

**AN ANALYSIS INTO THE DEGREE OF DISCRETION
EXERCISED BY THE AG IN DRUG TRAFFICKING CASES**

Dissertation presented by Abigail Bugeja

In partial fulfilment of the requirement for the

Master of Arts in Law

Faculty of Laws

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University of Malta
L-Universita' ta' Malta

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ABSTRACT

The dissertation will provide an analysis on legal provisions empowering the Attorney General to decide whether the trial concerning drug traffickers should take place before the Criminal Court or before the Court of Magistrates, and whether such provisions impinge on the accused persons' fundamental human rights. The main focus of this study will be Act XXIV of 2014 and it will serve to determine whether this recent legal enactment has provided an effective remedy to the Attorney General's unfettered discretion.

The study will first analyse various pieces of literature including relevant dissertations which have been submitted to the University of Malta, judgements delivered by the European Court of Human Rights and the Maltese Constitutional Court, including Court decrees which have been delivered by the Criminal Court following the introduction of Act XXIV of 2014. This assessment will be seen in context with the analysis carried out on Act XXIV of 2014 in order to establish whether the infringements highlighted in the above judgements and or dissertations have been addressed by the legislator in the above-indicated legal enactment and also whether an 'effective remedy' has been granted.

This study will also include a factual case analysis and a set of in-depth semi-structured interviews in order to better evaluate the present legal problems and to establish whether any recommendations and or suggestions to these problems can be put forth.

Keywords: *Attorney General, Discretion, Effective Remedy.*

To John, Kate & Ana

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LIST OF ABBREVIATIONS

AG	Attorney General
CPS	Crown Prosecution Service
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
UK	United Kingdom

CHAPTER 1

METHODOLOGY

1.1 Introduction

The purpose of this chapter is to provide details about the research design in order to determine whether the applied methodology was appropriate to answer the research question. It will delineate and explain the utilised research method including any necessary deviations to answer the research question. The research method will be clearly explained in the following sections (a) whether a qualitative or quantitative method of research was adopted, (b) how the adopted method of research fit the dissertation question, (c) the utilised methods of research, (d) the use of in-depth semi-structured interviews, (e) literature review, (f) ethical considerations, (g) data analysis and (h) Conclusion.

1.2 The Method of Research

This study has undertaken a mixed approach towards research methodology. A qualitative and a quantitative method of research were each found to be useful for data collecting and also for the purposes of assessing this data when answering the research question.

The quantitative method involved research data which already has been predetermined in objective, quantitative and valid data.¹ Whereas, the qualitative research method has sought to collect, analyse and interpret data from what individuals say or do. The latter method is considered as subjective and includes various methods of research such as in-depth interviews and focus groups. This

¹ John D. Anderson, 'Qualitative and Quantitative Research' <http://https://www.icoe.org/webfm_send/1936> accessed 13th February 2015.

research method is regarded as an exploratory method and has given rise to various open-ended answers.²

The aim of this study was to generate rich and valid data. This data has been gathered once an in-depth understanding of the subject was carried out. For this reason, it was important to first analyse Act XXIV of 2014 followed by an assessment of judgements delivered by the European Court of Human Rights and the Maltese Constitutional Court. By understanding these judgements, the study has identified whether the above judgements have adopted the *raison d'être* reached by the European Court of Human Rights and whether these judgements have called upon the legislator to intervene in providing an effective remedy to the highlighted legal breaches. The aim was to seek an interplay between theory and assessment with the scope of identifying irregular patterns which might prejudice an accused person's right to a fair hearing.

Another source of rich data included the semi-structured in-depth interviews. A limited number of participants were chosen and selection was based on their knowledge, skills and experience on the subject. These have been asked to answer five specific questions. The scope of these interviews was solely limited to assess the participants' response in regard to the present legal position.

As stated above, this study also aimed at utilising in part the quantitative method of research. The assessment has recognised that the qualitative method of research might have its limitations when gathering data. In view of this, the results of the qualitative method of research have been merged within the quantitative method of research with the scope of providing an insight into various aspects of this study. This mixed method of approach has enabled collection of diverse types of data in order to offer a better understanding of the research question.³

In view of this mixed approach, the study has primarily assessed judgements delivered by the European Court of Human Rights, the Maltese Constitutional Court and the respective decrees given by the Criminal Court from August 2014 to date.

² *Ibid*

³ John W. Creswell, 'Research Design, Qualitative, Quantitative and Mixed Methods of Approaches' (2ND Edition, SAGE Publications, 2003) <http://sites.harvard.edu/fs/docs/icb.topic1334586.files/2003_Creswell_A%20Framework%20for%20Design.pdf> accessed 13th February 2015.

This will be followed by an analysis of the opinions gathered from the semi-structured interviews. Another section of this study will specifically deal with a factual case assessment of an on-going Court case in connection with the Discretion Proceedings. This will serve to highlight the problems encountered, if any result. Finally, this study will present an overview of all Court decrees given by the Criminal Court in relation to the Discretion Proceedings.⁴ It is to note that such decrees were only made available once the appropriate requests were made to the Court. However, all the stages will be indicated in the respective sections of this study.

1.3 How the Method of Research Fit the Research Question

A monistic method of research would have proven to be inadequate for the purposes of answering the research question. As a matter of fact, the mixed method of research has assisted in developing multiple perspectives and a complete understanding of the research question.

The assessment has been carried out to view problems from multiple perspectives so as to enrich the meaning of a singular perspective.⁵ Another reason why merging qualitative data with quantitative data proved to be useful, is because it has provided a complete understanding of the problem and it has also assisted to further develop a complimentary picture of the present legal position. This picture has been completed once the gathered data was compared, validated and triangulated. The scope of having a quantitative method of research following a qualitative method of research, was to formulate suggestions and recommendations informed by the qualitative data.

The first step of the mixed research method involved making a decision about what the long-term aim of this dissertation is.⁶ In this case, the sole aim was to assess

⁴ Refer to Para. 1.4.

⁵ National Institutes of Health, 'Best Practices for Mixed Methods Research' <http://obssr.od.nih.gov/scientific_areas/methodology/mixed_methods_research/section2.aspx> accessed 13th February 2015.

⁶ Anthony J. Onwuegbuzie and Nancy L. Leech, 'Linking Research Questions to Mixed Methods Data Analysis Procedures' <[file:///C:/Users/Abigail/Downloads/MixedMethodsResearchQuestions.TQR%20\(2\).pdf](file:///C:/Users/Abigail/Downloads/MixedMethodsResearchQuestions.TQR%20(2).pdf)> accessed 13th February 2015.

whether the recent legal enactment has addressed the infringements highlighted in judgements delivered by the ECtHR and whether it provided an effective remedy.

In view of the above criteria, it was imperative that upon utilising the mixed method of research, this study provides an exploration, a description, an explanation and a prediction of the research question. A better understanding of the research question can only guarantee that this study provides a correct set of suggestions and recommendations.

By analysing the Attorney General's degree of discretion in drug-trafficking cases shows that this study is intended not to stay quoting and explaining the relevant legal provisions but to investigate whether the introduction of Act XXIV of 2014 has counter-addressed the violating legal provisions. This research question has been formulated both on past and present working experience and also on the practical need to make recommendations in such specific area. Why is it important? The scope of these recommendations is to provide an insight into the present legal position and offer improvements and or other alternatives which if adopted, can further guarantee an accused person's right to a fair and impartial hearing. This specific research question has adopted a mixed method of research because the above-indicated subject is central, interactive and evolving.

In view of the fact that such research question is considered to be as consequence oriented and problem-centred, the mixed research method has collected data in order to understand better the resulting research problem.⁷ This study has resulted complete only after the research question carried out an in-depth analysis of the present legal position backed up by a quantitative method of research.

1.4 The Adopted Methods of Research

This study has pursued a triangulation method of research. This method of research provided a wider and deeper understanding of the research assessment in

⁷ John W. Creswell, *Research Design, Qualitative, Quantitative and Mixed Methods of Approaches* (2ND Edition, SAGE Publications, 2003) <http://sites.harvard.edu/fs/docs/icb.topic1334586.files/2003_Creswell_A%20Framework%20for%20Design.pdf> accessed 13th February 2015.

determining whether the Attorney General's discretion in drug-trafficking cases is wide and unfettered. This method of research aimed solely at providing reliability to its content and credibility to its readers.

This method of research entailed three methods of assessment in order to verify whether the introduction of Act XXIV of 2014 has mitigated the Attorney General's discretion in drug-trafficking cases. In this respect, the research data includes: (a) In-depth semi-structured interviews, (b) a Factual Case Study, and (c) a list of all decrees delivered by the Criminal Court between August 2014 to date.

The factual case study includes minutes relating to Court sittings held before the Criminal Court in connection with the Discretion Proceedings. The purpose was to identify whether any issues relating to such proceedings emanate from this assessment. In gathering this information, it has assisted in determining whether its outcome corroborates with the findings of the next research method i.e. the in-depth semi-structured interviews.

The in-depth semi-structured interviews have followed an open and informal type of interview style. Their main purpose was to compile a list of all present legal *lacunae* as well as an assessment of these shortcomings, and possible recommendations. The participants for these interviews included keynote legal professionals who have been provided with a set of questions which have been discussed during the said interviews. The aim of these interviews was to gather additional substantive data from all experienced participants concerning the present legal position.

The recordings of these interviews were done by an audio recording which have been transcribed for data analysis purposes. The main benefits about this method of research included: (a) the high level of information gathered from the selected participants, (b) the emergence of unexpected issues or recommendations to the existing legal problems made by the same participants and (c) a better evaluation of the participants' perspectives and work experiences.

The interview questions were formulated after having conducted a considerable amount of research on the respective subject. As a matter of fact, the participants' response to these questions has resulted reliable and consistent.

The case study includes a factual case analysis of an on-going Court case where the Attorney General has referred the accused for trial before the Criminal Court. This case will explain how the discretion proceedings were filed, the respective sittings which took place before the Criminal Court and their outcome. This study will provide a detailed account of what shortcomings were encountered throughout the whole procedure and whether any recommendations can be made for such shortcomings. This method of research has sought to be well-documented in order to ensure validity and reliability in terms of addressing the research question.

1.5 The In-Depth Semi-Structured Interviews

The interview schedule was designed with five key questions which included the following:

- 1. Do you think that the introduction of Act XXIV of 2014, with particular reference to Part III (Medical and Kindred Professions Ordinance), Part VII (Dangerous Drugs Ordinance) and the Fourth Schedule, has fully addressed the issues relating to the AG's unfettered discretion in determining whether an individual should stand accused before a Court of Magistrates or face a trial by jury?*
- 2. Do you think that the above indicated legal amendments have addressed the issues raised in judgements given by the ECtHR and by the Maltese Constitutional Court?*
- 3. Do you think that these amendments have addressed the issues relating to the concept of 'foreseeability'?*
- 4. Do you think that additional remedies are required in order to provide effective safeguards against arbitrary punishment?*

5. *Do you envisage other instances apart from when the AG decides on whether an accused should have his case heard before the Court of Magistrates or before the Criminal Court, that require the legislator's intervention to further mitigate the AG's discretion?*

The interviewed participants were selected purposively. This selection was mainly based on their **a.** area of specialisation, **b.** work experience in such area of specialisation and **c.** approachability and willingness to contribute to this research.

Prior conducting the said interviews, all participants were first given a clear statement on what the research is about and what their participation will be. Participants have also been provided a verbal statement that confidentiality of records identifying them will be strictly maintained. It was indeed necessary that participants disclosed their thoughts, feelings, perceptions and opinions at the said interviews. That is why, anonymity has been thoroughly assessed and guaranteed. *'Trust is fundamental and must be maintained through professionalism and respect for each person whose perspective through this method should be recognised as unique and valuable'*.⁸

The most interesting aspect behind these semi-structured interviews was that an informal dialogue was created with the selected participants, whose views and opinions have never before been heard. Furthermore, the scope was to gain an insight and understanding of the participants' opinion in connection with the research question. This method of research was an opportunity to gather rich data which was later assessed in multiple ways.

1.6 Literature Review

The study includes a literature review which aims at restricting problems emanating from the research question and at identifying recommendations and suggestions for

⁸ Nigel Newton, *'The use of semi-structured interviews in qualitative research: strengths and weaknesses'* <https://www.academia.edu/1561689/The_use_of_semi-structured_interviews_in_qualitative_research_strengths_and_weaknesses>accessed 16th February 2015.

further legislative enactments. The literature review includes a distinction between what has been written so far and what requires additional insight.

The main priority in conducting a literature review was to combine all data findings across all methods of research and attempt to resolve any shortcomings emanating from the present legal position and from Act XXIV of 2014. This includes a critique analysis of previous contributions, an identification of main concerns and a production of a line of argument within this sphere.

Justus J. Randolph describes the stages of conducting a literature review as including:

- a. *Problem Formulation*
- b. *Data Collection*
- c. *Data Evaluation*
- d. *Analysis and Interpretation*
- e. *Public Presentation*⁹

The research problem has already been formulated and it was the aim of this study to establish whether the introduction of Act XXIV of 2014 has mitigated the Attorney General's discretion in determining whether an accused should face trial before the Court of Magistrates or the Criminal Court. The data related to this question has been collected according to the research methodology indicated above. The respective data has been evaluated and assessed once the research instruments have been utilised for data collection purposes. Some research data may be excluded from this study because it might be of little relevance to the research question. The particular criteria for inclusion and exclusion were influenced by the study's focus, goals and coverage.¹⁰ At the fourth stage of the literature review, this study provides an interpretation of the gathered material in order to integrate such data by providing a synthesis. Following these findings, the research lists down all concerns relating to Act XXIV of 2014 and explain why such concerns are important. The study has sought to elaborate on how these concerns can be addressed by means of recommendations and suggestions.

⁹ Justus J. Randolph will, '*Practical Assessment, Research and Evaluation*' (Vol. 14 No. 13, June 2009) <<http://pareonline.net/pdf/v14n13.pdf>> accessed 16th February 2015.

¹⁰ *Ibid.*

This study aimed at providing a successful literature review by relating all findings of the review to this research, by defining the best data sources, by relying mainly on primary sources of data, by providing a critical analysis of all research data and by merging statistical results with other research methods.

1.7 Ethical Considerations

This research necessitated an adherence to ethical norms partly because it helped to promote the aims of the research and also because the research entailed a considerable amount of collaborative work.

The approach towards collecting and interpreting data had to be ethically correct. In this regard, all individuals who have contributed to this research have received a clear statement of what the research is about and what their participation will be. Other participants taking part in the semi-structured interviews have been offered the possibility of remaining anonymous and also whether the same interviews can be recorded by means of audio recorders.

The following criteria have ensured the study's quality and integrity: (a) informed consent from all the participants contributing to this research, (b) respect for confidentiality and anonymity of all participants, (c) the participants' voluntariness to participate in the study, (d) avoidance of any possible harm to all the participants and (e) an independent and impartial research.

In addition to the above, it is also important to clarify that any critique analysis made in respect to other research studies was not intended to underestimate such work, but it was simply being made to draw up a comparative assessment between what has already been contributed to this area of specialisation and other areas which to date remain unexplored.

1.8 Data Analysis

The research aimed to present the collected data and its analysis in a comprehensive and understandable manner. In brief, the data analysis provides a formulation of the conclusion and the respective recommendations based on a detailed description of the various types of data, the respective methodological approach and the utilised research tools.

1.9 Conclusion

The Methodology indicated in this Chapter was considered to be appropriate and most suitable for the purposes of developing this study and achieve its purpose. The research instruments have been applied to the collected material in order to obtain the research findings. The findings are presented in Chapter 4.

CHAPTER 2

PROLEGOMENA

2.1 Background to the Study

The aim of this dissertation is to provide an analysis into the recent legal amendments introduced by means of Act XXIV of 2014 and on other legal provisions which empower the Attorney General to decide whether cases concerning drug traffickers should be heard before the Court of Magistrates or the Criminal Court. The objective is mainly to identify whether the recent legal amendments have addressed issues relating to the AG's unfettered discretion and to assess whether the law as it stands today continues to impinge on the accused persons' fundamental human rights.

The introduction of Part III, Part IV and the Fourth Schedule within Act XXIV of 2014 were specifically intended to counter-address issues raised in judgements delivered by the European Court of Human Rights (ECtHR) and by the Constitutional Court of Malta. In this respect, it is indeed opportune to list down the core provisions introduced by means of Legal Notice XXIV of 2014.

Article 77 of Part III includes the amendments concerning Chapter 31 of the Laws of Malta¹¹. The new provision, that is Sub-article (2E) of Article 120A, states that the Attorney General shall follow the Fourth Schedule Guidelines when giving direction on where an accused person should be tried, that is, either before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court.

Sub-section (2E)(b) of Article 120A of Chapter 31, provides the core remedy which can be availed of by an accused person and permits him to file an application requesting the Court to be tried before the Court of Magistrates as a Court of

¹¹ Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta.

Criminal Judicature instead of the Criminal Court. This provision specifically states that such application is only allowed when the Attorney General has directed that a person should be tried before the Criminal Court and within seven days from the conclusion of the inquiry. The same application shall then be served on the Attorney General who will then have seven days to file a reply. Following the filing of the accused's application and the Attorney General's reply, the Criminal Court, if it considers it necessary, shall proceed to hear oral submissions from the accused and the Attorney General. Once the oral submissions have been made, the Criminal Court will then decree the accused's Court application and decide whether he shall be tried before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court.

Prior to highlighting other legal provisions, it would indeed be opportune to first comment on the term '*conclusion of the inquiry*' which the legislator inserted in this provision, and secondly, to provide the reader with a specimen Court application as required by Sub-section (b) of Sub-article (2E) of Article 120A. With regards to the former term, it is to be noted that when Act XXIV of 2014 came into force, many lawyers were unable to identify whether the term '*conclusion of the inquiry*' referred to when the acts of the inquiry are remitted back to the Attorney General's office or when the Court of Magistrates as a Court of Criminal Inquiry declares that the Prosecution has produced sufficient evidence to commit the accused under a bill of indictment. The inclusion of such term in the above legal provision has initially created a bit of confusion, because in reality the conclusion of an inquiry only takes place when the Court of Magistrates as a Court of Criminal Inquiry commits an accused person under a bill of indictment. This issue had also necessitated the intervention of the Chamber of Advocates which purportedly released information guidelines a few weeks after such legislation came into force, precisely on the 11th of September 2014. The information given by the Chamber of Advocates addressed two main points: (a) the transitory provisions and (b) the significance of the term '*conclusion of the inquiry*'. The transitory provisions encapsulating the one month period which expired on the 15th of September 2014 applied only to cases which already had their bill of indictment issued. Other cases which were still being heard before the Court of Magistrates as a Court of Criminal Inquiry and which had no bill of indictment were not required to file a Court application within the 1 month period.

The second clarification concerned the term '*conclusion of the inquiry*' and according to the Chamber of Advocates, this included those instances where the Court of Magistrates as a Court of Criminal Inquiry remits the records of the inquiry to the Attorney General's office after the latter would have sent it back to Court following the decree to the effect that a *prima facie* case has been established.¹² The answer to whether this is the correct interpretation or not, will not be given at this stage but will be provided in Chapter 4.

With regards to the specimen Court application, the author thought it would be opportune to present the reader with an overview of what is normally stated in the Court application and how the requests to the Court are formulated. Given that the official language of the Courts is the Maltese language, such specimen can only be reproduced in Maltese. Reference to this can be made to Appendix A of this thesis.

The above-mentioned Court application should at least contain a brief outline of the facts surrounding the case including some referencing to Act XXIV of 2014. It is also important to link these facts with the requirements as set out in the legal provisions in order to show that the applicant deserves to have his application acceded to. Finally, the accused should formally request the Criminal Court to allow him to stand trial before the Court of Magistrates as a Court of Criminal Judicature instead of the Criminal Court.

Moving on to sub-section (b) of Sub-article (2E) which includes two provisos: the first states that the accused may file this Court application just once whereas the second proviso limits an accused person to a one month period within which to file his Court application if he is awaiting trial before the Criminal Court.

Following these two provisos, sub-section (2F) then provides that after the Criminal Court considers a. the circumstances of the case, b. the amount and the nature of the drug involved, c. the nature of any previous convictions including convictions in respect of which an order was made under the Probation Act, and d. the character of the person concerned, if the same Court concludes that the application of the

¹² Chamber of Advocates, 'Act XXIV of 2014', <http://www.avukati.org/news_detail.aspx?id=381678>accessed on 22 July 2015.

punishment provided for in paragraph (a) of sub-article (2) would be disproportionate, upon giving sufficient reasons, it may apply the punishment provided in paragraph (b) of sub-article (2).

Article 88 of Part VII includes the amendments concerning the Dangerous Drugs Ordinance¹³, Chapter 101 of the Laws of Malta. It introduces Article (2A) (a) following sub-article (2) of Article 22 which provides that the Attorney General shall follow the Fourth Schedule Guidelines when giving direction on where an accused person should be tried that is either before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court. This is precisely similar to what was introduced in Chapter 31 of the Laws of Malta by means of sub-article (2E) (a) in Article 120.

Sub-section (b) of Sub-article (2A) of Article 22 then provides the same remedy which was inserted in Chapter 31 of the Laws of Malta, that is, an accused person may file a Court application requesting the Criminal Court to be tried before the Court of Magistrates as a Court of Criminal Judicature instead of the Criminal Court. It is to be reminded that such application is only allowed when the Attorney General has directed that a person should be tried before the Criminal Court and within seven days from the conclusion of the inquiry. The same application shall then be served on the Attorney General who will then have seven days to file a reply. Once the accused person's Court application and the Attorney General's reply have been filed, the Criminal Court, if it considers it necessary, shall proceed to hear oral submissions from the accused and the Attorney General. Upon conclusion of the said oral submissions, the Criminal Court shall decree the accused's Court application and decide whether he shall be tried before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court.

Sub-section (b) of Sub-article (2A) also includes two provisos: the first states that the accused may file this Court application just once whereas the second proviso limits an accused person to a one month period within which to file his Court application if he is awaiting trial before the Criminal Court.

¹³ Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta.

Following these two provisos, sub-section (2B) includes the same exact wording inserted in sub-section (2F) of Article 120A of Chapter 31. This proves that the amendments inserted in Chapter 31 and in Chapter 101 of the Laws of Malta are the same including the criteria which the Court must follow when applying a different punishment.

Another salient aspect of these amendments includes the guidelines as listed in the Fourth Schedule of Act XXIV of 2014. A brief preamble to the guidelines state that such are only applicable to all accused persons who are sixteen years of age and over. Secondly, the law sets out other criteria for the Courts to observe and to follow in deciding whether an accused person should face a trial by jury or before the Court of Magistrates. These criteria include: a. the harm or the potential harm caused by the offence charged; b. the quantity of the drug; and c. the role played by the accused in the crime. The law elaborates further on the role played by the accused and draws a distinction between persons who played a leading role, others who play a significant role and individuals who have a lesser role in the commission of the offence.

The law lays down several criteria which serve as guidelines in determining whether the accused had a leading role in the commission of the offence. These criteria include the following:

- *That the accused organized or directed buying and selling of a drug on a commercial scale;*
- *That the accused had substantial links to and significant influence on other persons in a chain;*
- *That the accused had close links to the original source of the drugs;*
- *That the accused made substantial financial gain or had an expectation of substantial financial gain;*
- *That the accused used a legitimate business as a cover for buying or selling drugs;*
- *That the accused had abused a position of trust or of significant responsibility in the commission of the offence, for example when the accused is a prison employee or a legal or medical professional.*¹⁴

¹⁴ Act XXIV of 2014, Fourth Schedule, Guidelines on the Exercise of Discretion

The law further lays down guidelines in determining whether the accused had a significant role in the commission of the offence, which guidelines include:

- *That the accused had an operational or a management function within a chain;*
- *That the accused involved others in the operation either by exerting pressure or influence upon them or by intimidation or offer of reward;*
- *That the accused was motivated by the prospect of financial gain or other advantage, irrespective of whether the accused was acting with others;*
- *That the accused appeared to be aware and to understand the scale of the operation;*
- *That the accused, not being a person abusing a position of trust or responsibility, supplied the drug to a prisoner for gain but without coercion.*¹⁵

In addition to the above, and for an accused person to benefit from the criteria laid down for a lesser role, the following must be observed:

- *That the accused has performed a limited role in the commission of the offence and has acted under the direction of others;*
- *That the accused was engaged by others to commit the offence by pressure, coercion or intimidation;*
- *That the accused got involved in the commission of the offence because of his naivete or because he was exploited by others;*
- *That the accused had no influence on those above him in a chain;*
- *That the accused had very little, if any, understanding of the scale of the operation;*
- *That taking all circumstances into account it is reasonable to conclude that the accused was involved in the commission of the offence solely for the purpose of obtaining drugs for his own use;*
- *That the accused made no financial gain from the offence, for example in cases involving a common purchase of a minimal quantity for no profit or the sharing of a minimal quantity between friends on a non-commercial basis.*¹⁶

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The Fourth Schedule Guidelines lists also some aggravating factors which necessarily need to be taken into account when determining whether an accused person should face trial before the Criminal Court or before the Court of Magistrates as a Court of Criminal Judicature. These aggravating factors include: a. whether an accused person has tried concealing the drug and what methods of concealment were used; b. whether an accused person has attempted to conceal the drug and or dispose of any of the evidence; c. whether other individuals have been endangered whilst cutting the drug with harmful substances; d. whether the drug is of high purity or of low purity; e. whether the accused has tried offering the drug to vulnerable individuals or at places attended to by minors and e. whether children and or non-drug users were present when the commission of the offence took place.

The guidelines further add that where the amount of heroin and cocaine do not exceed 100 grams or where the amount of cannabis does not exceed 300 grams, such individuals should not be referred for trial before the Criminal Court. This means that the respective individuals' trial should take place before the Court of Magistrates as a Court of Criminal Judicature. It is important to highlight that this is the very first time that the legislator has set out a threshold concerning drug laws. Before the introduction of such laws, the only thing one could do was simply refer to past judgements and see what punishment was given in situations involving specific type of drugs. But does this mean that with these thresholds, legal professionals can finally stop referring to past Court judgements? Do we consider the threshold guidelines as sufficient enough to simply decide which cases don't have to be referred for trial before the Criminal Court? For obvious reasons, if a case does not satisfy the threshold requirements, then it is anticipated that such case will immediately be referred for trial before the Criminal Court. It would then be up to the accused to file a Court application and request to have his trial held before the Court of Magistrates as a Court of Criminal Judicature instead of the Criminal Court. However, it would be interesting to investigate whether there have been cases involving drugs in excess of the listed threshold amounts and which still have been referred for trial before the Court of Magistrates as a Court of Criminal Judicature. This analysis will form the subject matter of the findings chapter which will be reported in Chapter 4.

The Fourth Schedule Guidelines also provide that any assistance provided by the accused to the Police and or to the Prosecution may be taken into account. This assistance is mainly taken into consideration only when the above proceedings are lodged by the accused and for the purposes of determining whether an accused should face trial before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court.

This research will mainly focus on the above legal amendments, also commonly referred to as '*The Discretion proceedings*'. However, prior to assessing the requisites of the Discretion Proceedings, the dissertation will first outline the competences exercised by the Criminal Court and the Magistrates' Court. It will also highlight those instances when the Attorney General refers a case for trial before the Criminal Court instead of the Court of Magistrates.

The study will proceed to focus on decisions given by the European Court of Human Rights and on recent judgements delivered by the Maltese Constitutional Court. This analysis will be carried out in order to determine whether the Attorney General was given powers similar to those given to a judge when choosing where to try an individual. In assessing these, it will then be determined whether the recent legal amendments have addressed all issues raised in the above judgements.

2.2 Purpose of this Study

The purpose of this study is to assess whether the introduction of Act XXIV of 2014 has addressed all issues raised in judgements delivered by the European Court of Human Rights and the Maltese Constitutional Court. With specific reference to the case of *Camilleri v. Malta*,¹⁷ the applicant had requested the Court to declare the Attorney General's discretion in violation of Article 6 and Article 7 of the European Convention of Human Rights. The merits of this case together with the outcome of these proceedings will be discussed in further detail at a later stage, however, this study aims at reviewing the conclusions of the ECtHR and other constitutional

¹⁷ *Camilleri v. Malta*, App. No. 42931/10, (ECHR, 22 January 2013)

references filed before the Maltese Constitutional Court in order to determine whether Act XXIV of 2014 has addressed the highlighted legal infringements. The research also aims to analyse the applications filed before the Maltese Constitutional Court in order to determine whether the Constitutional references share any similarities. A variation in these constitutional references might simply occur because an accused person might be charged under the Dangerous Drugs Ordinance¹⁸ or under the Medical and Kindred Professions Ordinance.¹⁹ However, it would be ideal to review the Constitutional references in their entirety.

The purpose of reviewing the above material is specifically intended to ascertain whether the recent enactments, precisely Act XXIV of 2014, have addressed all infringements highlighted in the above indicated judgements. If not, this study will also provide a critical analysis of all shortcomings resulting from these new legal provisions with the intention to provide suggestions and or recommendations for possible future legal enactments, which would further guarantee the right to a fair and impartial hearing.

This assessment requires most importantly a practical approach in order to identify any shortcomings resulting from the recent legal enactment. By identifying these shortcomings, it is also my intention to provide a critique analysis with the scope of providing suggestions to fine tune the present legal position and ensure that an accused person's fundamental human rights are indeed safeguarded. It is indeed important that this study is carried out because from my practical experience, I feel that sensitive issues such as the recent legal amendments must be scrutinised to ensure that an accused person undergoes a fair and impartial hearing.

2.3 Organisation of this study

As stated in Paragraph 2.2, the study aims to assess judgements delivered by the European Court of Human Rights and by the Maltese Constitutional Court together with the 'discretion proceedings' decrees given by the Criminal Court.

¹⁸ Chapter 101 of the Laws of Malta

¹⁹ Chapter 31 of the Laws of Malta

After having analysed the above judgements, Constitutional references and other Court decrees, it is also my intention to conduct interviews among various professionals specialised in criminal law and gather their opinions on the above subject. The idea behind these interviews is to assess whether according to the selected participants, the above legal amendments have addressed all issues raised in judgements delivered by the ECtHR and the Maltese Constitutional Court. The participants will be asked to confirm whether sufficient remedies have been provided to an accused person especially when the Attorney General exercises his discretion in choosing the forum where to try an accused person. These interviews will be carried out amongst present and former members of the judiciary, defence legal practitioners and also legal practitioners forming part of the Attorney General's office. It was also my intention to interview the Honorable Minister for Justice, however until to date, the request sent by email has remained unanswered.

Following these interviews, this research will present a factual case analysis of a present on-going Court case whereby the accused person had expressed his wish to lodge the discretion proceedings. Notwithstanding the fact that cases such as this will be rendered public once judgement has been given, it is indeed my priority to retain confidentiality of all concerned individuals. The purpose behind such analysis is purely limited to the scope of identifying all problems encountered with the discretion proceedings and to assess other instances where the discretion of the Attorney General might be wide and unfettered.

The dissertation will also provide a non-exhaustive list of all decisions given by the Criminal Court in relation to the Discretion Proceedings. This is subject to the Court's authorisation given that permission to access such decrees would need to be requested from the Court beforehand. However, all my requests will be minuted and any outcome will be recorded in this study. The purpose of this task is to provide a statistical overview of all discretion proceedings' decisions given by the Criminal Court starting from the introduction of Act XXIV of 2014 and provide a list of criteria which the Criminal Court bases itself upon when deciding whether an accused should face trial before the Court of Magistrates or before the Criminal Court.

Finally, the study will carry out a critique analysis of all shortcomings encountered throughout and will provide recommendations based on these shortcomings.

2.4 Chapter Map

The first chapter entitled 'Methodology' has outlined all the steps which were followed in this study and which steps included (a) whether a qualitative or quantitative method of research was adopted, (b) why the proposed research method is appropriate for this study and (c) how the research method will achieve the desired outcome.²⁰

The chapter on literature review will follow straight after chapter 2. The purpose of writing a literature review is to convey to the reader what knowledge and ideas have been established on the research question, and to identify the strengths and weaknesses of the recent legal amendments.²¹

The literature review will seek useful information by analysing various pieces of literature in an efficient manner and also by conducting a critical appraisal of such research.²²

Based on the above requisites, this study intends primarily to review and analyse the below listed research material:

- A. Dissertations presented at the University of Malta until the year 2014;
- B. Judgements delivered by the European Court of Human Rights;
- C. Judgements delivered by the Maltese Constitutional Court;
- D. Court Decrees given by the Criminal Court in connection with the Discretion Proceedings; and
- E. Any newspaper articles relating to the subject matter.

Following this review and assessment, this research will proceed to provide a critical appraisal of all gathered material. This critical appraisal will also be envisaged in the reviewing of Act XXIV of 2014.

Chapter 4 will be based on Research Findings and will mainly include an analysis of the above-indicated gathered data. The findings will relate to the research question

²⁰ Diane M. Dusick, Ph.D., 'Writing the Methodology Section' <<http://bold-ed.com/barrc/method.html>> accessed 12th February 2015.

²¹ Dena Taylor, 'The Literature Review: A Few Tips On Conducting It' <<http://writing.utoronto.ca/advice/specific-types-of-writing/literature-review>> accessed 12th February 2015.

²² *Ibid.*

in connection with the Attorney General's degree of discretion in drug-trafficking cases. The respective data will then be classified into three sections. The first section deals with an analysis of judgements and decrees given by the European Court of Human Rights, the Maltese Constitutional Court and the Criminal Court. The second section will provide an insight into the semi-structured in-depth interviews, whereas the third section will deal with a factual case assessment of an on-going Court case in connection with the Discretion Proceedings. This section will minute all applications filed before the respective Court, the sittings which took place and also the outcome of such proceedings. Finally, this study will present a statistical overview of all Court decrees given by the Criminal Court in relation to the Discretion Proceedings. These statistics will serve the purpose for delineating the criteria which the Court mostly bases itself upon in determining whether an accused person should face trial before the Court of Magistrates or before the Criminal Court.

