

**ELECTORAL DISPUTES: AN ISSUE WHICH FALLS INTO
THE JURISDICTION OF THE CONSTITUTIONAL COURT?****Mr Ian REFALO (Malta)**

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The issue of the constitutional jurisdiction in the electoral process ties in with the evolving concepts in the ambit of the modern democratic State of the functions of the Courts both in relation to the constitutional life and processes of the State, and in relation to the possibility of review being exercised with respect to government and administrative matters. It ties in, in particular with the concept of an ensemble of fundamental rights pertaining to the individual which the State underwrites and guarantees, and it connects directly with the supervisory roles the Courts come to exercise in relation to securing these rights to every single individual. It is in the light of these principles that the judicial process relative to elections must be viewed. For it is this principle which to my mind justifies and underpins the whole exercise of jurisdiction in these matters. And I here refer purposely to the judicial process since, depending upon the structure of the Courts of a particular State, it may not necessarily be the constitutional Court in exercise of a constitutional jurisdiction which will intervene but any ordinary court competent to take cognizance of the matter. For the purpose of justifying the intervention it is not so essential to make a distinction between the ordinary jurisdiction and the constitutional jurisdiction since, to my mind, the democratic imperative underpins the jurisdiction of all Courts involved in the electoral process.

What do I understand by the democratic imperative? The State does not function consequent to an authority which it receives from above; rather, it functions on the basis of an authority it receives from below, from the people that compose it. This is the essence of the exercise of sovereignty in the democratic State. The sovereignty of the State is a result of the will of the people that compose it, and it functions in virtue of that will, in representation and in the interest of that people, and in full respect of the dignity of the individuals that compose it. The democratic imperative therefore implies two things – firstly representative government, and secondly government in accordance with the law and in full respect of the fundamental rights of all individuals. That this democratic imperative seems to be accepted by all modern democratic States needs no elaboration: it is of the very essence of the concept of democratic government. What perhaps may be clarified is the role of the Courts in connection with such matters. Independently of the existence or otherwise of a written Constitution, but perhaps more so where a written Constitution exists, the Courts have come to be the guardians to a large extent of the democratic imperative, entrusted with the task of verifying that the fundamental human rights of the individual are not in any manner violated or abridged.

In States with a written Constitution, the Courts – and the Constitutional court in particular – have developed a supervisory role not only in connection with the enforcement of fundamental human rights and with the possible breaches of the same by the executive, but also a supervisory role, which is sometimes exercised with greater (justifiable) hesitation in connection with the legislative. It is in this perspective that the concept of judicial review in relation to the electoral process has to be considered. It is not the place, here, to go into a history of developing constitutional jurisdictions. Suffice it to say that the concept was really born in a system which had indeed a constitution but no constitutional Court. I am here referring to the Constitution of the United States, where the old case of **Marbury v Madison** ushered in the concept of the supremacy of a constitution and the ability of the Courts to review the acts of the other organs of government for constitutionality. Indeed it has always been my idea that the concept of limited government, limited by the boundaries laid down for it by its constitution, was in a manner a reflection of the concepts of judicial review developed in common law jurisdictions. Even though in the United Kingdom, where the concept of judicial review had indeed developed, this concept of judicial review was a necessarily limited notion, limited by the idea of the sovereignty of Parliament which animates the United Kingdom constitution. In the British colonies the position was different as there, there was no sovereign Parliament, but necessarily subordinate bodies which allowed the concept of judicial review to extend even to constitutional matters.

To come back however to my main subject, after this digression, the democratic process, coupled with the human rights imperative, necessitates that the popular will be freely and fully expressed. In situations of necessarily representative and not direct democracy this can only be done through electoral processes and systems, and it therefore becomes more than ever necessary to safeguard this process in order to ensure that the will of the people is freely and adequately represented through the election of their members of parliament, members of local councils, and the election of other authorities. This is therefore clearly the legal justification for the exercise of a judicial power in connection with the electoral process.

