

# TOWARDS A ROBUST HUMAN RIGHTS & EQUALITY FRAMEWORK: SCOPING CONSULTATION

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## Scoping Consultation

Questions posed:

Do you think that human rights and equality are sufficiently protected and promoted in Malta?

If not:

Which human rights do you believe need further protection and promotion?

How can Malta better protect and promote human rights and equality overall?

Are there any models that you would propose that government should consider looking at in terms of legislation, institutional frameworks or both? If yes, what is especially good about such models?

Due to the fact that question (b) is broader in scope and consequence than question (a), it shall be dealt with first. A brief look into specific rights, which should serve only as an example of the many rights that need further protection, will then follow with regard to question (a), whilst the answers to question (c) will be incorporated into the first section.

An observation is made about question (a) of the consultation: While it was understandable and conceivable that it is asked if the protection of any specific right seems particularly lacking, the latter part of the question, ‘Which human rights do you believe need further promotion?’ seemed anomalous to the very notion of universal human rights as proclaimed by the Universal Declaration of Human Rights. It is the Programme’s belief that all human rights should be promoted with equal vigour.

How can Malta better protect and promote human rights and equality overall?

It is the Programme’s tenet that a more holistic approach should be taken in protecting and promoting human rights and equality. Doing so would allow for the development of a culture of human rights wherein it is understood that such rights are universal, indivisible and inalienable and would thereby bring Maltese human rights protection within the standards of the Universal Declaration of Human Rights of 1950. In this regard, while several positive measures aimed at providing individuals with access to their human rights have been adopted in recent years, it would be remiss not to acknowledge that the Maltese system of human rights protection is still lacking in a number of areas. Including:

### **1. Awareness of Human Rights and of Measures for Redressing their Abuse**

Roberto Rivello, Head of the Human Rights Directorate of the Council of Europe, earlier this year commented during a meeting launching a human rights course on alternatives to detention in Malta, that compared to other European countries, Malta has a very low number of human rights cases instituted each year, with the average being 20. This, he commented, in a somewhat

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tongue-in-cheek manner, could be pinned to the fact that Malta is the best protector of human rights in Europe or that there exists a lack of awareness among the people as to what constitutes a breach of their rights and what procedure should be followed in such instances.

The problem:

During the First Annual Conference of the University of Malta's Human Rights Platform held on the 10th of December 2013, it was highlighted that a major obstacle preventing individuals from accessing their human rights is a lack of awareness as to what rights individuals actually enjoy (including what such rights entitle them to); where to find help if one believes his/her rights to have been breached and the repercussions in the event that a human rights action proves unsuccessful.

What should be done:

### *1.1. Human Rights Education*

Article 26(2) of the Universal Declaration of Human Rights states that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace\*.

It is our belief that human rights should be embedded within our educational system because "childhood is the ideal time to begin lifelong learning about and for human rights"\*. Many studies evaluating human rights education with children have shown it to be an effective agent of moral education; children who learnt about the Convention on the Rights of the Child tended to be more respectful and mature in psychosocial competencies\*.

This suggestion may be met with opposition from primary schools as teachers might argue the impossibility of teaching such complex notions to children. However a number of methodologies to integrating human rights into the primary curriculum may be introduced, including:

Parables - teaching human rights in this manner induces children to remember the lessons learnt more vividly\*.

Creative approaches – through craftwork, dramatization, handouts and so on, children can be easier acquainted with the concept of human rights.

Participatory methods – these should always be used in educating – whether about human rights or otherwise – as they are perceived as a more democratic way of learning, engaging each individual and empowering him to think and reason for himself. Indeed "to be effective, human rights education must provide children with a supportive framework where the rights of every individual child are respected"\*.

Many more suggestions which could be incorporated into the school curriculum are contained in multiple theses held at the Melitensia Section of the Library of the University of Malta, including those of:

\* Universal Declaration of Human Rights, Article 26(2) *emphasis added*, available online at: <http://www.un.org/en/documents/udhr/index.shtml#a26>, last accessed 8<sup>th</sup> June 2014

\* Manual on Human Rights Education for Children, Chapter 2 available online at: [http://www.eycb.coe.int/comasito/chapter\\_2/1\\_int.html](http://www.eycb.coe.int/comasito/chapter_2/1_int.html), last accessed 8<sup>th</sup> June 2014

\* Daisy Kirk, 'Creative Approaches to understanding human rights issues: How effective is art in the education on and awareness of human rights?' (M.A. Dipl. Stud, University of Malta, 2010) 71

\* Ibid

\* Equitas, 'International Human Rights Education Evaluation Symposium' (5<sup>th</sup> - 6<sup>th</sup> May 2007) 6

Marie Buhagiar, 'Educating for human rights with special reference to the role of religious education' (B.A. Hons. THEOLOGY, University of Malta, 1997);

Rita Gauci, 'Teaching and Learning Human Rights: Maltese Teachers' and Students' Perspectives (M.Ed. Educational Research, University of Malta, 2009);

Giselle Caruana. 'Integrating Human Rights in the Primary Syllabus of Year 6' (B.Ed. Hons, University of Malta, 1995); and

Daisy Kirk, 'Creative Approaches to understanding human rights issues: How effective is art in the education on and awareness of human rights?' (M.A. Dipl. Stud., University of Malta, 2010)

Particularly striking about the latter thesis is its introduction of a stimulating way in which both children and adults can become more aware of and learn more about human rights. It does this by proposing that the perfect avenue for human rights education is art.