Based on the above findings, the concluding chapter will make a thorough appraisal of Act XXIV of 2014 and whether this legal enactment has addressed all shortcomings relating to the Attorney General's unfettered discretion. It will proceed to highlight other legal provisions which might require the legislator's intervention backed up by the appropriate suggestions and or recommendations.

2.5 Contribution to Knowledge

This research study is based on the analysis of judgements delivered by the European Court of Human Rights and the Maltese Constitutional Court, Act XXIV of 2014 and other Court decrees given in relation to the Discretion Proceedings. This analysis will serve partly as a descriptive function of the above subject. Another purpose of this research will also serve to identify those shortcomings which might result from Act XXIV of 2014. The scope of carrying out this research is purely limited to provide suggestions and or recommendations for any shortcomings which might exist.

This study will be structured on other peoples' contribution and it is not expected to provide *an immediate and paradigm shift in the field*.²³ The contribution to knowledge will originate from identifying the lacunae in Act XXIV of 2014. This will later serve as a determining factor is ascertaining whether the above legal enactment has addressed the violations indicated in judgements delivered by the European Court of Human Rights and by the Maltese Constitutional Court. The research is intended solely to make a contribution to the knowledge by making recommendations for those legal provisions which might require the legislator's intervention.

If any shortcomings result, these will be particularly assessed in order to ascertain whether they result in violation of the fundamental human rights or whether they simply lack clarity.

²³ Heather Cray, 'How to make an original contribution to knowledge' <<http://www.universityaffairs.ca/career-advice/career-advice-article-article/how-to-make-an-original-contribution-to-knowledge/>> accessed 12th February 2015.

CHAPTER 3

LITERATURE REVIEW

3.1 Introduction

The literature review will include a summary of all data sources, which data will be presented in an organised pattern combining both a summary and an analysis. As stated in Chapter 2,²⁴ the study will focus primarily on reproducing a summary of the following data sources followed by a critique analysis on each of the following:

- A. Dissertations presented at the University of Malta until the year 2014;
- B. Judgements delivered by the European Court of Human Rights;
- C. Judgements delivered by the Maltese Constitutional Court;
- D. Any newspaper articles relating to the subject matter.

An analysis into the dissertations presented at the University of Malta until the year 2014 will serve to assess whether past research contributions have dealt with the issue relating to the Attorney General's discretion in drug trafficking cases. This will also serve to assess whether past contributions have confirmed whether the discretion exercised by the Attorney General is indeed considered as unfettered and whether the appropriate recommendations were made following their findings. Unfortunately, it is a known fact that most of the dissertations which are relevant to this study's research question have been submitted prior the introduction of Act XXIV of 2014, therefore no critique appraisal can be given for any recommendations and or suggestions which could have been made in connection with the above legal enactment. It is also a known fact that this study will be the first to present any recommendations and suggestions vis-à-vis Act XXIV of 2014, if any suggestions and or recommendations are found to be opportune once the research findings have been concluded.

²⁴ *Vide* Para. 1.4.

Section B of this chapter will assess judgements which are delivered by the European Court of Human Rights. These are quite limited in number however it is important to highlight that any judgement delivered by the European Court of Human Rights have been nothing but an eye opener to our local judicial and legislative system. In reviewing these judgements, one can assess the interpretation given by the European Court of Human Rights and also whether this interpretation has been addressed *in toto* by our legislator when drafting Act XXIV of 2014. It is also important to keep in mind two specific questions when this exercise is being carried out, that is a) whether the European Court of Human Rights has made any specific reference to the Attorney General's unfettered discretion and b) whether Act XXIV of 2014 has encompassed any of the European Court of Human Rights' remarks. The recommendations and or suggestions will be based solely on the outcome of these two questions.

Section C of this Chapter will then focus on judgements delivered by the Maltese Constitutional Court following the handing down of judgements delivered by the European Court of Human Rights. The aim of this section is to assess whether the interpretation given by the latter Court has been adopted or has been followed by the local Courts. The chronology of judgements is of fundamental importance because *in primis* it will determine whether the issues relating to the Attorney General's unfettered discretion have been evaluated by the respective Courts and also whether these issues have been fully addressed with the introduction of Act XXIV of 2014.

Finally, the literature review will also contain some referencing to newspaper articles concerning the above matter. During the past months, newspaper journals have reported on the outcome of the Court decrees which were being given by the Criminal Court in regard to the remedy made available by means of Act XXIV of 2014. As a result of this media coverage, some slight sensationalism might have been created among the general public. The scope of this last task is to simply assess whether the respective newspaper articles have correctly reported such facts and whether a clear explanation has been provided to the general public on the respective situation.

The analysis of the above sources will then be seen contextually with the respective findings which will be presented in Chapter 4 of this study. The latter chapter will

mainly include a. a list of all the decrees which have been given by the Criminal Court following the introduction of Act XXIV of 2014 until to date, b. the semi-structured interviews conducted among experienced legal professionals and c. a case-study concerning a present on-going case which has sought the remedy enshrined in Act XXIV of 2014.

The scope of doing this, is mainly to create a link between Chapters 3 and 4 and see whether the issues discussed in this chapter are backed up by the findings presented in Chapter 4. Once a link between the literature review presented in Chapter 3 and the data presented in Chapter 4 has been established, the study will then be in a position to produce findings and or recommendations, if any are necessitated.

3.2 Dissertations presented at the University of Malta until 2014

3.2.1 The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis²⁵

This dissertation has been divided into five chapters which deal with (i) a historical perspective of the prosecution system in Malta, (ii) identifying the Prosecution, (iii) the discovery and investigation of offences, (iv) Proceeding to Trial and (v) the Trial.

The first chapter deals mainly with the historical perspective of the prosecution system in Malta and it is considered to be of little relevance to this study's research question. However, it is interesting to note that the author made reference to the *revolutionary laws* which Sir Thomas Maitland introduced in 1814 in order to ensure fair hearings during Court proceedings. These laws included the following:

- i. That all cases be tried in open Court*
- ii. That no private access to judges be permitted*
- iii. That it would be possible for both sides to employ advocates who were to have the power to cross-examine witnesses*

²⁵ Jean Paul Sammut: *The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis* (University of Malta, May 2013)

- iv. *That pleadings be drawn up and judgements delivered in the Italian language*
- v. *That all cases be filed and brought forward for trial according to the order of date at the next sitting of the Court*
- vi. *That in criminal cases the person accused was to have due notice of the charge upon which he was to be tried*
- vii. *That the witnesses were to be examined in the presence of the person accused*
- viii. *That no person can be detained without trial or sentence beyond the space of time.*²⁶

The above legal enactments were intended primarily to ensure that the accused is not discriminated both at an early stage of the proceedings and even after. Towards the end of this chapter, the author also comments that:

*The author is of the opinion that the increasing prominence that is given by the Union to the safeguarding of individual fundamental rights will in the future lead to the regulation of basic procedural matters at a community level. In fact, by way of example, in October 2013 a Directive on the rights of access to a lawyer in criminal proceedings was introduced.*²⁷

And that is exactly what is happening right now. Following the decisions delivered by the European Court of Human Rights, Malta is presently addressing all highlighted infringements by means of additional legal enactments, the most recent debated one being Act XXIV of 2014.

In Chapter 2, the author provides an in-depth analysis on the role of the Attorney General and its functions when it receives the records of the inquiry.²⁸ Unfortunately, the author of the above indicated dissertation has solely limited himself in quoting the respective legal provisions. This research will in part deal with this aspect too. It will seek to address whether presently our Courts are encountering any difficulties when transmitting the records of the inquiry to the Attorney General's office, and for which reasons.

In a separate section, the author also comments that:

*It is therefore understood that prosecution by a public authority is preferred to prosecution by private individuals.*²⁹

²⁶ *Ibid*, page 18-19.

²⁷ *Ibid*, page 22.

²⁸ *Ibid*, page 32 Para. 2.

²⁹ *Ibid*, page 33 Para. 5.

However, in another section, the author has provided a comparative analysis of the United Kingdom Legal System by defining the Crown Prosecution Service. The author states that:

*The Maltese criminal justice system should seek to achieve all the above improvements. The introduction of an authority similar to the CPS together the implementation of a scheme that is similar to statutory charging is strongly recommended by the author.*³⁰

Notwithstanding the first recommendation, the above research has concluded that the local Executive Police lack legal knowledge and that something similar to the United Kingdom's system ought to be implemented. It has not tackled issues relating to the Attorney General's discretion or whether the Executive Police's lack of legal knowledge on the interpretation and application of the law could in some way impinge on an accused person's right to a fair trial.

In addition to the above, in chapter 3, the author has somewhat highlighted in brief the role of the Executive Police and the powers conferred upon them. It states that:

*It is unanimously upheld that, in order for a modern society to function properly, the Executive Police need to be vested with a wide range of necessary powers in order to fulfil their duties.*³¹

The author proceeds to highlight that:

*Through the Constitution, the European Convention of Human Rights, the provisions of the Criminal Code and those of the Police Act, our Legislator has sought to strike a balance between the powers pertaining to police officers on hand, and a person's fundamental human rights on the other.*³²

This comment illustrates that the author felt the need to highlight the fact that the Executive Police should seek to fulfil their duties within certain parameters which safeguard an individuals' fundamental human rights. This implies that if these parameters are not observed, then the Executive Police would end up acting beyond the powers conferred upon them thus leading to an immediate breach of human rights. The position of the Executive Police is somewhat similar to the position of the Attorney General. However, and albeit the fact that certain legal provisions confer discretionary powers on the Attorney General, one must not only assess whether such discretionary powers are being exercised within the parameters but also

³⁰ *Ibid*, page 36 Para. 2.

³¹ *Ibid*, page 43 Para 1.

³² *Ibid*.

whether such legal provisions allow the Attorney General a wide discretion in deciding certain matters pertaining to a suspect or an accused person.

Further on, the same author makes reference to Article 6 of the European Convention on Human Rights and states that:

Article 6 of the Convention contains the general right to a fair trial. It also has additional rights to the accused, such as the right to be promptly informed of their accusation in a language that is understood by them, in order for the full details of the accusation to be comprehended. Moreover, this article also gives the accused the right to have the adequate time and facilities for the preparation of their defence, the right to defend themselves or to defend themselves through a lawyer, for witnesses to be examined. Furthermore, if the language used in the Court is not understood or spoken by the accused, then they have the right to a free interpreter. It is noted from the above-mentioned rights, that the spirit of the law is to properly safeguard the rights of the accused and to make sure that those rights are not breached with unlawful treatment or omission.³³

Reference to the above is being made simply because, almost all cases relating to drug-trafficking which were either lodged before the European Court of Human Rights or before the Maltese Constitutional Court, have claimed a breach of Articles 6 or 7. And that is purely why this study has embarked on a quest to assess all available material mainly Court judgements to see on what grounds a breach of Article 6 of the European Convention of Human Rights is being claimed.

This same author has also provided a section dealing specifically with the Criminal Inquiry.³⁴ Unfortunately the author has once again limited himself in defining the respective legal provisions without pointing out whether any legal intervention is required from the legislator to fine-tune the present position. It is noted that at some point the author does make reference to the incumbent and numerous transmissions which take place in a criminal inquiry and in actual fact, he does recommend to have an extension of period relating to the conclusion of the inquiry.³⁵ However, the study fails to point out other problems arising from this specific issue, that is, the fact that the Attorney General keeps the records of the inquiry at his office for a much longer period of time than it is kept by the Magistrate. At the end of Chapter 3, the author recommends the introduction of a body similar to that of the CPS found in England

³³ *Ibid*, page 51, Para 1.

³⁴ *Ibid*, page 62, section 3.4, Para. 4.

³⁵ *Ibid*, page 64, Para. 4.

and Wales to assist the Attorney General with the collection of evidence and to prosecute individuals.³⁶ It is a brilliant recommendation however one must keep in mind that our Constitution, specifically Article 91 sub-article (3) states the following:

In the exercise of his powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment the Attorney General shall not be subject to the direction or control of any other person or authority.

This means that the Attorney General should act in his own individual capacity and exercise the powers conferred upon him by the law without being subjected to the direction and or control of any other individual body. If the author's recommendation had to be applied, it would certainly necessitate an amendment to our Constitution therefore requiring a two thirds (2/3) majority approval in the House of Representatives. This recommendation is indeed doubted if one had to consider the practicality of its introduction into our legal system.

In Chapter 4, the author has briefly touched upon the issue relating to when the Attorney General issues an order which determines the forum in which the accused will be tried, that is either before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court. As a matter of fact, this is dealt with in Section 4.1 sub-section (C) entitled '*Lack of Authority to Proceed*'.³⁷ Issues relating to the discretion of the Attorney General have been mentioned in Sections 4.2 and 4.3 where the former is entitled '*The Attorney General's discretion following the Criminal Inquiry*' and the latter is entitled '*A critique of the Attorney General's discretionary powers*'.³⁸ In the first section, the author makes specific reference to Article 433 sub-sections (1) to (4) of Chapter 9 of the Laws of Malta.

The above-indicated provisions are very clear and they certainly do not require any explanation on the above remedies. However, it is important to clarify that the author of this respective thesis commented that '*the Attorney General has the power to overrule the Court of Magistrate's decree*'.³⁹ He continues adding that '*The Attorney*

³⁶ *Ibid*, page 65.

³⁷ *Ibid*, page 72.

³⁸ *Ibid*, page 73.

³⁹ *Ibid*, page 73, Section 4.2.

*General is granted an implicit absolute discretion, and as such is not subject to any form of control whether of the executive or judicial bodies’.*⁴⁰

At this stage, it is important to remark that there is no agreement on this remark relating to the Attorney General’s power to overrule the Court of Magistrate’s decree. This is mainly due to the fact that the above legal provisions only allow certain remedies which can be availed of by the Attorney General and as laid out in Article 433(3), these remedies are ultimately subject to the Criminal Court’s final decision. So the power to overrule the Court of Magistrate’s decree rests primarily with the Criminal Court and not with the Attorney General. The legislation simply allows the Attorney General to lodge the respective Court application or a Court declaration requesting the Court to either re-arrest or to discharge the respective individual. In addition, it is important to stress out that with the inclusion of sub-section (3A) of Article 433 of Chapter 9, the legislator wanted to make sure that the Criminal Court, prior decreeing the Attorney General’s application, schedules a Court hearing specifically to hear submissions from the respective parties. This is certainly intended to ensure that the individual’s right to a fair hearing is amply safeguarded.

In this respect, it is interesting to note that in the case of *Il-Pulizija vs Dr. Joseph Cassar Galea LL.D.*,⁴¹ the Court has affirmed the following:

*Id-Decizjoni tal-Qorti ta` Istruttoria fil-frattemp ma jistax jinghad li tkun giet irrevokata ghaliex l-ezercizzju kellu taht l-Artikolu 445(3) mhux appell izda biss ezercizzju ta` l-Avukat Generali li f’dan il-kaz ghandu funzjoni li hi superjuri ghal dik tal-Qorti Istruttoria. U din hi l-pozizzjoni legali. L-Avukat Generali appena jircievi l-atti tal-kumpilazzjoni ghandu ukoll funzjoni guridika. Jista`, anke jekk il-Qorti Istruttoria tkun qalet li hemm ragunijiet bizzejjed biex johrog l-att ta` akkuza, jordna minflok in-nulla prosequi. Jista` ma johrog ebda att ta` akkuza u jirrimetti lill-Qorti tal-Istruttoria biex tiddecidi hi l-kawza jekk ikun il-kaz u skond il-ligi. Jista` ukoll jekk il-Qorti Istruttoria tkun illiberat taht l-Artikolu 413 (2) ma jjehu ebda provvediment iehor billi jibqa` passiv.*⁴²

The Court continues adding that:

⁴⁰ *Ibid.*

⁴¹ *Il-Pulizija vs Dr. Joseph Cassar Galea LL.D.*, Court of Criminal Appeal, 11th April 1984.

⁴² *Ibid* – It cannot be said that the decision of the Court of Criminal Inquiry has been revoked because the exercise granted under Article 445 (3) is not an appeal but an exercise given to the Attorney General whose role is superior to that of the Court of Criminal Inquiry. And this is the legal position. The Attorney General as soon as he receives the records of the inquiry, he also assumes a juridical function. He may also order the nulla prosequi even if the Court of Criminal Inquiry declares that there are sufficient reasons to place the individual under a bill of indictment. He can also remit the records of the inquiry to the Court of Criminal Inquiry in order to decide on the merits of the case. He may also remain passive if the Court of Criminal Inquiry discharges the individual as per Article 413 (2).

Dan kollu juri bic-car primarjament zewg kontastazzjonijiet u cjoe` li l-Avukat Generali ghandu funzjoni guridika f'certi kazi anke superjuri ghal dik tal-Qorti Istrutturja u inoltre li lanqas hu ma jista` jagixxi b'mod illi jillibera direttament lill-persuna li tkun giet imputata. Jekk dan hu hekk, kemm aktar ma tistax taghmel l-istess il-Qorti Istrutturja li kif inghad il-gurisdizzjoni taghha hi limitata u cirkoskritta u d-decizjoni taghha soggetta ghall-iskrutinju ta` l-istess Avukat Generali.⁴³

The above conclusions were in fact supported by the judgement given in the case of *Il-Pulizija vs L-Onorevoli Lawrence sive Lorry Sant et.*⁴⁴ However the Criminal Court of Appeal insisted on clarifying the below:

Ma taqbilx li d-decizjoni moghtija minn Qorti Istrutturja ghandha qatt tigi ekwiparata ma` sentenza vera u propja moghtija minn Qorti ta` Kriminal Gudikatura, u ghalhekk applikabbli skond l-artikoli 413 et seq tal-Kodici Kriminali, sakemm dik id-decizjoni ma tkunx moghtija fl-ipotesi preciza kontemplata fl-artikolu 403 (1) tal-Kodici Kriminali li ser jigi citat hawn taht il-paragrafu li gej:

Di fatti meta tinghalaq il-kumpilazzjoni, il-Qorti Istrutturja ghandha skond il-ligi tipprocedi b`wiehed mis-segweni tlett modi:

- (1) Tiddeciedi li hemm ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta` akkuza, u tibghat lill-imputat biex jitqieghed taht dak l-att ta` akkuza quddiem il-Qorti Kriminali (artikolu 401 (2) Kodici Kriminali);*
- (2) Tiddeciedi li ma hemmx ragunijiet bizzejjed biex l-imputat jitqieghed taht att ta` akkuza, u tordna l-liberazzjoni tieghu (artikolu 401 (2) Kodici Kriminali);*
- (3) Jekk ikun jidhrilha li r-reat mhux ta` kompetenza tal-Qorti Kriminali, izda ta` kompetenza tal-Qorti tal-Magistrati bhala Qorti ta` Gudikatura Kriminali, il-Qorti li tkun mexxiet il-kumpilazzjoni ghandha taghti s-sentenza fuq ir-reat (Artikolu 403 (1) Kodici Kriminali).⁴⁵*

In this respect, the Court of Criminal Appeal also highlighted the following:

⁴³ *Ibid* – All this proves two points that is, that the Attorney General assumes a juridical function which at times is superior to that of the Court of Criminal Inquiry and that he may not directly discharge an individual charged before the Court. The Court of Criminal Inquiry's jurisdiction is limited and subjected to the Attorney General's scrutiny.

⁴⁴ *Il-Pulizija vs Onorevoli Lawrence sive Lorry Sant et.*, Court of Criminal Appeal, 14th August 1991

⁴⁵ *Ibid*, Para. 8-9 – The Court does not agree that the decision given by the Court of Criminal Inquiry should be levelled with a proper judgement given by a Court of Criminal Judicature, therefore made applicable as per Article 413 et seq of the Criminal Code, at least until such decision is not given at a precise moment as laid out in Article 403 (1) of the Criminal Code which states as follows. As a matter of fact, when an inquiry is concluded, the Court of Criminal Inquiry may proceed in either one of the three below-mentioned ways: (1) decides that there are sufficient reasons to commit the accused for trial on of indictment (Article 401 (2) of the Criminal Code);(2) decides that there aren't sufficient reasons to commit the accused for trial on of indictment and discharge him; or (3) if it deems that such crime should not be adjudged by the Criminal Court, and that the trial should take place before the Court of Magistrates, the Court of Criminal Inquiry may proceed to give judgement (Article 403 (1)).

Il-Ligi ma tikkontempla ebda appell minn decizjoni tal-Qorti tal-Magistrati bhala Qorti Istrutturja. Jekk id-digriet ta` dik il-Qorti f'eghluq il-kumpilazzjoni ma jkunx konformi mas-sostanza ma` dak li jippreskrivi l-artikolu 401(2) tal-Kodici Kriminali, dak id-digriet mhux appellabbli. Lanqas isir appellabbli dak id-digriet minhabba li jkun b`xi mod ifixkel jew addirittura jxekkel lill-Avukat Generali fil-funzjonijiet tieghu fuq accennati. Dana propju ghaliex il-ligi ma tikkontemplax tali appell, ubi lex voluit dicit.⁴⁶

The above confirms the conclusions made by the author stating that the remedies available to the Attorney General are not subject to any form of judicial review. However, one should not conclude saying that the Attorney General 'has the power to overrule the Court of Magistrate's decree', because as pointed out earlier, the Attorney General is only granted additional remedies which are subject to the Criminal Court's final decree.

In this section, the study's author concludes stating that the *Attorney General is granted an 'implicit absolute discretion, and as such is not subject to any form of control whether of the executive or judicial bodies'*.⁴⁷ In this regard, and in the author's humble opinion, it is indeed a bit premature to conclude that Article 433 of Chapter 9 confers 'implicit and absolute discretion' on the Attorney General which is not subjected to any form of judicial review. It is indeed important to first highlight that judicial reviews would be essential to safeguard an individual person's fundamental human rights which include the right to a fair trial. Thus it is important to assess when a judicial review on the Attorney General's use of discretion would be required. Cases involving sub-sections (1) and (2) of Article 433,⁴⁸ concerning the withdrawal of indictment and discharge of the accused person, a judicial review would not be necessary. In the case concerning sub-section (3) of Article 433, where the Attorney General requests authorisation from the Criminal Court to re-arrest a person who was discharged by the Court of Magistrates, in such circumstances, provisions (3A), (3B) and (3C) of sub-section 3 of Article 433 would kick in. As already explained above, these provisions enable the Criminal Court to schedule a

⁴⁶ *Ibid*, Para. 13 – *The law does not provide for any appeal against the decision given by the Court of Magistrates as a Court of Criminal Inquiry. If such decree does not conform to the requisites of Article 401 (2) of the Criminal Code, that decree is not appealable. And it does not become appealable so as not to interfere the Attorney General from exercising properly his duties. This is due to the fact that the law does not allow any appeal, ubi lex voluit dicit.*

⁴⁷ Jean Paul Sammut: *The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis* (University of Malta, May 2013), page 73.

⁴⁸ Chapter 9 of the Laws of Malta.

Court hearing during which all parties make their submissions in connection with the Attorney General's request. This procedure *per se*, is already a form of judicial review because the final decision as to whether an individual should be re-arrested lies solely with the Criminal Court.

In the following section entitled '*A critique of the Attorney General's Discretionary Powers*',⁴⁹ the author also makes reference to the Lorry Sant case⁵⁰ and lists down the options made available to the Attorney General. The author continues to stress that there are no procedures which the Attorney General is expected to follow in the exercise of his duties and or discretion.⁵¹ However one should be careful enough to draw a distinction between the Attorney General's decision to prosecute and the Attorney General's decision to try an accused person before the Criminal Court instead of the Court of Magistrates as a Court of Criminal Judicature. The former decision is clearly permitted by our Constitution given that the Attorney General is empowered to institute, undertake and discontinue criminal proceedings without being subjected to the control and or authority of any other person or authority.⁵² With regards to the latter scenario, it is indeed important to have such decision subjected to a judicial review and that is precisely why Act XXIV of 2014 was introduced. Having an individual stand trial in front of the Court of Magistrates as a Court of Criminal Judicature, the criteria of foreseeability vis-à-vis his punishment is fulfilled because before such Court, his maximum punishment is clearly identified. However, the foreseeability criteria is slightly unclear when it comes to cases involving trials taking place before the Criminal Court, given that the maximum punishment can reach up to a lifetime imprisonment. This unclarity is even more evident when one compares our penal system to the UK drug sentencing guidelines which list clear punishment thresholds for individuals convicted of crimes related to drug-trafficking. This could be the result of lack of sentencing policy however, the problems emanating from the present legal system and any recommendations to fine tune the current situation will be discussed in further detail in Chapter 5.

⁴⁹ Jean Paul Sammut: *The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis* (University of Malta, May 2013), page 74.

⁵⁰ *Il-Pulizija vs Onorevoli Lawrence sive Lorry Sant et.*, Court of Criminal Appeal, 14th August 1991

⁵¹ Jean Paul Sammut: *The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis* (University of Malta, May 2013), page 75.

⁵² Article 91, Constitution of Malta.

Prior to the introduction of Act XXIV of 2014, the decision as to where an accused person should face trial was left in the hands of the Attorney General. However, with the introduction of this legislation, such decision is being made subject to a judicial review.

As a matter of fact, the above author proceeds to highlight this very important position given that '*the choice of Court affects the bracket of punishment to which the accused may be subjected*'.⁵³ The same also makes reference to the case of *Camilleri vs Malta*⁵⁴ and concludes by saying that '*the legislator should avoid any semblance of arbitrary decision-making*'.⁵⁵ This case will be discussed in detail in the following sections however the said author continues adding that '*the separation of powers, as well as the right to a fair hearing, would undoubtedly be better respected if the legislator had to establish the punishment bracket himself, rather than allowing such applicable punishment to be decided by one of the parties in the eventual trial*'.⁵⁶ The author was not in a position to make any reference to Act XXIV of 2014 and this because his dissertation was filed a few months before this new legislation came into force. However, it is important to point out that the author was correct in stating that such decision should not be left completely in the hands of the Attorney General. This is due to the fact that such decision should be scrutinised by the Courts in order to determine whether the Attorney General made the correct assessment where to direct a trial. And that is precisely why the judgements delivered by the Maltese Constitutional Court following the judgement of *Camilleri v. Malta*, urged the legislator to intervene on such instances.

In Chapter 5 entitled '*The Structure of the Maltese Courts and the discretion of the Attorney General*'⁵⁷, it is important to first highlight that certain legal provisions amongst which include Article 370 of Chapter 9 of the Laws of Malta were all amended. The Court of Magistrate's competence as a Court of Criminal Judicature to deal with offences punishable by a term of imprisonment has been extended to

⁵³ Jean Paul Sammut: *The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis* (University of Malta, May 2013), page 77.

⁵⁴ *Camilleri vs Malta*, Application Number 42931/10, 22nd January 2013.

⁵⁵ Jean Paul Sammut: *The Conduct of Criminal Prosecution in Malta – A Legal and Comparative Analysis* (University of Malta, May 2013), page 79.

⁵⁶ *Ibid.*

⁵⁷ *Ibid*, page 81.

include offences punishable up to two years imprisonment.⁵⁸ The extended competence of the Court of Magistrates as a Court of Criminal Judicature has also been amended to such extent that Article 370 (3a) *et sequitur* now include crimes punishable with imprisonment for a term exceeding two years and not more than twelve years. Before, this included crimes punishable with imprisonment for a term exceeding six months but not more than ten years. Article 370 (4a) now includes crimes punishable with imprisonment for a term not exceeding two years and not more than six years. Before, this included crimes punishable with imprisonment for a term exceeding six months and not more than four years. The competence of the Court of Magistrates as a Court of Criminal Judicature has been mainly extended to facilitate and expedite Court proceedings through summary proceedings. The author proceeds to highlight other legal provisions relating to the trial but which are of limited relevance to this study. On this research, one can conclude saying that the author has very much managed to encompass all legal aspects concerning 'The Conduct of the Criminal Prosecution in Malta' and by analysing the contents of this study, has proven to be a very fruitful task.

3.2.2 The "In Genere": Is it an effective tool for the Investigation and Prosecution of Crime⁵⁹

This dissertation has been divided into six chapters and are each entitled '(i) Historical Overview (ii) The Players in the Match The Text (iii) The Test (iv) Inquiries Under Maltese Law: A Survey (v) A Comparative Study and (vi) Suggestions For Reform'.

The first Chapter deals mainly with the historical development of the *In Genere* and it outlines the promulgation of the respective legislation. The study has touched upon various legal provisions in connection with the above, in order to provide a brief summary of all the legal amendments carried out throughout the years. An analysis of this chapter will not be provided given that this chapter is of little relevance to this study's research question. However, it is interesting to note that the author has concluded Chapter 1 by questioning whether the *In Genere* is an efficient or an out-

⁵⁸ Article 370 (1), Chapter 9 of the Laws of Malta.

⁵⁹ Angele Agius: *The "In Genere": Is it an effective tool for the Investigation and Prosecution of Crime* (University of Malta, May 2010).

dated tool, and that the scope of her thesis is to determine how far-reaching these amendments have been and what are the present deficiencies.⁶⁰ This study can very much relate to this last comment and this because the main scope of this dissertation is to assess whether the introduction of Act XXIV of 2014 has achieved a balance between the Attorney General's use of discretion and the safeguarding of an individual's right to a fair trial.

The first section of Chapter 2 deals with the role of the Inquiring Magistrate and the powers conferred upon him by law. The author makes reference to Articles 546-548⁶¹ concerning the *In Genere* investigation, the inquest held by the Inquiring Magistrate and the *Procès-verbal* and Articles 550A, 552-554⁶² concerning the Inquiring Magistrate's notice to the Attorney General where the *process-verbal* has not been drawn up within sixty days and the powers of the Inquiring Magistrate in holding an inquest specifically the power to order an autopsy and or to order the arrest of a suspected person. The author has also highlighted various Court judgements to further define the above legal provisions and to extract the formalities which are to be followed when the *In Genere* is being carried out.

The second section of Chapter 2 deals with the role of the Attorney General throughout the *In Genere* investigation. It mentions Articles 546, 547 and 569⁶³ concerning the role and powers conferred upon the Attorney General. It is interesting to note that with regards to the Magistrate's notice to the Attorney General in case an inquest is not held, the author has stated that '*The reason for these sub-articles is to ensure that the AG keeps track of the In Genere inquests and hence a kind of check over the Magistrate.*'⁶⁴ This comment might suggest that the Attorney General is accorded with wider powers than those accorded to the Inquiring Magistrate even before the commencement of an *In Genere*.

The author also comments on when the *procès-verbal* is completed and is transmitted to the Attorney General's office for vetting purposes. The author states that upon vetting, the Attorney General's considerable powers emerge.⁶⁵ This is

⁶⁰ *Ibid*, page. 37.

⁶¹ Chapter 9 of the Laws of Malta.

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ Angele Agius: *The "In Genere": Is it an effective tool for the Investigation and Prosecution of Crime (University of Malta, May 2010)*, page 50.

⁶⁵ *Ibid*, page 51.

being said because where the Attorney General is of the opinion that the Inquiring Magistrate should hear further evidence, then he may request the respective Inquiring Magistrate to hear the indicated witnesses or request those experts to file their reports. The author once again states that '*the proceedings taking place during the In Genere are secret and this high confidential nature gives rise to another power that the AG enjoys which is laid out in Article 518. Here the Attorney General has discretion to give copies of procès-verbaux against a payment of fee and to make them open to inspection*'.⁶⁶ This study disagrees with this last comment simply because the discretion enjoyed by the Attorney General in this particular instance is subject to the Court's permission as to whether such acts can be viewed by the requesting party. In a separate paragraph, the above author makes reference to when the *procès-verbal* is transmitted by the Inquiring Magistrate to the Commissioner of Police to proceed accordingly, who will then consult with the Attorney General on whether proceedings are to be instituted. The same has opined that '*the law grants the last word to the AG*'.⁶⁷

It also makes reference to Bill Number 45 of 2010 which provides that a Duty Magistrate is bound to communicate to the Attorney General such information about the inquest as might be requested by the Attorney General and further concludes that such Bill enhances the AG's powers quite considerably.⁶⁸ It would have been appreciated if the author would have elaborated a bit more on the last two statements and to indicate whether such wide discretionary powers add up to an accused or suspected person's hardship and whether it requires the legislator's intervention on the merits.

The third section of Chapter 2 deals with the role of the Executive Police in the *In Genere* and highlights their role and powers as laid down in Articles 346, 546, 551 and 568 of Chapter 9. No reference is made to any discretionary powers which the Executive Police might enjoy during the *In Genere*, therefore this section is of little relevance to this study. The Fourth Section of Chapter 3 deals with the office of Experts which are appointed by the Inquiring Magistrate. This office has nothing to do with the role and powers exercised by the Executive Police and or the Attorney

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, page 53.

⁶⁸ *Ibid.*

General and therefore any discretion that the experts might enjoy in the course of their duties certainly cannot be compared to any level of discretion which might be exercised by the Executive Police and or the Attorney General.