Bede Harris in *A New Constitution for Australia* comments on Section 354 of the Commonwealth Electoral Act which confers jurisdiction on the High Court of Australia in relation to the validity of elections or returns. The High Court may also exercise jurisdiction on disputes relating to the qualification of members of either House of Parliament or vacancies in either House. He comments that: "In doing so Parliament waives its privilege in respect of such matters. There is much to be said for the crucial matter of the validity of elections, and of the eligibility of members of Parliament to sit in either House, to be de-politicised by having them fall within the jurisdiction of the courts as a matter of law, rather than it being left to Parliament whether the courts will hear such matters." He argues that jurisdiction in relation to electoral matters should be in the constitution as part of the High Court's original jurisdiction.

In this perspective the constitutional jurisdiction forces the dispute in relation to elections to be discussed on purely legal terms and therefore removes it from the arena of partisan politics and puts it squarely in the perspective of the protection of people's rights as a matter of law. This is what to my mind underlies the exercise of a jurisdiction in relation to electoral processes. It is ultimately the task of the courts, and in that respect principally the constitutional court, to see that the electoral process takes place in accordance with the law and this in order to ensure the full and free exercise of the right to vote by the people.

It is also pertinent to point out that the electoral process does not involve the operation of one single fundamental right but an ensemble of fundamental rights which together reflect themselves in the electoral process. There is of course obviously, the right of each individual to participate in the electoral process. This right is enshrined in article 3 of the First Protocol to the European Convention. Though this right is today taken for granted it is good not to forget that this has not always been so, and that this is a right which has been won in the course of history. Universal suffrage is today a guaranteed right, and moreover it is normally stipulated that this right is to be exercised by secret and free ballot. Article 3 of the First Protocol to the Convention provides that "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." But in the electoral process other rights may come to the fore or enter into play and these may have to be considered by a court exercising jurisdiction over electoral matters. Not least among these rights are freedom of speech, freedom of opinion, and the right to associate freely. These rights are evidently important in the context of free elections and democracy, and safeguarding these rights becomes a key element in ensuring a free and balanced election which truly expresses the people's will. Besides, in the course of legal contestation and other proceedings, further rights may enter the picture and would have to be taken into account by the adjudicating tribunal, for instance the right to a fair hearing. The electoral process therefore clearly impinges on a number of associated fundamental rights without which the exercise of the right to vote would be inadequate. It is therefore good to keep in mind, when looking at the constitutional jurisdiction and the electoral process, that the reference to the court, or the issue in front of the court, may well arise not only directly as a matter of the right to vote, but in areas such as the above which either impact on the right to vote or condition the electoral process. As these are rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the matter may also become an issue before the European Court in Strasburg, and must therefore also be looked at from the point of view of the local judicial authorities enforcing the Convention obligations within their territories.

At the opposite end of the right to universal suffrage one ought also to consider the right to contest elections. As the Strasbourg Court stated in the case of **Podkolzina v Latvia**, 'the right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment.' The Court conceded that States do have a wide margin of appreciation when establishing eligibility conditions in the abstract, but it also drew attention to the principle that rights must be effective and it went on to state that this principle requires the finding. In particular, the Court added that the finding that a particular candidate has failed to satisfy eligibility conditions must be

reached by a body which can provide a minimum of guarantees of its impartiality, whose discretion is not to be exorbitantly wide but, rather one that is circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the Court opined that the procedure for declaring a candidate ineligible must be such as to ensure a fair and objective decision and prevent any abuse of power on the part of the relevant authority.¹