One may argue that this educational approach allows us to look at human rights within a broader perspective. The emphasis is not purely, or in some cases even primarily, on legalistic and penal perspectives. Instead this approach presents human rights very much in the holistic spirit of the Universal Declaration of Human Rights\*.

What's more, art can be used to teach in a variety of ways. It can be present in the classroom or curriculum at schools; it can be an extra subject which students may opt to take or it can be taught outside the official school setting (organised by youth groups, education networks, NGOs and/or other human rights organisations). In fact, Ms. Kirk gives examples of success stories using art as a medium to educating people on human rights issues, such as: The Euro- Mediterranean Human Rights Network Mural, Barcelona (2008); The MEDAC Human Rights Summer School Mural on Crimes Against Humanity, Malta (2010); and The African Awareness Project 'Africa Unmasked', Mural and Performance Art Piece, Ireland (2008/09)\*.

Additionally, in her thesis, Marie Buhagiar, puts forth the very real and intriguing possibility that human rights should be taught in schools as a moral standard of some sort within religion lessons\*. This should be especially looked into for those students who opt out of Christianity-based religion lessons.

Human rights should also be mainstreamed into all educational curricula at any level: issues relating to human rights may be highlighted through mathematics, language comprehension and choice of texts, science and indeed all subjects in an age appropriate manner.

## *1.2. Setting up a National Human Rights Institution*

The Danish Institute for Human Rights\* serves as a good model for the approach that should be taken in this regard, so as to ensure that not only is the National Human Rights Institution tasked with educating the public and raising awareness, but also:

Produces analyses and research on human rights issues.

Carries out specific projects to promote equal treatment and advises those who may have been discriminated against.

\* Kirk (n 3) 117

\* Ibid 128-143

\* Marie Buhagiar, 'Educating for human rights with special reference to the role of religious education' (B.A. Hons. THEOLOGY, University of Malta, 1997) 37-50

\* See <http://www.humanrights.dk/about-us>

Maps out the biggest human rights challenges in Malta as well as yearly improvements in the area through an annual 'Status Report'.

Works with States, independent organizations and the corporate sector, enabling them to strengthen human rights in their respective context.

Assists in building well-functioning legal systems abroad.

Aids private companies in assessing the impact of their work on human rights.

Educates professionals such as police officers, school teachers, social workers, doctors, ombudsmen, lawyers and judges on human rights.

Collaborates and cooperates with existing institutions the functions of which are safeguarding specific rights (such as the National Commission for Persons with Disability (KNPD) and the Commissioner for Children).

### *1.3. Creating a 'Human Rights in Malta' Website*

The simplest and most cost-effective way of tackling the lack of awareness of human rights seems to be the setting up of a 'Human Rights in Malta' website; one which will appear first in any Google search when one types the words 'human rights Malta' or 'drittijiet tal- bniedem Malta'. The website, which should be available both in English and Maltese, should contain:

A 'What are human rights?' tab which leads the user to:

A simplified explanation of what individuals are entitled to

The Constitution of Malta

The European Convention Act

The European Convention on Human Rights and Fundamental Freedoms

The Universal Declaration on Human Rights

The Charter of Fundamental Rights

Other Related Treaties and Declarations such as the Convention on the Rights of the Child (CRC)

Latest judgments of the First Hall of the Civil Court (in its constitutional jurisdiction) as well as of the Constitutional Court on human rights matters

Summaries in both English and Maltese of these judgments

Latest judgments of the European Court of Human Rights, both in relation to Malta and other Contracting States

News on the latest legislative developments

Yearly Status reports of the National Human Rights Institution

A 'Have your rights been breached?' tab which leads the user to;

the procedure that needs to be followed to obtain redress,

where and how to apply for legal aid,

a link to the Chamber of Advocates website in order to be able to contact an expert,

what happens in the event that a case is lost both at the First Hall and at the Constitutional Court.

## 2. Discrimination

Advocate General Jacobs of the European Court of Justice stated in his reasoned opinion in the Phil Collins case of 1993\* that “the prohibition of discrimination on grounds of nationality is the single most important principle of Community Law. It is the leitmotiv of the EEC Treaty”\*.

The problem:

In a recent study on promoting the integration of third-country nationals, it was brought to light that most Maltese legislation aimed at combating discrimination does not protect against discrimination on grounds of nationality\*. In fact Article 45(3) of the Constitution, which was recently amended, provides that:

In this article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Notably, while the provision defining discrimination includes the ground of ‘place of origin’ it excludes ‘nationality’ which two grounds are not necessarily one and the same. Of course, as also highlighted by the study, the European Convention on Human Rights, transposed into Maltese law through Chapter 319 includes a provision on discrimination which does mention nationality as a basis. However this provision is restricted in that it protects against discrimination on this basis but only in conjunction with one of the human rights found in the Convention; and the remedy conceivable in case of a breach of this provision is not only expensive but also extraordinary, hence this protection would only be afforded if one can show that he has exhausted all other ordinary remedies\*.