The said author entitled the third chapter as '*The Test*'.⁶⁹ The scope behind this chapter is to analyse whether the legal provisions related to the *In Genere* are followed when put into practice and whether any malpractices emerge. The author highlights various malpractices which emerge during the *In Genere* but no reference is made to any discretion which the Executive Police or the Attorney General might exercise in the course of their duties. However, towards the end of this same chapter, the author has interestingly commented that the role of the Inquiring Magistrate has diminished whereas that exercised by the Executive Police has acquired a powerful status throughout the investigative stage. More precisely on the role of the Executive Police, the author has expressed that '*it is very difficult to envisage how in such a role he would gather evidence both in favour and against the accused when the former would impinge on him to build a sound case. Hence the need to have a Duty Magistrate acting as a check on any possible abuse during investigations conducted by the Police is essential*'.⁷⁰ This comment is particularly important because the author has managed to identify that even in the course of an *In Genere*, with the powers conferred upon the Executive Police, there might still be an excessive use of discretion which could result in a possible cause for jeopardising an accused person's right to a fair trial. As pointed out earlier, the *In Genere* is the investigation into the material traces of the offence. The role of the Executive Police is to simply gather evidence which can be both in favour and or against a suspect. However, once the investigation is lodged, as the above author rightly questions, are we sure that the Executive Police are collecting evidence which might also be in favour of the suspected person. On this point, it would be interesting to analyse and assess how the *In Genere* is carried out in drug-trafficking cases and how the *procès-verbal* is drawn up by the Inquiring Magistrate. This analysis will be carried out once the assessment on this dissertation has been completed. The author has concluded Chapter 3 by reiterating that the law relating to the *In Genere* requires the legislator's intervention to address some lacunae and eliminate all malpractices.⁷¹

⁶⁹ *Ibid*, page 60.

⁷⁰ *Ibid*, page 69.

⁷¹ *Ibid*, page 71.

She suggests that an efficient administration overseeing the implementation of such legal provisions is required.

Chapter 4 gives an overview of the various types of inquiries which exist under Maltese Law. In brief, the author lists the Inquiries Act⁷² which empowers the Board to investigate the conduct of public officers, Government departments or other statutory bodies. An example of an inquiry which would fall under this piece of legislation would be an inquiry lodged by the Office of the Prime Minister. The author has also given an overview of how the *In Genere* distinguishes itself from an inquiry lodged by the Office of the Prime Minister. The author also highlights how an inquiry is carried out under the Merchant Shipping Act⁷³. It is interesting to note that the Attorney General has almost no say in these inquiries and this because the Court addresses its report to the concerned Minister and not to the Attorney General. For obvious reasons, his role would then come into picture as the Prosecutor once proceedings are lodged before the Court of Magistrates as a Court of Criminal Inquiry. The author concludes suggesting that Chapter 9 of the Laws of Malta should include a provision which outlines the difference between the *In Genere* and any other kind of inquiry. This study certainly does not agree with this last suggestion simply because the institute concerning the *In Genere* is clearly explained in the respective legal provisions and if one required further clarification, this can easily be sought by referring to Court judgements.

A comparative study on France, Italy and the United Kingdom's legal system concerning the preliminary investigation is provided in Chapter 6. In the course of this chapter, the author indirectly makes a recommendation concerning the role of the Executive Police in Malta. She states that '*the prosecution function should be removed from the Police's hands and left solely to the the AG in order to have the most efficient working system since one here is dealing with human beings with all their possible weaknesses and hence the ideal situation would be to keep the investigative and prosecutorial functions separate and distinct by having the Police investigating minor crimes and keeping public peace, the AG prosecuting all types of crimes whether minor or major ones and the Duty Magistrate who investigates*

⁷² Chapter 273 of the Laws of Malta.

⁷³ Chapter 234 of the Laws of Malta.

serious offence'.⁷⁴ On this comment, a reference ought to be made to Article 346 of Chapter 9 of the Laws of Malta, which provision entrusts the collection of evidence to the Police. This provision does not make any distinction between minor offences and crimes so any collection of material traces related to an offence is vested solely in the Executive Police. In this chapter, the author has very briefly touched upon the issues of discretion however she concludes that although certain authors refer to our mixed legal system as an '*original piece of work*', according to her, it is not working to its full potential.⁷⁵ The reasons behind such statement will be outlined in Chapter 6.

The last chapter is entitled '*Suggestions for Reform*' and it is intended to provide proposals for changing the present legal system concerning the *In Genere*. The author's first proposal is to have the Duty Magistrate '*assume a more significant position in the sphere of criminal investigation*'.⁷⁶ This is being suggested in order to ensure that the necessary safeguards are in place. Another recommendation put forward by the author and which recommendation might be of interest to this research question, is to have an administrative body composed of at least 3 Magistrates to be on call on an alternating basis. However, the author is also suggesting that a type of Court application may be lodged by a suspected person indicating to the Inquiring Magistrate that some evidence which is in his favour might not have been collected by the Police in the course of their duties. This suggestion is being made in order to have additional checks on the duties being exercised by the Police.

Further on, the above author also notes that '*the Police investigator is also a prosecutor and the latter has a vested interest to protect himself*'.⁷⁷ She also highlights that the prosecution should be solely left in the Attorney General's office and should not be left in the hands of the Police, which should focus more on the investigative part.⁷⁸ Other recommendations made by the author were of little relevance to this study however in reviewing this dissertation, it was interesting to note that the author has managed to identify instances where the Police might

⁷⁴ Angele Agius: *The "In Genere": Is it an effective tool for the Investigation and Prosecution of Crime (University of Malta, May 2010)*, page 99.

⁷⁵ *Ibid*, page 104.

⁷⁶ *Ibid*, page 105.

⁷⁷ *Ibid*, page 116.

⁷⁸ *Ibid*.

excessively use their discretion which might be allowed in certain instances throughout the *In Genere*.

Prior proceeding to another dissertation analysis, it would be opportune to provide an insight into the documentation inserted in the *procès-verbal* of a drug-trafficking case. As an introduction, the Magistrate makes reference to the written report filed by the police inspector and lays down the facts known to him in writing. In this respect, the Magistrate makes reference to the report made by the inspector in order to substantiate the cause for commencing an *In Genere*. The reference made by the Inquiring Magistrate needs to give an account of what preceded the *In Genere* and thereafter. The same report needs to list down the experts nominated for the purposes of assisting the Inquiring Magistrate with the collection and preservation of evidence. In scenarios involving drug-trafficking, it is normal practice for duty Magistrates to appoint the following: 1) A Forensic scientist to identify the type, quantity and purity of any illicit substance involved, 2) A finger print expert, 3) A Ballistics expert where firearms are found and 4) additional Scene of the Crime officers to assist the nominated Court experts. In most drug-trafficking cases, the police inspectors in charge of the drug-trafficking cases would proceed with the respective Court arraignment after a couple of days following the commencement of the inquiry. If this is the case, the police inspector would then file a Court application before the Inquiring Magistrate informing him that their investigations have been concluded and that the indicated Court arraignments would be taking place. The Police Inspector's final request in the above Court application should be that of concluding the *procès-verbal* and that it is sent to the Attorney General's office. Upon receipt of the respective Court application, the Inquiring Magistrate needs to specify in the *procès-verbal* whether any of the nominated Court experts had already presented their reports. As a concluding remark, the Inquiring Magistrate will then state that the *procès-verbal* is being sent to the Attorney General's office together with the police inspector's report and any other documentation relating to the inquiry. It is also interesting to note that the application filed by the police inspector requesting the Inquiring Magistrate to conclude the *procès-verbal* because the criminal investigations have come to an end, remains uncontested all throughout. This is due to the fact that the law does not permit service of this application on the respective suspected persons. This procedure is only made available to the

Executive police and to some extent, it is being considered as lacking the appropriate safeguards to ensure that an individual's fundamental human rights are respected even at the investigative stage.

In reviewing the above thesis and assessing the documentation inserted in the *procès-verbal* produced in drug-trafficking inquiries, has shown that there might be other instances where the discretion afforded to the Police might be excessively utilised. If this is the case, then we might be facing a situation where there is a direct infringement of human rights even before the case has commenced before the Court of Magistrates as a Court of Criminal Inquiry. However this issue might require a study of its own including an in-depth analysis of all available research material in connection with the same. Notwithstanding the above, the analysis of the above dissertation has assisted with the identification of other instances which permit the Attorney General a wide use of discretion. However, this study will be reviewing an additional two dissertations which are related to this research question.

*3.2.3 The Maltese Sentencing Regime In Relation to Drug Trafficking Offences*⁷⁹

This dissertation has been divided into five chapters and are entitled: '*(i) Maltese Law on Drug Trafficking (ii) Pre-Trial and Procedural Issues affecting Sentencing Outcomes (iii) Mandatory Sentencing Considerations (iv) Discretionary Sentencing Considerations and (v) Towards a Consistent Approach to Sentencing*'.

The first chapter makes reference to the various Conventions relating to illicit substances which include the 1961 United Nations Single Convention on Narcotic Drugs, the 1971 United Nations Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The author also indicates the European Union Drugs Strategy which is highlighted as an important initiative by the European Union to guide Member States in implementing certain measures in their respective national drug legislation. The above author also lists the main pieces of legislation which have been enacted in the Maltese legal system: the Dangerous Drugs Ordinance⁸⁰ and the Medical and

⁷⁹ Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013)

⁸⁰ Chapter 101 of the Laws of Malta.

Kindred Professions Ordinance.⁸¹ The author also dedicates a separate section to the various drug trafficking offences and provides a careful analysis of each of the following: 1) '*Dealing*', 2) '*Production and Manufacture*', 3) '*Cultivation*', 4) '*Importation and exportation*', 5) '*Distribution*', 6) '*Supply*' and 7) '*Precursor Trafficking*'. In defining these offences, the author cross-refers to various pieces of legislation in order to provide a clear definition of each one. Following this, the author also lists other '*dealing offences*,⁸² such as '*Aggravated Possession*', '*Conspiracy*', and '*Money Laundering*'.

Another section of Chapter 1 envisages the punishment of drug-trafficking offences, including a '*brief portrayal of the penalties perceived under the drug laws*'.⁸³ It highlights the punishment brackets which are given by the Criminal Court and the Court of Magistrates as a Court of Criminal Judicature in drug-trafficking offences. Together with the punishment that is given by the above Courts, the study has also highlighted the '*forfeiture of criminal assets*'⁸⁴ which order is very much linked with drug-trafficking offences. The author provides a general overview of this measure and also identifies its scope when the same is put into practice.

In Chapter 2, the above study delves into the '*pre-trial role of the Attorney General*'.⁸⁵ It assesses the functions of the Attorney General as delineated in Article 431 of Chapter 9 of the Laws of Malta. However this section has already been dealt with in the first thesis assessment which was carried out earlier. Further on, the author carries out an assessment on the contingency of the punishment.⁸⁶ As stated earlier, the author confirms that '*the punishment is largely contingent upon the Court that presides the case*'.⁸⁷ It is also interesting to note that the same author has also affirmed that '*by virtue of this discretionary power, the AG is able to implicitly dictate the parameters of punishment to be meted out*'.⁸⁸ The Attorney General's decision relates to when he directs cases to the Criminal Court. Obviously one has to keep in mind that the minimum punishment awarded before the Criminal Court would be that

⁸¹ Chapter 31 of the Laws of Malta.

⁸² Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013), page 35.

⁸³ *Ibid*, page 43.

⁸⁴ *Ibid*, page 46.

⁸⁵ *Ibid*, page 49.

⁸⁶ *Ibid*, page 50.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

of four years imprisonment whereas that awarded before the Court of Magistrates would be that of six months. In addition to this premise, the author asserts that *‘to rub salt into the wound, the AG does not provide reasons for his final decision and ultimately the drug laws make no provision for judicial review. Incidentally, this nebulous discretionary exercise calls for a situation of uncertainty, whether existing doubts indicating bias or error are warranted or not’*.⁸⁹

And this is precisely the position that one had to face prior the introduction of Act XXIV of 2014. It is also true that the Attorney General refers to its own set of guidelines in order to determine whether an accused should stand trial before a jury or before the Court of Magistrates. Given that such guidelines were never made available to the concerned individuals, the Attorney General’s final decision was considered to lack transparency. In the following sub-headings, the author makes reference to the nature and effects of the Attorney General’s decision and other remedies and procedural safeguards which were made available before Act XXIV of 2014 was introduced. The author makes reference to the case of *Ir-Repubblika ta` Malta vs Antonio Barbara*⁹⁰ where the Court of Court of Appeal has recognised the possibility of disparity in cases involving two persons charged with similar offences but are facing trial in front of two distinct Courts. However, in this particular instance, the Court has felt the need to stress that such problem needs to be addressed by the legislator because the Courts can only apply the law as it stands.⁹¹

In a separate sub-heading the author lists down the various legal remedies available to an individual who wishes to challenge the Attorney General’s discretion. The author makes reference to the judicial review procedure as laid down under Article 469A of the Chapter 12 of the Laws of Malta.⁹² This procedure has been viewed in terms of the Claudio Porsenna judgement, however this case will be examined in further detail in the section dedicated to the Constitutional Judgements. As a concluding remark, the author states that *‘the Court is paving a new path for*

⁸⁹ *Ibid*, page 51.

⁹⁰ *Ir-Repubblika ta` Malta vs Antonio Barbara*, Court of Criminal Appeal, 17 January 2008.

⁹¹ Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013), page 53.

⁹² The Code of Organisation and Procedure, Chapter 12 of the Laws of Malta.

individuals looking for an alternative method for the review of the AG's decision, which was previously regarded as final'.⁹³

A separate sub-heading is entitled '*Human Rights Violations*' which include a brief outline of what is normally cited in applications lodged before the European Court of Human Rights, mainly Articles 6 and 7 of the ECHR.⁹⁴ This sub-section delves into the application of both articles and refers to judgements delivered by the ECtHR in connection with the same. The salient features of Articles 6 and 7 and related Court judgements will then be outlined in the section dedicated to judgements delivered by the ECtHR. The author entitles another section '*Aiding the Police*'⁹⁵ in which it lists down all those factors which mitigate the quantum of the punishment, including the applicability of Article 29 of Chapter 101 of the Laws of Malta. The author has not opined on whether any discretion is left in the hands of the Attorney General's with respect to the applicability of Article 29, however a detailed analysis on the correct applicability of Article 29 will be provided in Chapter 4 of this study. As a concluding remark, the author states that '*In the exercise of his quasi-judicial functions, the AG has traditionally been identified as a Chief-Magistrate, which is somewhat discordant vis-à-vis his duties as State Prosecutor, tending to conflict with the principle of separation of powers and the concept of equality of arms. This is especially true with respect to drug offences and his discretionary power to direct trial, which, as it stands today, remains non-reviewable in nature, yielding far-reaching sentencing consequences for the accused in question*'.⁹⁶

In Chapter 3, the author defines the Maltese drug-sentencing regime as being '*largely unstructured*'.⁹⁷ According to the author, adjudicators are not provided with much legal guidance on the parameters of punishment. It would be interesting to seek the author's input following the introduction of Act XXIV of 2014 and see whether the above legal regime has remained unstructured. Other sections dealing with the '*Mandatory Sentence Parameters and Aggravating and Mitigating Factors*' for the purposes of Punishment have provided an insight into the discretion

⁹³Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013), page 54.

⁹⁴Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR).

⁹⁵Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013), page 65.

⁹⁶*Ibid*, page 72.

⁹⁷*Ibid*, page 73.

exercised by the Courts for the purposes of determining punishment. However none of these sections have made any reference to the Attorney General's unfettered discretion. In view of this, an analysis of the above sections is being omitted since it is of little relevance to this study. Interestingly enough, this chapter concludes that *'the stipulation of the relevant weight to be given to the aggravating and mitigating factors when quantifying punishment undoubtedly limits judicial discretion and further strengthens predictability in sentencing'*.⁹⁸ This predictability / foreseeability issue will be seen in context of the Attorney General's use of discretion when determining the forum in which an accused person is to be tried. This will be provided both in the section dealing with judgements delivered by the ECtHR and also in Chapter 5.

In Chapter 4, the author deals with *'Discretionary Sentencing Considerations'*. The sections included deal mainly with the exercise of judicial discretion when meting out punishment and the sources which regulate the use of such discretion. To this cause, the author has stated that *'the Maltese adjudicator consults jurisprudence and takes into account previously contemplated principles and sentence tariffs meted out by the other Courts in similar situations'*.⁹⁹ As stated earlier, it has been established that the Attorney General does consult guidelines of its own prior formulating its own decision. The only problem is that such guidelines are not made available to anyone and that the Attorney General does not provide reasons for his decision. The above chapter also lists the discretionary mitigating and aggravating factors, the legal discretionary factors and the personal discretionary factors. However, it is important to point out once again that these factors are being discussed in light of the discretion exercised by the Courts in determining the accused person's punishment.

It is also important to point out that many of the listed factors, including the quantity, the street value and purity of the drug, the role of the accused in the commission of the offence, the length of the offence, the previous conduct of the accused, the age of the accused and the accused's drug addiction, are all listed in the Fourth Schedule Guidelines which were introduced by means of Act XXIV of 2014. This proves that the new legal enactment has in some way, tried addressing the various principles which were already established in past Court judgements. However, the

⁹⁸ *Ibid*, page 86.

⁹⁹ Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013), page 89.

guidelines were intended to counter-address the problem relating to the Attorney General's use of discretion. As a concluding observation to Chapter 4, the author states that '*the evident difficulty with individualised sentencing is that although it encourages the imposition of the most appropriate punishment, the adjudicator may be tempted to pursue his individual sentencing preferences.*¹⁰⁰ As a matter of fact, the author tried to identify key factors aimed at structuring the moral judgement of the adjudicator'.¹⁰¹

Following Chapter 4, the author entitles her last chapter '*Towards a Consistent Approach to Sentencing*'.¹⁰² The first sections of this chapter deal mainly with the sentencing policy and classification of drugs, whereas the second section deals with recommendations for the present Maltese legal system. The former section is of little importance to this research since it refers to punishment inflicted by the Courts and the rationales behind such sentences. With respect to the sentencing guidelines in connection with the classification of drugs, the author states that the law does not distinguish between the different drugs.¹⁰³ This is no longer the case because with the introduction of the Fourth Schedule Guidelines, the legislator has sought to indicate the amounts for each respective drugs which if found in excess, such persons would be referred for trial before the Criminal Court. In addition to the above, the author has also highlighted other jurisdictions' sentencing guidelines, mainly those relating to the England and Wales and the United States of America. However this comparative analysis is of very little relevance to this study.

In the recommendations section, the author has stressed about the importance to address '*the controversial pre-trial power of the AG*'.¹⁰⁴ It recommends an amendment to the law with the scope of obtaining a more transparent approach. It calls for a set of legally defined grounds which are to form the basis of the Attorney General's decision. In addition, it also recommends that the Attorney General's decision is to be laid down in writing including the reasons for such decisions. Further to the above proposals, the author also backs up the recommendation put forth during the Seventh Legislature¹⁰⁵ by the Hon. Dr. Joseph Brincat who opined

¹⁰⁰ *Ibid*, page 104.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*, page 105.

¹⁰³ *Ibid*, page 109.

¹⁰⁴ *Ibid*, page 120.

¹⁰⁵ Sitting Number 219, 19 January 1994.

that the law should establish a common minimum punishment to be applied both by the Inferior and Superior Courts.¹⁰⁶ This would ensure that if the Attorney Generals' pre-trial decision is incorrect, such position would not further jeopardise an accused person and he would nonetheless have a remedy with the common minimum punishment.

The author also proposes the creation of a Drugs Court in Malta to deal with minor offences of trafficking. Albeit this proposal is of little importance to this research, it is to be noted that Act 1 of 2015 has implemented many of the author's suggestions including the incorporation of a Drugs Court. With respect to the Voluntary Guideline¹⁰⁷ mechanism, many of the suggestions highlighted by the author have also been included in the Fourth Schedule Guidelines. As a concluding recommendation, the author suggests that a Sentencing Advisory Body should be created with the scope of creating more public awareness on sentencing procedures. With respect to this last suggestion, it is to be noted that such public awareness will be raised locally and this because primarily, it concerns local legislation. However, many of the drug couriers and or drug mules which are often apprehended in our jurisdiction are mostly foreigners who lack knowledge about our legal punitive system. Therefore any awareness which the Sentencing Advisory Body might be creating, won't be perceived by individuals who might be transiting with illicit substances. On a concluding note, the assessment carried out on this dissertation has proven very fruitful and this because it was one of the very few theses which dealt with all aspects of the subject. In addition, the contents of this thesis were presented in a very well structured manner.

3.2.4 The Unlawful Possession of Drugs and Narcotic Substances: A Comparative Analysis¹⁰⁸

This dissertation has been divided into five chapters which deal with the following notions: '1) *Background of our previous domestic legislation*, 2) *Definitions of the most important terms*, 3) *The various processes relative to dealing and trafficking of*

¹⁰⁶ Stephanie Shaw: *The Maltese Sentencing Regime in Relation to Drug Trafficking Offences* (University of Malta, May 2013), page 121.

¹⁰⁷ *Ibid*, page 124.

¹⁰⁸ Marouska Debono: *The Unlawful Possession of Drugs and Narcotic Substances* (University of Malta, May 2010)

drugs, 4) *Simple and Aggravated Possession* and 5) *A comparative analysis on the procedure adopted by 3 member states including suggestions for possible reform*'.

Chapter 1 provides a historical insight on the use of drugs which led to the eventual drug addiction and the need to enact legislation to regulate the use thereof. The author makes reference to various international conventions amongst which include the 1912 Hague International Opium Convention,¹⁰⁹ the revised Opium Convention,¹¹⁰ the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs,¹¹¹ the Convention for the Suppression of Illicit Traffic in Dangerous Drugs,¹¹² the Single Convention on Narcotic Drugs¹¹³ and the 1972 Protocol amending the Single Convention on Narcotic Drugs. This is followed by a brief overview of the first national drug law, that is the Second Sanitary Ordinance,¹¹⁴ the Opium Ordinance¹¹⁵ which was subsequently amended in 1921 and in 1924 to include the term '*other drugs*'. This is followed by a reference to the 1926 Dangerous Drugs Ordinance,¹¹⁶ Act XV of 1926, the 1939 Dangerous Drugs Ordinance¹¹⁷ and the Medical and Kindred Professions Ordinance.¹¹⁸ The analysis of the above Conventions and pieces of legislation is a very thorough one and includes the salient features of each one. However, in reviewing the local legislation, particularly the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance, the author does not make any reference to issues relating to the Attorney General's discretion to decide which Court shall preside an accused person's case.

The author attempts to define '*simple possession*' in Chapter 2 by first providing a clear definition of '*dangerous drug*'. She affirms that the definition given in the Dangerous Drugs Ordinance is '*prima facie a formal one rather than a substantive one and all it does is that it tells us what a dangerous drug includes*'.¹¹⁹ This study disagrees with such affirmation and this because the definition of the term '*dangerous drugs*' necessitates a classification of all prohibited drugs. Following this

¹⁰⁹Signed on the 23rd January 1912

¹¹⁰ Signed on the 19th February 1925

¹¹¹ Signed on the 13th July 1931.

¹¹² Signed on the 26th June 1936.

¹¹³ Signed on the 30th March 1961.

¹¹⁴ Ordinance XVII of 1901.

¹¹⁵ Ordinance XVI of 1913.

¹¹⁶ Ordinance 1 of 1926.

¹¹⁷ Ordinance XXXI of 1939.

¹¹⁸ *Ibid.* 92.

¹¹⁹ Marouska Debono: *The Unlawful Possession of Drugs and Narcotic Substances* (University of Malta, May 2010), page 42.

definition, the author proceeds to further define the term '*simple possession*' by referring to the Dangerous Drugs Ordinance and Court judgements. The author makes an interesting point with respect to the discretion given to the Courts in determining whether an offender intended to consume the drug on the spot or not.¹²⁰

The author also states that such discretion is backed up by guidelines which include '*the amount and the nature of the drug involved, the character of the person involved and also, the number and nature of any previous convictions*'.¹²¹ These guidelines are very similar to the ones included in the Fourth Schedule Guidelines of Act XXIV of 2014, however the former guidelines are only intended to assist the Courts in determining whether an accused person intended to consume the drug on the spot and the latter guidelines were purposely introduced to assist the Attorney General in determining whether an accused person should face trial before the Criminal Court or before the Inferior Courts.

In a separate section, the author remarks also on the possible punishment scenario which is normally given in cases concerning simple drug possession. The punishments indicated by the author may not be very precise because since then, Act 1 of 2015 has been introduced. This Act deals specifically with first time offenders charged with simple possession and who will be subjected to fines instead of undergoing proceedings in Court. If the same individuals are caught for the second time in two years, then their cases will be referred to a Drugs Offenders Rehabilitation Board. Following the above section, the author also offers an insight into a comparative analysis on the notion of '*possession*' mainly those relating to the South African legal system and the Greek legal system.

Chapter 3 delves into the definitions of '*Possession not for the Exclusive Use*', '*Cultivation*', '*Sharing*', '*Importation*' and '*Dealing*'. The author has provided a detailed explanation for each one backed up by Court judgements. However, no reference was made to any discretion which the Attorney General might exercise when issuing the above charges against individuals caught dealing or in possession of the listed illicit substances.

¹²⁰ *Ibid*, page 49.

¹²¹ *Ibid*.

Chapter 4 includes an overview of ‘*simple and aggravated possession*’ and an insight into the ‘*role of the Attorney General*’ and ‘*the police investigative powers*’. In the section dealing with the ‘*role of the Attorney General*’, the author has opined that ‘*The Attorney General is delegated special powers under several acts and ordinances, one of which is the Dangerous Drugs Ordinance.*’¹²² She continues adding that ‘*He has the power to decide whether a person should be tried either in the Court of Magistrates or in the Criminal Court. It went on that till the present day, it is left in the hands of the Attorney General to decide whether the accused of drug trafficking is charged in front of one Court or another which punishments differ.*’¹²³

She also stresses that the Attorney General factors various elements which assist him in such decision. These include ‘*1) the nature of the drug involved; 2) the nature of the dealing of the drug; 3) the quantity of the drug; 4) the purity of the drug involved; 5) the way it is dealt with, and 6) who the person is.*’¹²⁴ Many of these considerations are very similar to the ones inserted in the Fourth Schedule Guidelines of Act XXIV of 2014. It is also interesting to note that the author has concluded that given that the Attorney General has its own guidelines in order to determine whether an individual should face trial before the Court of Magistrates or before the Criminal Court, then it should suffice. She also states that ‘*if the defendant thinks that the judgement was not appropriate, he can seek remedy by filing an appeal.*’¹²⁵ It is indeed worrying to note that the author of this dissertation was very comfortable in accepting the legal position which existed prior the introduction of Act XXIV of 2014. In view of such statement, this study is indeed considered as essential because in matters relating to drug-trafficking we certainly cannot afford being indifferent to certain circumstances which might heavily impinge on individuals’ fundamental human rights. It is certainly never enough to continue improving our present legal system so the Courts can deliver fair judgements in a proper, accountable and reliable manner.

The section dealing with the ‘*Police Investigative Powers*’ deals mainly on whether the Police require the Attorney General’s consent to commence proceedings for

¹²² Marouska Debono: *The Unlawful Possession of Drugs and Narcotic Substances* (University of Malta, May 2010), page 78.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, page 79.

¹²⁵ *Ibid.*

simple or aggravated possession. In a separate section, the author goes into the specifics of Article 29 of Chapter 101 of the Laws of Malta which concerns the diminishment of punishment where the accused person assists the Police in apprehending the supplier of illicit substances. She also states that *'This is a very important provision, in such a way that the person charged who is in possession of an illegal substance, is given an incentive by helping the police'*.¹²⁶ The author does not indicate any suggestions and or recommendations for such provision therefore the assumption is that she might be content of what the law states. However, it is important to stress out that the application of Article 29, which is left in the hands of the Prosecution and this alone can create a bit of havoc when it is declared in Court that one of two accused persons charged with the same offences, should benefit from such provision. However, this scenario will be discussed in further detail in Chapter 4 of this study.

In Chapter 5, the author discusses the different approaches undertaken in different jurisdictions and puts forth her recommendations to the problems encountered. The first recommendation is to amalgamate both existing Ordinances, that is, the Medical and Kindred Professions Ordinance together with the Dangerous Drugs Ordinance. The second recommendation is related to unregulated drugs such as the substance *'khat'* whereas the third recommendation concerns the incorporation of a Drugs Court to deal with offenders and their problems related to substance abuse. As stated earlier, this last recommendation has already been attended to by means of Act 1 of 2015. As a final recommendation, the author proposes a legislative proposal concerning the control of dangerous drugs. The proposed amendments to the Dangerous Drugs Ordinance mainly relate to the inclusion of the substance *'khat'* to the other listed illicit substances.

In reviewing the above dissertations, one can conclude saying that certain authors have dedicated more time than others on the issue relating to the Attorney General's discretion. It is clearly evident that not all authors regard such issue as being of fundamental importance, however those who were capable of identifying such issues, have shown concern and have also provided feasible recommendations and or suggestions to address such matters.

¹²⁶ *Ibid*, page 81.

3.3 JUDGEMENTS DELIVERED BY THE EUROPEAN COURT OF HUMAN RIGHTS

3.3.1 Case of *Camilleri v. Malta*¹²⁷

The above case is thought to have sparked the debate relating to the Attorney General's unfettered discretion in determining where an accused person should stand trial. It is indeed opportune to assess the merits of this case and the outcome of such proceedings.

In 2003, the applicant was charged with having been in possession of ecstasy pills which amounts denoted that these were not for his exclusive use. In view of such amounts, the Attorney General decided to proceed with the trial before the Criminal Court. Subsequently, a trial by jury took place before the Criminal Court and found the accused guilty of all the charges which were brought against him. On the 16th November 2005, the Court condemned him to fifteen years imprisonment plus payment of a fine amounting to fifteen thousand Maltese pounds (Lm 15,000) and payment of all costs and expenses. The Court had also ordered a confiscation of his assets.¹²⁸

In 2009, the applicant lodged a Constitutional redress and argued that the discretion exercised by the Attorney General in deciding where to try an accused person infringed the impartiality requirement as laid down in Article 6 of the Convention. However, by means of a judgement delivered on the 14th July 2009, the Court rejected the applicant's complaint. An appeal was filed on the 31st July 2009 before the Constitutional Court. The latter Court ruled that *'there was no doubt that the applicant has been tried before an impartial tribunal established by law and that the trial had been fair'*.¹²⁹ In addition, the Court declared that there was no infringement of Articles 6 and 7 of the Convention given that the accused was aware of what the minimum and maximum punishments were at the time when the crime was committed.

¹²⁷ *Camilleri v. Malta*, App. No. 42931/10, 22nd January 2013.

¹²⁸ *Ibid.*

¹²⁹ *Ibid*, page 3.

In the above judgement,¹³⁰ the ECtHR assessed the relevant domestic law and quoted Articles 120A (2) and 120A (7) of Chapter 31, Articles 21, 28A and 430 of Chapter 9 and Section 91 (3) of the Constitution of Malta. In quoting the above sections, the ECtHR wanted to gain knowledge on the minimum and maximum punishments which can be given by the Criminal Court. In addition to these, the Court has also highlighted other provisions mainly Articles 6 §1 and 7 of the Convention which the Complainant quoted when filing his application. It also makes reference to the declaration of admissibility in connection with the same application.

With respect to the merits, the ECtHR made reference to the parties' submissions, which included numerous valid arguments raised by the applicant. The first argument relates to the imbalance created by the Attorney General when making a binding decision in connection with the trial. He stresses that such imbalance can never be rectified by the Courts because the Attorney General's decision at that stage was never appealable. The applicant's second argument highlights the punishment parameters which are given by the Court of Magistrates and the Criminal Court. He also states that the '*Constitutional Court was wrong to hold that he had not suffered any prejudice since he had been punished with a sentence of fifteen years' imprisonment and a fine of approximately Eur 35,000, while if he appeared before the Court of Magistrates, the maximum punishment for a verdict of guilt would have been ten years' imprisonment and a lower fine.*'¹³¹ In his third argument, the applicant questions whether the Attorney General was wise enough to prosecute him before the Criminal Court instead of the Court of Magistrates. The fact that such decision could not be based on objective criteria was raised as a fourth argument. As a final argument, the applicant makes reference to the recommendations put forth by the Constitutional Court, which had suggested that the Attorney General should draw up clear guidelines on which to base such decisions. The applicant made reference to the cases of *Kafkaris v. Cyprus*¹³², *Salduz v. Turkey*¹³³ and of *Imbroscia v. Switzerland*¹³⁴ in substantiation of his argument concerning the exercise of fair treatment which should also be extended to the pre-trial stage.

¹³⁰ *Ibid*, 105.

¹³¹ *Camilleri v. Malta*, App. No. 42931/10, 22nd January 2013, page 6.

¹³² *Kafkaris v. Cyprus*, App. No. 21906/04, 12th February 2008.

¹³³ *Salduz v. Turkey*, App. No. 36391/02, 27th November 2008.

¹³⁴ *Imbroscia v. Switzerland*, App. No. 13972/88, 24th November 1993.

The arguments raised by the Government of Malta included the following: 1) that the decision made by the Attorney General was made at the pre-trial stage that is before he assumed the role of prosecutor, 2) that such decision would in no way influence the ensuing trial thus there could be no breach of the independence or impartiality requirement, 3) that such discretion would not be exercised during the criminal proceedings thus falling outside the remit of the relevant provisions relating to 'fair trial', 4) that such decision is based on objective criteria which includes taking into account the quantity of drugs seized, the method of concealment and the accused person's involvement, 5) that the applicant could foresee the applicable punishment once the Attorney General exercised his discretion at the pre-trial stage, 6) that punishment was clearly foreseeable to the applicant, and 7) that in view of the seriousness of the crime, the applicant is surely aware of the punishment bracket and this without the need to seek legal advice.