Another case which is relevant in the context of the right to contest elections is **Sukhovetsky v Ukraine**². In this case the applicant complained under Article 3 of Protocol No. 1 and Article 14 of the Convention that it was impossible for him to stand for parliamentary election on account of his inability to raise the money to pay the election deposit. The Ukrainian Law on Parliamentary Elections of the 18th of October 2001 required all candidates for parliamentary elections to pay an electoral deposit of sixty times the tax-free monthly income. The Constitutional Court of the Ukraine declared the deposit to be in conformity with the Ukrainian Constitution, and this in order to encourage a responsible attitude on the part of potential candidates as well as to prevent an abuse of electoral rights. The Strasbourg Court also declared that the requirement to pay an electoral deposit did not constitute a violation of Article 3 of Protocol No.1 of the Convention and it opined that the said fee could not be considered 'excessive or such as to constitute an impenetrable administrative or financial barrier for a determined candidate wishing to enter the electoral race, and even less so an obstacle to the emergence of sufficiently representative political currents or an interference with the principle of pluralism'. This line of Strasbourg jurisprudence therefore indicates that the right to contest elections may not be an unlimited one, although those limits cannot be exempt from the power of review.

It is therefore necessary to analyze the different ways the electoral process may become the subject-matter of a constitutional or judicial dispute. I say a constitutional or judicial dispute because it is quite clear that, depending on the nature of the contestation as well on the particular provisions of the local or constitutional law, the matter may fall either within the jurisdiction of the ordinary courts or of a constitutional court; this will not only depend on the nature of the dispute at hand but also on the specific provisions of the particular constitution within the framework of which the dispute arises.

In order to attempt an analysis of the different ways in which a dispute relative to the electoral process may become the subject-matter of constitutional litigation, it is natural to follow the whole *iter* of the electoral process. The electoral process and the manner of participation in that process is not normally regulated in great detail by the constitution itself, and while constitutions lay down the general guidelines the detailed framework of the system is usually left to be provided for by ordinary legislation. Legislation may also usually provide for a balanced access to the media and for a plurality of other matters pertinent to the running of elections. Disputes may arise as to whether the system is sufficiently representative or fairly reflects the constitutional guidelines laid down and such matters may be pertinent to Constitutional review by a Court enabled to review legislation.

An electoral process also necessitates a number of administrative decisions connected with the logistics of holding a general election. In order to exemplify such matters, these would be issues relative to the registration of voters, issues relative to the distribution of constituencies, and issues relative to the whole manner in which the voting is to take place. Although most of these matters may be dealt with administratively, they would normally be regulated by legislation providing the parameters within which the administrative decisions are taken. These matters do not necessarily or always raise constitutional issues. The law may reserve the review of such decisions either to administrative or ordinary courts, and it may not be necessary to resort to a constitutional jurisdiction on such matters. However, whether such matters will raise a constitutional issue or not would also depend on the particular provisions of the local law and the local constitution. Moreover, the issue may also present a question touching upon the fundamental human rights of an individual and in that event the constitutional jurisdiction may well be, in a number of cases, called into play.

There is then also the consideration of the validity of the election itself, and in particular the validity of the election of any single member or official, as well as issues touching upon the qualification of an elected member to a particular office, or the incurring of disqualifications by an elected member or official. This is often a matter to be referred to a constitutional court in its constitutional jurisdiction, though of course there may be systems, where either all matters are referred to the ordinary courts as there would be no

¹ *Podkolzina v Latvia*, no. 46726/99, § 35, ECHR 2002-II.

² Application number 13716/02, decided on the 28th of March 2006.

constitutional court provided for, or where the particular matter, despite the existence of a constitutional court, would still be reserved to an ordinary court or some other body.

Lastly, there is the duty to see that an election is fair and allows for the proper expression of the popular will. That is, an election is to be free from illegal or corrupt practices. The Court may have a constitutional jurisdiction to enquire whether the election is thus free from corrupt practices and to take the necessary remedial action if it finds that corrupt practices have so extensively occurred as to substantially affect the electoral result.