What’s more, the Equal Treatment in Employment Regulations of 2004 state in Regulation 1(5)(a) that it:

*... does not apply to any difference of treatment based on nationality and is without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta and to any treatment which arises from the legal status of these individuals concerned.*

This very provision is reiterated in the Equal Treatment of Persons Order of 2007 which prevents discrimination in areas of social life other than employment. Even though the above ordinary law provisions are simply transpositions from the corresponding European Directives\* the intention of such provisions was so as to make clear that the European Union would not encroach on national rules in relation to third country nationals. Their ambiguity, coupled with the absence of ‘nationality’ as a ground for discrimination within the Convention, may be interpreted by some as permitting discrimination on the basis of nationality within Maltese legislation.

What should be done:

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\* Joined cases C-92/92 and C326/92

\* Ibid

\* David Zammit and Robert Suban, ‘Promoting the integration of third country nationals through the labour market: Combating discrimination in Employment: The case of third-country nationals in Malta’ Pan-European Conference - Work: a Tool for Inclusion or a Reason for Exclusion? (Research Paper 2, 2013) 12

\* Ibid 13

\* Council Directives 76/207/EEC, 2000/78/EC, 2000/43/EC, 2002/73/EC and 2006/54/EC

One possible way to deal with this issue is to implement an in-depth study of the possibility of including ‘nationality’ as a ground of discrimination within the constitution, possibly in collaboration with the Human Rights Platform of the Faculty of Laws as the HRP already has expertise in this field; so as to reach a conclusion on the matter which is both clear and fair to citizens of Malta or other Member States as well as to third country nationals legally resident in Malta.

Additionally, a single codified Act on Equality, preferably following the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000\* should be enacted. Such an act would provide for the promotion of equality, inter alia and without prejudice to the existing institutions whose function it is to safeguard specific rights (such as KNPD and the Commissioner for Children). Such bodies could include:

An Equality Review Committee tasked with:

- a. advising the Minister about the operation of the proposed Act;
- b. advising the Minister about laws that impact on equality;
- c. submitting regular reports to the Minister on the operation of the proposed Act, addressing whether the objectives of the proposed Act and the Constitution have been achieved and making recommendations on any necessary amendments to the proposed Act to improve its operation;

An Equality Court which should, when proceedings are brought before it in terms of the proposed Act, hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.

After holding such inquiry, the equality court should have the power to make an appropriate order in the circumstances, including:

- (a) an interim order;
- (b) a declaratory order;
- (c) an order making a settlement between the parties to the proceedings an order of court;
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
- (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;

\* South Africa: Consolidated Acts, Promotion of Equality and Prevention of Unfair Discrimination Act 2000, available online at: [http://www.saflii.org/za/legis/consol\\_act/poeapouda2000637/](http://www.saflii.org/za/legis/consol_act/poeapouda2000637/), last accessed 2<sup>nd</sup> July 2014

- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
- (n) an order directing the clerk of the equality court to submit the matter to the Attorney General for the possible institution of criminal proceedings in terms of the relevant legislation;
- (o) an appropriate order of costs against any party to the proceedings;
- (p) an order to comply with any provision of the proposed Act\*.

### 3. Gender equality

The problem:

Discrepancies between the treatment of men and women at law still linger in the national legal system. Notably:

Article 2 of the Social Security Act defines the “head of the household” as: “such person as is in the opinion of the Director the head of household”. Although this provision does not explicitly favour men over women or vice versa, its connotations are that one could or should be deemed to prevail over the other for the purposes of this Act and runs directly counter to the concept of joint responsibility of spouses\*.

The Convention to Eliminate all forms of Discrimination Against Women (CEDAW) has still not been fully incorporated into Maltese law and hence cannot be invoked before Maltese courts\*.

What's more, the Optional Protocol to CEDAW establishing a direct complaint procedure to the Committee on the Elimination of Discrimination Against Women has not been signed by Malta.

Malta still currently holds three reservations to CEDAW, most offensively that to Article 13 which states:

*“i) The Government of Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation which deems, in certain circumstances, the income of a married woman to be the income of her husband and taxable as such.*

*(ii) The Government of Malta reserves the right to continue to apply its social security legislation which in certain circumstances makes certain benefits payable to the head of the household which is, by such legislation, presumed to be the husband.”*

It is not possible for women fleeing the matrimonial home in fear of domestic violence to apply for a short-term protection order to be issued in her and/or her children's regard. Protection orders are only ordered:

\* The South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 should be looked at for further details.

\* Sarah Chircop Beck, ‘CEDAW: Its enforcement and application in Maltese Law’ (LL.D. Dis., University of Malta, 2013)

\* Ibid 117

In the criminal sphere: when a person is accused before the Court of Magistrates (in the form of restraining orders) or along with judgment or sentence following a criminal trial in which the person requiring protection was the victim.

In the civil sphere: Either before the commencement of or during separation proceedings if proof of domestic violence is brought.

What's more, barring orders (which effectively bar an abusive spouse from the matrimonial home) are not possible under Maltese law. This leaves women in a vulnerable position, as neither protection nor restraining orders can be applied for if not in connection with court proceedings and only, as highlighted above, at limited stages of the case.

What should be done:

Article 2 of the Social Securities Act should be repealed, thereby putting spouses on an equal footing at law.

CEDAW should be incorporated fully into domestic legislation thereby making it directly enforceable before Maltese courts.

The Optional Protocol to CEDAW should be signed, ratified and transposed.

The reservations held to CEDAW should be withdrawn, at least with regard to Article 13.

Legislation should be created for the possibility of short-term/temporary protection/restraining/ barring orders to be issued independently of court proceedings.