In its assessment, the ECtHR examined the applicant's complaint firstly under Article 7 of the Convention.¹³⁵ It reiterated the following general principles which should have been observed both at the pre-trial stage and during the pendency of such criminal proceedings. These include: 1) the application of Article 7 of the Convention to ensure effective safeguards against arbitrary punishment, therefore offences and the relevant penalties should be clearly delineated; 2) *'An individual must know from the wording of the relevant provision what acts and omissions will make him criminally liable and what penalty will be imposed for the act and or omission committed,'*¹³⁶ 3) the duty on the respective Courts to clarify any ambiguities which might result from the wording of the law in connection with criminal liability – it should first ascertain whether the requirements of accessibility and foreseeability have been observed; 4) the decision relating to the choice of jurisdiction remained questionable as to whether it satisfied the requisites of foreseeability; 5) such punishment bracket was only made known to the applicant after he is charged before the respective Court – this also means that even if the applicant had to seek legal advice during the pre-trial stage, he would not have been in a position to ascertain the above punishment bracket; 6) the criteria which the Attorney General follows prior determining which Court has the appropriate jurisdiction to hear the case, such

¹³⁵ *Camilleri v. Malta*, App. No. 42931/10, 22nd January 2013, page 10.

¹³⁶ *Ibid*, page 10.

criteria does not emanate from any legislation. Based on these, the ECtHR declared that *'the decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards'*.¹³⁷ In view of this, the ECtHR ruled that there has been a violation of Article 7 of the Convention. It awarded the applicant one thousand Euros (€ 1,000) in respect of non-pecuniary damage and five thousand Euros (€ 5,000) in respect of costs and expenses.

Following the above judgement, one finds the partly dissenting opinion of Judge Emeritus Lawrence Quintano. The latter has indicated various reasons as to why he does not share the same conclusions as those reached by the ECtHR. He makes reference to paragraphs 34, 35, 37, 41, 42 and 43 of the same judgement and explains why he does not agree with the same conclusions. In brief, he explains that the applicant could have easily obtained legal advice from a criminal lawyer who would have advised that possession of nine hundred and fifty-three ecstasy pills would have brought about a penalty of between four years and life imprisonment. He also insists that the wording inserted in our legislation is clear enough and that case-law is also available as soon as judgement is pronounced. Irrespective of whether the applicant could have sought legal advice or not, the Judge also stresses that drug cases are widely reported in Malta and that the applicant could easily foresee such penalties. He also makes reference to our case-law which indicates the parameters as set out by the Attorney General – mainly those relating to the quantity of drugs, the circumstances in which such drugs were found, whether the facts reveal conspiracy and the willingness of the accused to file an early guilty plea and or whether he cooperated with the Police. An important point made by the judge was the one relating to recommendations made by the Constitutional Court for the respective legislative refinements. Rightly so, Judge Quintano states that suggestions for refinements do not necessarily mean a violation of Article 7.¹³⁸ As a concluding remark, the Judge refers to Article 21 of the Criminal Code and states *'that there is nothing to stop the Criminal Court from going below the minimum of four years if the evidence reveals circumstances identical to those which may apply before the Court of Magistrates'*.¹³⁹

¹³⁷ *Ibid*, page 12.

¹³⁸ *Ibid*, page 20.

¹³⁹ *Ibid*, page 21.

It is also interesting to note that according to an Action Report filed by Malta on the 19th August 2014, the Government of Malta declared that following the above-indicated judgement, an Act was enacted in order to amend Chapter 9 of the Laws of Malta – Act XXIV of 2014.¹⁴⁰ In this communication report, it is explained that Part III of this Act deals with amendments to Chapter 31 of the Laws of Malta and that such legislation allows an accused person to file an application before the Criminal Court requesting a trial before the Court of Magistrates. It makes reference to the transitory provisions and highlights another important provision relating to the application of the appropriate punishment if the Criminal Court deems it opportune to apply a lesser penalty. As a concluding remark, the Government also highlights the Fourth Schedule Guidelines which the Attorney General must observe when deciding where to try an accused person. According to the Action Report, *'this procedure will eliminate any doubt as to the proper exercise of the discretion given to the public prosecutor by the independent scrutiny of the Courts'*.¹⁴¹ Based on this, the Government of Malta is of the opinion that all necessary measures have been taken to execute the respective judgement.

The above Action Report serves the purpose of reporting all measures taken by the Government of Malta in connection with the infringements highlighted in the Camilleri judgement. These measures relate mainly to the introduction of Act XXIV of 2014 and other additional remedies made available to an accused person pending criminal proceedings. The main question which remains unanswered is whether such remedies are indeed considered to be as effective as the Government is implying and whether the new procedures are functioning in the best possible manner. The answer to this lies precisely in the manner that this research is conducted and in the analysis carried out on all selected and extracted data.

The next source of data shall be all judgements delivered by the Constitutional Court from January 2013 to date. There are two reasons as to why this study will be limiting itself to reviewing judgements as from January 2013 and this mainly because the research needs to be limited in some way and also because the research is

¹⁴⁰ <[https://wcd.coe.int/ViewDoc.jsp?Ref=DHDD\(2014\)992&Language=lanFrench&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=DHDD(2014)992&Language=lanFrench&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)> accessed on 10th August 2015.

¹⁴¹ *Ibid.*

solely interested in the conclusions made by the respective Courts and whether any recommendations are put forth in the same judgements.

3.4 JUDGEMENTS DELIVERED BY THE MALTESE CONSTITUTIONAL COURT

This section will be analysing various judgements delivered by the Maltese Constitutional Court from January 2013 onwards and which judgements will be listed out in a chronological order. It is indeed opportune that this study outlines each of the following from the above judgements: 1) the facts of the case, 2) the applicant's requests, 3) the pleas raised by the Attorney General, 4) the Court's considerations and 5) the Judgement.

*3.4.1 Mario Camilleri vs Avukat Generali*¹⁴²

This judgement does not outline the facts of the case except for a mere reference to the charges which were brought against the applicant – aggravated possession of drugs. The applicant highlights the unjust discretionary power conferred upon the Attorney General when deciding which Court is to preside the trial. The applicant underlines the punishment brackets which are applicable to the Court of Magistrates and those applicable to the Criminal Court. He also states that even before the commencement of the respective proceedings, the Attorney General makes a binding judgement which will have effect on the accused's punishment, in case of guilt or admission.¹⁴³

In his request to the Court, the applicant also makes reference to the points raised by the ECtHR in the John Camilleri judgement and also to those raised in the Stanley Chircop case, where the Courts showed perplexity as to why the Attorney General took such decision.

¹⁴² *Mario Camilleri vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 9th July 2013.

¹⁴³ *Ibid*, page 2.

On the other hand, the Attorney General first argues that such proceedings are only intended to prolong the criminal proceedings. Then it proceeds to clarify that the powers conferred upon the Attorney General by means of Article 22 (2) of Chapter 101 are not synonymous to the functions exercised by members of the judiciary and to the powers conferred upon them. This discretionary exercise is carried out after having taken in regard all circumstances of the case. However this does not have any bearing on the quantum of punishment being applied, in case of admission or guilt.

The Court assessed Article 22 (2) of Chapter 101 and Articles 6 and 7 of the Convention. With respect to the applicability of Article 6 of the Convention, the Court states that:

Fid-dawl tal-fuq espost insenjament, li din il-Qorti tikkondividi, ma jistax, fil-fehma ta` din il-Qorti, jitqies li r-rikorrenti ser isoffri xi lezjoni tal-jedd fundamentali tieghu ghal smiegh xieraq kif protet bl-Art. 6 tal-Konvenzjoni Ewropea.¹⁴⁴

Following this evaluation, the Court reviews Article 7 in terms of the declarations made by the ECtHR in the John Camilleri judgment and states that:

Din il-Qorti tikkondividi pjenament dan ir-ragunament tal-Qorti Ewropea u ghaldaqstant issib illi fic-cirkostanzi, l-Art. 22(2) tal-Kap. 101 jivvjola l-Art. 7 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem.¹⁴⁵

Following the above, the Court declared that Article 22 (2) of Chapter 101 violates Article 7 of the Convention.

3.4.2 *Joseph Lebrun vs Avukat Generali*¹⁴⁶

In this case, the applicant was charged with various offences in breach of Chapter 101 of the Laws of Malta amongst which included possession of 7023.3 grams of heroin and 2.851 grams of cocaine.

The applicant claimed that he was still unaware of which Court will be presiding his trial and that such circumstances were violating Articles 6 and 7 of the Convention.

¹⁴⁴ *Ibid*, page 10 – In view of the said teachings which this Court agrees to, the applicant cannot be considered as being at risk of not having a fair trial as protected by Article 6 of the European Convention.

¹⁴⁵ *Ibid*, page 12 – This Court agrees with the reasoning provided by the European Court and in these circumstances, it finds that Article 22(2) of Chapter 101 violates Article 7 of the Convention.

¹⁴⁶ *Joseph Lebrun vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 21st February 2014.

He makes reference to the John Camilleri judgement and pinpoints that the Attorney General assumes the role of Prosecutor in the ensuing criminal proceedings. His decision is regarded as binding and implies a punishment bracket irrespective of whether the applicant is found guilty or not guilty by the respective Court.

The Attorney General argues that his decision is simply regarded as a direction and that it is made in a conscientious manner after having reviewed the respective local jurisprudence.

In its considerations, the Court first reviews Article 7 of the Convention and adds that:

Hu fatt li sal-lum il-gurnata ma jezistu l-ebda kriterji definiti li ghandu juza l-prosekutur meta jigi biex jiddeciedi quddiem liema qorti ghandu jsir il-process kriminali. Inoltre, l-ordni tal-prosekutur m'hijjex motivata. GHalhekk l-akkuzat ma jigix infurmat ta xi jkun iwassal lill-Avukat Generali sabiex jiddeciedi li l-akkuzat ghnadu jigi ggudikat mill-Qorti tal-Magistrati jew Qorti Kriminali. M'hemmx dubju li d-decizjoni tal-Avukat Generali ikollha impatt fuq il-piena karcerarja li jista` jehel l-akkuzat meta tqies li fir-rigward ta` akkuzi bhal dawk li saru fil-konfront tar-rikorrent, quddiem il-Qorti Kriminali :- (a) l-piena hi ta` ghomor il-habs; b'dan li (b) fic-cirkostanzi kontemplati fil-Kap. 101 l-akkuzat jista` jehel piena minima ta` 4 snin habs, filwaqt li quddiem il-Qorti tal-Magistrati l-piena minima hi ta` 6 xhur habs;¹⁴⁷

The Court goes on to assess the case of *Mark James Taylor v United Kingdom*,¹⁴⁸ and the John Camilleri and Mario Camilleri judgements which were delivered by the ECtHR. Another reference is made to the *Marckx v. Belgium*,¹⁴⁹ where it quoted the following:

*Admittedly, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions.*¹⁵⁰

¹⁴⁷ *Ibid*, page 5 – It is a fact that until this present day, there exist no definite guidelines which the prosecutor must follow when deciding which Court is to have jurisdiction. In addition, the prosecutor's order is not motivated. Therefore the accused is not informed of the Attorney General's reasons as to what lead to his decision. There is no doubt that such decision will have an impact on the imprisonment term which the accused may face before the Criminal Court:- (a) punishment of up to a lifetime imprisonment; (b) in the circumstances prescribed in Chapter 101, the minimum punishment which the accused can get is that of four years whereas the minimum punishment before the Court of Magistrates is of six months imprisonment.

¹⁴⁸ *Mark James Taylor v United Kingdom*, App. No. 48864/99, 3rd December 2002.

¹⁴⁹ *Marckx v. Belgium*, App. No. 6833/74, 13th June 1979.

¹⁵⁰ *Joseph Lebrun vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 21st February 2014, page 9.

Based on the above, the Court confirms that it wants to follow the interpretation given by the ECtHR in the above judgements in order to ensure certainty, consistency and uniformity in the application of the respective legal provisions.¹⁵¹

In assessing Article 6 of the Convention, the Court expresses its concern at the fact that the minimum punishment which can be meted out by the Criminal Court is much higher than that which can be imposed by the Court of Magistrates. This implies that it is the Attorney General who decides on the applicable minimum punishment once he directs an accused person to face trial before the respective Court.¹⁵²

The Court also adds that:

Il-Principju tar-Rule of law u l-kuncett ta` fair trial sanciti fl-Artikolu 6 ma ghandhomx jippermettu li jkun hemm dn it-tip ta` indhil fl-amministrazzjoni tal-gustizzja¹⁵³ ...Ghalhekk il-Qorti tikkonkludi li l-Artikolu 22(2) tal-Kap. 101 hu inkonsistenti mad-dritt tas-smiegh xieraq, gialadarba hu l-Avukat Generali li qiegħed jiddeciedi liema hi l-piena applikabbli għar-reati taht il-Kap. 101.¹⁵⁴

As a concluding remark, the Court highlights also the applicable remedy to the case in question and given that criminal proceedings had not yet initiated before the Criminal Court, it recommended the latter Court to take note that the decision exercised by the Attorney General was violating the provisions of Articles 6 and 7 of the Convention.

It is to be noted that following an appeal filed by the Attorney General, on the 16th September 2014, the Constitutional Court revoked the judgement delivered by the First Hall of the Civil Court (Constitutional Jurisdiction) and declared that the application of Article 22(2) of Chapter 101 of the Laws of Malta had not violated Articles 6 and 7 of the Convention and Article 39 of the Constitution of Malta.¹⁵⁵

¹⁵¹ *Ibid*, page 10.

¹⁵² *Ibid*, page 11.

¹⁵³ *Ibid*, page 12.

¹⁵⁴ *Ibid* – *The Principle of Rule of Law and the concept of fair trial as enshrined in Article 6 should not permit this type of involvement in the administration of justice.... Therefore the Court concludes that Article 22(2) of Chapter 101 is inconsistent with the concept of fair trial, once it is the Attorney General that decides which punishment is to apply for the crimes laid out in Chapter 101.*

¹⁵⁵ *Joseph Lebrun v. Avukat General*, Constitutional Court, 16th September 2014, page 20.

In its considerations, the Constitutional Court made reference to the judgements delivered in *Godfrey Ellul v. Avukat Generali*¹⁵⁶, *Repubblika ta` Malta v. Mario Camilleri*¹⁵⁷ and to *Claudio Porsenna v. Avukat Generali*¹⁵⁸. It also stated that:

Fil-Kaz odjern mhux qed jigi allegat li r-rikorrent ma kienx qed jinghata smiegh xieraq minhabba xi haga li sehhet matul l-iter tal-proceduri kriminali wara li kien gie mixli quddiem il-qrati kriminali, imma qed jilmenta mill-fatt li hu "ghadu fil-ghama jekk fl-gheluq tal-kumpilazzjoni l-Avukat Generali hux ser jordna li l-kaz tieghu jigi deciz mill-Qorti tal-Magistrati (Malta) jew minn guri fil-Qorti Kriminali." Din il-Qorti tosserva li dan ma jwassalx ghal ksur tad-dritt ghal smiegh xieraq tar-rikorrent, stante li d-diskrezzjoni tal-intimat hija finalment marbuta mal-provi li jingabru matul l-istrutturja, u huwa fil-konkluzjoni tal-gbir ta` dawn il-provi li l-intimat ikun fl-ahjar pozizzjoni li finalment jiddeciedi f'liema forum ghandu jigi trattat u deciz il-kaz kontra r-rikorrent.¹⁵⁹

3.4.3 *Repubblika ta` Malta vs Matthew Zarb et*¹⁶⁰

One of the accused persons in this case, Franklin Orsini made a Constitutional reference before the Criminal Court on the 25th September 2013. One of the grounds cited in his constitutional reference relates to the discretion exercised by the Attorney General in drug-trafficking cases in determining whether the respective individuals are to face trial before the Court of Magistrates or before the Criminal Court.

As a preamble, the Court highlights the following:

L-uzu tad-diskrezzjoni huwa ezercizzju amministrattiv li, bhal kull decizjoni amministrattiva, jista` jkun sindikabbli mill-qrati ordinarji bis-sahha tal-poteri generali taghom ta` stharrig gudizzjarju tal-ghemil tal-gvern. Din il-qorti la hija kompetenti u lanqas ma giet mitluba tissindika d-diskrezzjoni uzata mill-Avukat Generali fil-konfront ta` Franklin Orsini, izda trid tara biss jekk id-diskrezzjoni moghtija bil-ligi lill-Avukat Generali jilledix id-dritt tar-rikorrent skond l-Artikolu 7 tal-Konvenzjoni Ewropea dwar id-drittijiet tal-bniedem.¹⁶¹

The Court has also made reference to the Camilleri judgement particularly to the section relating to the foreseeability requirement. It also stresses the importance of

¹⁵⁶ *Godfrey Ellul v. Avukat Generali*, Constitutional Court, 5th July 2005.

¹⁵⁷ *Repubblika ta` Malta v. Mario Camilleri*, Criminal Court, 23rd January 2001.

¹⁵⁸ *Claudio Porsenna v. Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 16th March 2012.

¹⁵⁹ *Joseph Lebrun v. Avukat Generali*, Constitutional Court, 16th September 2014.

¹⁶⁰ *Repubblika ta` Malta vs Matthew Zarb et.*, First Hall of the Civil Court (Constitutional Jurisdiction), 7th March 2014.

¹⁶¹ *Ibid*, page 2-3 – *The use of discretion is an administrative exercise, and similar to any other administrative decision, can be made subject to judicial review with the government's intervention. This Court is not competent and has not been requested to review the Attorney General's discretion in Franklin Orsini's case, but it should assess whether such discretion permitted to the Attorney General by law, impinges of the individual's human rights according to Article 7 of the Convention.*

the dissenting opinion as presented by Judge Emeritus Lawrence Quintano and that in case of an infringement, this would not hinder the criminal process in any way and that a trial by jury would still take place. It also states that:

*Din il-Qorti taqbel ma` dan il-pronunzjament, pero`, ma tistax u mhux se taghti xi forma ta` rimedju ghax dan ma jdholx fil-kompetenza taghha.*¹⁶²

In its conclusion, the Court declared that Article 22(2) of Chapter 101 and Article 120A (2) of Chapter 31 of the Laws of Malta breach Article 7 of the Convention.

Similar to the case of *Joseph Lebrun v. Avukat General*, and following an appeal filed by the Republic of Malta, the Constitutional Court once again declared that Article 7 of the Convention is inapplicable given that the applicants' criminal proceedings was still pending.¹⁶³ In addition to this, the Court has also declared the following:

*Wara l-emendi li saru bl-att XXIV u li gew fis-sehh fl-14 ta` Awwissu 2014, irrikorrent akkuzat ghandu dritt ta` appell mid-decizjoni tal-Avukat Generali quddiem il-Qorti tal-Appell Kriminali u ghalhekk l-uzu tad-diskrezzjoni uzata mill-Avukat Generali fil-kazijiet individwali hija sindikabbli gudizzjarjament mill-grati lokali. Ghalhekk il-fatur tal-'unfettered discretion' jew possibilita` ta` arbitrarjeta` da parti tal-Avukat Generali fl-uzu tad-diskrezzjoni tieghu illum spicca, ghax skont l-istess emendi, in forza ta` dispozizzjoni transatorja, irrikorrenti, tenut kont li l-proceduri kriminali kontra tieghu ghadhom pendent, ghandu d-dritt li jappella, ghal darba wahda biss, mid-decizjoni tal-Avukat Generali fi zmien xahar mid-data tad-dhul fis-sehh tal-istess subinciz u cioe` fl-14 ta` Awwissu 2014.*¹⁶⁴

It is indeed interesting to note the Court's remarks vis-à-vis the new legal provisions regulating the Attorney General's use of discretion. In this case, the Court seems to be satisfied with such legal enactment and does not question the effectiveness of such remedy.

¹⁶² *Ibid*, page 4 – This Court does not agree with such decision however it cannot and will not give a remedy because this goes beyond its competence.

¹⁶³ *Repubblika ta` Malta v. Matthew Zarb et.*, Constitutional Court, 6th February 2015.

¹⁶⁴ *Ibid*, page 11 – After the introduction of Act XXIV which came into force on the 14th August 2014, the accused has a right to appeal the Attorney General's decision before the Court of Criminal Appeal, therefore the Attorney General's discretion is made subject to judicial review. Therefore the notion of 'unfettered discretion' or possible arbitrariness exercised by the Attorney General through his decision has ended, because the accused has been given the right of appeal, once only, against the decision made by the Attorney General, within one month from the date of enactment, that is from the 14th August 2014.

3.4.4 *Ir-Repubblika ta` Malta vs Giovanna Pace, Mark Pace u Christopher Mazzitelli*¹⁶⁵

The Court referred to the Constitutional reference filed by the applicant Giovanna Pace, which reference was acceded to by means of a decree issued by the Criminal Court on the 26th November 2013. In its judgement, the Court did not make any specific reference to the submissions made by the applicant in its Court application. However, the Court has made reference to the Attorney General's reply which was filed on the 30th December 2013. The Attorney General contested such application for the following reasons: 1) that the applicant was aware of the punishment parameters, 2) that the Attorney General's discretionary function is only utilised after the respective Court acts are assessed meticulously, 3) that such decision is taken in a conscientious manner – notwithstanding the fact that the criteria followed by the Attorney General are not listed in any legislative text, this should not be regarded as an infringement to Article 7 of the Convention, 4) that there has not been any change in punishment since the crime was committed, 5) that as from the commencement of the inquiry proceedings, the applicant knew that the trial would have taken place before the Criminal Court, 6) that the applicant was aware of such punishment parameters once the crime was committed, 7) that the criminal Court is vested with the discretion to apply punishments which are normally meted out by the Court of Magistrates, 8) that the applicant could have anticipated before which Court her trial would have taken place and this before she was actually arraigned in Court, and 8) that the Attorney General formally declares that he does not agree with the conclusions reached by the ECtHR and that he embraces the dissenting opinion provided by Judge Emeritus Lawrence Quintano.¹⁶⁶

The applicant was charged with having conspired with others for the purposes of selling or dealing in heroin, cocaine and cannabis resin. The quantities recovered were that of 13.3 grams of heroin, 118.4 grams cannabis resin and 0.6 grams cocaine. The applicant was arraigned before the Court of Magistrates on the 22nd April 2004 and was subsequently placed under a bill of indictment on the 16th June 2011.

¹⁶⁵ *Ir-Repubblika ta` Malta vs Giovanna Pace, Mark Pace u Christopher Mazzitelli*, First Hall of the Civil Court (Constitutional Jurisdiction), 28th March 2014.

¹⁶⁶ *Ibid*, page 2-3.

In its considerations, the Court made reference to the cases of *Dimech vs Avukat Generali*¹⁶⁷ and *Lebrun vs Avukat Generali*¹⁶⁸, and quoted the following:

*L-Artikolu 22(2) tal-Kap. 101 jipprovdi li persuna akkuzata b'reat kontra l-Ordinanza ghandu jitressaq jew quddiem il-Qorti Kriminali jew quddiem il-Qorti tal-Magistrati (Malta) jew quddiem il-Qorti tal-Magistrati (Ghawdex), skond kif jordna l-Avukat Generali. Il-piena f'kaz ta` sejbien ta` htija minn Qorti Kriminali tista` tasal sa ghomor il-habs, mentri f'kaz ta` sejbien ta` htija minn Qorti tal-Magistrati (Malta) jew (GHawdex), il-piena hija l-massima.*¹⁶⁹

In addition to the above, the Court highlights the referencing made to Article 91 (3) of the Constitution of Malta and Article 7 of the Convention by the above-indicated judgements. It also highlighted the interpretation given by the Courts in regard to Article 7 of the Convention.¹⁷⁰

The Court quotes additional chunks of text from the same above-indicated judgements, which mainly relate to the cases of *John Camilleri vs Avukat Generali*¹⁷¹, *John Camilleri v. Malta* and the conclusions reached by the ECtHR in the latter judgement.

As a concluding remark, the Court stated the following:

Fil-kaz in ezami l-qorti taddotta l-istess ragunament. Minn dakinhar jirrizulta illi fis-7 ta` Marzu 2014 inghatat sentenza ohra minn din il-qorti fil-kaz ir-Repubblika ta` Malta vs Matthew Zarb et fejn il-qorti addottat il-pozizzjoni li hadet il-Qorti Ewropea fil-Kaz Camilleri vs Ellul (42931/10). Sfortunatament sal-lum ghadhom ma ttiehdux passi biex is-sitwazzjoni tigi rimedjata, b'introduzzjoni ta` att li jemenda l-posizzjoni attwali dwar id-diskrezzjoni li jgawdi l-Avukat Generali meta jgii biex jiddeciedi quddiem liema qorti ghandu jinstema` u jigi deciz il-kaz. Dan ser ikompli iwassal ghall-kazijiet rispettivi bla bzonni. Wiehed jista` jkollu rizervi dwar dak li ddecidiet il-Qorti Ewropea, pero` d-decizjoni hija cara. L-implimentazzjoni tad-decizjoni kontra Malta titlob li jittiehdu mizuri generali mill-Istat koncernat sabiex ma jippermettix li tkompli

¹⁶⁷ *Joseph Lebrun vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 21st February 2014.

¹⁶⁸ *Martin Dimech vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 21st February 2014.

¹⁶⁹ *Ir-Repubblika ta` Malta vs Giovanna Pace, Mark Pace u Christopher Mazzitelli*, First Hall of the Civil Court (Constitutional Jurisdiction), 28th March 2014 page 3 – *Article 22(2) of Chapter 101 provides that any person committing a crime against the provisions of the Ordinance shall face trial before the Criminal Court, or before the Court of Magistrates (Gozo) or before the Court of Magistrates (Malta). If found guilty before the Criminal Court, the punishment can go up to a lifetime imprisonment whereas the maximum punishment which can be given by the Court of Magistrates, there is a maximum in punishment.*

¹⁷⁰ *Ibid* 138.

¹⁷¹ *John Camilleri vs l-Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 9th July 2013.

*ssehh vjolazzjoni simili ghal dik li sabet il-Qorti Ewropea. Wiehed jittama li fl-emendi li qieghed jinghad li ser jigu ntrodotti, din il-materja tigi trattata.*¹⁷²

This study fully agrees with the interpretation given by the above Court, however regrettably enough, a typo could have been avoided when quoting the Camilleri judgement. Based on this reasoning, the Court declared a breach of Article 7 of the Convention and of Article 39 (8) of the Constitution of Malta.

*3.4.5 The Republic of Malta vs Ndubisi Ndah Patrick*¹⁷³

In this case, the applicant was charged with various offences in breach of Chapter 101 of the Laws of Malta amongst which included possession of 491.4 grams of heroin and 148.5 grams of cocaine. On the 30th August 2010, the Attorney General gave an order to direct the accused for trial before the Criminal Court. In his constitutional reference, the applicant made reference to John Camilleri judgement, particularly to paragraph 44 relating to Article 120A (2) of Chapter 31 of the Laws of Malta which failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment.¹⁷⁴

The Attorney General opposed the applicant's request and argued that the discretion was not in violation of Article 7 of the Convention. He referred to Article 91 of the Constitution of Malta and that such discretion was exercised in a conscientious manner, well within the parameters and criteria as laid down in local jurisprudence. In addition, the Attorney General has highlighted the differences resulting from the Camilleri judgement and the above case. The former case was not concluded yet whereas the latter, the applicant had been condemned to fifteen years imprisonment. The applicant in these proceedings could easily anticipate the punishment parameter and which Court would have had jurisdiction. Moreover, the Attorney General once

¹⁷² *Ir-Repubblika ta` Malta vs Giovanna Pace, Mark Pace u Christopher Mazzitelli*, First Hall of the Civil Court (Constitutional Jurisdiction), 28th March 2014, page 10 – *In this case, the Court adopts the same interpretation. From that day, it results that on the 7th March 2014 a judgement was given in the case of Repubblica ta` Malta vs Matthew Zarb et where the Court adopted the same position as that of Camilleri vs Ellul (42931/10). Unfortunately, nothing has been done yet in order to remedy the situation, by means of a legal enactment to amend the present position relating to the discretion enjoyed by the Attorney General in deciding which Court shall have jurisdiction to hear the case. This will continue adding up to these kind of cases. One might have his own reservations on the conclusions reached by the European Court of Human Rights, however the decision is clear. The implementation of such decision requires that certain measures are taken in order not to have additional violations as those highlighted by the European Court of Human Rights. One hopes that with the new legal amendments, the above will be attended to.*

¹⁷³ *The Republic of Malta vs Ndubisi Ndah Patrick*, First Hall of the Civil Court (Constitutional Jurisdiction), 8 May 2014.

¹⁷⁴ *Ibid*, page 6.

again supports the conclusions reached by Judge Emeritus Lawrence Quintano in his dissenting opinion.

In its considerations, the Court first reviews Article 7 of the Convention and Article 39(8) of the Maltese Constitution, which are substantively similar. It refers to various judgements delivered by the ECtHR namely *Kokkinakis v Greece*,¹⁷⁵ *Achour v France*,¹⁷⁶ *Soros v France*,¹⁷⁷ *Sunday Times v United Kingdom*,¹⁷⁸ *Coeme and others v Belgium*,¹⁷⁹ *Cantoni v France*,¹⁸⁰ *S.W. v UK*¹⁸¹ and *Pessino v France*.¹⁸² A reference to all these cases was made in order to highlight the following: a. that all criminal laws have to be precise and clear in order to guarantee foreseeability, b. that written and unwritten legal provisions need to be accessible and foreseeable, and c. that the criterion of foreseeability is closely linked to clarity and accessibility.

With respect to local case-law, the local Court referred to the above-quoted judgements, mainly those concerning *Joseph Lebrun vs Avukat Generali* and *Martin Dimech vs Avukat Generali*, *Repubblika ta` Malta vs Matthew Zarb* and *Repubblika ta` Malta vs Giovanna Pace et*. It points out that the Courts were unanimous in their findings and declared that such provision breaches Article 7 of the Convention.

The Court also made an in-depth analysis of the Camilleri judgement and states the following:

*The Court considers that the accused in this and similar cases is faced with a decision already made by the Attorney General which not only impacts the choice of forum but also determines the penalty bracket applicable to him and this is known to him only at the moment he is charged before one Court and not another. Article 7 is breached not because the penalties applicable are unclear, but because the discretion is arbitrary in the terms discussed ante. The uncertainty does not depend on a finding of guilt but on the making of the decision itself in violation of the principles of the rule of law underpinning Article 7.*¹⁸³

The same Court concludes that:

¹⁷⁵ *Kokkinakis v Greece*, App. No. 14307/88, 25th May 1993.

¹⁷⁶ *Achour v France*, App No. 67335/01, 29th March 2006.

¹⁷⁷ *Soros v France*, App. No. 50425/06, 6th October 2011.

¹⁷⁸ *Sunday Times v United Kingdom*, App. No. 6538/74, 26th April 1979.

¹⁷⁹ *Coeme and other v Belgium*, App. No. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96.

¹⁸⁰ *Cantoni v France*, App. No. 17862/91, 11th November 1996.

¹⁸¹ *S.W. v UK*, App. No. 20166/92, 22nd November 1995.

¹⁸² *Pessino v France*, App. No. 40403/02, 10th October 2006.

¹⁸³ *The Republic of Malta vs Ndubisi Ndah Patrick*, First Hall of the Civil Court (Constitutional Jurisdiction), 8 May 2014, page 17.

*The Court in view of the foregoing does not see any reason to depart from the decisions consistently taken by this Court as presided by different members of the judiciary already quoted.*¹⁸⁴

It also declares that Article 22(2) of Chapter 101 of the Laws of Malta is in breach of Article 7 of the Convention.

3.4.6 *The Republic of Malta vs Nelson Mufa*¹⁸⁵

In this case, the applicant, by means of a bill of indictment, was charged with various offences related to drug trafficking amongst which included the charge of conspiracy for the purposes of selling or dealing in the drug heroin, which drug amounted to 948 grams.

The Court made reference to the Attorney General's reply which first reiterated the powers conferred upon him as per Article 91 of the Constitution of Malta and that such discretion was exercised conscientiously and according to the established guidelines which emanated from local jurisprudence. He also draws a distinction between the John Camilleri case and the above case where the former's proceedings were concluded and judgement was pronounced whereas the latter's proceedings were still pending. In addition, the Attorney General once again stresses about the endorsement of the dissenting opinion of Judge Emeritus Lawrence Quintano.¹⁸⁶

In its considerations, the Court assessed Article 7 of the Convention and Article 39(8) of the Constitution. It also quoted the various judgements which were highlighted in the above-indicated case of *The Republic of Malta vs Ndubisi Ndah Patrick*. Additionally, it has also declared that:

*The spate of litigation which the Camilleri case has spawned, in the face of the passivity of the State authorities to address the issues raised, is not the ideal situation and places an unnecessary burden on the taxpayer. It is not the place of the Courts to legislate but suffice it to say that the decision of the ECHR does not require the legislator's eliminates the Attorney General's discretion, but that the law introduces the elements of certainty, possible through the stipulation of guidelines, or the possibility of lowering the minimum punishment applicable even before the Criminal Court.*¹⁸⁷

¹⁸⁴ *Ibid.*

¹⁸⁵ *The Republic of Malta vs Nelson Mufa*, First Hall of the Civil Court (Constitutional Jurisdiction), 8th May 2014.

¹⁸⁶ *Ibid*, page 5.

¹⁸⁷ *Ibid*, page 16.

In this respect, this is one of the very few judgements which actually makes recommendations to the legislator on how it should have acted, before the introduction of Act XXIV of 2014. It is indeed interesting to note in the same judgement the same Court explains its functions:

*A constitutional reference is not “an action” but a question put to this Court and defines the parameters of investigation which is to be made which strictly have to be adhered to. Consequently, this Court cannot determine or order an effective remedy which was not requested in the reference.*¹⁸⁸

In this respect, the Court has concluded that the application of Article 22(2) of Chapter 101 is likely to result in a breach of Article 7 of the Convention and Article 39(8) of the Constitution.