The above is not intended to attempt an exhaustive list of the manner in which the electoral process may come to the attention of the ordinary tribunals or of a constitutional Court. It is only an attempt to cursorily list the different ways in which the problem may present itself, as this would usually have an effect on whether the constitutional jurisdiction is going to be called into play or otherwise. Whether such jurisdiction is called into play or not will ultimately depend also on the particular provisions of the constitution and laws under which the problem arises as this will have a determining role on the issue of whether the matter is to be decided as a constitutional issue or as a matter of ordinary law.

Besides, as we are seeing, disputes concerning the electoral process often develop into claims that the fundamental human rights of the individuals are in some manner being violated or breached. This may in turn ultimately call into play a further jurisdiction under the European Convention for the Protection of Human Rights and Fundamental Freedoms, that is the Strasbourg jurisdiction where local remedies have been exhausted without success. Indeed the European Convention itself, especially where the convention has been incorporated into local law, may open another avenue for the review of the electoral process either in front of an ordinary court or in front of a Constitutional Court; only after the local Courts have pronounced themselves on the matter would the dispute spill over to Strasbourg. There is thus a further element to take into account in considering the exercise of the constitutional jurisdiction in relation to the electoral process.

In situations where there is no Constitutional Court, such as in the United Kingdom, the incorporation of the Convention into United Kingdom legislation by the Human Rights Act of 1998 has introduced a further element of judicial review on the basis of the Convention. Under British Law, the Election Court (a Divisional Court of the Queen's Bench Division) has the power, in respect of the electoral process, to order a re-count, declare corrupt or illegal practices, disqualify a candidate from membership of the House of Commons and declare the runner-up duly elected, or to order a fresh election³. It is interesting in this context to refer to the case **The Liberal Party v UK** decided by the European Commission in Strasbourg in 1982; it was claimed that the British electoral system engendered a situation which violated both Article 3 of the First Protocol and Article 14 of the Convention as the electoral system produced a situation where the Liberal Party was under-represented in Parliament when one took into account the number of votes obtained by the Party. The Commission found that neither Article was breached as there was no obligation under Article 3 to bind the States as to the electoral system they should use, and that Article 3 does not add any requirement of 'equality' to the 'secret ballot'. But evidently in the United Kingdom the Convention rights may be used as a basis for bringing ordinary litigation under review in the British Courts in relation to the electoral process.

In systems operating a Constitutional Court, a number of issues may be reserved for the Constitutional Court to decide. The French Constitutional Council 'shall monitor the validity of the election of the President of the Republic.'⁴ It also 'investigates complaints and declares the result of the ballot.' In cases of dispute the Constitutional Council rules on the validity of the election of deputies and senators.⁵ It also monitors the validity of referenda and declares results.⁶ It is clear therefore that the Council exercises a constitutional jurisdiction with reference to disputed elections. In **Pierre-Bloch v France** the exercise of this constitutional jurisdiction by the Council led to the unsuccessful attempt by Pierre-Bloch to have the exercise of such jurisdiction declared to be in violation of his fundamental rights as protected by the European Convention.⁷ Mr. Pierre-Bloch failed as the Court held that the rights in question did not qualify as civil rights for the purposes of Article 6 of the Convention. But of course there have been a number of

³ Hilaire Barnett, *Constitutional & Administrative Law*, 4th edition, p.440.

⁴ Art. 58 of the French Constitution.

⁵ Art. 59 of the French Constitution.

⁶ Art. 60 of the French Constitution.

⁷ Judgement of the Strasbourg Court of the 21st of October, 1997.

applications to Strasbourg from several jurisdictions following the exercise of Constitutional review in connection with disputed elections.