#### **4. Rights of Asylum-seekers**

The problem:

The core problem faced by asylum-seekers when applying for refugee status in Malta is the absence of a fair trial and/or hearing. This is manifested in the fact that:

Whilst asylum-seekers are generally afforded a snippet of information at the onset of their application, they are not regularly updated as to the status of their application or the procedures and investigations being undertaken, leaving them feeling helpless and neglected.

In addition, it is not always ascertained whether the information provided at the initial stages of the application is in a language which the asylum-seeker understands.

Additionally, evidence produced by applicants is often disregarded due to inability to translate documents\*.

Applicants are not currently provided with transcripts of interviews carried out, on the basis of which their application will be determined (they are only provided with an interview report – not a transcript - after a decision is taken). Because of this, applicants are not invited to review or comment on the interview, in case there is anything they wish to add.

Applicants are not afforded access to any documents used in assessing the application, including documents used to rebut country of origin.

Tacit withdrawal of an application is supposed on broad categories at the discretion of the authorities. This has led to the deportation of individuals possibly in need of protection on the assumption that

\* Nicolette Busuttill, 'Safeguarding the rights of asylum applicants to a fair and effective refugee status determination procedure' (LL.D Dis., University of Malta, 2012) 135



their departure from their detention centres exhibited their wish to withdraw their application\* . Moreover, once applications are deemed tacitly withdrawn, requests for applications to be re-opened are often disregarded\* .

The role of the UNHCR is limited to the overall supervision of the asylum application procedure without providing any legal assistance to individuals.

There is currently no duty to provide reasons for the refusal of refugee status, giving applicants and their legal counsel no basis for an appeal. It is not possible for asylum-seekers to apply for free legal aid.

What should be done:

The relevant legislation should be amended to ensure that:

Asylum-seekers are provided with more information – in a language that is understood by them - on a continual basis and in such a way so as to allow the applicant a chance to voice his/her concerns, pose the necessary questions in order to better understand the information being presented to him/her and make additional statements\* .

Asylum-seekers are assisted in filling out their application by cultural mediators in order to make sure they understand what is being asked of them. This is required because misunderstanding applications is often not solely attributable to language barriers and so providing an interpreter alone is not sufficient to ensure the applicant's rights are upheld.

Any evidence produced by the applicant is dutifully translated and taken into consideration when assessing his application.

Asylum-seekers are provided with transcripts of their interviews and invited to review them and add any points they deem essential for consideration.

Asylum-seekers are provided with all evidence used in the determination of their application before a decision is taken so as to be able to counter or directly challenge such evidence. Following the recent heralding of the right of disclosure to persons accused of crimes, it seems hardly logical that persons potentially in need of protection are denied that same right.

The possibility of tacit withdrawal of an application is either abolished altogether or restricted to exhaustive and express grounds to be listed in the law.

The right of the UNHCR to be directly involved in proceedings is enshrined in law and that its supervisory role is considerably widened to cover the entirety of the asylum application procedure.

Decisions for refusal of asylum applications are well-reasoned.

Asylum-seekers are provided with the possibility of applying for free legal aid.

Decisions to deny/grant asylum are subject to judicial review.

Asylum seeking children should also be afforded independent access to justice in keeping with the Council of Europe Guidelines on Child friendly Justice (promoted across all EU member states by the European Commission and currently the subject of in depth research by FRA)

Specific issues related to the situation of unaccompanied asylum seeking children are currently being addressed through a Child Protection Bill before Parliament at second reading where provision is being suggested for immediate appointment of a guardian, establishment

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\* Ibid 143

\* Ibid 145

\* Ibid 132

of a Residential Assessment Facility, access to a child advocate and other items to address human rights concerns.

## 5. Effectiveness of Human Rights Actions

Article 46(1) of the Constitution of Malta states:

Subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

Article 6 of the Constitution of Malta states:

*Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.*

Article 4 of the European Convention Act states:

*Any person who alleges that any of the Human Rights and Fundamental Freedoms, has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.*

Article 3(2) of the European Convention Act states:

Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void.

The problem:

While it is clear from the above provisions that persons are afforded the opportunity to redress any breaches that may have befallen them, the proper effects of a human rights action seem to have been overlooked by the organs of the State in the following ways:

Firstly, the Constitutional Court's role with respect to pronouncements of human rights breaches is not being respected. The above provisions of the law are being interpreted by Parliament and the Constitutional Court itself to mean that when the Court finds that a particular piece of legislation violates an individual's human rights, said legislation is merely voidable by Parliament, and not, as the law states, automatically void. The problem which this situation creates is best depicted through perusal of an excerpt of Dr. Giovanni Bonello's recent article entitled "The Supremacy Delusion: Unconstitutional Laws and Neo-Colonial Nostalgias", that reads thus:

On September 6, 2010, the Constitutional Court found a law establishing compulsory arbitration in some traffic accidents to be valid as it was in conformity with the human rights provisions of the Constitution. On September 30, 2011, the Constitutional Court, in a law suit instituted by a different plaintiff, ruled that the same law on compulsory arbitration was void as it violated the same human rights provisions of that same Constitution. According to current thinking, there is

nothing to preclude the Constitutional Court from deciding, at some future time, that the law which it had found to be valid in 2010 and void in 2011, to be valid in 2012 and to be void in 2013\*.