*3.4.7 Repubblika ta` Malta vs Rafal Zelbert*¹⁸⁹

In this case, the applicant was charged with having conspired with others for the purposes of selling or dealing in heroin and cocaine and for having in his possession 443.68 grams of Diazepam. However, the applicant requested the Court to make a Constitutional reference for the purposes of determining whether the discretion exercised by the Attorney General goes against the decision delivered by the ECtHR in the John Camilleri judgement.

In his application, he highlighted five salient points which the Court ought to take into consideration: a. that the Attorney General’s discretion to decide where the accused should stand trial ran counter to the impartiality requirement as laid down in Article 6 of the Convention, b. that on the contrary to the punishment given by the Criminal Court which amounted to fifteen years’ imprisonment and a fine of Eur 35,000, the maximum punishment which could have been meted out by the Court of Magistrates would have been that of ten years’ imprisonment, c. that the Government of Malta had quoted a judgement delivered in 1990, that is before the enactment of Section 120 A (7) of Chapter 31 of the Laws of Malta, which section precluded the application of Article 21 of Chapter 9 of the Laws of Malta, d. that the law was unclear and uncertain because the guidelines followed by the Attorney General did not derive from any legislative text and e. ‘that the exercise of fair treatment could

¹⁸⁸ *Ibid*, page 19.

¹⁸⁹ *Repubblika ta` Malta vs Rafal Zelbert*, First Hall of the Civil Court (Constitutional Jurisdiction), 16th May 2014.

not be limited to the trial but should include the pre-trial period as in the case of *Salduz v. Turkey*.¹⁹⁰

On the other side, the Government once again re-iterated the following: a. that the Attorney General made this decision prior to assuming the role of public prosecutor, b. that the Attorney General's decision would in no way influence the ensuing trial and or its outcome. 'The Government argued that he was not a member of the tribunal and could not therefore participate in any finding of guilt or innocence and therefore there could be no breach of the independence or impartiality requirement',¹⁹¹ c. that such discretion did not bear any effect on the fairness of the criminal proceedings, d. that the Attorney General follows objective criteria when deciding which Court should have jurisdiction, e. that applicant becomes aware of the punishment bracket as soon as the charges are issued; and f. that the applicant's punishment was clearly defined in the law and that it was sufficiently clear and accessible.

In its assessment, the Court assessed mainly the following judgements: *Camilleri vs Malta (ECtHR)*, *John Camilleri vs Avukat Generali*¹⁹² and *Mario Camilleri vs Avukat Generali*.¹⁹³ It listed the parties' submissions and the Court's assessment made in the John Camilleri case. With respect to the case of *John Camilleri vs Avukat Generali*, the Court highlighted that the criminal proceedings would still take place even if the foreseeability requirement is not fully adhered to. In regard to the case of *Mario Camilleri vs Avukat Generali*, the Court has stressed that this judgement found no violation of Article 6 of the Convention but declared that Article 22(1) of Chapter 101 of the Laws of Malta was in breach of Article 7 of the Convention.

The Court also stated the following:

Din il-Qorti tibda biex tghid li hawn mhux il-forum adettat fejn isir stharrig tal-uzu tad-diskrezzjoni f'dan il-kaz. L-uzu tad-diskrezzjoni huwa ezercizzju amministrattiv li, bhal kull decizjoni amministrattiva, jista` jkun sidnikabbli mill-qrati ordinarji bis-sahha tal-poteri generali taghhom ta` stharrig gudizzjarju tal-ghemil tal-gvern. Din il-Qorti li hija kompetenti u lanqas ma giet mitluba mill-Qorti Kriminali li tissindika d-diskrezzjoni uzata mill-Avukat Generali fil-konfront ta` Refel Zelbert, izda trid tara biss jekk id-diskrezzjoni moghtija bil-

¹⁹⁰ *Ibid*, page 6.

¹⁹¹ *Ibid*, 7.

¹⁹² John Camilleri vs Avukat Generali, First Hall of the Civil Court (Constitutional Jurisdiction), 1 July 2012

¹⁹³ Mario Camilleri vs Avukat Generali, First Hall of the Civil Court (Constitutional Jurisdiction), 9 July 2013

*ligi lill-Avukat Generali jilledix id-dritt tar-rikorrent skont l-Artikolu 7 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.*¹⁹⁴

The Court has concluded that Article 22(2) of Chapter 101 and Article 120A (2) of Chapter 31 violate Article 7 of the Convention.

*3.4.8 Jeffrey Zammit vs l-Avukat Generali u l-Onorevoli Prim Ministru*¹⁹⁵

The applicant in this case had been charged with trafficking one thousand ecstasy pills and was placed under bill of indictment 008/13. In his application, the applicant made reference to Court case *Il-Pulizija Assistant Kummissarju (Neil Harrison) vs Spiridione Vella*¹⁹⁶ where the accused was charged with trafficking six hundred ecstasy pills and was initially placed under a bill of indictment. However, pending proceedings, the Attorney General issued a counter-order and the accused faced trial before the Court of Magistrates. The applicant stresses that his main complaint concerned the discretion exercised by the Attorney General in deciding which Court should have jurisdiction to hear the accused's case. He states that 'lid-diskrezzjoni nsidikabbli mhollija lill-Avukat Generali sabiex jiddeciedi hu hekk l-akkauzat ghandux jingieb quddiem il-Qorti Kriminali sabiex jghaddi guri jew jekk il-kaz tieghu ma jisntemax quddiem il-Qorti tal-Magistrati hija diametrikament opposta ghall-principju tac-certezza legali'.¹⁹⁷ The applicant quotes the Camilleri judgement particularly paragraphs 34, 43, 44 and 45 concerning the safeguards enshrined in Article 7 of the Convention, that the Attorney General's criteria were not specified in any legal provision and that such provisions lacked clarity thus failing to satisfy the foreseeability requirement. As a concluding remark, the applicant makes reference to another case *Camilleri Mario vs Avukat Generali*¹⁹⁸ where the Courts embraced the Camilleri judgement and declared a violation of the Convention.

On the other hand, the Attorney General insisted that the provisions of the Convention were not infringed based on the following arguments: a. that the Attorney General is empowered to institute, undertake and discontinue criminal proceedings by means of Article 91 of the Constitution of Malta, b. that the Attorney General

¹⁹⁴ *Repubblika ta' Malta vs Rafal Zelbert*, First Hall of the Civil Court (Constitutional Jurisdiction), 16th May 2014.

¹⁹⁵ *Jeffrey Zammit vs l-Avukat Generali u l-Onorevoli Prim Ministru*, First Hall of the Civil Court (Constitutional Jurisdiction), 16 May 2014

¹⁹⁶ *Il-Pulizija Assistant Kummissarju (Neil Harrison) vs Spiridione Vella*, Court of Magistrates, 30 September 2010

¹⁹⁷ *Jeffrey Zammit vs l-Avukat Generali u l-Onorevoli Prim Ministru*, First Hall of the Civil Court (Constitutional Jurisdiction), 16th May 2014, page 3.

¹⁹⁸ *Camilleri Mario vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 9th July 2013.

follows meticulously certain criteria in deciding where an individual is to face trial. That this criteria is easily traceable and identifiable from local jurisprudence, c. that albeit the fact that this criteria is not listed in any legal provision, it should certainly not amount to an infringement of Article 7 of the Convention, d. that the Attorney General's decision was taken in a responsible and conscience manner, e. that the Camilleri judgement is in no way similar to this case. The reason being that John Camilleri had instituted proceedings before the ECtHR when judgement was already pronounced whereas in the present case, no judgement had been pronounced yet. Therefore the Criminal Court could still mete a lower punishment that would be given by the Court of Magistrates in similar circumstances, f. that the applicant could foresee the punishment parameter and which Court would eventually have jurisdiction to hear his case, and g. that the dissenting opinion of the Judge Emeritus Lawrence Quintano offered the correct interpretation of Article 7 of the Convention.

In the considerations drawn up by the Court, the Judge noted that the applicant's proceedings had not yet concluded and there existed a possibility that the accused might not be found guilty. It refers to Harris O'Boyle & Warbrick, '*Law of the European Convention on Human Rights*' and quotes the following text:¹⁹⁹

*The wording of Article 7 (1) is limited to cases in which a person is ultimately held guilty of a criminal offence. A prosecution that does not lead to a conviction or has not yet done so, cannot raise an issue under Article 7 – at least not by means of an individual application.*²⁰⁰

Based on this, the Court has concluded that such application was filed untimely and thus rejected the applicant's requests.

3.4.9 *Ir-Repubblika ta` Malta vs Jose` Edgar Pena*²⁰¹

The facts of the case relate to the charge of conspiracy with others for the purposes of selling or dealing in the drug cocaine, which drug amounted to 1500 grams.

The Attorney General raised the following pleas: 1. That the crime and its respective punishment were clearly defined in the legislative provisions, thus abiding by the principle of certainty as enshrined in Article 7 of the Convention and Article 39 of the

¹⁹⁹ *Jeffrey Zammit vs I-Avukat Generali u I-Onorevoli Prim Ministru*, First Hall of the Civil Court (Constitutional Jurisdiction), 16th May 2014, page 13.

²⁰⁰ Harris O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, page 332.

²⁰¹ *Ir-Repubblika ta` Malta vs Jose` Edgar Pena*, First Hall of the Civil Court (Constitutional Jurisdiction), 23rd July 2014.

Constitution of Malta, 2. That the powers conferred upon the Attorney General by means of Article 91 of the Constitution should not be subjected to the control of any other independent person and or authority, 3. That the Attorney General exercised his discretion in a conscientious manner and according to general criteria which are easily accessible from local jurisprudence, 4. That albeit such criteria are not specifically laid down in the law, this should not lead to a direct infringement of Article 7 of the Convention, 5. That the Attorney General's decision may be reviewed before the local Courts which have the discretion to determine whether such was exercised according to the law, 6. That the Attorney General's decision to send the accused person for trial before the Criminal Court was taken conscientiously, 7. That the judgement had already been pronounced in the John Camilleri case whereas in the applicant's case, criminal proceedings were still pending, 8. That the accused could easily predict and anticipate before which Court he was going to face trial and 9. That the Attorney General was endorsing the dissenting opinion presented by Judge Emeritus Lawrence Quintano in the John Camilleri case.

The Court also made reference to the various cases highlighted in the accused's applications, all of which were never highlighted in other Court applications. The cases were two which included *the compatibility of the bill of indictment with Article 7 of the Convention and secondly the identification of an effective remedy*.²⁰²

He referred to the Mario Camilleri case and stated that in this particular case, the Court declared that there was a violation but did not give a remedy. In this respect, he quotes Article 13 of the Convention which deals specifically with the '*effective remedy at national level*',²⁰³ and cross-refers to the case of *M.A. V Cyprus*²⁰⁴ which clarified in further detail the correct application of this provision. The applicant quotes the following:

132. *The notion of an effective remedy under Article 13 in this context requires that the remedy **may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible**. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States*

²⁰² *Ibid*, page 4.

²⁰³ *Ibid*, page 5.

²⁰⁴ *M.A. v Cyprus*, App. No. 41872/10, 23rd July 2013.

*are afforded some discretion as to the manner in which they conform to their obligations under this provision.*²⁰⁵

In this respect, the applicant stressed out that the bill of indictment violated Article 7 of the Convention and that an effective remedy is being sought before the respective Courts.

In addition to the above, the applicant also makes reference to the case of *Baliystki vs Ukraine*²⁰⁶ and stresses that Malta is obliged to apply the law to all other similar and attending cases. It refers to Chapter 319 and Article 46 of the Constitution which are duty bound to prevent the infringement of a human right.²⁰⁷

The applicant also suggests that the only remedy available in such a case would be to introduce an amendment to Article 22 of Chapter 101 and Article 120 of Chapter 33.²⁰⁸ In this respect, he also makes reference to the case of *The Police vs Joseph Lebrun*²⁰⁹, where the Court suspended proceedings at least until a legislative amendment was introduced. As a matter of fact, Parliament had taken action and passed the respective legislative amendments within a couple of months.²¹⁰

In its considerations, the Court once again made reference to the various judgements delivered by the ECtHR and by our local Courts and which judgements were already highlighted in the case of *The Republic of Malta vs Ndubisi Ndah Patrick*²¹¹ as listed above. It also makes reference to the latter judgement. The Court then assesses the provisions inserted in Article 7 of the Convention and in Article 39(8) of the Constitution of Malta. Finally, the Court quotes various extracts from the Camilleri judgment, mainly paragraphs 39-43 which relate to the accessibility and foreseeability requirements, the punishment bracket which was not made known to the accused before the Attorney General made such decision and the unspecified criteria followed by the Attorney General.

In its concluding remarks, the Court stressed out the following:

²⁰⁵ *Ibid* and *Repubblika ta` Malta vs Jose Edgar Pena*, First Hall of the Civil Court, (Constitutional Jurisdiction), 23rd July 2014, page 5.

²⁰⁶ *Baliystki vs Ukraine*, 30th November 2011.

²⁰⁷ *Repubblika ta` Malta vs Jose Edgar Pena*, First Hall of the Civil Court, (Constitutional Jurisdiction), 23rd July 2014, page 7.

²⁰⁸ *Ibid*, page 8.

²⁰⁹ *The Police vs Joseph Lebrun*, First Hall of the Civil Court (Constitutional Jurisdiction), 9th February 2007.

²¹⁰ *Repubblika ta` Malta vs Jose Edgar Pena*, First Hall of the Civil Court, (Constitutional Jurisdiction), 23rd July 2014, page 8.

²¹¹ *The Republic of Malta vs Ndubisi Ndah Patrick*, First Hall of the Civil Court (Constitutional Jurisdiction), 8 May 2014.

In the case under review the Court notes that unfortunately to date, no measures have been implemented by the legislative arm of this country to remedy this situation, through the promulgation of the necessary legislation. It is evident that the decision of the ECHR in the Camilleri case, did not require the legislator to abrogate the Attorney General's discretion but required the legislator to establish the requisite and or precise criteria or guidelines that would regulate, to a significant extent, the Attorney General's discretion, and thus nullify the perceived arbitrariness of the same. This has put the Courts of Malta in an unenviable position, in that they have repeatedly called upon to provide an effective remedy.²¹²

The Court delves more importantly into the requisites of Article 13 of the Convention and in bold it states that:

The Court considers that it is of paramount importance that effective measures necessarily need to be aimed at the cessation of continuing human right violations.²¹³

Based on the above, the Court has declared that the accused's bill of indictment is incompatible with Article 7 of the Convention and Article 39 of the Constitution of Malta because it failed to abide by the foreseeability requirement and to provide effective safeguards against arbitrary punishment.²¹⁴

This is the very first judgement where the Court apart from declaring a violation of Article 7 of the Convention, has given recommendations on what kind of effective remedy needs to be introduced by the legislator. As a matter of fact, it stresses that:

*This Court is of the opinion that **the effective remedy** to the perceived arbitrariness of the Attorney General's discretion and the lack of foreseeability **needs to focus** on the **minimum punishment** of four (4) years imprisonment.²¹⁵*

3.4.10 Daniel Alexander Holmes vs L-Avukat Generali, Kummissarju tal-Pulizija, Direttur Generali tal-Qrati u Tribunal (Ghawdex), Registratur Qrati u Tribunal Kriminali²¹⁶

²¹² *Repubblika ta` Malta vs Jose Edgar Pena*, First Hall of the Civil Court, (Constitutional Jurisdiction), 23rd July 2014, page 12.

²¹³ *Ibid*, page 14.

²¹⁴ *Ibid*, page 15.

²¹⁵ *Ibid*.

²¹⁶ *Daniel Alexander Holmes vs L-Avukat Generali, Kummissarju tal-Pulizija, Direttur Generali tal-Qrati u Tribunal (Ghawdex), Registratur Qrati u Tribunal Kriminali*, First Hall of the Civil Court (Constitutional Jurisdiction), 3rd October 2014.

In this case, the applicant had been charged with importing and cultivating cannabis which amounted to approximately 1070 grams with a street value of *circa* Eur 11,694.44. On the 24th November 2011. The Criminal Court had condemned him to ten years and six months imprisonment and payment of fine amounting to Eur 23,000. The Court of Criminal Appeal had confirmed this judgement by means of a sentence delivered on the 31st October 2013. In his application, the applicant alleged various breaches however this analysis will be solely limited to the breach relating to the discretion exercised by the Attorney General in determining where an accused person should stand trial. The applicant makes reference to paragraphs 14 and 29 found in the John Camilleri judgement. He stresses the following:

*jigi sottolineat illi l-Avukat Generali ghandu rwol ta` prosekutur fil-konfront tal-akkuzat b`poteri li jiddecidu fejn ghandu jigi ggudikat l-akkuzat u liema piena ghandha tapplika u dan ifisser li l-Avukat Generali ghandu l-poter li jaghmel a binding judgement of a quasi-judicial nature qabel ma jkun inbeda l-process mhux abbazi ta` regola izda abbazi ta` diskrezzjoni suggettiva u insikdikabbli liema gudizzju jorbot lil Qorti wkoll.*²¹⁷

In its considerations, the Court has made reference to the following judgements: *Joseph Lebrun vs Avukat Generali*,²¹⁸ *Martin Dimech vs Avukat Generali*,²¹⁹ *Repubblika ta` Malta vs Matthew Zarb*,²²⁰ *Republic of Malta vs Ndubisi Ndah Patrick*²²¹ and *Repubblika ta` Malta vs Jose Edgar Pena*.²²² With respect to the first two above-indicated cases, the Court also quotes an extract from the judgement delivered by the Constitutional Court on the 16th September 2014 and states that:

*L-Artikolu 7 tal-Konvenzjoni jista` japplika biss fl-eventwalita` ta` sejbien ta` htija tal-akkuzat. Ghalhekk ma setax isir il-paragun mal-kaz **Camilleri vs Malta**, "... ghax f`dak il-kaz ix-xenarju tal-fatti kien differenti fis-sens li l-kaz kontra l-applikant kien diga` definittivament maghluq bis-sejbien ta` htija*

²¹⁷ It is being highlighted that the Attorney General assumes the role of a prosecutor and has powers to decide where the accused should face trial and what punishments should apply. This means that the Attorney General has powers to execute a binding judgement of a quasi-judicial nature even before the commencement of proceedings and this not on the basis of regulations but on the basis of subject discretion not subject to any form of judicial review.

²¹⁸ *Joseph Lebrun vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 21st February 2014.

²¹⁹ *Martin Dimech vs Avukat Generali*, First Hall of the Civil Court, (Constitutional Jurisdiction), 21st February 2014.

²²⁰ *Repubblika ta` Malta vs Matthew Zarb*, First Hall of the Civil Court, (Constitutional Jurisdiction), 7th March 2014.

²²¹ *Republic of Malta vs Ndubisi Ndah Patrick*, First Hall of the Civil Court, (Constitutional Jurisdiction), 8th May 2014.

²²² *Repubblika ta` Malta vs Jose Edgar Pena*, First Hall of the Civil Court, (Constitutional Jurisdiction), 23rd July 2014.

*tieghu filwaqt li l-kaz odjern il-proceduri ghadhom pendenti u ghalhekk l-Artikolu 7 huwa f'dan l-isteadju inapplikabbli.*²²³

The above Court highlighted the various grounds on which the ECtHR based its judgement. These include: a. the accused becomes aware of the punishment bracket only after the respective charges are issued; b. the decision relating to where an individual should stand trial is dependent on the Attorney General's discretion, c. the Attorney General's criteria are not specified in any legislative text and d. the Attorney General's discretion was extended to which minimum penalty would be applicable in respect of the same offence. Based on this, the Court declared that Article 22(1) of Chapter 101 of the Laws of Malta breaches Article 7 of the Convention.

Once again, it is to be noted that following an appeal lodged both by the Attorney General and by the applicant, on the 16th of March 2015, the Constitutional Court has revoked part of the judgement delivered by the First Hall of the Civil Court and declared that Article 22(1) of Chapter 101 of the Laws of Malta does not breach Article 7 of the Convention.²²⁴

*3.4.11 Ir-Repubblika ta` Malta vs Simon Borg*²²⁵

The applicant in this case was charged with aggravated possession of cocaine, and which drugs amounted to 254 grams. Albeit the amount was not a substantial one, the Attorney General insisted on his first decision to have the accused stand trial before the Criminal Court and no counter-order was issued.

The applicant insisted on the following grounds: 1) that the Attorney General should not have the discretion to decide where the accused should stand trial, which decision is considered to be irrevocable and definite and 2) that the Court should adopt the same interpretation provided by the ECtHR in the John Camilleri case.

²²³ *Daniel Alexander Holmes vs L-Avukat Generali, Kummissarju tal-Pulizija, Direttur Generali tal-Qrati u Tribunal (Ghawdex), Registratur Qrati u Tribunal Kriminali*, First Hall of the Civil Court (Constitutional Jurisdiction), 3rd October 2014, page 17 – *Article 7 of the Convention applies only once the accused is found guilty. That is why a comparison could not be made with the case of Camilleri vs Malta, "... Because in that case, the circumstances of the case were different, in the sense that, the case against the applicant had already terminated whereas proceedings were still pending in the latter case. Therefore at this stage, Article 7 is inapplicable.*

²²⁴ *Daniel Alexander Holmes vs L-Avukat Generali, Kummissarju tal-Pulizija, Direttur Generali tal-Qrati u Tribunal (Ghawdex), Registratur Qrati u Tribunal Kriminali*, Constitutional Court, 16th March 2015.

²²⁵ *Ir-Repubblika ta` Malta vs Simon Borg*, First Hall of the Civil Court (Constitutional Jurisdiction), 15th October 2014.

On the other side, the Attorney General based most of its pleas on the fact that the above decision was taken after duly analysing all circumstances of the case and stressed out that the applicant knew about the punishment brackets upon commencement of the respective criminal proceedings.

In its considerations, the Court reviewed Articles 22 (1G) (2) of Chapter 101, Article 91 (3) of the Constitution of Malta and Article 7 of the Convention and stated that the core legislative principles emanating from such legal provisions include 1. That the law needs to be progressive and not retrospective, 2. That such discretionary exercise should be backed up with just reasons, 3. That such reasons need to be indicated *ex ante* and not *ex post* and 4. That such discretionary decision-making should be subjected to some sort of scrutiny carried out by an independent authority.²²⁶

By analysing such discretion, the Court notes that the Attorney General's decision is not subjected to any form of scrutiny and or control. This would then lead to a situation which automatically dictates the minimum punishment that an accused person would be entitled to. Given that such decision-making is considered to be a subjective process, it is anticipated that such may give rise to arbitrariness.²²⁷

Finally, the Court refers to the *Repubblika ta` Malta vs Matthew Zarb* judgement and also *Marckx vs Belgium* as listed further above. It is interesting to note the Court's concluding remark which states as follows:

*Illi ghandu wkoll finalment jinghad li l-emendi ricenti fir-rigward, introdotti permezz tal-Att XXIV tal-2014, jindirizzaw il-lanzanza odjerna u jippruvaw jirrispondu ghall-problematika naxxenti mill-istess poter ezoritanti precedentement moghti, minghajr il-possibilita` ta` skrutinju, lill-Avukat Generali.*²²⁸

Given that this judgement was delivered some months after the introduction of Act XXIV of 2014, the Court felt the need to opine on this legislative enactment. However it is interesting to note the wording utilised by the Court where it states '*tries to address*'. Is this an implication that maybe the Courts are not too satisfied with such

²²⁶ *Ibid*, page 13.

²²⁷ *Ibid*, page 15.

²²⁸ *Ibid*, page 16 – Finally, the recent amendments introduced by means of Act XXIV of 2014, address the individual's complaints and they try remedy against such discretionary powers, which were not scrutinised and which were given to the Attorney General.

legislative measure? The answer to this would lie in future cases which are yet to be delivered by the Courts.

In this case, the Court declared that the discretion exercised by the Attorney General is in breach of Article 7 of the Convention and Article 39 (8) of the Constitution.

3.4.12 *The Republic of Malta v Nelson Mufa*²²⁹

The applicant in this case, was charged with various offences related to drug trafficking *inter alia* conspiracy for the purposes of selling or dealing in the drug heroin, which drug amounted to 948 grams.

The above case concerns an appeal filed by the Attorney General following a judgement given by the First Hall of the Civil Court (Constitutional Jurisdiction), whereby the said Court declared that Article 22 (2) of Chapter 101 of the Laws of Malta violated Article 7 of the Convention. The Court made reference to the Attorney General's reply which first reiterated that the powers exercised are those conferred upon him as per Article 91 of the Constitution of Malta and that such discretion was exercised conscientiously and according to the established guidelines which emanated from local jurisprudence. He also draws a distinction between the John Camilleri case and the above case where the former's proceedings were concluded and judgement was pronounced whereas the latter's proceedings were still pending. In addition, the Attorney General once again stresses on the importance of the dissenting opinion of Judge Emeritus Lawrence Quintano.²³⁰

The Constitutional Court also makes reference to the legal considerations made by the First Hall of the Civil Court, mainly those relating to the analysis of Article 7 of the Convention, Article 39(8) of the Constitution of Malta and other judgements which were delivered by the ECtHR and the Maltese Courts.

In its concluding remarks, the Constitutional Court made reference to the case *Repubblika ta` Malta v. Matthew Zarb*, which decided on the non-applicability of Article 7 of the Convention because the proceedings were still pending. In this respect, the Court declared that:

²²⁹ *The Republic of Malta v. Nelson Mufa*, Constitutional Court, 2nd March 2015.

²³⁰ *Ibid*, page 5.

*For this reason, the issue regarding the constitutionality or otherwise of Article 22(2) of Chapter 101 raised at this stage must be considered as premature.*²³¹

The Court made reference to the introduction of Act XXIV of 2014 and declared that such provisions subject the Attorney General's discretion to judicial review. It also added that such procedure 'eliminates the possible exercise of unfettered discretion and any possibility of arbitrariness in the use of his discretion'.²³²

In its last consideration, the Court notes that the applicant also availed himself of the new legislative procedures as laid out in Act XXIV of 2014 however the Criminal Court had dismissed such application by means of a decree dated 23rd October 2014.

In view of the above, the Court upheld the Attorney General's appeal and revoked the judgement given by the First Hall of the Civil Court.

*3.4.13 The Republic of Malta vs George Moses*²³³

In this case, the Court does not outline the accused's charges and the quantities and type of the drugs involved. However, it states that the applicant is insisting that the Attorney General's discretion violates Articles 6 and 7 of the Convention and Article 39 (8) of the Constitution of Malta.

The Court also quotes the Attorney General's lengthy reply where it was argued that:

1. The applicant's request was made untimely given that criminal proceedings were still pending,
2. That the applicant had already lodged proceedings before the Criminal Court in terms of Act XXIV of 2014 and yet his application was dismissed,
3. That by means of Article 91 of the Constitution of Malta, the Attorney General is empowered to institute, undertake and discontinue criminal proceedings without being subjected to the control of any individual or authority,
4. That the Attorney General's decision was taken conscientiously and after having assessed all respective guidelines,
5. That in case of guilt, the Criminal Court can still mete out punishments which are normally given by the Court of Magistrates,
6. That the

²³¹ *Ibid*, page 15.

²³² *Ibid*, page 16.

²³³ *The Republic of Malta vs George Moses*, First Hall of the Civil Court (Constitutional Jurisdiction), 13th March 2015.

applicant could easily foresee which Court would have presided his trial, 7. That the Court should take note of the dissenting opinion of Judge Emeritus Lawrence Quintano, 8. That in giving such direction, the Attorney General was not assuming the role of a judge or a magistrate, 9. That such decision does not affect the outcome of the proceedings including its, respective punishment and 10. That the Constitutional Court in the cases of *Lebrun Joseph vs Avukat Generali u Dimech vs Avukat Generali*, proceeded to revoke the judgements delivered by the First Hall of the Civil Court declared that Articles 6 and 7 of the Convention were not violated.

In its considerations, the above Court has quoted various extracts from the judgements of *Lebrun Joseph vs Avukat Generali u Dimech vs Avukat Generali*, which judgements were delivered by the Constitutional Court. It then states that:

*Mill-premess jirrizulta car, li l-ilmenti ta` George Moses ma jistghux jigu milqugha, peress li ma tezisti ebda vjolazzjoni la tal-artikolu 7 u lanqas tal-artikolu 6 tal-Konvenzjoni u l-artikolu 39 tal-Kostituzzjoni, u dan anke ghaliex f'dan il-kaz ghad ma ghawnx sejbien ta` htija fil-konfront ta` George Moses u l-kaz tieghu ghadu pendent.*²³⁴

It then makes reference to the proceedings filed by the applicant before the Criminal Court in terms of Act XXIV of 2014 and declares that albeit its outcome was not as anticipated, an opportune and effective remedy was provided.

In this respect, the Court denied the applicant's request.

*3.4.14 Ir-Repubblika ta` Malta vs Khaled Mohammed Said Nasser u Adam Mohammed*²³⁵

In this case, the accused was charged with aggravated possession of 974 grams of opium.

The Attorney General argued the following: 1. That the constitutional reference was made in terms of Chapter 31 whereas the applicant was charged with offences not related to this Act, 2. That the Attorney General's decision in terms of Article 22 (2) of Chapter 101 can be made subject to judicial review as per Article 469A of Chapter 12 of the Laws of Malta, 3. That in regard to the case of *Josephine Bugeja vs Avukat*

²³⁴ *Ibid*, page 15 – From the premise it clearly results that, the complaints of George Moses cannot be acceded because there exist no violation of Articles 6 or 7 of the Convention or Article 39 of the Constitution, and this in view of the fact that George Moses has not been found guilty yet and his case is still pending.

²³⁵ *Ir-Repubblika ta` Malta vs Khaled Mohammed Said Nasser u Adam Mohammed*, First Hall of the Civil Court (Constitutional Jurisdiction), 19th May 2015.

*Generali*²³⁶, the Court had declared that the ECtHR is not part of our local judicial system and that its case law is not binding on our Courts, 4. That reference should also be made to the cases of *Godfrey Ellul vs Avukat Generali*²³⁷ and that of *Claudio Porsenna vs Avukat Generali*,²³⁸ 5. That the applicants' criminal proceedings are still pending and no judgement has been given yet, 6. That our local jurisprudence serves as guidelines on which Court is to preside the applicant's trial, 7. That past cases have shown that drug finds involved 300 grams or more have all been referred for trial before the Criminal Court, 8. That the applicant was informed about the choice of Court upon his arraignment in Court when the prosecutor filed the Attorney General's order to prosecute the accused in front of the Criminal Court, 9. That in case of guilt, the punishment brackets are clearly delineated in Article 22 of Chapter 101, and 10. That when the applicants were placed under a bill of indictment, they knew exactly what charges were issued and what the respective punishment would be.

In its considerations, the Court assessed the provisions of Article 22 of Chapter 101 of the Laws of Malta, Article 120A(2) of Chapter 31 and also the conclusions drawn up by the Court in the case of *The Republic of Malta vs Nelson Mufa*, as listed above. It also highlights the enactment of Act XXIV of 2014 whereby the Attorney General is bound to follow the guidelines listed in the Fourth Schedule.²³⁹

It then reviewed Article 6 of the Convention and Article 39 of the Constitution of Malta and quoted the conclusions made in the cases of *Godfrey Ellul vs Avukat Generali* and *Lebrun vs Avukat Generali, Repubblica ta` Malta v. Mario Camilleri, Claudio Porsenna v. Avukat Generali, Martin Dimech v. Avukat Generali* and *Daniel Alexamder Holmes v. Avukat Generali*.²⁴⁰ The Court also concluded that:

Ghalhekk, kemm jekk l-Avukat Generali jistrada l-kaz quddiem il-Qorti tal-Magistrati, kemm jekk quddiem il-Qorti Kriminali, il-Qorti dejjem hija wahda li tiggarrantixxi l-indipendenza u l-imparzjalita`, l-equality of arms bejn il-prosekuzzjoni u d-difiza, fejn inter alia jispetta lill-akkuzat li jigi mgharraf dwar in-natura u r-raguni tal-akkuza migjuba kontra tieghu li l-kaz tieghu jigi

²³⁶ *Josephine Bugeja vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 7th December 2009.

²³⁷ *Godfrey Ellul vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 27th April 2006

²³⁸ *Claudio Porsenna vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 16th March 2012.

²³⁹ *Ir-Repubblika ta` Malta vs Khaled Mohammed Said Nasser u Adam Mohammed*, First Hall of the Civil Court (Constitutional Jurisdiction), 19th May 2015 page 19.

²⁴⁰ *Ibid*, page 22-23.