Another case where a country which has a Constitution was sued before the Strasbourg Court relates to the Ukraine. In **Kovach v Ukraine**⁸ the applicant claimed that while he had received more votes than his rival candidate, he had been denied a seat in Parliament owing to the unfair counting procedure and the unfettered discretion of the constituency Electoral Commission. The European Court of Human Rights found that there had been a violation of Article 3 Protocol No.1 in that the local authority's decision to annul the vote in four electoral divisions was arbitrary and not proportionate to any legitimate aim on the Government's part. In particular, the Court noted that the irregularities in the process had not been so extensive as to make it impossible to ascertain the wishes of the voters without annulling the entire vote. As we will see later on, a similar approach is to be observed in English case-law regarding the challenging of election results where the Courts are reluctant to upset these results if the breach complained of is not such as to affect the final outcome of the result itself. The case of **Kovack v Ukraine** is also interesting insofar as the Strasbourg Court was scrutinising the review of the outcome of the electoral process made by the Ukrainian authorities, including the Supreme Court. In this respect it reflects the rather wide powers of review which the international Court has the power of exercising over the pronouncements of the domestic courts.

In reality, in democratic systems, elections seem a fertile ground for the calling into play of a constitutional jurisdiction. This stems from the need that there must necessarily be an overseeing of electoral processes to ensure that the will of the people is freely and honestly reflected in the vote. As was stated by the European Court in **United Communist Party of Turkey vs Turkey**, where the Turkish Constitutional Court had made an order dissolving the Turkish Communist Party on the ground that its programme contained statements to undermine the integrity of the state and the unity of the nation,

Democracy is without doubt a fundamental freedom of the European public order. That is apparent, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. [This emphasises] the prime importance of article 3 of Protocol No. 1 which enshrines an effective principle of an effective political democracy.⁹

It is this principle of the need to safeguard and guard a functioning democracy that underlies the basis for the exercise of a constitutional jurisdiction in electoral matters and that would presumably guide the Court in the exercise of such a jurisdiction. It is the belief that such matters are better discussed and solved as legal issues distanced from the heat and passions generated by partisan politics.

It is also to be pointed out that not all systems will entrust such matters to a constitutional review. In various systems, a number of issues would fall within the parameters of judicial review and be left for decision by the ordinary courts while other issues will be reserved for a constitutional jurisdiction. This much depends on the particular system operating within a particular constitution. In situations where there is no Constitutional Court, it would be natural for such issues as are thrown up by the electoral process to be decided by the judicial organ in its ordinary jurisdiction. A case in point would be the United Kingdom situation where no constitutional Court exists. In a number of situations the constitutional review may not be largely different from that exercised by the ordinary courts of the State. A case in point would be that of Malta, where the composition of the Constitutional Court is largely identical to that of the Court of Appeal, and there is little to distinguish the exercise of constitutional review from judicial review except in the name of the Court, and except of course that the Court in such cases would be exercising a constitutional jurisdiction which would not normally or otherwise be exercised by the Court of Appeal. To refer to the Maltese situation, the Constitution specifically refers a number of electoral disputes to the jurisdiction of the Constitutional Court. It also reserves to the Constitutional Court appeals touching matters involving the breach of human rights as protected either under the Constitution itself or under the Convention for the Protection of Human Rights and Fundamental Freedoms. In electoral matters the jurisdiction specifically reserved to the Constitutional Court comprises:

⁸ Application number 39424/02.

⁹ Cited in David Hoffman and John Rowe, *Human Rights in the UK*, at p.311.

Any question whether -

- (a) any person has been validly elected as a member of the House of Representatives;
- (b) any member of the House has vacated his seat therein or is required, under the provisions of sub-article (2) of article 55 of this Constitution, to cease to perform his functions as a member; or
- (c) any person has been validly elected as Speaker from among persons who are not members of the House or, having been so elected, has vacated the office of Speaker,

[which] shall be referred to and determined by the Constitutional Court in accordance with the provisions of any law for the time being in force in Malta”¹⁰

as well as:

“any reference made to it in accordance with article 56 of this Constitution and any matter referred to it in accordance with any law relating to the election of members of the House of Representatives.”¹¹