This not only creates a situation whereby laws declared unconstitutional are being enforced by our courts but also detracts from the notion of legal certainty, as potential human rights victims would not be certain their claim would be upheld even though they would be in similar if not identical situations as others before them.

Secondly, as a consequence of the former misinterpretation, Parliament is tasked with amending laws deemed unconstitutional. However, Parliament's reaction to such declarations is, more often than not, substantially delayed. In fact, the above excerpt illustrates how one law deemed unconstitutional by the Constitutional Court was still in force (and indeed upheld) a year later.

Thirdly, the effects of judgments of the European Court of Human Rights are likewise stagnated. For example: In the judgment *Schembri and Others v. Malta* decided on the 9<sup>th</sup> November 2009, the ECtHR declared that Maltese law on the compensation awardable in expropriation cases violated human rights, in that it could not be said that an individual received just compensation for land expropriated 20 years prior, if the compensation only reflected the price of the land at the time of the expropriation\*. In the separate judgment bearing the names of the same parties, on the compensation to be awarded to the applicant, the European

Court again held that:

*“... the compensation as established by Maltese law, amounting to a sum equal to the price of the land at the time when the declaration had been served... plus interest at 5 % was not sufficient to offset the failure to pay compensation to that date”\**.

The original judgment was delivered in 2009 and the subsequent just satisfaction judgment in 2010, and yet in 2011, another two expropriation cases concerning Maltese applicants were brought before the European Court of Human Rights wherein, once more, the Court held that “Maltese law relating to compensation in such cases is in breach of Article 1 of Protocol No. 1 to the Convention”\*.

To this day, the law in question stands firm on its stance that the compensation awardable in expropriation cases should only reflect the value of the property at the time it was expropriated\*, regardless of the above judgments and others like them\*. This is more than likely due to Article 6 and Article 6A of the European Convention Act which state respectively:

*6. (1) Any judgment of the European Court of Human Rights to which a declaration made by the Government of Malta in accordance with Article 46 of the Convention applies, may be enforced by the Constitutional Court in Malta, in the same manner as judgments delivered by that court and enforceable by it, upon an application filed in the Constitutional Court and served on the Attorney General containing a demand that the enforcement of such judgment be ordered.*

\* Giovanni Bonello, ‘The Supremacy Delusion: Unconstitutional Laws and Neo-Colonial Nostalgias’ in *Does Malta’s Constitution still cater for the People’s Needs?* (Office of the President, 2013) emphasis added

\* *Schembri and Others v. Malta*, 10<sup>th</sup> November 2009 (Application no. 42583/06)

\* *Schembri and Others v. Malta*, 28<sup>th</sup> September 2010, (Application no. 42583/06)

\* *Vassallo v. Malta*, 11<sup>th</sup> October 2011 (Application no. 57862/09) See also: *Frendo Randon v. Malta*, 22<sup>nd</sup> November 2011 (Application no. 2226/10)

\* See Land Acquisition (Public Purposes) Ordinance (Chapter 88 of the Revised Laws of Malta) Article 27 sub-article 1 (b)

\* See *Deguara Caruana Gatto and Others v. Malta*, 9<sup>th</sup> July 2013 (Application no. 14796/11)

*(2) Before adjudging upon any such demand the Constitutional Court shall examine if the judgment of the European Court of Human Rights sought to be enforced, is one to which a declaration as is referred to in sub-article (1) applies.*

*(3) The Constitutional Court shall order the enforcement of a judgment referred to in this article if it finds that such judgment is one to which a declaration referred to in sub-article (2) applies.*

*6A. Where by a final judgment in a case against Malta the European Court of Human Rights finds that any instrument having the force of law in Malta or any provision thereof is inconsistent with the Human Rights and Fundamental Freedoms, the Prime Minister may, within the period of six months from the date that the judgment becomes final and to the extent necessary in his opinion to remove the inconsistency, make regulations deleting any such instrument or provision found to be inconsistent as aforesaid.*

According to Dr. Giovanni Bonello, the drafter of the European Convention Act, these two Articles were never meant to form part of the law. The former because it can easily be taken advantage of, making the European Court subordinate to the “overriding whims of local politicians”; the latter because the delegation of the discretion to delete or retain a law found to violate human rights to a political branch of the government “undermines the architecture of the Convention edifice”<sup>\*</sup>.

What should be done:

A. According to Dr. Giovanni Bonello, Article 6 and Article 6A of the European Convention Act (Chapter 319) should be repealed and substituted by:

*“6(1). Final judgments of the European Court of Human Rights in cases in which Malta was a defendant state, have the force of law in Malta.*

*(2). If applicants require individual measures for the specific performance of judgments of the European Court of Human Rights, these shall be enforceable in the Constitutional Court against the Attorney General in accordance with the provisions of Sections 252 to 395 of Chapter 12 of the Laws of Malta where applicable, as if they were judgments delivered by a court in Malta”<sup>\*</sup>.*

B. A Human Rights Parliamentary Committee should be set up modeled on the UK Joint Select Committee on Human Rights<sup>\*</sup> which should be tasked, inter alia, with:

Scrutinizing proposed legislation to ensure conformity with human rights and fundamental freedoms.

Monitoring the judgments of the First Hall of the Civil Court (in its constitutional jurisdiction) which have become res judicata and those of the Constitutional Court for determinations of violations and advising the House of Representatives accordingly.

Noting judgments of the European Court of Human Rights given against Malta and advising the House of Representatives accordingly.