*mistharreg u deciz minghajr dewmienm fejn igawdi mill-presunzjoni tal-innocenza, fejn ikollu l-assistenza legali u d-dritt li ma jinkriminax ruhu, u fejn ikollu kull opportunita` li jressaq il-provi tieghu u jezamina x-xhieda mressqa kontrih.*²⁴¹

Based on this, the Court declared that there is no violation of Article 6 of the Convention. In reviewing Article 7 of the Convention and Article 39(8) of the Constitution of Malta, the Court has once again referred to the cases of *Scoppola vs Italy*, *Kokkinakis v Greece*, *Mark James Taylor v United Kingdom* and to all other cases which were referred to in the above-indicate case of *The Republic of Malta vs Nelson Mufa*. Last but not least, the Court refers to the case of *John Camilleri v Malta* and argues that the pleas raised by the Attorney General were identical to those raised in this case, many of which were rejected by the ECtHR. With regards to the plea relating to the principle of binding precedent, the Court firmly states that:

*Ghalkemm tifhem li l-Qrati taghna ma jabbraccjawx il-principju tal-binding precedent, temmen li bhala organi gudizzjarji tal-Istat, il-Qrati taghna huma obbligati li japplikaw il-Konvenzjoni Ewropea inkluzi l-interpretazzjoni dottrinali tal-Qorti Ewropea.*²⁴²

With regards to the plea relating to the untimeliness of such Court application, the Court refers once again to the case of *Martin Dimech v Avukat Generali* and confirms that such request was filed untimely. The Court then once again referred to Act XXIV of 2014 and mentioned that the applicant did not wish to avail himself of such remedy given that such legal provisions did not provide for an effective remedy.²⁴³ The Court did not agree with such statement and clearly states that:

Izda b'dawn l-ammendi, d-decizjoni tal-Avukat Generali hija assoggettata ghas-sindakar ta` Qorti indipendenti u imparzjali kif ukoll cirkoskritta b'linji gwida li ukoll gew introdotti u huma elenkati fir-Raba` Skeda annessa mal-Att.....Kontrarjament ghal dak sostnut mill-akkuzat f'dawn il-proceduri, l-ammendi hekk kif introdotti huma ta` rilevanza ghall-indoli kostituzzjonali u

²⁴¹ *Ibid*, page 24 – Therefore, in whichever Court the Attorney General decides to direct a case, that is either before the Court of Magistrates or before the Criminal Court, the Court will always guarantee its independence and impartiality, the equality of arms between prosecution and defence, where it is expected that the accused is always informed about the nature and causes of his charges and that his case is decided within a reasonable time frame throughout which he should be presumed innocent and where he is entitled to legal assistance, to benefit from the right not to incriminate himself and to bring forth all evidence in his favour and cross-examine all witnesses brought against him.

²⁴² *Ibid*, page 30 – Although our Courts do not follow the principle of binding precedent, the Court believes that our Courts are obliged to apply the European Convention including the interpretation principles given by the European Court of Human Rights.

²⁴³ *Ibid*, page 34.

*konvenzjonali tal-kaz in ezami propju ghaliex jeliminaw l-aspetti lezivi tad-diskrezzjoni.*²⁴⁴

Therefore, the Court concludes that there has been no violation of Articles 6 and 7 of the Convention and Article 39 of the Constitution of Malta.

*3.4.15 Jean Pierre Abdilla vs Avukat Generali*²⁴⁵

The facts of the case relate to the charge of conspiracy with others for the purposes of selling or dealing in the drug heroin amounting to 1000 grams. At the time when proceedings took place, the drug was valued at twenty-five Maltese Pounds (€25.00) per gram. The accused was sentenced by the Criminal Court of 16 years' imprisonment and payment of fine of Eur 40,000. The applicant based his constitutional reference on three issues, one of which concerned the discretion exercised by the Attorney General.

The applicant claimed the following: 1. A violation of Article 37 of the Constitution of Malta and Article 7 of the Convention, 2. The punishment bracket is not clearly delineated in the legislative provisions, 3. That the Attorney General has unlimited discretion, 4. That the Attorney General's decision is subjective and arbitrary, 5. That the Attorney General is also the prosecutor conducting the criminal proceedings and 6. That such discretion binds the respective presiding Court.²⁴⁶

In its considerations, the Court once again made reference to the John Camilleri judgment and added:

*Illi n-nuqqas ta` tali skruntinju oggettiv imur kontra s-sovranita` tad-dritt u jirriverti l-arlogg lura ghar-rinroduzzjoni ta` sistema inkwizitorjali li f'Malta li ilha giet konsenjata lill-istorja ghal aktar minn seklu u nofs.*²⁴⁷

The Court concluded stating that:

Illi in vista tal-premess, din il-qorti hi sodisfatta li r-rikorrenti pprova l-kaz tieghu in parte, senjatament, illi tenut kont tad-diskrezzjoni tal-Avukat Generali in kwistjoni u tan-nuqqas riskontrat fil-mument ta` l-istqarrijiet mehuda lis-

²⁴⁴ *Ibid*, page 34-35 – *With these amendments, the Attorney General's decision is subject to the Courts' independent and impartial review and is also made subject to guidelines which are listed in the Fourth Schedule annexed to the same.... On the contrary to what was sustained by the accused, the amendments have a constitutional and conventional relevance simply because they eliminate any doubt on any unfettered discretion.*

²⁴⁵ *Jean Pierre Abdilla vs Avukat Generali*, First Hall of the Civil Court (Constitutional Jurisdiction), 24th June 2015.

²⁴⁶ *Ibid*, page 3-5.

²⁴⁷ *Ibid*, page 18 – *Failure to scrutinise in an objective manner goes against the sovereignty of human rights and reverts the present time to an inquisitorial system which was consigned to Malta a century and a half ago.*

*suspettat, illum rikorrenti, d-drittijiet fundamentali tieghu, kif minnu ndirizzati fir-rikors promotur gew effettivament miksura.*²⁴⁸

Once again, the Court acceded to the applicant's request and declared a violation of his fundamental human rights.

3.5 CONCLUSION

The analysis of the literature review presented in Chapter 3, will then be seen contextually with the findings reported in Chapter 4. However, prior reporting on the respective findings, it is indeed opportune to relate on the utilised methodology for this dissertation.

²⁴⁸ *Ibid*, page 19 – *In view of the circumstances, this Court is satisfied that the applicant has proved his case in part, and on account of the discretion exercised by the Attorney General, his fundamental rights as claimed in his application were violated.*

CHAPTER 4

FINDINGS

4.1 Introduction

This Chapter is intended to gather the findings related to the research question in order to evaluate and assess whether a link between the literature review presented in Chapter 3 and the findings presented in this chapter can be established. This assessment is mainly being carried out in order to determine whether the chosen legal professionals who participated in the semi-structured interviews agree to the conclusions made by the Courts in the judgements highlighted in Chapter 3. The findings will include a. a factual case analysis of a present pending criminal Court case, b. the in-depth semi-structured interviews, and c. a list of Court decrees given by the Criminal Court since August 2014 to date.

4.2 A Factual Case Analysis

This analysis relates to a present pending Court case where two individuals are undergoing criminal proceedings in connection with various offences related to drug-trafficking. The above individuals are being charged: a. For having conspired with one or more persons in Malta or outside Malta for the purposes of selling or dealing in a drug (Cannabis Grass) in these Islands as against the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta, or for having promoted, constituted, organised or financed such conspiracy; b. For having imported, or having assisted in the importation or for having committed something ancillary to the importation of the dangerous drug (cannabis) in Malta, as against the provisions of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta; c. For having sold or otherwise dealt in the whole or any portion of the plant Cannabis, as against the provisions of Art. 8 (e) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta and for having in their possession (otherwise than in the

course of transit through Malta or the territorial waters thereof) the whole or any portion of the plant Cannabis, as against the provisions of Art. 8 (d) of the Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta;

Both accused persons were apprehended in 2014 and to date proceedings have not concluded yet. The amount of drugs involved was approximately 1700 grams however one of the accused insisted that the charges should reflect the actual quantities that he was carrying and which quantities amounted to *circa* 500 grams of cannabis. Following the introduction of Act XXIV of 2014, one of the accused persons filed an application requesting the Criminal Court to allow him stand trial before the Inferior Courts instead of the Superior Courts. The said Court application was filed on the 29th October 2014 and upon presentation of the above Court application, the Judge ordered notification to the Attorney General which had seven days to file his reply. The Attorney General's reply was filed on the 7th November 2014, and argued that since the accused was carrying 3261.76 grams of cannabis, 277.87 grams of heroin and 437 grams of cocaine, his trial should remain before the Criminal Court as it was initially ordered in 2014. Following the filing of the Attorney General's reply, the Criminal Court scheduled a Court hearing for December 2014.

During the said Court hearing, the Attorney General remarked that the quantities and drugs indicated in the reply filed on the 7th November 2014 were incorrect and that it should have read as 1700 grams of cannabis. The Court was also informed that both the defence and the Attorney General had commenced sentence bargaining and that an agreement regarding a suitable punishment had not been reached yet. Instead of proceeding with the oral submissions relating to the request made by the applicant, the Court suggested another adjournment date, at least until an agreement on a suitable punishment was reached. The case was in fact adjourned for the 24th February 2015. At the second Court hearing, the judge was once again informed that no agreement had been reached however both the Attorney General and defence counsel made brief submissions to the Court. For obvious reasons, the defence highlighted the fact that the accused was caught carrying some 500 grams of cannabis and that he should not be prosecuted for the whole aggregate amount of cannabis. In addition, the defence made reference to past Court judgements involving the same kind of drug and quantities, whereby the Courts had given a punishment which was below the ten year imprisonment threshold. This meant that

after having taken into consideration all circumstances of the case, the accused's punishment could still be meted out by the Inferior Courts. On the other side, the Attorney General insisted that the applicant should be charged for the whole 1700 grams of cannabis and that his trial should take place before the Criminal Court. Notwithstanding the submissions made by the defence counsel, the Court once again suggested another adjournment date in order to try and reach an agreement on the *quantum* of punishment. The case was adjourned for a second time and the Court scheduled another sitting for the 7th April 2015. In the meantime, the applicant's proceedings before the Court of Magistrates as a Court of Criminal Inquiry were coming to an end and given that the accused did not want to face a trial by jury, on the 24th of March 2015, he decided to file a guilty plea in terms of Section 392B of Chapter 9 of the Laws of Mata. This accused believed that the Criminal Court would give a more favourable punishment than that proposed by the Attorney General. In view of such admission, judgement would be pronounced by the Criminal Court and not by the Court of Magistrates. Therefore, the defence counsel had no other alternative but to withdraw the above-mentioned Court application during the sitting held on 7th April 2015.

It would have been interesting to see what conclusions would have been reached by the Criminal Court in determining where the respective trial should take place. There have been cases where the Criminal Court has referred an accused person for trial before the Court of Magistrates, notwithstanding the fact that the respective individuals might have been apprehended with quantities which are in excess of the threshold guidelines as laid out in the Fourth Schedule Guidelines of Act XXIV of 2014. A detailed explanation of these decisions will be given in the foregoing sections.

With regards to the above case analysis, one may question why did the Attorney General and the defence counsel take so long with sentence bargaining. The sentence bargaining had commenced in July 2014 but unfortunately it was never concluded. This is being said because the above applicant, after filing his guilty plea before the Court of Magistrates, opted to proceed with his submissions and allow the judge to determine his punishment. In his opinion, the Attorney General was proposing something which was in excess of what was given in past judgements. Another issue which cropped up during the sentence bargaining was that the

Attorney General declared that the co-accused should benefit from a reduction in punishment in terms of Article 29 of Chapter 101 but refrained from applying the above to the applicant. On several occasions, it was argued and debated that the above legal provision was being applied in a discriminatory manner, and this in view of the fact that the information provided by the co-accused did not lead to the arrest of the person supplying the illicit substance. In addition, there were other instances where the accused had offered to provide additional information to the police including access to his email accounts but all were refused. These two issues had contributed to a prolonged sentence bargaining because it was later made clear that the Attorney General had in fact proposed eight years imprisonment to the applicant whereas the co-accused was offered six years' imprisonment if they both admitted to the respective charges. And this notwithstanding the fact that the co-accused was carrying *circa* 1200 grams of cannabis whereas the applicant was carrying 500 grams of cannabis.

This case has served to identify another situation where the Attorney General is allowed a wider use of discretion, that is in determining whether an accused person should benefit from Section 29 of Chapter 101 or not. The law is very clear however when and how it is applied in real life, remains very unclear. And it was precisely for this reason why the applicant did not accept the Attorney General's proposal and decided to leave it in the hands of the Judge to decide on the *quantum* of the punishment.

4.3 The In-Depth Semi-Structured Interviews

This section is dedicated to the in-depth semi-structured interviews which were conducted among chosen legal professionals. The reason why these interviews were carried out was to assess the participants' opinion on the respective research question and to further analyse any problems that the same might highlight in respect of the present situation. In such instance, the semi-structured interviews are regarded as the perfect opportunity to engage into an informal discussion with

experienced legal professionals in order to retrieve information and guidance on the respective study.

The selection relating to the participants who took part in the said interviews was based upon the following criteria: **a.** the participants' area of specialisation, **b.** the participants' work experience and **c.** the participants' approachability and willingness to contribute to this research.

A preliminary email request was sent to all the participants which cordially requested their participation in the said research. This request was accompanied by a brief overview of the aim of this research together with an explanation of their involvement. Initially, it was intended to have a representative from the Ministry for Justice and a lawyer from the Attorney General's office included in the list of participants, however the email requests which were sent in December 2014 have to date, remained unanswered.

The above email requests also informed the participants that their identities will remain anonymous and that confidentiality in regard to case referencing will be retained at all times. The reason why this was being done because the prime aim behind these semi-structured interviews was to have participants relate their personal thoughts and feelings about the present position. Upon confirmation of their involvement, most of the participants requested a copy of the interview questions. This was immediately made available to them following their request to have it. The interview questions have been provided in the Methodology section presented in Chapter 1.

The respective interview meetings were held with the participants between December 2014 and May 2015 with an exception to one interview which was done by means of a telephone conversation.

The list of participants included two well-experienced criminal defence lawyers, a retired judge, a present acting judge and a magistrate. Their interviews will be highlighted separately in the foregoing sections however it is important to note that the interview relating to the present acting judge and magistrate was carried out contextually. The interviews concerning the two criminal defence lawyers were recorded by means of an audio recorder however no audio recorder was utilised at

the interviews conducted amongst present and acting members of the judiciary. The reason for doing so was primarily due to the fact of anticipating the emergence of very sensitive data from such interviews. Therefore immediately after the said interviews, minutes of the most relevant pieces of the conversation were drawn up.

4.3.1 The First Criminal Defence Lawyer

The first candidate is a leading and well experienced criminal law practitioner who has devoted his entire career specialising in criminal law. He was very much willing to assist with this research and has kindly offered to continue assisting until the very end. The Interview took place in January 2015 at the lawyer's offices in Valletta.

This interview cannot be classified as a dialogue because the participant was mostly interested in voicing his concerns relating to the Act XXIV of 2014. The interview commenced this way:

l-ewwel haga din il-legal notice skatolixxit ruhha a bazi ta` sentenzi kostituzzjonali fejn gie stabbilit li ma jistax ikollok an unfettered discretion tal-Attorney General.²⁴⁹

The legal notice up to a certain extent is a step in the right direction humbly submitting that it is not good enough because it does not provide to a double examination test – il doppio esame. Why? Because you have only the right to file an application before the Criminal Court and the decision of the Criminal Court is final and conclusive. That is not correct. That is not right. And perhaps there should be an appeal also from the decision of the Criminal Court.

Whether we are reaping the fruits of it? Unfortunately, given that it is a prima facie case, the defence is in a bit of a disadvantage situation. Why? It is in a disadvantage situation because you have the evidence given by the Prosecution who would have already summed up their case, and concluding their case and knowing the full disclosure of the case, unlike the defence who as at yet, at this stage wouldn't have the full disclosure of facts and probably wouldn't have built their line of defence. Why am I saying this? I am saying they would say look, this is just a case where the Court should be either the Court of Magistrates or the Criminal Court. No its not only that. It is the point but I am 100% sure the Court are always very influenced from what is resulting in the investigations of the case and wrongly enough, although we speak of equality of arms, one might suspect that there is still a prejudice in favour of prosecution that they are more equal than the defence.

²⁴⁹ This legal notice followed Constitutional Judgements which determined that the Attorney General's discretion must not be unfettered.

The interviewee has read again through the questions and has moved on to the fourth and fifth question. He continues adding the following:

Ofcourse. We need additional safeguards. With specific reference to the applicability of Article 29, there should be a challenge on section 29, and this is not given. Why? Because there are instances where you have people that they are risking their heads and they collaborate and collaborate and ultimately the Police do not arrive to arraign somebody, either because of circumstances or also because the Police would not have been efficient enough to do their job. There are instances which is very simple where they say yes you have collaborated it's a one to one, so you are entitled for section 29. It shouldn't be the case. I think about this yes there should be a challenge, there should be a reviewing Court so that defence can challenge the Prosecution by the fact that, they have given the necessary information, and if it is established that it is not through any fault of the person involved, but it is through circumstances or Police inefficiency, I have a case like that, conducting their investigation in a superficial way, and arguing that practically this person would do the job of the Police, in that particular case I think there should be a challenge.

I also think that in the drug cases, we should have a Court where we have the Magistrate who is also flanked by a doctor, and perhaps by a social worker. There is this tribunal but it is going to hit some cases. I am referring to other cases which wouldn't be covered. And even when it comes to meteing out punishment, in the criminal Court, I believe, the Court should be flanked because as things are evolving, from our judges we are requiring from them to practically live a monastic life, this implies that perhaps they are getting detached from the problems of the World. So there is the need to have the social workers, probation officers and doctors to assist them.

The interview lasted for about forty-five minutes and the answers provided were specifically detailed. The lawyer has also pointed out at various other instances which might require the legislator's intervention in order to mitigate the AG's unfettered discretion. The participant proposed additional legal remedies which can be introduced with the aim to provide an effective remedy to the accused.

The scope of conducting these interviews was primarily to obtain specific answers for each of the above questions however one of the features of semi-structured interviews indeed allows for some deviation. Nonetheless, the data obtained from this participant can certainly be classified as rich and very useful.

4.3.2 The Second Criminal Defence Lawyer

The second candidate is another leading and well experienced criminal law practitioner. He was also very kind enough to accept this invitation and his

contribution to this research was immensely rewarding. The Interview took place in February 2015 at a very quiet coffee shop in Valletta.

This interview took the form of a dialogue because the participant and the researcher engaged in an informal conversation on the subject matter and each expressed their concerns on various situations. However, this section will only highlight extracts from the participant's interview. At the beginning of the interview, the participant spent some time reading through the interview questions. He also sought clarification about the fifth question and it was pointed out to him that this study might also assess whether the discretion to determine the applicability of Article 29 of Chapter 101 might be excessively used by the Attorney General or the Police. Interestingly enough, the participant replied saying:

The law is clear on that provision - The law allows some discretion to the Court – at the end of the day the Court can ignore the prosecutor – the Court can also come to apply it on its own. There is the need to have judges who understand it and inspectors need to understand it too. L-AG ma jafx joqghod f'postu u ma jafx xinhu r-rwol tieghu. Dik il-problema. L-AG qisu sar pulizija tal-gudikant. Il-ligi ma ttihx dak ir-rwol. Dik hija wahda mill-problemi kbar li ghandna.²⁵⁰

Fir-rigward tas-section 29, jekk il-prosekutur ma jiddikjarax li tapplika, il-qorti xorta tista` tapplikaha jekk tigi konvinta mill-akkuzat li ghandha tapplikaha. Jiena meta nikkritika se mai nikkritika l-ligi ghax jekk ghandek gudikant jinterpretaha hazin jew ma jifhimix, - il-ligi taghti zewg options – issa jekk l-ispettur li jinvestigaha l-kaz u jibqa jghid li m'ghandiex tapplika section 29, l-akkuzat ghandu xelta, illi xorta wahda jikkonvinci l-qorti u l-qorti tista` tapplikaha independentement ta` dak li jkun gie ddikjarat mill-prosekuzzjoni. Jiena hekk naraha personalment. L-AG ma jidholx fiha. Nerga nghidlek, l-AG ma jafx izomm postu. Jigifieri l-AG ma jafx ir-rwol li ghandu f;dawn it-tip ta` kazijiet. Pero l-ligi kif inhi fit-29 tajba qeghda. L-interpretazzjoni ta` dan l-artikolu hija korretta. Hija drakonjana il-mod kif qed tigi interpretata pero` hija korretta. Jien qed nirreferi ghall-interpretazzjoni tal-Qrati superjuri. L-applikazzjoni mhux necessarjament korretta. L-applikazzjoni taghha hija hafna drabi zbaljata.²⁵¹

²⁵⁰ *The law is clear on that provision - The law allows some discretion to the Court – at the end of the day the Court can ignore the prosecutor – the Court can also come to apply it on its own. There is the need to have judges who understand it and inspectors need to understand it too. The AG does not know what his role his. That is the problem. The AG has become the judiciary's inspector. The law does not give him that role. That is one of the major problems that we have.*

²⁵¹ *With regards to Section 29, if the prosecuting officer does not declare its applicability, the Court can still apply it once the accused manages to convince it that he should benefit from such. If I had to criticise something, I would not criticise the law because you either have a judge who does not understand the law or who misunderstands the law. The law gives two options - now if the police inspector in charge of the case continues stating that Article 29 does not apply, the accused has a choice, that of convincing the Court and the Court can still apply such reduction irrespective of what has been stated by the Prosecuting Officer. That is how I personally see it. The AG does not come into it. However, the AG does not how to act within its role. He does not know what*

The participant then goes on to highlight the problems emanating from Act XXIV of 2014 or rather the problems emanating from the interpretation of the above legal enactment. He states the following:

With regards to the challenge proceedings, the problem lies here, if you have a judge interpreting the law in an unorthodox way, can you blame the law? I will never criticise the law because of the way it is applied.

*Il-ligi ma tinkitibx ghal min ma jridx japplikaha jew ghal min forsi jrid jiehu short cut jew ghal min ma jridx ikun konformi mal-hsieb tal-legislatur. Trid tara l-ligi x'tghid.*²⁵²

*This creates two problems – 1. Criteria seem to be exhaustive and these guidelines should never be exhaustive and need to allow some leeway for jurisprudence, biex naturalment tevalwa problemi godda li jistghu jinqalghu u anke cirkostanzi godda.*²⁵³ *2. Il-ligi taghna tekwi para drugs – l-uniku distinzjoni li taghmel il-ligi tad-droga huma distinzjoni maghmula permezz ta` schedule A u schedule B tad-drogi psikotropici. In-narkotici m'hemm l-ebda distinzjoni bejn droga u ohra. Allura inti ghandek is-schedule A u n-narkotici placed in the same basket. S'issa l-qrati taghna dejjem kienu very hard and rigid on this – jekk il-legislatur il-cannabis poggija fl-istess livell tal-kokaina, ghaliex ghandi niddistingwi jien. Are they correct or are they not correct? Jien nahseb li hija correct fl-interpretazzjoni ghaliex il-legislatur qal hekk. Fl-applikazzjoni m'hiex l-istess. Fil-verita` meta jigu biex japplikawha, they do not use the same criteria. U nahseb dak huwa ngust. Issa nara pero li jhalli lok ghall-abbuz. Per ezempju meta jkollu appelli – per ezempju tal-kaz ta` 'A' – il-problema hi li l-qrati jifawlek paragrafu illi l-paragun jkun odjuz. Mela jkollok tizju li jiehu tlett snin u jkollok iehor b'cirkostanzi ferm inqas gravi u jiehu disa` snin. Pero meta inti tmur tippattegija mal-Avukat Generali, paragun tkun qed taghmel biex tippattegija. Allura l-paragun huma odjuzi meta tuzahom id-difiza. Imma meta juzahom l-avukat generali biex jiddetta ma jkun odjuzi. So this is the real problem that we have – li inti ghandek il-qorti illi qed tikkreja certi principji f'dIn l-interpretazzjoni, illi huma principji li huma tajbin biss ghal prosekuzzjoni. Meta tigi difiza, isawtuk bihom l-istess kriterji illi avallaw il-pozizzjoni tal-prosekuzzjoni. Li l-legislatur pogga l-mephedrone fl-istess baskett tal-kokaina, dik mhux tort tal-qorti, dik tort tal-legislatur.*²⁵⁴

role he has in these type of proceedings. However, the law how it is laid down in Article 29 is good. The interpretation is correct. By that I am referring to the interpretation given by the Superior Courts. Its application is not necessarily correct. Most of the times, its application is incorrect.

²⁵² The law is not written for who does not want to apply it or for those opting for short-cuts or for those who do not wish to conform to the legislator's thoughts. One has to see what the law states.

²⁵³ This creates two problems – 1. Criteria seem to be exhaustive and these guidelines should never be exhaustive and need to allow some leeway for jurisprudence, so naturally you can evaluate new problems which may occur and also new circumstances.

²⁵⁴ Our law puts drugs all on the same level – the only distinction it makes is through schedule A and Schedule B concerning psychotropic drugs. There is no distinction drawn up between the various type of narcotic drugs. So you have Schedule A and the narcotics placed in the same basket. Till now, our Courts have been very hard and rigid on this – if the legislator placed cannabis on the same level as cocaine, why I distinguish between them. Are they correct or are they not correct? I think that the interpretation is correct because that is what the legislator had in mind. With regards to its applicability, this is not the same. In real life, when it is applied, they do not use the same criteria. And I think that that is unjust. That leaves room for abuse. For example – in the case of 'A' – the

With regards to the John Camilleri judgement, the participant highlights one of the problems emanating from such judgement and also other problems resulting from the interpretation of Article 6 of the Convention. He adds that:

I think that this judgement, I think that this was a missed opportunity by the Court of Strasbourg – because it only addressed Article 7 and avoided Article 6. I made a case of ‘A’ which to date is still pending before the ECtHR, where I had said that the problem with article 6, (side remark – dawn li jattakkaw id-diskrezzjoni ilhom mill-antik – issa kellu jiccaqlaq xi haga u kellha tkun Strasbourg li caqalqitna li n-nies jindunaw li kienu qed isiru ngustizzji kbar) problema meta jghidulek article 6 fair trial, it has a very very restricted meaning u allura d-decizjoni fil-bidu tal-proceduri ta fejn l-avukat generali jiddecidi li jiffa lill-akkuzat, hija decizjoni illi tittiehed fi stadju li jghidulek it’s not a trial. It is pre-trial. U allura hemmhekk ghandek problema min naha tal-article 6 jigifieri kif se tinkwadra din id-diskriminazzjoni, tista tkun tajba u tista tkun hazina, kif ha tinkwadra din id-diskriminazzjoni fil-kuncett ta fair trial. In my humble opinion, solvejt din il-problema ghaliex meta per ezempju fil-kaz ta` ‘A’, l-avukat generali hareg l-att tal-akkuza, u allura kkonferma l-ordni tieghu, pero` d-decizjoni tikkonferma dik l-ordni, u allura hemmhekk fl-opinjoni tieghi hemmhekk ghandek mhux biss lezjoni tal-article 7 imma anke lezjoni tal-artiklu 6. Sfortunatament is-sentenza ta` John Camilleri ma ndirizzatix din. Issa naraw tindirizzahix f`ta ‘A’. Ghaliex jiena nahseb li jekk ikun hemm lezjoni tal-artiklu 6, ittiha izjed sahha. Pero` nahseb dak huwa punt li wiehed irid jara fir-rigward tal-violation of article 6. Strasbourg will give a remedy and nothing else. Jigifieri imbaghad sta al legislatur li jikkrehom il-guidelines. Li rajt daqxejn stupida fil-guidelines tal-emendi, apparti mil-mod kif giet drafted, li hija l-fatt li ma tawx certa guidelines illi huma hard and fast rules, u kellna nistennew l-ewwel digriet tal-qorti kriminali fil-kaz ta Emmanuel Magri li ta l-imhalled Michael mallia, li jtina guidelines. Ghaliex ghandha tkun il-qorti li ttina guidelines? Ghaliex m’ghandiex tkun il-ligi li ttik il-guidelines? U ghaliex inti biex ikollok guidelines trid toqghod fuq ligi ohra? Ta Emmanuel Magri, il-qorti qalet li dawk il-guidelines huma biss indicative. Fil-fatt jien ftit wara kelli kaz ta` certu ‘B’, fejn kien harigli att ta` akkuza fuq 500 grams of mephedrone, u l-avukat generali kien irribatti li jzomm mal-guidelines, imma jien kont ghedt li fil-guidelines qas biss hemm imnizzel mephedrone ghaliex il-guidelines hargu biss fir-rigward ta` cannabis u kokaina. U l-imhalled kien tani ragun. Kien tefa l-kaz isfel. Issa illum il-kaz qieghed quddiem il-qorti tal-magistrati.²⁵⁵

problem is that the Courts draw an odious comparison when you have an individual getting three years’ imprisonment and another with less aggravating factors getting nine years’ imprisonment. However for one to plea bargain with the Attorney General, a comparison has to be made. But the comparisons are considered as odious when made by the defence but when made by the Attorney General to dictate his position, these are not considered as odious. That is the real problem that we have – that you have a Court creating certain principles in its interpretation, principles which are very much in favour of the prosecution. The defence is mistreated when utilising these same principles. The fact that the legislator put mephedrone in the same basket as cocaine, that’s not the Court’s fault, but the legislator’s fault.

²⁵⁵ *I think that this judgement, I think that this was a missed opportunity by the Court of Strasbourg – because it only addressed Article 7 and avoided Article 6. I made a case of ‘A’ which to date is still pending before the ECtHR, where I had said that the problem with article 6, (side remark – those attacking the discretion has been taking place for a very long time – it had to be Strasbourg which made us realise that great injustices were being*

The participant then makes reference to another problem emanating from the unclear provisions inserted in Act XXIV of 2014 in regard to when filing of the respective Court application can be made.

Hemm ukoll problema fir-rigward ta' meta wiehed irid jipprezenta rikors. It is not clear. Kien hemm talks bejn il-Ministru, l-Avukat Generali u rapprezentant tal-kamra tal-avukati illi hargu guidelines ta' kif ghandha tigi nterpretata l-ligi minn mindu jiskatta terminu pero ghaliex m'ghandiex taghmilha cara l-ligi nnifisha u mhux il-ministru, l-avukat generali u rapprezentant tal-kamra tal-avukati. Dawn kollha huma incertezzi tal-ligi. Another problem is that you can only do it once. Tista' taghmlu immedjatament u imbaghad fil-mori tal-kumpilazzjoni jifaccaw cirkostanzi godda li jimmeritaw verament li jerga' jsir dan ir-rikors.²⁵⁶

Following the above, the participant then makes reference to a personal case of his which has gone through the ordeal of the Attorney General's unfettered discretion:

Fir-rigward tal-kaz ta' 'A', dan huwa l-akbar li qatt rajt f'hajti. Dana kien hemm tnejn min-nies, wiehed 'A' u 'B' li ddecidew li jittrafikaw il-cannabis, iddecidew flimkien li jittrafikaw il-cannabis, 'A' kien jipprokuraha, u l-iehor kien jaghmel l-arrangement u l-pjan ta' kollox. Sabu runner and there were these 3 people who were involved. Huwa ovvju li 'A' u 'B' kellhom rwol aktar importanti mir-runner f'dan il-kaz. L-avukat generali meta hareg l-ordnijiet, hareg ordni kulhadd ghal fuq. Lill-'B' u lir-runner akkuzawhom flimkien, l-iehor akkuzawh wahdu. Lil 'B' hargulu counter-order. Issa dan kien il-mohh ma' 'A' in this operation. Il-kaz ta' 'B' inqata u dan inqata quddiem gudikant li tatu sena habs

made). The problem is when they tell you Article 6 fair trial, it has a very very restricted meaning and therefore the Attorney General's decision taken at the very beginning of proceedings concerning the Court which will try an accused person, is considered as a decision taken at such a stage of the proceedings which is not considered as the trial. It is pre-trial. And there you have a problem with Article 6 and how to attack such discretion under the same article in the concept of fair trial. In my humble opinion, I solved this problem, because for example in 'A's' case, the Attorney General issued the bill of indictment and therefore he confirmed his original decision, and at that stage, you have a violation of Articles 7 and 6. Unfortunately, the John Camilleri judgement did not address this issue. Now we'll see whether it will address it in 'A's' case. Because if it finds a breach of Article 6, it will strengthen the outcome of the decision. that is one issue which one would have to look into when arguing breach of Article 6. Strasbourg will give a remedy and nothing else. Then it is up to the legislator to create guidelines. What I have seen a bit stupid emanating from the amendments' guidelines, apart from the way they were drafted, is the fact that they have not given any hard and fast rules, and that we had to wait until the first decree provided by the Criminal Court in the case of Emmanuel Magri, delivered by Judge Michael Mallia, which gave us some guidelines. Why should the Court give us guidelines? Why shouldn't it be the law providing these guidelines? And why should you rely on another legislation in order to have guidelines? With regards to Emmanuel Magri's the Court specifically stated that such guidelines are only indicative. As a matter of fact, I had a case of 'B', who had a bill of indictment for 500 grams of mephedrone, and the Attorney General insisted that one should follow the guidelines. I argued that mephedrone was not even listed in the guidelines. The judge gave me credit and ordered that the trial takes place before the Inferior Courts. The case is now before the Court of Magistrates.

²⁵⁶ There is also another problem on when one should file his application. It is not clear. Discussions were held between the Minister, the Attorney General and a representative from the Chamber of Advocates who issued guidelines on how the law should be interpreted. Again, why shouldn't the law make it clear instead of having the Minister, the Attorney General and a representative from the Chamber of Advocates issuing guidelines. Another problem is that you can do it only once. One can file it immediately and that during the same proceedings, new circumstances arise which merit another application.