Under the Maltese system, the conduct and overseeing of elections are entrusted to an electoral Commission constituted under the Constitution. Among its powers the Commission has the power to suspend an election if it feels that corrupt or illegal practices have so prevailed as to substantially affect the electoral result. Should the Commission decide to so suspend an election, then it is under a duty under the Constitution to refer the matter to the Constitutional Court for a final decision on the matter. If, on the other, hand corrupt and illegal practices occur and the Commission does nothing about them, it is open to any voter to bring an application before the Constitutional Court not later than three days from the publication of the electoral result alleging that corrupt and illegal practices have so prevailed as to substantially affect the electoral result. In such circumstances the Constitutional Court has a very wide remit and jurisdiction and may make any such orders or give any such directions as it may consider appropriate or desirable to ensure that an election is free from corrupt and illegal practices, including among such orders the annulling of an election and an order that a further election be held.

Before turning to an examination of Maltese case-law regarding the jurisdiction of the Constitutional Court over electoral matters, I would like to take a glance at UK jurisprudence as even though no constitutional jurisdiction is here called into play, the decisions are still instructive. In the UK the position established by the case of **Morgan and another v Simpson** is that for an election not to be free and fair ‘the objection must be something substantial. Something calculated really to affect the result of the election’.¹² In that judgment Lord Denning had stated the law succinctly in three propositions:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the *Hackney* case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.
2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the *Islington* case, 17 T.L.R. 210, where 14 ballot papers were issued after 8pm.
3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result- then the election is vitiated. That is shown by *Gunn v. Sharpe* [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers did affect the result.

¹⁰ Section 63 of the Constitution of Malta.

¹¹ Section 96(1)(b) of the Constitution of Malta.

¹² *Morgan and others v Simpson*, [1974] 3 A11E.R.722.

It is interesting to note that where English courts have maintained that as much as possible they will not disturb an election, and this even where official duties and election rules may have been breached, provided that such breaches will not have affected the result of the election itself, the English Courts have always done so with a view to preserving as much as possible the will of the voters. This position is harvested from a perusal of such cases as **Woodward v Sarsons**¹³, **Islington**¹⁴, **Marshall v Gibson**¹⁵ and **Harris v Gilmour**¹⁶. A recent English case in this line of decisions is that of **John Fitch v Tom Stephenson, Harshad Dahyabhai Bhavsar, Annette Dawn Byrne and Colin Stuart Marriott**, decided by the Queen's Bench Division on the 1st of April of this year. Mr. Fitch, the petitioner in this case, had been defeated in the May 2007 local government elections for the 22 wards of Leicester City Council and brought an action under Section 127 of the Representation of the People Act 1983 alleging that the fact that a proportion of the votes cast were not counted constituted an irregularity in the conduct of the election such that it could not be said that the election had been conducted substantially in accordance with the law as to elections and contrary to section 48(1) of the Representation of the People Act. Mr. Fitch submitted that an election should be declared invalid if it appears that it was not so conducted as to be substantially in accordance with the law as to elections, irrespective of whether any failure affected the result. In their turn, Respondents claimed that the breaches complained of were not sufficient to invalidate the election process since the same candidates would have been elected even had all the votes been counted. The Court found that Mr. Fitch had not shown that the election in question had been 'so conducted as to be substantially in accordance with the law as to elections' and it therefore rejected his petition and declared the election confirmed. In particular, the Court reiterated that the courts should 'give effect to the will of the electorate and to preserve the election'. What is also interesting from a constitutional law point of view is the remark which the Court made when it substantiated its reasons for the rejection of the petition. The Court remarked, '*In the present case we do not consider that the informed member of the public would regard what happened as a travesty.*' This indicates that the Court also has in mind the confidence of the electorate as a benchmark for assessing whether or not to upset the electoral process.