Noting judgments of the European Court of Human Rights given against other Contracting States which may affect the national legal system and advising the House of Representatives accordingly.

<sup>\*</sup> Mark Sammut, ‘The author and his creation: An interview with Dr. Giovanni Bonello’ in Mark Sammut, Patrick Cuiquet & David Borg (eds) *Malta at the European Court of Human Rights 1987-2012* (Kotba-Argo Limited, 2012) 35

<sup>\*</sup> Ibid

<sup>\*</sup> See <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/>

## 6. Other General Recommendations:

General Recommendation 1: As envisaged through the workshops at the First Annual Conference of the University of Malta's Human Rights Platform, as well as by the Ombudsman and Former Chief Justice Joseph Said Pullicino\*, the standard of human rights in Malta would benefit from the insertion of a provision in the Constitution for the right to good public administration.

General Recommendation 2: Public awareness of human rights may be facilitated if all human rights legislation were codified into one document.

General Recommendation 3: Provision should be introduced into the Constitution for the interpretation of all laws as compatible with human rights and fundamental freedoms.

General Recommendation 4: Regular training in human rights issues should be provided to the judiciary, lawyers and law enforcement officers. Such training could be carried out by the National Human Rights Institution.

General Recommendation 5: Alternatives to detention of irregular immigrants should be considered, as the current system has been found by the European Court of Human Rights, to be below par with regard to human rights standards.

Which human rights do you believe need further protection and promotion?

### 6.1. *The right to property*

As highlighted in the previous section, Section 27 (1)(b) of the Land Acquisition (Public Purposes) Ordinance has been found to violate human rights on multiple occasions by the ECtHR.

The offending legislation should be amended accordingly in order to further guarantee the peaceful enjoyment of individuals' property.

### 6.2. *The right to a fair trial*

The *Micallef v Malta* judgment\* of the ECtHR brought to light an area in which the independence and impartiality of the Maltese judiciary may be called into question in that the Grand Chamber took cognisance of a case wherein a party to proceedings was faced with the impossibility of challenging the presiding judge at the Court of Appeal who happened to be the other party's lawyer's uncle. Such a relation is not contemplated in the list of challenges of a judge or magistrate under Article 734 of the Code of Organisation and Civil Procedure. In such cases, in the event that the judge himself does not step down, as occurred in the *Micallef* case, the other party is left with no recourse and must undergo seemingly biased proceedings.

Moreover, this provision of the Code of Organisation and Civil Procedure has not been amended accordingly following the introduction of divorce into the national legal system.

Article 734 of the Code of Organisation and Civil Procedure should be amended to include a broader range of relations, so as to curb the appearance of bias; including, but not limited to, former spouses.

\* See Joseph Said Pullicino, 'A Constitution to Serve the People' in *Does Malta's Constitution still cater for the People's Needs?* (Office of the President, 2013)

\* *Micallef v. Malta* [GC], no. 17056/06, ECHR 2009

## 7. Conclusion

In conclusion, there will be many other rights currently curtailed which deserve the attention of the proposed Human Rights Institution; however, this report could not delve into each and every one in detail; it has in fact been utilized as a platform for only some salient issues. Additionally, the two specific rights fastened on in the latter part of this report are but examples of those rights that should be further protected.

## 8. Summary of the Recommendations

### 8.1. Institutional Recommendations:

#### 1. A National Human Rights Institution

A National Human Rights Institution should be set up based on the Paris Principles and the Danish Institute for Human Rights\* so as to ensure that not only is the National Human Rights Institution tasked with educating the public and raising awareness, but also:

Produces analyses and research on human rights issues.

Carries out specific projects to promote equal treatment and advise those who may have been discriminated against.

Maps out the biggest human rights challenges in Malta as well as yearly improvements in the area through an annual 'Status Report'.

Works with States, independent organization and the corporate sector, enabling them to strengthen human rights in their respective countries.

Assists in building well-functioning legal systems abroad.

Aids private companies in assessing the impact of their work on human rights.

Educates police officers, school teachers, ombudsmen, lawyers and judges on human rights.

#### 2. A Human Rights Parliamentary Committee should be set up modeled on the UK Joint Human Rights Parliamentary Committee should be set up modeled on the UK Joint Select Committee on Human Rights\* which should be tasked, inter alia, with:

Scrutinizing proposed legislation to ensure conformity with human rights and fundamental freedoms.

Monitoring the judgments of the First Hall of the Civil Court (in its constitutional jurisdiction) which have become *res judicata* and those of the Constitutional Court for determinations of violations and advising the House of Representatives accordingly.

Noting judgments of the European Court of Human Rights given against Malta and advising the House of Representatives accordingly.

Noting judgments of the European Court of Human Rights given against other Contracting States which may affect the national legal system and advising the House of Representatives accordingly.

An Equality Review Committee should be set up tasked with:

Advising the Minister about the operation of the proposed Act;

\* See <http://www.humanrights.dk/about-us>

\* See <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/>

advising the Minister about laws that impact on equality;

submitting regular reports to the Minister on the operation of the proposed Act, addressing whether the objectives of the Act and the Constitution have been achieved and making recommendations on any necessary amendments to the Act to improve its operation;

An Equality Court should be established which should, when proceedings are brought before it in terms of the proposed Act, hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged. After holding such inquiry, the equality court should have the power to make an appropriate order in the circumstances, including:

- (a) an interim order;
- (b) a declaratory order;
- (c) an order making a settlement between the parties to the proceedings an order of court;
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
- (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;
- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
- (n) an order directing the clerk of the equality court to submit the matter to the Attorney General for the possible institution of criminal proceedings in terms of the relevant legislation;
- (o) an appropriate order of costs against any party to the proceedings;
- (p) an order to comply with any provision of the proposed Act\*.