(fuq cirka kilo cannabis). Dan kien ammetta, kixef lil 'A' u lil iehor u bbenefika mit-29. U fl-appell spicca wehel 6 xhur.²⁵⁷

In the meantime, 'A' u l-iehor jircievu att ta akkuza, jiena mal-ewwel ghamilt rikors kostituzzjonali u attakkajt id-diskrezzjoni taht l-artiklu 6. U naturalment attakkajt that l-artiklu 6 ghax gie nieqes milli ninkwadrah l-article 6 minhabba n-nuqqas tal-konferma tal-ordni. Il-kawza kostituzzjonali tieghi giet quddiem gudikant 'X' u tar-runner giet quddiem gudikant 'Y'. Ir-Runner tella jixhed lil l-Avukat Generali. Probbabilment induna bl-izball kbir li kien sar mill-ufficju tieghu u kif mar lura hariglu l-counter-order. Tlabt li ngib bhala prova li kien hareg il-counter-order fil-kaz tar-runner pero qaluli li ma stajtx ingib provi at that stage. Ma nafx mill-liema ligi tohrog din pero` qaluli li ma stajtx inressaq din il-prova. Tieghi spicca b'att ta` akkuza wahdu. Il-provi f'dan il-kaz kienu skjaccanti. Jien iddecidejt li nippattegija mal-AG. Ghamilt il-kawza quddiem il-qorti ta` Strasbourg u nvokajt l-article 7. Kont tlabt il-guidkant tal-Qorti Kriminali jissospendi l-guri habba dan il-kaz u qalli ma tarax ha noqghod nistenna dan il-kaz daqs kemm ilu. Dan kien ilu ghax kien inharaq il-process fl-awla tal-magistrat u ghalhekk kien dam, u allura kellhom jippruvaw jaghmlu rikostruzzjoni tieghu. Meta mort nippattegija mal-avukat generali, dan qalli li ried seba` snin. Qatlu ha nghidlek xi haga – inti ghandek sitwazzjoni fejn 'B' li ghamel prattikament daqs 'A', pero ghamel izjed minnu ghax kellu izjed akkuzi relatati ma xi droga ohra, ha sitt xhur, ghaliex jien ghandi naccetta seba` snin? X'hemm li jiggustifika din il-proposta li tammonta ghal fourteen times as much? U bazikament qalli that this was his final offer. Kellimt il-klijent u dan qalli li ried il-minimum. Jien ghedtlu li there's the risk that the Court might give him more. The minimum was four years which was still eight times as much li ha l-iehor. L-iehor li kellu favur tieghu hu li kellu t-29. Tieghi ma kellux. Pero kontra 'B' kienet li dan kellu akkuzi ohrajn li tieghi ma kellux. Dawn qishom jekwiparaw lil xulxin. Dana mort nittrata quddiem il-gudikant u spjegajtlu ghalfejn tieghi ma ridtx jaccetta s-seba` snin. L-avukat tal-AG vera ghamlet trattazzjoni velenusa u l-imhalled tah tmien snin. Jigifieri hawn l-imhalled ta messagg li jekk ma taccettax il-proposta tal-AG jien ser intik iktar. Naturalment appellajt.

This is l-abbuz lampanti li kien hemm u li ghad hemm – meta inti tara li l-abbuz jikkondonawh, ikollok tragedji bhalma kien hemm fil-kaz ta` 'A'.²⁵⁸

²⁵⁷ In the case of 'A', this is one of the most disgusting cases that I have ever seen in my life. There were two individuals, 'A' and 'B' who decided to import cannabis. 'A' used to import it and the other used to make the necessary arrangements to sell it. They found a runner and in all three people were involved. It was obvious that 'A' and 'B' had a much more important role than the runner. The Attorney General first decided that they all should face trial before the Criminal Court. 'B' and the runner were charged together whereas 'A' was charged on his own. A counter-order was issued for 'B'. now this guy was the master mind together with 'A'. Nonetheless, his case was decided and the magistrate gave him a year's imprisonment for a case involving one kilogramme cannabis. He had admitted to the charges, he testified against A and benefited from Section 29. He appealed and his jail term was reduced to six months' imprisonment.

²⁵⁸ In the meantime, 'A' and the other one receive their bill of indictment. I filed a constitutional application and attacked the discretion under Article 6. My constitutional case was assigned to Judge 'X' and the runner's case was assigned to Judge 'Y'. The runner summoned the Attorney General. Most probably he realised what grave mistake was made from his office so when he returned back, a counter-order was issued. I requested to bring this as evidence in my case however it was rejected because I was told that I could not bring any more evidence at that stage of the proceedings. I do not know from which provision of the law this comes out however they told me I could not bring it as evidence. My client ended up with a bill of indictment on his own. I decided to plea bargain with the AG. In the meantime, I filed my case in Strasbourg and claimed a breach of Article 7. I had also requested the Judge to suspend the jury who rejected my request on the basis that the case had been pending

The above extract indicates the participant's major concerns with the past and present legal position. He makes reference to a very important case which in the past could not avail itself of the legal remedies enshrined in Act XXIV of 2014. However, he also notes another problem which emanates from the present legal position, and which problem relates to the lack of legal clarity. Notwithstanding the above, as a concluding remark the participant also states that:

*There is one thing I like about the law. Illi jekk il-qorti hija konvinta li l-Avukat Generali ghamel zball bid-diskrezzjoni tieghu, hi tista tuza l-parametri li normalment jintuzaw mill-Qorti tal-Magistrati. Kieku dan il-kaz gara lllum meta hawn din il-ligi l-gdida, lill-qorti ma kontx nghidilha li l-minimum is four years imma l-minimum huwa six months.*²⁵⁹

This interview lasted for an hour and a half and it differs in many ways than the first interview. However they both present the individuals' personal thoughts and opinions on the same subject matter. One may be a bit more detailed than the other however both were resourceful in offering suggestions and or recommendations to the present legal position.

4.3.3 The Retired Judge

As already stated earlier, for reasons which cannot be disclosed in this study, this interview was conducted via a telephone conversation which took place in May 2015. The Interview Questions were provided to the participant some weeks in advance and following a request made by the same. Minutes of the respective telephone

for quite a long time. The reason why it had been pending for such a long time because the Court file was destroyed in a fire which took place in the magistrate's chambers and they spent quite some time trying to reconstruct the whole of the file. When I met up with the AG, he told me that he wanted seven years' imprisonment. I pinpointed to him that 'B' who did practically everything like 'A' if not more because he had other charges included which 'A' did not have, got six months' imprisonment, why should I accept seven years' imprisonment? What justifies such proposal which is equivalent to times as much? And basically he told me that this was his final offer. I spoke to my client and he told me that he wanted the minimum. I told him that the minimum was four years and that there's the risk that the judge might give more than that. The minimum was still considered to be eight times as much which the other received. The other had the section 29 in his favour. Mine did not have this. However, 'B' had other charges which mine did not have. I made my oral submissions before the Judge and explained to him why my client did not want to accept seven years. The AG's lawyer made a repugnant oral submission and the Judge gave him eight years. The Judge wanted to send a message that if you do not accept the AG's proposal, I will give you more. Naturally, I appealed. The is most evident abuse that there was and that is still there – when you see them approving of such injustices, you end up having tragedies similar to those of 'A's' case.

²⁵⁹ *There is one thing I like about the law. That if the Court is convinced that the Attorney General made a mistake with his decision, it can apply the punishment which is normally meted out by the Court of Magistrates. If this law were in force back then, I would not have told the judge that the minimum is four years but six months.*

conversation were drawn up whilst conversing; however the most salient points covered during this session included the following:

- *The Camilleri Judgement in my opinion has a wrong conclusion mainly because no proof reading of the dissenting opinion was carried out and also because it was wrongly based on Article 7. The case had to see whether the wide discretion of the AG could impinge on the outcome of the proceedings on the basis of Article 6;*
- *With regards to question 1, the answer is YES. The wording of the legal enactment is somewhat strange for the following reasons. Read through Article 22 of chapter 101, Sub-articles (2A)(a). This is a very important provision because it is the first time that guidelines were included in the application of the law. Other guidelines which are known to me are the ethical guidelines concerning judges. However, in the criminal code, this is the first time that legislator determined that someone exercising a judicial discretion, or in this case the AG exercising a quasi-judicial discretion, is subject to judicial review. The AG does not exercise a quasi-judicial role because according to the Constitution he is put under the Executive and not under the Judiciary.*

Following this, the Judge also felt the need to clarify some important issues relating to the guidelines issued by the Chamber of Advocates soon after Act XXIV of 2014 was enacted. His main concern lies in the interpretation given on the term 'conclusion of the inquiry'. He states that:

- *Reference should also be made to the guidelines issued by the Chamber of Advocates and the Minister for Justice when such legislation was introduced in defining the term 'upon termination of the inquiry'. An inquiry terminates when the Court of criminal inquiry decides that there are sufficient grounds to indict an individual. When the AG remits the records to Court for further investigation, that is not and should not be considered as termination of inquiry but it is part of a continuing inquiry. The interpretation provided by the Chamber of Advocates was not correct. As a matter of fact, there have been many judgements relating to the notion of termination of inquiry and which cases prove otherwise.*

Following this clarification, the Judge further elaborated on the provisions inserted in Act XXIV of 2014 and defined this measure as a form of judicial review on the discretion exercised by the Attorney General:

- *With this legal enactment, the discretion exercised by the Attorney General is subject to judicial review. This is a first for our criminal legal system. There aren't too many instances where the AG's discretion is subject*

to judicial review. For example, another instance where the AG's discretion is subject to judicial review is when a request for access to an accused person before the Court of Magistrates as a Court of criminal inquiry, a decision to indict the person is taken and such request is considered by the Criminal Court. Vide Art. 437 of Chapter 9. This is a form of indirect judicial review. Refer also to Art. 431 of Chapter 9. Can such discretion be challenged? No. Pending an inquiry, the Magistrate gives his decision. There are few instances where the AG's discretion is subject to judicial review.

In addition to the above, the judge felt it was opportune to remark that notwithstanding Act XXIV of 2014 introduced an element of judicial review on the Attorney General's use of discretion, the Attorney General's decision to prosecute should not be made subject to any form of judicial review given that such power is conferred upon him by the Constitution of Malta.

- *The AG's decision to prosecute certainly cannot be subject to judicial review because such powers are conferred upon him by the Constitution. However this is a question concerning within which Court proceedings should take place.*

Following this, the judge also highlights another anomaly which is present in the wording of the law. He refers to Sub-Article (2B) of Article 22 of Chapter 101 and states that:

- *If we continue reading sub-article (2B) of Article 22, the law in this provision should certainly not include the wording 'may'. This should have been replaced by the word 'shall'. The AG's discretion is being subjected to judicial review based on the concept of punishment disproportion. If an individual decides not to challenge the AG's discretion, the criminal Court if convicted, and in seeing that such punishment is disproportionate, should apply the respective punishment and not 'May'. The Court is obliged to apply it in order to avoid impinging on individuals' human rights. One should also refer to the Maltese version of the law in order to see what terminology is used.*

Once the above has been clarified, the judge continues answering the interview questions 2, 3, 4 and 5 and he even makes suggestions to improve the present legal system:

- *Re. Question 2 – Provided you agree with the judgement, yes it has. However the conclusion was incorrect.*

- *Re. Question 3 –the moment you are aware in which Court you will be tried can an individual foresee what punishment will be applied? Yes, an individual will get to know where his trial will take place and also about the punishment parameters. Apart from that, once an individual is aware of the*

illegality of his actions, then he is also aware that such actions will entail a punishment.

- *Re. Question 4 – in drug-trafficking cases, the punishment parameters may be substantially wide however this is a problem which deals mostly with sentencing policy. Judgements set out sentencing guidelines. The UK have the sentencing commission guidelines. Our case-law unfortunately is very limited and there is no scope for a manual. There was a local practicing judge who had managed to collect all related judgements and sorted them out in a table in order to calculate with precision the punishment for all pending cases. However, with regards to Magistrates, these may not have the time to do such specific task.*

- *Re. 'arbitrary punishment' – I do not agree with such definition. The term 'disproportionate' would be much more appropriate because the term 'arbitrary' might insinuate something 'illegal'.*

- *How to deal with sentencing policy – this needs to be implemented otherwise the legislator might implement micro management and this can certainly backfire. This should definitely be avoided. However, a sentencing policy should be utilised.*

- *Re. Question 5 – reference is made to the applicability of Article 29 of Chapter 101. I fully agree that such applicability should only take place when the information provided by an individual leads to a conviction and the information should not simply stand on its own. However the wording utilised in Article 29 is such that an individual may he himself prove to the satisfaction of the Court that he has helped the Prosecution to apprehend a third party. This exercise can and should be done by the defence.*

As a concluding remark, the Judge felt the need to highlight other instances which might require the legislator's intervention however such instances might not necessarily involve the Attorney General's wide use of discretion. For completeness sake, the Judge concludes that:

- *As a final remark, reference should also be made to the issue relating to the numerous times that the AG makes a request to the Courts to produce additional evidence. It is important to note that once a person is indicted, the AG can continue producing additional evidence before the Criminal Court however he may not add to the charges unless a special procedure is followed. Vide Article 435. One should also put special emphasis on the numerous transmissions which take place during the rinviu in order not to prolong and or delay proceedings.*

This telephone interview lasted for about an hour and a half and it has proven to be one of the most difficult interviews. This is due to the fact that a substantial amount of information was given by the participant which information had to be laid down in

writing whilst the interview was taking place. Nonetheless, it was a great experience to have this retired member of the judiciary offering his kind contribution to this study.

4.3.4 The Present Acting Magistrate and Judge

This interview took place in February 2015 at the Magistrate's Chambers at the Law Courts. The Magistrate had requested a copy of the interview questions some weeks before the interview took place. This interview developed into an informal dialogue and it is for this reason that this session was not audio recorded. Minutes of the meeting were taken immediately after the session terminated.

After reviewing the interview questions, the Magistrate first highlighted that:

- *The AG became aware of his overpowering discretion following the decision given by the ECtHR. The legal notice was certainly rushed into without giving enough thought to its effects.*

Following this response, the Judge highlighted that:

- *Prior to the introduction of Act XXIV of 2014, the Courts already followed certain criteria relating to punishment applicable to drug trafficking offences and this albeit the fact that the law did not distinguish between hard and soft drugs. The Courts still gave due importance to the type, quantity and purity of drugs involved, the street value. It is also important to point out that all cases are different from one another and each one merits an in-depth analysis. Other aggravating factors are also taken into consideration such as recidivism.*

In addition to this, the Magistrate highlights one particular flaw with the present remedy offered through Act XXIV of 2014, however she also questions whether any viable solution can be provided:

- *Some sort of remedy should be granted towards the outcome of the challenge proceedings however one must keep in mind that the inquiry proceedings are already lengthy in their nature and by instituting additional Court proceedings to contest the outcome of the challenge proceedings might cause additional undue Court delay which indirectly cause a prejudice for the accused in having a fair trial within a reasonable time frame, especially when the accused has spent a considerable amount of time under preventive arrest.*

The Magistrate also highlighted another problem which members of the judiciary encounter during the compilation of evidence in inquiry proceedings. The same states that:

- *The AG keeps the Court file approximately six to eight weeks (when a proroga is requested) whereas the Courts only keep the file for a much shorter period. This definitely needs to be addressed.*

On the other hand, the Judge felt it opportune to stress out that Act XXIV of 2014 is in itself a remedy which should not be made subject to additional judicial review. He states that:

- *I am against the introduction of reviewing procedures in challenge proceedings simply because in my opinion, the challenge proceedings are already an indirect form of appeal to the AG's consent given before the Court of Magistrates as a Court of Criminal Inquiry. In these proceedings, the Courts are already referring cases involving illicit substances of up to 500 grams to the Court of Magistrates as a Court of Criminal Judicature.*

During the same interview session, another issue which was discussed in further detail was related to the applicability of Article 29 of Chapter 101 of the Laws of Malta. The Magistrate stated that:

- *The applicability of this article is very subjective and it can be easily abused of. The Courts are aware that this can be easily abused of however the Courts may withdraw its applicability in seeing that an accused person does not satisfy the requisites of Article 29 eg. Testifying incorrectly or providing a misleading testimony. Article 29 needs to be reviewed in its entirety because the provision specifically states that an accused person's assistance to the police has led to the arrest of another individual. This certainly does not include those instances where an accused person gives a statement under oath. There were instances where I have had the Police declaring that an accused person should benefit from Article 29 simply because he would have given a statement under oath and when the accused is then summoned to confirm all the facts in Court, he would have forgotten all details mentioned in his statement. In addition to this, any sentence bargaining which might have taken place between prosecution and defence in which both suggest a punishment which is lower than that is normally given by the Courts, the Court has the discretion to simply discard their suggestion and proceed to decide according to what is ethically correct. This is being said in view of the fact that judgements delivered by the Courts are under the general public's scrutiny. In my opinion, it would be in the interest of an accused person to seek sentence bargaining rather than opt for a jury mainly because a trial by jury would further prejudice his position. Apart from that, one should keep in mind that sentence bargaining should not be left towards the very end*

of proceedings but should commence at an early stage so that an individual is given clear guidelines as to what the AG is proposing.

With respect to the recent legal enactment, the Magistrate opined that:

- *The recent amendments cannot be analysed from a defence lawyer's point of view but one needs to keep everything into perspective. Defence lawyers are always requesting additional remedies in order to be able to offer the best possible legal assistance to their clients however, in this respect, presently the AG's abuse of discretion is heavily monitored by Strasbourg and it is certainly not being abused of as it was in the past.*

In addition to the above and as a concluding remark, the Magistrate felt it opportune to highlight another problem which the Inferior Courts will be facing following the introduction of Act XXIV of 2014, and states that:

- *The Court of Magistrates are presently overburdened with work and that employment of other members of the judiciary is necessary especially to address all cases which are being referred by the Criminal Court to the lower Courts in connection with the challenge proceedings.*

This interview lasted for about an hour and it has managed to cover areas which remained uncovered with the other interviews. The only drawback with this interview is that no specific answers were given for each and every individual question. Many of the answers were open-ended and remained subject for further debate. It was also interesting to note that during such interview session, both members of the judiciary felt comfortable enough to voice their concerns with the present legal position, particularly the comment made by the Magistrate in relation to the recent amendments which cannot be analysed from a defence lawyer's point of view. Therefore this study's assessment should be conducted in the most responsible manner whilst taking into consideration every aspect of it.

4.4 Court Decrees given by the Criminal Court from August 2014 until to date

This section will include a list of all Court decrees which have been given by the Criminal Court following the introduction of Act XXIV of 2014 in order to determine

how many cases have been referred for trial before the Court of Magistrates. This section will list all the respective decrees in a chronological order and will omit any details relating to individuals whose cases are pending for trial.

It is first important to highlight that in order to gain access to these decrees, one had to first file a Court application before the Criminal Court requesting authorisation to view these decrees for purposes of conducting this research.

The above-mentioned application was filed in Court on the 7th April 2015. By means of a decree given on the 8th of April 2015, the Court acceded to the applicant's request however it requested that a copy of the respective thesis is filed in Court prior its publication. As stated earlier, the decrees will be listed in separate sub-headings indicating the amount and type of drugs involved, if any are indicated. The details relating to the respective individuals will be concealed. Each one will also indicate the reasons given by the Criminal Court in deciding whether to accede or reject the applicants' requests.

4.4.1 Decree dated 2nd October 2014

This is the very first decree which was given by the Criminal Court following the introduction of Act XXIV of 2014. As a matter of fact, this decree managed to give additional clarification guidelines on how the Courts should determine the respective applications. The second defence lawyer who took part in the semi-structured interviews also made reference to this decree and acknowledged the fact that it has given additional guiding information on the recent legal enactment.

The Court makes reference to the charges brought against the applicant which amongst other charges included the crime of importing, dealing and trafficking 546.344 grams of heroin (20% purity). The applicant argued that the drug's level of purity was considered as the norm however he stressed that his role in the commission of the offence was a secondary one and that no financial gain was made out of this transaction. He also highlighted that his conduct was clean and never had any problems with the local authorities.

In the same decree, the Court also noted the submissions made by the Attorney General whereby it was argued that pending investigations, the applicant tried

bribing one of the investigating officers. This showed that the applicant played a major role in such transaction. The Attorney General made reference to the Fourth Schedule Guidelines which stipulate that cases involving up to 100 grams of heroin are to be referred to the Court of Magistrates.

The Court in its considerations stated the following:

Meta l-ligi tghid illi ammont ta` eroina ta` anqas minn mitt gramma huwa "indikattiv" illi l-persuna m'ghandhiex tkun gudikata mill-Qorti Kriminali ma jfissirx awtomatikament illi kwalunkwe ammont ghola minn mitt gramma bilfors trid tigi quddiem il-Qorti Kriminali. Dawn il-linji gwida huma biss punt ta` tluq u m'ghandhomx iservu esklussivament bhala process artimatiku.²⁶⁰

In this decree, the Court goes on to state that it has made the necessary research to establish whether past cases relating to heroin trafficking have been tried before the Criminal Court or the Court of Magistrates. In its assessment, it has concluded that many of the cases involving heroin in excess of 700 grams were all referred to the Criminal Court. Therefore, if this case were to be referred for trial, it would have been referred to the Court of Magistrates since it involved 500 grams of heroin.

The Court then refers to the definitions drawn up in Act XXIV of 2014 in determining whether the applicant had a leading role, a significant or a lesser role. It concluded that the applicant had a significant role because he was motivated by the prospect of a financial gain.

With regards to the purity of the drugs involved, the Court once again made an assessment of those cases which were referred for trial before the Criminal Court and which included heroin trafficking. It noted that many of these cases, the drugs involved had a 35% purity and more. Therefore the level of purity of this case was not to be considered as an aggravating factor.

The Court concluded by stating the following:

Ghalhekk meta l-Qorti tara dan il-kaz holistikament issib illi dan huwa "borderline case" illi jista` jmur zewg nahat – jew processat quddiem il-Qorti tal-Magistrati jew quddiem il-Qorti Kriminali. F'dan il-kaz il-Qorti trid tiehu

²⁶⁰ Decree dated 2nd October 2014, Criminal Court - *When the law states that amount of heroin should not exceed one hundred grams, this is only indicative that the said person should not be adjudged by the Criminal Court. It does not mean that any amount in excess of one hundred grams should have its trial before the Criminal Court. These guidelines are a starting point and should not serve the purpose of an arithmetic exercise.*

*decizjoni l-aktar favorevoli ghall-akkuzat u ghalhekk tordna illi tilqa` t-talba tal-akkuzat u tordna illi ghandu jigi ggudikat quddiem il-Qorti tal-Magistrati.*²⁶¹

4.4.2 Decree dated 3rd October 2014

This decree does not indicate the type or amount of drugs involved. It only states that the Court has heard submissions by the Attorney General and the applicant's defence lawyer. The Court also notes that the amount and purity of the drugs involved are both low and that after it assessed the Fourth Schedule Guidelines of Act XXIV of 2014, it orders that the trial takes place before the Court of Magistrates.

Following this decree, this case was decided by the Court of Magistrates in November 2014 therefore the details relating to the drugs involved were retrieved from the respective judgment. As a matter of fact, the applicant was caught carrying forty-seven (47) capsules containing 443.68 grams of Diazepam. In its judgement, the Court of Magistrates imprisoned the applicant for four and a half years and ordered him to pay a fine of Eur 8,000 together with expenses amounting to Eur 1,620.29.²⁶² The applicant benefited from a reduction of two degrees in punishment after applying Article 29 of Chapter 101 of the Laws of Malta.

4.4.3 Decree dated 3rd October 2014

The Court rejected the applicant's request and ordered that the trial takes place before the Criminal Court. The reasons given by the Court included the substantial amount of drugs involved and the significant role played by the accused.

The decree does not indicate the type and amount of drugs involved.

4.4.4 Decree dated 3rd October 2014

The Court rejected the applicant's request and ordered that the trial takes place before the Criminal Court. The Court based its decision on the substantial amount of drugs involved and the role played by the accused. It also stated that the Court took

²⁶¹ *Ibid* – so when the Court views this case holistically, it finds that this is a “borderline case” which can go either way – either before the Court of Magistrates or before the Criminal Court. In this case, the Court needs to take a decision which is the most favourable for the accused therefore it acceded to his request and orders that the trial takes place before the Court of Magistrates.

²⁶² *Il-Pulizija vs Rafal Zelbert*, Court of Magistrates, 18th November 2014.

into consideration the age of the accused during the commission of the same offence, which consideration affects the punishment and not the merits.

The decree does not indicate the type and amount of drugs involved.

4.4.5 Decree dated 3rd October 2014

The Court rejected the applicant's request and ordered that the trial takes place before the Criminal Court. The Court based its decision on the substantial amount and purity of drugs involved and the significant role played by the accused.

The decree does not indicate the type and amount of drugs involved.

4.4.6 Decree dated 3rd October 2014

The Court stated that the amount of drugs in question is not a substantial one however its purity was quite high. It considered this as a "borderline" case and that its decision should favour the applicant. In view of this, it ordered that such trial takes place before the Court of Magistrates.

The decree does not indicate the type and amount of drugs involved.

From additional research carried out in the Inferior Courts, it has resulted that the above case concerns 285.94 grams of cocaine bearing a street value of approximately Eur 21,731.00.

4.4.7 Decree dated 21st October 2014

In this decree, the Court indicated the amount of drugs involved but not did not specify the type of drugs found in the applicant's possession. The Court concluded that the applicant should face trial before the Criminal Court because the amount of drugs included 4,736 grams and also because the applicant's role in the commission of the offence was significant.

4.4.8 Decree dated 21st October 2014

The Court acceded to the applicant's request given that his role in the commission of the offence was minimal. It ordered that the trial takes place before the Court of Magistrates. This decree was filed in the acts relating to the preceding decree given

that the respective Court case was brought against two separate individuals. This also meant that one of the applicants had his application rejected whereas the other was acceded to.

4.4.9 Decree dated 23rd October 2014

This study has not managed to gain access to this decree however reference to it was made in appeal judgement delivered by the Constitutional Court on the 2nd March 2015, which stated that the applicant's request was rejected by means of a decree dated 23rd October 2014. This was primarily due to the fact that the applicant was caught dealing in 639.90 grams of heroin.²⁶³

4.4.10 Decree dated 23rd October 2014

This decree makes reference to the guidelines given in the decree dated 3rd October 2014 and states that since the amount of drugs involved is of 440.11 grams with a purity of 43.3%, it acceded to the applicant's request and refers the case for trial before the Court of Magistrates.

4.4.11 Decree dated 7th November 2014

The Court ordered that the applicant faces trial before the Criminal Court given that the amount of drugs involved exceed the Fourth Schedule Guidelines of Act XXIV of 2014.

The decree does not indicate the type and amount of drugs involved.

4.4.12 Decree dated 12th November 2014

This decree makes reference to the Court's considerations mainly those relating to the type and amount of drugs and the circumstances of the cases. It acceded to the applicant's request notwithstanding that he may have had a significant role in the commission of the offence.

The decree does not indicate the type and amount of drugs involved.

4.4.13 Decree dated 3rd December 2014

²⁶³ The Republic of Malta vs Nelson Mufa, Constitutional Court, 2nd March 2015.

This decree rejects the applicant's request based on the substantial amount of drugs involved which exceed the respective guidelines and the financial prospect which enhance the commission of such crime.

The decree does not indicate the type and amount of drugs involved.

4.4.14 Decree dated 5th December 2014

The Court rejects the applicant's request and orders that the trial takes place before the Criminal Court. In its conclusion, the Court considered the amount of drugs involved and the applicant's role in the commission of the offence.

The decree does not indicate the type and amount of drugs involved.

4.4.15 Decree dated 14th January 2015

This decree rejects the applicant's request and orders that the trial takes place before the Criminal Court. This is based on the amount and purity of drugs involved and all other circumstances of the case.

The decree does not indicate the type and amount of drugs involved.

4.4.16 Decree dated 4th March 2015

The Court acceded to the applicant's request after having considered the type and amount of drugs involved and the applicant's role which was classified as minimal. It also makes reference to the applicant's drug dependency problem and orders that the trial takes place before the Court of Magistrates.

The decree does not indicate the type and amount of drugs involved.

4.4.17 Decree dated 18th March 2015

This decree makes reference to the amount of drugs involved but does not indicate its type. It also treats 449.03 grams as a "borderline" case however because the applicant had a significant role in the commission of this offence, the Court ordered that the trial takes place before the Criminal Court.

4.4.18 Decree dated 14th April 2015

This decree rejects the applicant's request and orders that the trial takes place before the Criminal Court. This is based on the substantial amount of drugs involved and the applicant's significant involvement in the case.

The decree does not indicate the type and amount of drugs involved.

4.4.19 Decree dated 30th July 2015

This is the one of the most detailed decrees which to date has been given by the Criminal Court. In its length considerations, the Court assesses the Fourth Schedule Guidelines together with the UK Drug Offences Definitive Guidelines and states that both share a great deal of similarities. The Court quotes various extracts from the UK Drug Offences Definitive Guidelines in connection with the guidelines relating to the role played by an accused person however it also refers to the following extract:

*Where there are characteristics present which fall under different role categories, the Court should balance these characteristics to reach a fair assessment of the offender's culpability. In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account...*²⁶⁴

Another very important consideration drawn up by the Court is the following:

*Meta wiehed ihares allura lejn dak li il-legislatur kellu f'moffu meta l-Qorti tigi biex tqies il-forum fejn il-persuna akkuzata ghandha tigi ggudikata, johrog bil-wisq evidenti illi dak li ghandu jigi evalwat f'dan l-istadju huwa indubbjament konsiderazzjoni ta` piena li l-persuna akkuzata ghandha tircievi jekk hija tigi misjuba hatja tar-reat lilha addebitati. Dan necessarjament irid isir billi l-Qorti, minghajr ma tisma` l-provi fuq il-mertu tghaddi gudizzju "preliminary" dwar l-involvement tal-persuna akkuzata fir-reat li dwarha hija tinsab akkuzata u dan fi stadju meta dik il-persuna ghandha tibqa` titqies illi hija innocenti.*²⁶⁵

For the very first time, the Courts have voiced their concern in deciding these applications given that an individual might be facing a pre-judgement even before the Courts might have determined his guilt or innocence. And as the Court also confirmed, this decision might also influence the outcome of the latter proceedings. In earlier sections, particularly those relating to the judgements given by the Constitutional Court, reference was made to the pleas raised by the Attorney

²⁶⁴ Decree dated 30th July 2015, Criminal Court, page 3.

²⁶⁵ *Ibid* - – In determining what the legislator had in mind with respect to when a Court has to decide which forum is to try an individual, it becomes evident that at that stage one needs to evaluate the punishment which an individual might receive if he/she is found guilty of the charges brought against her. This has to be done by having the Courts giving a preliminary judgement without hearing evidence on the individual's involvement in the said case and this at a stage, where the individual should be presumed innocent.

General whereby it was sustained that such decision would in no way influence the outcome of the pending criminal proceedings. But here, the Courts are for the first time confirming that such decision might have an effect on the outcome of the proceedings, that is whether a person is found innocent or guilty.

The Court continues adding that:

Il-Qorti necessarjament u skont il-ligi u l-linji gwida li hija moghnija bihom trid necessarjament tqies jekk ir-rwol tal-persuna tar-rikorrenti fir-reat addebitati lilha u il-hsara attwali jew potenzjali li setghet tigi kkawzata ghandhomx iwasslu sabiex huwa jigi ggudikat minn din il-Qorti jew inkella mill-Qorti tal-Magistrati.²⁶⁶

The above shows that the Court will be mainly focusing on the role played by the accused in the commission of the offence and the harm caused by such offence. It also makes reference to the amount of drugs involved which included 2.2 kilograms of cocaine, however it also points out that the lead person behind this transaction was someone other than the accused. It also stresses that various other individuals were involved in this transaction, most of which had already been sentenced by the Court of Magistrates. The Court quotes various extracts from the above judgements in order to give an overview of what the transaction entailed. The Court also refers to the initial statement given by the accused and focuses on his role and actions performed when the crime took place. It also concludes that the accused's role in this whole transaction was similar to a courier's who delivers the consignment from the supplier to the trafficker. The Court also makes reference to the case of *R v Boake and Others*²⁶⁷ and quotes the following extract:

...The courier who is worldly wise, who knows what he or she is doing, and does it as a matter of free choice for the money, is likely to be assessed as having a significant role: see the expressions 'motivated by financial or other advantage, whether or not operating alone' and sometimes 'some awareness and understanding of the scale of the operation'.²⁶⁸

In assessing the above guidelines, the Court concluded that the applicant's role in this transaction was minimal when compared to other individuals who were charged separately. It also highlighted that the accused always followed instructions given by

²⁶⁶ *Ibid* - The Court, according to the law and its guidelines needs to look into the accused's role in the circumstances of the case and the potential harm which has been caused or which could have been caused in order to determine whether the case should be heard by the Court of Magistrates or the Criminal Court.

²⁶⁷ *R v Boake and Others*, EWCA Crim 838, 2012.

²⁶⁸ *Ibid*.

third parties and did not have full understanding of the scale of the operation. It also stated that the accused was not involved in the trafficking and had no influence on those above him. Apart from that, the financial gain was very low when compared to the scale of the operation.

Based on the above, the Court acceded to the applicant's request and ordered that the trial takes place before the Court of Magistrates.

It is evident that in the above decree, the Court has managed to give the appropriate attention that such application deserves by partly assessing the merits of the case in order to determine the role played by the accused irrespective of what drug quantities were retrieved. As happened in this case, albeit the fact that 2.2 kilograms of cocaine were retrieved, the Court still acceded to the applicant's request simply because his role was a very minimal one. One can also say that, with the profound exercise carried out by this Court, an effective remedy as was initially intended by the enactment of Act XXIV of 2014 has indeed been granted to the applicant.

4.5 Conclusion

This Chapter has provided three very interesting sections dealing with the in-depth semi-structured interviews, the factual case analysis and an overview of the decrees given by the Criminal Court from August 2014 until to date. All three sections have managed to identify problems which one might encounter when seeking a remedy under Act XXIV of 2014. However, it was also interesting to note that even members of the judiciary do encounter problems of their own which very often remain disregarded by most legal practitioners. Notwithstanding this, one must certainly assess whether the highlighted problems are running counter the provision of an effective remedy and also whether the Courts are adopting the correct procedures when deciding the respective Court applications. A resume of all these problems will be provided in the concluding chapter together with suggestions and recommendations for each one.