English pronouncements regarding the courts' reluctance to disturb the result of an election may be compared with Maltese Constitutional Court pronouncements to the effect that the procedure for contesting the electoral process is one of public order which must be strictly observed. In 1998 two cases arose before the Maltese Constitutional Court following the general elections held that same year. The first of these, **Nazzareno sive Reno Calleja v Electoral Commission**, decided on the 20th of October 1998, was a case opened by a candidate who during the counting of the votes had requested the Electoral Commission to order a re-count of the penultimate count, where he had been outvoted. The Electoral Commission had declined this request and the candidate filed his application before the Constitutional Court. The Constitutional Court, however, refused his application owing to the fact that the plaintiff had not requested the re-count in the period of time established by law. The Constitutional Court reasoned that the procedure for impugning the electoral process was one of public order which therefore had to be followed, and it also highlighted that it was important that the time-limit for challenging the process was there in order to ensure the legal certainty of the entire process. A similar situation cropped up in **Ansell Farrugia Migneco v Electoral Commission**¹⁷ where the plaintiff submitted that the Electoral Commission had given a wrong interpretation of the electoral rules. Whilst rebutting the merits, the defendant also submitted that the First Hall of the Civil Court (in its Constitutional jurisdiction) lacked jurisdiction since the plaintiff had not observed the established procedure. Whilst this procedural plea was rejected by the first Court, which then found for defendant regarding the merits, the plea as to lack of jurisdiction was accepted upon an appeal to the Constitutional Court. The Constitutional Court reiterated that the procedure for attacking electoral processes was one of public order and was necessary to ensure legal certainty; since the plaintiff had not scrupulously followed the established procedure, the Constitutional Court could not entertain his claim.

The point of interest when the British judgments abovementioned are compared with the Maltese judgments relates to the reasons which motivate the decisions in both cases. Whereas UK Courts are reluctant to upset the electoral result even if the applicant adduces proof of breaches of the established electoral process, provided the breach in question does not affect the outcome of the result, and this in

¹³ (1875) LR 10 CP 733.

¹⁴ 5 O'M & H 120.

¹⁵ Divisional Court, Judgment of the 14th of December 1995.

¹⁶ Divisional Court, Judgment of the 11th of December 2000.

¹⁷ Decided on the 22nd of September 1998.

deference to the will of the electorate, the Maltese Constitutional Court has, on both occasions when the electoral process was challenged, refused to entertain the application and this on grounds of public order and legal certainty. The implied common ground between the Maltese and the English position seems to be that the Court gives prevalence to the electorate's interests in exercising its jurisdiction as a reviewing court. In the UK the interests of the electorate to have their choice respected are regarded as a cardinal principle and elections are therefore not to be invalidated so long as it can be ascertained that that choice remains legitimate, even in the presence of a certain amount of tampering. In Malta the interests of the electorate are interpreted as an interest for certain (i.e. definite) knowledge, in the sense that the result of an election cannot be held suspended for too long a time, as otherwise the confidence of the people in their own vote will be undermined. This prompts the Maltese Constitutional Court to place the emphasis on the procedural aspect. Thus, while the Maltese approach may be criticised for refusing to scrutinise potential fundamental human rights and constitutional law breaches merely on procedural grounds, albeit legally established ones, the Court's approach is to interpret the procedure itself as safeguarding the collective interests of the electorate. In a way, therefore, in their constitutional jurisdiction to review the electoral process, what the English Courts achieve substantively in terms of protection of the interests of the electorate, the Maltese Courts achieve procedurally.

An interesting issue arose in front of the United States Courts in the presidential elections of 2000 in connection with the counting of votes. Unfortunately in the process of the election of a United States President it may well happen that the person getting the lesser number of votes gets elected. When the decision of the result becomes dependant on judicial decisions situations may easily arise which will cause confusion or undermine the confidence of the public in the electoral process.

The importance, in a democracy, of a transparent and fair electoral process for both individual and collective rights to be respected immediately takes on real shape if one but thinks of electoral crises. The guiding principle in the exercise of a constitutional jurisdiction is that the function of the Court is ultimately to ensure the prevalence of the will of the electorate. If this were not so public confidence in the election process would be heavily compromised. It is important that the public perception remains throughout that it is the decision of the electorate that has prevailed.