\* The South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 should be looked at for further details.

## 8.2. *Amendments to the Constitution:*

### 1. The Right to Good Public Administration

The standard of human rights in Malta would benefit from the insertion of a provision in the Constitution for the right to good public administration.

### 2. Interpretation of Legislation as Compatible with Human Rights

Provision should be introduced into the Constitution for the interpretation of all laws as compatible with human rights and fundamental freedoms.

## 8.3. *Tentative amendment:*

### 3. ‘Nationality’ as a Ground of Discrimination

The possibility of adding ‘nationality’ as a ground of discrimination within the Constitution, should be studied in depth, preferably in collaboration with the Human Rights Platform of the Faculty of Laws, so as to reach a conclusion that is clear and fair to both citizens of Malta and other Member States as well as third country nationals legally residing in Malta.

## 8.4. *Amendments to Legislation:*

1. Article 6 and Article 6A of the European Convention Act (Chapter 319) should be repealed and substituted by the drafter’s originally intended provision:

*“6(1). Final judgments of the European Court of Human Rights in cases in which Malta was a defendant state, have the force of law in Malta.*

*(2). If applicants require individual measures for the specific performance of judgments of the European Court of Human Rights, these shall be enforceable in the Constitutional Court against the Attorney General in accordance with the provisions of Sections 252 to 395 of Chapter 12 of the Laws of Malta where applicable, as if they were judgments delivered by a court in Malta”\**.

2. Article 2 of the Social Securities Act should be repealed, thereby putting spouses on an equal footing at law.

3. CEDAW should be incorporated fully into domestic legislation thereby making it directly enforceable before Maltese courts.

4. Rights of Asylum-seekers. Current legislation should be amended to ensure asylum-seekers are granted full access to their human rights, especially throughout their application for refugee status; such that:

Asylum-seekers are provided with more information – in a language that is understood by them – on a continual basis and in such a way so as to allow the applicant a chance to voice his concerns, pose the necessary questions in order to better understand the information being presented to him and make additional statements\*.

Asylum-seekers are assisted in filling out their application by cultural mediators in order to make sure they understand what is being asked of them. This is required because misunderstanding

\* Mark Sammut, ‘The author and his creation: An interview with Dr. Giovanni Bonello’ in Mark Sammut, Patrick Cuiquet & David Borg (eds) *Malta at the European Court of Human Rights 1987-2012* (Kotba-Argo Limited, 2012) 35

\* Ibid 132



applications is often not solely attributable to language barriers and so providing an interpreter alone is not sufficient to ensure the applicant's rights are upheld.

Any evidence produced by the applicant is dutifully translated and taken into consideration when assessing his application.

Asylum-seekers are provided with transcripts of their interviews and invited to review them and add any points they deem essential for consideration.

Asylum-seekers are provided with all evidence used in the determination of their application before a decision is taken so as to be able to counter or directly challenge such evidence. Following the recent heralding of the right of disclosure to persons accused of crimes, it seems hardly logical that persons potentially in need of protection are denied that same right.

The possibility of tacit withdrawal of an application is either abolished altogether or restricted to exhaustive and express grounds to be listed in the law.

The right of the UNHCR to be directly involved in proceedings is enshrined in law and that its supervisory role is considerably widened to cover the entirety of the asylum application procedure.

Decisions for refusal of asylum applications are well-reasoned.

Asylum-seekers are provided with the possibility of applying for free legal aid.

Decisions to deny/grant asylum are subject to judicial review.

5. Article 734 of the Code of Organisation and Civil Procedure should be amended to include a broader range of relations, so as to curb the appearance of bias; including, but not limited to former spouses.

6. Section 27 (1)(b) of the Land Acquisition (Public Purposes) Ordinance, which has been found to violate human rights on multiple occasions by the ECtHR, should be amended accordingly in order to further guarantee the peaceful enjoyment of individuals' property.

## 8.5. Other Recommendations:

### 1. Human Rights Education

*"Children are the world's most valuable resource and its best hope for the future."  
(John F. Kennedy)*

Article 26(2) of the Universal Declaration of Human Rights states that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace\*.

It is our belief that human rights should be embedded within our educational system because "childhood is the ideal time to begin lifelong learning about and for human rights"\*. Many studies

\* Universal Declaration of Human Rights, Article 26(2) *emphasis added*, available online at: <http://www.un.org/en/documents/udhr/index.shtml#a26>, last accessed 8<sup>th</sup> June 2014

\* Manual on Human Rights Education for Children, Chapter 2 available online at: [http://www.eycb.coe.int/compasito/chapter\\_2/1\\_int.html](http://www.eycb.coe.int/compasito/chapter_2/1_int.html), last accessed 8<sup>th</sup> June 2014

evaluating human rights education with children have shown it to be an effective agent of moral education; children who learnt about the Convention on the Rights of the Child tended to be more respectful and mature in psychosocial competencies\*.

