine Goodwin versus the United Kingdom (11 July 2002, application 28957/1995) concerning the right of trans-sexuals to marry, and what may be seen as a restrictive interpretation of the ruling in Salduz versus Turkey (27 November 2008, application 36391/02) concerning the right to legal assistance during preliminary police interrogation.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

Where a breach of fundamental rights is alleged before a court not having jurisdiction to determine constitutional issues (*e.g.* before the Criminal Court) that court can refer the issue to the First Hall of the Civil Court, which has constitutional jurisdiction, with a right of appeal therefrom to the Constitutional Court. When the issue is finally determined by the First Hall of the Civil Court or, on appeal, by the Constitutional Court, the decision is binding on the referring court. Therefore, if the Constitutional Court refers to a judgment of the European Court of Human Rights in its decision, the referring court is bound to take that judgment into consideration

⁶ See note 2.

In other cases, precedent is not binding but in practice other national courts do follow the decisions of the Constitutional Court, thereby implying that they do take judgments of the European Court of Human Rights into account when these are cited by the Constitutional Court.

As regards the jurisprudence of the Court of Justice of the European Union, in terms of art. 5 of the European Union Act, cited in the answer to question 3 of Section I, *supra*, national courts are bound to take “judicial notice ... of any decision of, or expression of opinion by, the Court of Justice of the European Communities” irrespective of whether it was also taken into consideration by the Constitutional Court.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

We are not aware of any judgment by a European court of justice influenced by the jurisprudence of the Maltese Constitutional Court.

II. Interactions between constitutional courts

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Since the Constitution of Malta is a “Westminster type” constitution, early judgments soon after independence in 1964 did refer to decisions of Commonwealth courts. This practice has become much rarer today. A more recent example is the adoption of the “constitutionally compliant” interpretation of ordinary laws on the example of judgments of the Italian Constitutional Court. There is nothing which precludes any court in Malta from referring to the judgements of any European or non-European constitutional court where the reasoning in the judgment is deemed persuasive.

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

Maltese courts (not only the Constitutional Court) refer mostly to jurisprudence (and doctrine) in Italian, English and French.

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

Mostly in the field of Criminal Law.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

We are not aware of any decisions of the Maltese Constitutional Court having influenced the jurisprudence of foreign constitutional courts.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

The Constitutional Court is not currently involved in any structured form of co-operation with other Constitutional Courts.

III. Interactions between European courts in the jurisprudence of constitutional courts

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

By virtue of the doctrine of supremacy and direct effect (see answer to question 1, Section I, *supra*) and of art. 5 of the European Union Act (see answer to question 3, Section I, *supra*), European Union law and decisions by the Court of Justice of the European Union necessarily have an impact on the jurisprudence of the Constitutional Court, irrespective of whether they are referred to in the jurisprudence of the European Court of Human Rights.

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

We are not aware of any decisions of the Maltese Constitutional Court having had any such influence.

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?

The general rule in such instances is that there is a legal obligation to take judicial notice of the decisions of the Court of Justice of the European Union but there is no corresponding provision concerning judgments of the European Court of Human Rights (see the answer to question 3 of Section I, *supra*).

No particular instances of differences as are mentioned in the question have so far arisen before the Constitutional Court of Malta, so it is still an open question whether in such cases the court will rely on its obligation under art. 5 of the European Union Act or whether it will be influenced rather by the *Solange* judgments of the German Constitutional Court.