CHAPTER 5

CONCLUSION

This Chapter is intended to provide a résumé of the literature review listed in Chapter 3 and the findings reported in Chapter 4, with the scope of identifying the problems related to this research question.

In Section 3.2.1 of this thesis, reference was made to the thesis entitled *'The Conduct of Criminal Prosecution in Malta – A legal and Comparative Analysis'*. Among other issues, the author has criticised the Police for lacking legal knowledge and also recommends that an authority similar to the CPS found in England ought to be implemented locally. The same thesis also highlighted other problems emanating from the Attorney General's excessive use of discretion however it fails to provide suggestions to improve or remedy the situation.

Section 3.2.2 refers to another thesis entitled *'The 'In Genere': Is it an effective tool for the Investigation and Prosecution of crime'*. The majority of the content inserted in this thesis was of little relevance to this research question. Notwithstanding this, the analysis of this thesis has been of great assistance in identifying other problems which might occur in drug-trafficking cases even at a pre-trial stage. Most importantly was the reference made to the powers conferred upon the Attorney General in Chapter 2. The author had even concluded that the AG is given wider powers in order to keep a check on the Inquiring Magistrate especially when inquests do not take place. This comment is indeed supported by statements reported in Chapter 4 of this study and which statements were made by one of the defence lawyers who took part in the semi-structured interviews. The participant had reiterated that the Attorney General acts as an inspector over the judiciary and that the real problem lied in the fact that the Attorney General does not understand what role he has. In addition to this, in Chapter 3, the author continues affirming that the role of the inquiring magistrate is diminishing when compared to the role and powers given to the Executive Police and the Attorney General. However, she stresses that the role of the inquiring magistrate should be preserved in order to keep the appropriate checks on any possible abuse when the Police are carrying out investigations. One

of the most important concluding recommendations is where the author suggests that the Duty Magistrate should assume a more significant role in the realm of criminal investigations. The problem highlighted in the above thesis can in some way relate to the problem highlighted with this research question. In this respect, once our legislator has acted upon the infringements highlighted in the decision given by the ECtHR and also provided us with a remedy through Act XXIV of 2014, the responsibility presently lies on our Courts in order to review the Attorney General's decision. The Courts' main duties consist of providing a careful and correct interpretation and application of the law in order to grant the remedy which is being sought by the respective applicants.

Section 3.2.3 deals with the thesis entitled 'The Maltese Sentencing Regime in Relation to Drug Trafficking Offences'. As stated earlier, the author makes reference to the Attorney General's wide discretionary power in Chapter 2 and remarks that the lack of judicial review calls for '*a situation of uncertainty*'.²⁶⁹ In addition to this, the same author continues adding that the Maltese sentencing regime is '*largely unstructured*'.²⁷⁰ In the above two chapters, the author has managed to highlight all problems which emanated from the past legal position including the disparity in punishments which are given by the Court of Magistrates and the Criminal Court. In its concluding chapter, the author presents its recommendations together with suggestions for a better sentencing policy. With regards to the Attorney General's controversial pre-trial decision, it calls for a set of legally defined grounds which are to form the basis of such decision. In addition, it also calls for the introduction of a common minimum punishment which can be applied by both Inferior and Superior Courts. An additional recommendation which was made was that concerning the creation of a Drugs Court to deal with minor offences of drug-trafficking together with a Sentencing Advisory Body with the scope of creating more public awareness on sentencing procedures. Most of the recommendations suggested by this author have already been implemented and it seems that one of the recommendations relating to the common minimum punishment seems to be supported also by one of the legal practitioners who took part in the semi-structured interviews. It is important to note

²⁶⁹ *Ibid*, Section 2.2.3 page 51.

²⁷⁰ *Ibid*, page 53.

the last comment made by the above practitioner can be found in section 4.3.2 above.

Section 3.2.4 deals with the thesis entitled *'The Unlawful Possession of Drugs and Narcotic Substances: A Comparative Analysis'*. A large part of this thesis was mostly dedicated to the historical evolvement of local and international drug laws. Reference to the Attorney General's wide discretionary powers is made in Chapter 4, however it does not seem to provide an detailed account of the repercussions that individuals could have ended up facing before the introduction of Act XXIV of 2014. In the same chapter, the study also refers to the *'Police Investigative Powers'* and highlights the importance of Article 29 of Chapter 101. Unfortunately, it does not provide any insight as to whether any problems might be encountered when such provision is applied. As a concluding recommendation, the author suggests the amalgamation of the Medical and Kindred Professions Ordinance and the Dangerous Drugs Ordinance. In addition, she recommends the inclusion of the substance 'khat' to the other illicit substances listed down in the law. It is indeed important to note that the most feasible and accurate recommendations made before the introduction of Act XXIV of 2014 were the ones put forth in the third thesis entitled *'The Maltese Sentencing Regime in Relation to Drug Trafficking Offences'*. This is because Act XXIV of 2014 subjects the Attorney General's pre-trial decision to the scrutiny of the Courts. Whether the Courts are scrutinising such decision in the most favourable manner will be assessed when reviewing the Court decrees listed in Chapter 4 of this study.

In reviewing the judgements delivered by the First Hall of the Civil Court in its Constitutional Jurisdiction²⁷¹ from January 2013 to date, one can say that before the introduction of Act XXIV of 2014, the Court acceded to the applicants' requests in eight out of nine of these cases. In these eight cases, the Court either declared that Article 22 (2) of Chapter 101 and Article 120A (2) of Chapter 31 violated Article 7 of the Convention or that the discretion exercised by the Attorney General violated Articles 6 and 7 of the Convention and of Article 39 (8) of the Constitution of Malta. It is also important to highlight that there were additional judgements delivered after the introduction of Act XXIV of 2014, whereby the Constitutional Court revoked the

²⁷¹ *Ibid* Section 2.4.

judgements delivered by the First Hall of the Civil Court in three of the above eight cases and declared that no violation took place. Following the introduction of Act XXIV of 2014, three out of six cases had their requests acceded to by the First Hall of the Civil Court whereas the other three cases were instantly rejected. Additionally, the Constitutional Court overturned the judgement delivered by the First Hall of the Civil Court in one of these three cases and declared that no violation took place. The reasons given by the First Hall of the Civil Court in those cases which had their applications rejected were mainly relating to the untimeliness of the application or because an effective remedy was already granted to the accused once he availed himself of the procedure laid out in Act XXIV of 2014. This analysis has illustrated that following the John Camilleri judgement, our Civil Courts were faced with numerous applications concerning the AG's discretion which violated Articles 6 and 7 of the Convention, most of which were upheld. There were also appeal judgements delivered after the introduction of Act XXIV of 2014 which revoked some of the above-listed decisions which initially had been delivered by the First Hall of the Civil Court before the introduction of Act XXIV of 2014. Following the introduction of Act XXIV of 2014, the number of applications filed before the First Hall of the Civil Courts has reduced. The latter Court has also rejected applications from individuals who had already availed themselves of the above-mentioned remedy. So the position is quite clear. If the Criminal Court does not accede to the individual's request to have his trial before the Court of Magistrates, the chances of having the First Hall of the Civil Court declaring a violation of Articles 6 and 7 of the Convention are close to nil. At least, this is the position that is being made evident through judgements which have been delivered to date. The situation may change, however it is important that all legal practitioners keep in mind such judgements when giving their own advice. In addition to this, it has also emerged that in the case of *Ir-Repubblika ta` Malta vs Josè Edgar Pena*²⁷², the Court remarked that the legislator had not yet acted following the decision delivered by the ECtHR in the John Camilleri case. It also highlighted the importance of granting an effective remedy to the respective individual.

The findings reported in Chapter 4 included a factual case analysis, the in-depth semi-structured interviews and a list of all Court decrees given by the Criminal Court

²⁷² *Ibid* Section 2.4.9.

from August 2014 to date. The factual case analysis served the purpose of identifying other instances where the Attorney General is granted wider use of discretion. This includes instances where the Prosecuting Officers refuse to declare the applicability of Article 29 of Chapter 101, therefore leading to a situation where an accused person might not benefit from a reduction in punishment. This would be the cause of an incorrect interpretation and application of the law. Nonetheless, according to the first legal practitioner who took part in the semi-structured interviews, such provision should also be made subject to judicial review.²⁷³ As he correctly pointed out, Article 29 of Chapter 101 should be made subject to a challenge because *'people are risking their heads'*. The second legal practitioner shared the same views however he did not make the same recommendation which was put forth by the first legal practitioner. He simply added that the Courts can still apply such reduction in punishment if the accused manages to convince it that he should benefit from the same provision. This would mean that the accused would have to make additional oral submissions before the Court in order to substantiate his argument relating to the application of Article 29. Whether this would turn out to be effective leaves room for debate. For example, if an individual admits to the charges as per Article 392B of Chapter 9, and does not manage to conclude sentence bargaining with the Attorney General, this would mean that before the Criminal Court, he would have to give his reasons as to why he did not accept the Attorney General's proposal together with a request to the Court to apply Article 29 backed up with valid arguments. It also depends on whether the Courts are willing to hear all these oral submissions relating to a suitable punishment and the applicability of Article 29. In view of the above, this study is indeed in favour of recommending the introduction of an additional remedy which scrutinises the applicability of Article 29 independently from other procedures and other sittings. Such remedy should be made available to an individual as soon as the Prosecuting Officer declares in Court that an individual does not benefit from a reduction in punishment. It would then be up to the accused person to avail himself of this remedy within one month from the declaration made by the Prosecuting Officer.

With respect to the effectiveness of Act XXIV of 2014 and whether it has managed to address all violations highlighted in the John Camilleri judgement, some of the

²⁷³ *Ibid* Section 4.3.1.

participants who took part in the semi-structured interviews shared the same views while others opined differently. The first two defence lawyers both agree that the recent amendments are not good enough. The first stated that it 'is a step in the right direction.'²⁷⁴ However, he also states that such procedure should be made subject to a 'double examination test' given that presently, the decision given by the Criminal Court is considered as final and conclusive. So, the first lawyer's recommendation is to simply introduce some sort of appeal measure to the above remedy. On the other hand, the second defence lawyer does not recommend the same. He highlights various inconsistencies with the law amongst which include: a. the exhaustive guidelines inserted in the Fourth Schedule of Act XXIV of 2014, b. the unclarity resulting from the wording of the law in regard to when the application should be filed, c. that such application can only be filed once and d. that 'no hard and fast rules' were included in the above guidelines.

Other participants who took part in the semi-structured interviews included the Retired Judge and the Present Acting Judge and Magistrate. It is important to highlight that the retired judge also pointed out to the unclear terms emanating from the recent legal enactment and which terms concern the interpretation of '*termination of inquiry*'. He stressed out the European Court of Human Rights made the wrong conclusions in the John Camilleri judgement and that it should have given greater importance to the dissenting opinion of Judge Lawrence Quintano. The only recommendations made by the judge were limited to the interpretation given to the above-indicated term and to address other issues relating to sentencing policy which ought to be implemented into our local legal system. With regards to the issue relating to the applicability of Article 29 of Chapter 101, the Judge seems to share the same views as those given by the second defence lawyer, whereby he stated that an individual may he himself prove to the satisfaction of the Court that he should benefit from such reduction in punishment.

The Present Acting Judge and Magistrate did acknowledge that the recent amendments were rushed into, however they also remarked that introducing additional appeal procedures on the existing remedies might cause undue delay which would end up prejudicing the accused person's right to have a fair trial within a

²⁷⁴ *Ibid* page 7.

reasonable time frame. What is interesting to note is that the last two members of the judiciary did not recommend any particular changes to the above legal enactment however they did recommend that any analysis carried out should not be limited to a defence lawyer's point of view.

Following these interviews, a list of all decrees provided by the Criminal Court following the introduction of Act XXIV of 2014 was provided in Section 4.4. The purpose behind this analysis was to assess whether such decrees make a detailed inquiry about the merits of the case and whether any binding principles emerge. It has resulted that two of these decrees provided additional guidelines on the interpretation of Act XXIV of 2014 and its Fourth Schedule Guidelines. The relevant decrees were the ones dated 2nd October 2014 and 30th July 2015. Most of the decrees which were given during this period rejected the applicants' requests to have their trial before the Court of Magistrates instead of the Criminal Court. In the remaining Court decrees, the Court ordered that the individuals' respective trials take place before the Court of Magistrates. One major problem which results from the assessment carried out in these Court decrees, is that most of them lack substance. For example, if one had to review the detailed assessment made by the Court in the decree dated 30th July 2015, it immediately becomes evident that the Court has carried out a detailed examination of the facts of the case with the scope of determining the role of the accused. This also shows that the Court was aware of its responsibility in giving a preliminary judgement at a stage where an individual should be presumed innocent. In reviewing the other listed Court decrees, it becomes clear that the respective Courts did not voice their concern on their responsibility in delivering such binding judgement. An additional recommendation to this present situation would be to recommend the presiding members of the judiciary undertake an in-depth assessment of the circumstances surrounding each case and provide a more detailed conclusion rather than limiting themselves to just 'upholding' or 'rejecting' the applicants' requests.

The final recommendation which ought to be made by this study is closely linked to sentencing policy. The second defence lawyer and the retired judge who took part in the semi-structured interviews both remarked at the fact that '*no hard and fast rules*' were implemented in the recent guidelines and also that the problems encountered with the present legal position concern mostly sentencing policy. If one had to review

the UK Drug Offences Definitive Guideline²⁷⁵, it immediately becomes clear that the Guidelines inserted in Act XXIV of 2014 have attempted to follow the classifications made under the UK Drug Offences Guideline. A major similarity exists in the classification of the accused's role. Albeit such detailed classification, these guidelines also stipulate that the same criteria are '*not exhaustive*'. So the first Court decree provided by our Courts following the introduction of Act XXIV of 2014, was right in declaring that the same guidelines are only indicative and that '*the process should not serve as an arithmetic purpose.*' In comparison, the UK Drug Offences Guidelines also split the category of harm into four sections. These categories include six different drugs whereas our guidelines only refer to three different type of drugs.²⁷⁶ This classification can be seen in the image below:

Culpability demonstrated by offender's role One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.	Category of harm Indicative quantity of drug concerned (upon which the starting point is based):
<p>LEADING role:</p> <ul style="list-style-type: none"> • directing or organising buying and selling on a commercial scale; • substantial links to, and influence on, others in a chain; • close links to original source; • expectation of substantial financial gain; • uses business as cover; • abuses a position of trust or responsibility. 	<p>Category 1</p> <ul style="list-style-type: none"> • heroin, cocaine – 5kg; • ecstasy – 10,000 tablets; • LSD – 250,000 squares; • amphetamine – 20kg; • cannabis – 200kg; • ketamine – 5kg.
<p>SIGNIFICANT role:</p> <ul style="list-style-type: none"> • operational or management function within a chain; • involves others in the operation whether by pressure, influence, intimidation or reward; • motivated by financial or other advantage, whether or not operating alone; • some awareness and understanding of scale of operation. 	<p>Category 2</p> <ul style="list-style-type: none"> • heroin, cocaine – 1kg; • ecstasy – 2,000 tablets; • LSD – 25,000 squares; • amphetamine – 4kg; • cannabis – 40kg; • ketamine – 1kg.
<p>LESSER role:</p> <ul style="list-style-type: none"> • performs a limited function under direction; • engaged by pressure, coercion, intimidation; • involvement through naivety/exploitation; • no influence on those above in a chain; • very little, if any, awareness or understanding of the scale of operation; • if own operation, solely for own use (considering reasonableness of account in all the circumstances). 	<p>Category 3</p> <ul style="list-style-type: none"> • heroin, cocaine – 150g; • ecstasy – 300 tablets; • LSD – 2,500 squares; • amphetamine – 750g; • cannabis – 6kg; • ketamine – 150g.
	<p>Category 4</p> <ul style="list-style-type: none"> • heroin, cocaine – 5g; • ecstasy – 20 tablets; • LSD – 170 squares; • amphetamine – 20g; • cannabis – 100g; • ketamine – 5g.

Illustration 1

The second most interesting step in the UK guidelines is the one relating to the category range. Basically, the four categories of harm and the clarification of the accused's role are amalgamated in one table which then indicates the quantum of punishment that ought to be applied.²⁷⁷ This can be seen hereunder:

²⁷⁵ UK Sentencing Council: *Drug Offences Definitive Guideline*, <http://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Definitive_Guideline_final_web1.pdf>, accessed on 4th September 2015.

²⁷⁶ *Ibid*, page 4.

²⁷⁷ *Ibid*, page 5.

CLASS A	Leading role	Significant role	Lesser role
Category 1	Starting point 14 years' custody	Starting point 10 years' custody	Starting point 8 years' custody
	Category range 12 – 16 years' custody	Category range 9 – 12 years' custody	Category range 6 – 9 years' custody
Category 2	Starting point 11 years' custody	Starting point 8 years' custody	Starting point 6 years' custody
	Category range 9 – 13 years' custody	Category range 6 years 6 months' – 10 years' custody	Category range 5 – 7 years' custody
Category 3	Starting point 8 years 6 months' custody	Starting point 6 years' custody	Starting point 4 years 6 months' custody
	Category range 6 years 6 months' – 10 years' custody	Category range 5 – 7 years' custody	Category range 3 years 6 months' – 5 years' custody
Category 4	<p>Where the quantity falls below the indicative amount set out for category 4 on the previous page, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent.</p> <p>Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges above.</p>		

Illustration 2

The UK guidelines highlight six other additional steps which the Courts must follow before sentencing an offender. The other steps include a. to consider other factors which might benefit the accused from a reduction in punishment, b. to apply a reduction in punishment when an accused files a guilty plea, c. to observe the totality principle, that is, to consider whether the aggregate punishment is 'just and proportionate to the offending behaviour', d. to authorise and order confiscation and ancillary orders, e. to give reasons for such punishment and f. to take note of any time spent under preventive arrest.

The same guidelines provide an annex which defines fine bands and community orders.²⁷⁸ These two tables are set out as follows:

²⁷⁸ *Ibid*, page 33.

FINE BANDS

In this guideline, fines are expressed as one of three fine bands (A, B or C).

Fine Band	Starting point (applicable to all offenders)	Category range (applicable to all offenders)
Band A	50% of relevant weekly income	25–75% of relevant weekly income
Band B	100% of relevant weekly income	75–125% of relevant weekly income
Band C	150% of relevant weekly income	125–175% of relevant weekly income

COMMUNITY ORDERS

In this guideline, community sentences are expressed as one of three levels (low, medium and high).

An illustrative description of examples of requirements that might be appropriate for each level is provided below. Where two or more requirements are ordered, they must be compatible with each other.

LOW	MEDIUM	HIGH
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
Suitable requirements might include: <ul style="list-style-type: none">• 40 – 80 hours unpaid work;• curfew requirement within the lowest range (for example, up to 12 hours per day for a few weeks);• exclusion requirement, without electronic monitoring, for a few months;• prohibited activity requirement;• attendance centre requirement (where available).	Suitable requirements might include: <ul style="list-style-type: none">• greater number of hours of unpaid work (for example, 80 – 150 hours);• an activity requirement in the middle range (20 to 30 days);• curfew requirement within the middle range (for example, up to 12 hours for two to three months);• exclusion requirement, lasting in the region of six months;• prohibited activity requirement.	Suitable requirements might include: <ul style="list-style-type: none">• 150 – 300 hours unpaid work;• activity requirement up to the maximum of 60 days;• curfew requirement up to 12 hours per day for four to six months;• exclusion order lasting in the region of 12 months.

Illustration 3

In comparison to the guidelines inserted in Act XXIV of 2014, the UK guidelines have managed to provide the UK Courts a clear set of criteria to assist them in determining the punishment. In view of the detailed classification made under such guidelines, the foreseeability requirement is amply safeguarded. The Fourth Schedule Guidelines inserted in Act XXIV of 2014 did not implement all respective classifications, and it would be opportune that the present legal position is upgraded to match the UK guidelines to enable the Maltese judiciary interpret and apply the law in the most clear, appropriate and transparent manner.

In view of the above arguments, the author strongly recommends that:

1. A clear sentencing policy is adopted for drug-trafficking cases. The same guidelines should include all types of illicit substances and also punishment parameters which are to be applied by the local Courts for each circumstance. An example of this has been exhibited in the above tables which have been retrieved from the UK Drug Sentencing Policy Guidelines; and

2. All decrees given by the Criminal Court following applications made in terms of the recent amendments, should clearly stipulate the type and quantities of the drug involved including a detailed reasoning as to what led the Courts accede or reject such applications.

The above recommendations are considered as a very good starting point towards refining the present legal position and also to provide individuals with a clear overview of what the punishment parameters consist of.

APPENDICES

Appendix A – Specimen Court Application relating to the request made to the Criminal Court to undergo trial before the Court of Magistrates instead of the Criminal Court

Appendix B – Newspaper articles concerning issues relating to the Attorney General's discretion.

APPENDIX A

FIL-QORTI KRIMINALI

IL-PULIZIJA

(Spettur)

vs

.....

Rikors ta' (Detentur tal-Karta tal-Identita` Numru:)

Jesponi bir-rispett:

Illi fit-....., l-esponent tressaq quddiem l-Onorabli Qorti tal-Magistrati, akkuzat b'reati ta' traffikar u pussess aggravat tad-droga ecstasy;

Illi attwalment il-proceduri qiegħdin fl-istadju tal-Istruttorja, u cioe l-prosekuzzjoni għadha qed tigbor il-provi tagħha;

Illi l-Ordinanza dwar il-Medicini Perikolużi li għandhom magħhom gie ricientement emendat bl-Att XXIV tal-2014;

Illi l-emendi ntrodotti proprju bl-Att XXIV imsemmi – jagħtu rimedju lil min fil-konfront tiegħu l-Avukat Generali ikun ordna li jigi processat fil-Qorti Kriminali.

Dan ir-rimedju jikkonsisti billi l-persuna koncernata tirrikorri quddiem l-istess Qorti Kriminali għar-revizjoni ta' dik l-ordni. It-terminu mogħti f'din id-dispozizzjoni huwa ta' "sebat ijiem mit-tmiem tal-inkjesta [recte istruttorja]";

Illi pero', id-dispozizzjoni transitorja tat-tieni proviso tal-subartikolu imsemmi, tghid hekk:

"Izda wkoll persuni li, fid-data tad-dñul fis-señħ ta' dan is-subartikolu, ikunu qed jistennew kawża fil-Qorti Kriminali wara ordni mogħtija skont is-

subartikolu (2) jista', minkejja id-dispożizzjonijiet l-oħra ta' dan il-paragrafu, jippreżenta rikors quddiem l-imsemmija qorti skont dan il-paragrafu fi żmien xahar mill-imsemmija data.”;

Illi skont l-Avviz Legali 275 ta' l-2014, id-data tad-dhul fis-sehh ta' din id-dispożizzjoni hija l-14 ta' Awwissu 2014;

Illi bl-akbar rispett jinghad li l-Avukat Generali ma kellux jordna li l-esponent jitressaq quddiem il-Qorti Kriminali u dan inter alia, ghar-ragunijiet segwenti:

Illi l-esponent ghandu kondotta nadifa u tul hajtu, l-esponent ghex hajja 'l boghod mill-kriminalita;

Illi skond il-verzjoni kif esposta mill-prosekuzzjoni f'dan il-process jirrizulta car illi anke jekk għall-grazzja ta' l-argument wiehed kellu jaccetta tali verzjoni hemm kriterji u ragunijiet bizzejjed skond il-linji gwida fir-Raba' Skeda ta' l-Ordinanza dwar il-Medicini Perikoluzi introdotti permezz ta' l-Att XXIV ta' l-2014 sabiex il-kaz ta' l-esponent jigi ggudikat quddiem il-Qorti tal-Magistrati;

Illi l-esponent huwa xorta wahda tal-fehma li dan ir-rikors ma ghandux jigi deciz f'dan l-istadju. Kif inghad l-Avukat Generali ghad ghandu l-fakulta' li jirrevedi d-decizjoni tieghu fid-dawl tal-evidenza kollha migbura fl-istrutturja. Di piu', tali revizjoni, fid-dawl ta' dak li nghad hija f'dan l-istadju proceduralment vijabbli;

Illi fl-eventwalita' li l-Avukat Generali, iktar 'l quddiem, jidhirlu li ghandu jaghmel “kontro ordni”, l-ezercizzju in dizamina jkun kollu superfluwu. Huwa f'dan is-sens li l-esponent huwa tal-fehma li l-Qorti Kriminali ghandha tipposponi d-decisjoni taghha

Ghaldaqstant l-esponent bl-akbar rispett jitlob lil din l-Onorabbli Qorti sabiex:

(i) Tiegħu konjizzjoni tat-talba tiegħu u wara li tiegħu konjizzjoni wkoll tar-risposta tal-Avukat Generali, tipposponi d-decizjoni tagħha għall-istadju opportun; u

(ii) Fl-eventwalita' biss li l-Avukat Generali jipprocedi kontra l-esponent b'att ta' akkuza u wara li jingħata smigh dwar ir-ragunijiet għat-talba tiegħu min din il-Qorti, tiddikjara li huwa jigi ggudikat u pprocessat quddiem il-Qorti tal-Magistrati.

Avv. Abigail Bugeja

Esponent: Facilita Korrettiva ta` Kordin, Paola

APPENDIX A - TRANSLATION

In the Criminal Court

The Police
(Inspector)
vs
.....

Court Application of' (Holder of Identity Crad Number:)

Humbly submits:

Whereas on the, the applicant was arraigned before the Court of Magistrates and was charged with various offences relating to trafficking and aggravated possession of ecstasy;

That presently proceedings are being held before the Court of Criminal Inquiry whereby the Prosecution is still gathering its evidence;

That the Medical and Kindred Professions Ordinance has been recently amended by Act XXIV of 2014;

That the above amendments give a remedy to whoever the AG has ordered that his trial takes place before the Criminal Court;

That this remedy enables the applicant to file an application before the Criminal Court to review such order. The term indicated by the law is that of seven days from when the conclusion of the inquiry [recte istruttoria];

That in addition, the transitory provision included in the second proviso states as follows:

'Provided further that persons, who on the date of the coming into force of this sub-article, are awaiting trial in the Criminal Court further to a direction given in terms of sub-article (2) may, notwithstanding the other provisions of this paragraph, file an application in the said Court in terms of this paragraph within one month from the said date;'

That according to Legal Notice 275 of 2014, such enactment shall commence to apply on the 14th August 2014;

That with all due respect, it is being humbly submitted that the Attorney General should have never ordered that the trial takes place before the Criminal Court and this for the following reasons:

That the applicant has a clean conduct and throughout his life, he has never been involved in criminal offences;

That even if one had to accept the version produced by the Prosecution, according to the Fourth Schedule Guidelines, it is clear that there are sufficient reasons which enable the applicant to have his trial take place before the Court of Magistrates;

That the applicant still insists that such application should not be decreed at this stage of the proceedings. As already stated, the Attorney General has the faculty to review his original decision on account of all evidence produced before the Court of Criminal Inquiry. In addition, such revision, in view of what has been submitted, is presently procedurally viable;

That in the eventuality that the Attorney General, in due course, considers a counter-order, this exercise will prove superfluous. And it is for this reason that the Criminal Court should postpone its decision;

Therefore, the applicant humbly requests this Honorable Court to:

- (i) *Take cognisance of his request and after having seen the Attorney General's reply, to postpone its decision to a more opportune stage;*
- (ii) *That in the eventuality that the Attorney General proceeds against applicant with a bill of indictment, and after having heard his submissions on such request, declares that the trial should take place before the Court of Magistrates.*

Dr. Abigail Bugeja

Applicant: Corradino Correctional Facility, Paola.

APPENDIX B

Newspaper articles

- *Court in landmark ruling against Attorney General's discretion*²⁷⁹

This article relates to the cases of Joseph Lebrun and Martin Dimech and stated that *'the discretion enjoyed by the Attorney General to decide whether drug cases should be heard before the Magistrates' Court or the Superior Courts was a breach of human rights and the right for a fair trial for the accused.'*²⁸⁰

The article does not provide an overview of the charges brought against the applicants and highlights solely the defence arguments raised by the applicants. In such circumstances, one would have at least expected to have a sheer indication of the pleas raised by the Attorney General in regard to the matter.

In its final remark, the same newspaper article makes a correct interpretation of the Court's judgement and states that:

*The principle of rule of law and fair trial should not permit this interference in the administration of justice.*²⁸¹

- *New guidelines will help structure Attorney General's discretion*²⁸²

The above article makes reference to Act XXIV of 2014 and to the comments made by the Justice Minister in connection with such legislative amendments. The author also states that *'the AG enjoys the power to decide whether drug cases, among others, should be heard before the Magistrates' Court or face a judge.'*²⁸³ The term *'enjoys the power'* could have been interpreted a bit differently because it gives the

²⁷⁹ The Times of Malta, *Court in landmark ruling against Attorney General's discretion*, (published on 21st February 2014) <<http://www.timesofmalta.com/articles/view/20140221/local/Court-in-landmark-ruling-against-attorney-generals-discretion.507733>>, accessed on 15th August 2015.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² Maltatoday, *New guidelines will help structure Attorney General's discretion*, (published on 13th May 2014), <http://www.maltatoday.com.mt/news/Court_and_police/38955/new_guidelines_will_help_structure_attorney_generals_discretion>, accessed on 15th August 2015.

²⁸³ *Ibid.*

impression that an accused person's position is being jeopardised when it might not be the case.

The same article makes reference to the '*exhaustive guidelines*' which will be inserted in the legislative enactment and that such '*will help structure the Attorney General's discretion*'.²⁸⁴ In addition, the article also explains the punishment brackets which could be meted out by the Court of Magistrates and by the Criminal Court and that the AG's decision where to try an individual was not appealable. Finally, the writer makes reference to the John Camilleri judgement and briefly outlines the facts of the case, including the punishment awarded and judgement delivered by the ECtHR.

It is indeed opportune to remark that this article has provided very useful information on the respective facts and has managed to provide the reader with an overview of the past and present legal position in clear simple terms.

- *Constitutional Court again slams AG's unfettered discretion*²⁸⁵

This article makes reference to the case of Rafal Zelbert as decided by the First Hall of the Civil Court (Constitutional Jurisdiction) on the 16th May 2014. First, it is to be noted that this judgement was not delivered by the Constitutional Court but by the First Hall of the Civil Court. By stating that the judgement was given by the Constitutional Court, it would have been implied that this case reached the appeal stage, when it was not the case.

Notwithstanding the above, the writer correctly reports the facts of the case relating to Rafal Zelbert and the proceedings brought against him. It highlighted the applicant's grievances and the Court's considerations which included the following:

*The Constitutional Court noted that there existed no guidelines which could aid the Attorney General in taking such a decision.... The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards.*²⁸⁶

²⁸⁴ *Ibid.*

²⁸⁵ Maltatoday, *Constitutional Court again slams AG's unfettered discretion*, (published on 19th May 2014), <http://www.maltatoday.com.mt/news/Court_and_police/39195/constitutional_Court_again_slams_ag_unfettered_discretion>, accessed on 15th August 2015.

²⁸⁶ *Ibid.*

In this article, the writer made a lot of referencing to the conclusions reached by the Court however, it was detailed enough to minute the salient points in a clear and structured manner.

- *Drug trafficking case first to challenge Attorney General's discretion on Court hearing*²⁸⁷

This article reports on the very first decrees which were given by the Criminal Court in respect of the remedies made available by means of Act XXIV of 2014. It concerns the application filed by Emmanuel Magri who requested the Criminal Court to order that his trial be held before the Court of Magistrates, and not before the Criminal Court, as instructed by the Attorney General.

The article correctly states that:

*the decision is the first to use the procedure that allows the accused to challenge the hitherto sacrosanct discretion of the Attorney General in choosing whether a defendant is to be put under a bill of indictment and sent before the Criminal Court, with the maximum possible sentence being life imprisonment, or decided summarily by a magistrate, where the maximum custodial sentence that can be awarded is ten years.*²⁸⁸

The author has also provided an explanation on the punishment brackets which are normally meted out by the Superior and Inferior Courts, in order to highlight what lead to such legislative enactment and what remedies were created.

- *Daniel Holmes to file human rights case against Malta*²⁸⁹

This last article reports on the never-ending cases of Daniel Holmes and is mainly intended to outline the recent judgement delivered by the Constitutional Court which 'quashed' the compensational remedy given by the First Hall of the Civil Court. This article first makes reference to the proceedings held against Daniel Holmes, the punishment given by the Criminal Court and subsequent Constitutional references made by the same applicant.

²⁸⁷ Maltatoday, *Drug trafficking case first to challenge Attorney General's discretion on Court hearing*, (published on 2nd October 2014), <http://www.maltatoday.com.mt/news/Court_and_police/44492/drug_trafficking_case_first_to_challenge_attorney_generals_discretion_on_Court_hearing>, accessed on 15th August 2015.

²⁸⁸ *Ibid.*

²⁸⁹ Malta Today, *Daniel Holmes to file human rights case against Malta*, (published on 30th March 2015), <http://www.maltatoday.com.mt/news/Court_and_police/51245/daniel_holmes_to_file_human_rights_case_against_malta#.VdLm1_mqgkq>, accessed on 15th August 2015.

The writer also correctly states that:

*The latest judgement means that Holmes has exhausted all legal remedies and he can now take his case to the European Court of Human Rights in Strasburg.*²⁹⁰

In addition to the above, the author also highlights the number of arguments which will be raised by the applicant and which apart from including the issue relating to the Attorney General's discretion, it will also include the '*unjust and unreasonable delays*' and the '*right to legal assistance*'.

It is to be noted that this article served partly as an interview carried out to Holmes' defence lawyers and in some way, it was intended to generate some publicity. Such approach towards reporting certain cases should be avoided at least until such cases are filed before the respective Courts.

²⁹⁰ *Ibid.*

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