This suggestion may be met with opposition from primary schools as teachers might argue the impossibility of teaching such complex notions to children. However a number of methodologies to integrating human rights into the primary curriculum may be introduced, including:

Parables - teaching human rights in this manner induces children to remember the lessons learnt more vividly\*.

Creative approaches – through craftwork, dramatization, handouts and so on, children can be easier acquainted with the concept of human rights.

Participatory methods – these should always be used in educating – whether about human rights or otherwise – as they are perceived as a more democratic way of learning, engaging each individual and empowering him to think and reason for himself. Indeed “to be effective, human rights education must provide children with a supportive framework where the rights of every individual child are respected”\*\*.

Many more suggestions which could be incorporated into the school curriculum are contained in multiple theses held at the Melitensia Section of the Library of the University of Malta, including those of:

Marie Buhagiar, ‘Educating for human rights with special reference to the role of religious education’ (B.A. Hons. THEOLOGY, University of Malta, 1997);

Rita Gauci, ‘Teaching and Learning Human Rights: Maltese Teachers’ and Studnets’ Perspectives (M.Ed. Educational Research, University of Malta, 2009);

Giselle Caruana. ‘Integrating Human Rights in the Primary Syllabus of Year 6’ (B.Ed. Hons, University of Malta, 1995); and

Daisy Kirk, ‘Creative Approaches to understanding human rights issues: How effective is art in the education on and awareness of human rights?’ (M.A. Dipl. Stud., University of Malta, 2010).

Particularly striking about the latter thesis is its introduction of a stimulating way in which both children and adults can become more aware of and learn more about human rights. It does this by proposing that the perfect avenue for human rights education is art.

One may argue that this educational approach allows us to look at human rights within a broader perspective. The emphasis is not purely, or in some cases even primarily, on legalistic and penal perspectives. Instead this approach presents human rights very much in the holistic spirit of the Universal Declaration of Human Rights\*.

What’s more, art can be used to teach in a variety of ways. It can be present in the classroom or curriculum at schools; it can be an extra subject which students may opt to take or it can be taught outside the official school setting (organised by youth groups, education networks, NGOs and/or other human rights organisations). In fact, Ms. Kirk gives examples of success stories using art as a medium to educating people on human rights issues, such as: The Euro- Mediterranean Human Rights Network Mural, Barcelona (2008); The MEDAC Human Rights Summer School Mural on

\* Daisy Kirk, ‘Creative Approaches to understanding human rights issues: How effective is art in the education on and awareness of human rights?’ (M.A. Dipl. Stud., University of Malta, 2010) 71

\* Ibid

\* Equitas, ‘International Human Rights Education Evaluation Symposium’ (5<sup>th</sup> - 6<sup>th</sup> May 2007) 6

\* Kirk (n 3) 117

Crimes Against Humanity, Malta (2010); and The African Awareness Project 'Africa Unmasked', Mural and Performance Art Piece, Ireland (2008/09)\*.

Additionally, in her thesis, Marie Buhagiar, puts forth the very real and intriguing possibility that human rights should be taught in schools as a moral standard of some sort within religion lessons\*. This should be especially looked into for those students who opt out of Christianity-based religion lessons.

## 2. The 'Human Rights in Malta' Website

The simplest and most cost-effective way of tackling the lack of awareness of human rights seems to be the setting up of a 'Human Rights in Malta' website; one which will appear first in any Google search when one types the words 'human rights Malta' or 'drittijiet tal- bniedem Malta'. The website, which should be available both in English and Maltese, should contain:

A 'What are human rights?' tab which leads the user to:

A simplified explanation of what individuals are entitled to

The Constitution of Malta

The European Convention Act

The European Convention on Human Rights and Fundamental Freedoms

The Universal Declaration on Human Rights

The Charter of Fundamental Rights

Other Related Treaties and Declarations such as the Convention on the Rights of the Child (CRC)

Latest judgments of the First Hall of the Civil Court (in its constitutional jurisdiction) as well as of the Constitutional Court on human rights matters

Summaries in both English and Maltese of these judgments

Latest judgments of the European Court of Human Rights, both in relation to Malta and other Contracting States

News on the latest legislative developments

A 'Have your rights been breached?' tab which leads the user to:

the procedure that needs to be followed to obtain redress,

where and how to apply for legal aid,

a link to the Chamber of Advocates website in order to be able to contact an expert,

what happens in the event that a case is lost both at the First Hall and at the Constitutional Court.

## 3. Measures should be adopted to ensure gender equality, such that:

The Optional Protocol to CEDAW should be signed, ratified and transposed.

The reservations held to CEDAW should be withdrawn, at least with regard to Article 13.

Legislation should be created for the possibility of short-term/temporary protection/restraining/ barring orders to be issued independently of court proceedings.

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\* Ibid 128-143

\* Marie Buhagiar, 'Educating for human rights with special reference to the role of religious education' (B.A. Hons. THEOLOGY, University of Malta, 1997) 37-50

4. Human Rights legislation could be codified into one document in order for awareness to be facilitated.
5. An Equality Act should be enacted consolidating equality legislation and providing for the above mentioned Equality Review Committee and Equality Court.
6. Regular training in human rights issues should be provided to the judiciary, lawyers and law enforcement officers. Such training could be carried out by the National Human Rights Institution.
7. Alternatives to detention of irregular immigrants should be considered, as the current system has been found by the European Court of Human Rights, to be below par with regard to human rights standards.